BRB No. 87-1012 BLA

ORVAL J. LEWIS	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Motion for Reconsideration of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Ronald G. Ray, Sr. (David S. Fortney, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

McGRANERY, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Denial of Motion for Reconsideration (85-BLA-1644) of Administrative Law Judge Charles P. Rippey awarding benefits on a

claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 727 and 20 C.F.R. Part 410, and found that the Director conceded that claimant was totally disabled due to pneumoconiosis. The administrative law judge further found that certain duties which claimant performed as a railroad conductor and brakeman qualified claimant as a "miner" within the meaning of the Act. See 30 U.S.C. §902(d); 30 U.S.C. §802(h)(2), (i); 20 C.F.R. §§725.101(a)(22)-(26), 725.202(a). Accordingly, benefits were awarded. The administrative law judge subsequently denied the Director's Motion for Reconsideration. On appeal, the Director contends that the administrative law judge erred in finding that claimant qualified as a "miner" within the meaning of the Act. Claimant has not participated in the instant appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish that he is a "miner" as defined by the Act and regulations, claimant must satisfy the two-prong "situs-function" test applied by the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case lies. Under this test, claimant must establish that he worked in or around a coal mine or coal preparation facility, and that he performed a function integral to the extraction or preparation of coal. See Norfolk & Western Railway Co. v. Roberson, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990) aff'g 13 BLR 1-6 (1989); Collins v. Director, OWCP, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986). The Director conceded that claimant satisfied the "situs" test, but contends that claimant's activities failed to satisfy the "function" element. We disagree. The administrative law judge properly found that claimant's involvement in transporting processed coal away from the mine site did not constitute covered coal mine employment. See Collins, supra. The administrative law judge further found, however, that claimant was engaged in covered activities which exposed him to large quantities of coal dust for a substantial part of each day, i.e., approximately six hours per day for twenty years. Decision and Order at 2. Claimant's covered duties were performed both prior to and during the loading process at the tipple, the traditional demarcation point between the mining and marketing of coal, and included positioning railroad cars under the tipple

for loading, tying up the air hoses and knocking off the brakes. See Hearing Transcript at 7, 9, 11, 12, 25; Roberson, supra; Collins, supra. Although claimant did not engage in the actual loading of the coal, the administrative law judge rationally determined that his activities were part of the loading process and were more closely related to the covered duties of a tipple operator than to the uncovered duties of a railroad crew transporting coal in the stream of commerce. Decision and Order at 2; Denial of Motion for Reconsideration at 1. See Hanna v. Director, OWCP, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988); Mitchell v. Director, OWCP, 855 F.2d 485 (7th Cir. 1988); Sexton v. Mathews, 538 F.2d 88 (4th Cir. 1976). As the regulatory definition of a "miner" encompasses any individual who has worked in or around a coal mine in the preparation of coal, which includes the loading of coal, as well as any transportation worker who was exposed to coal dust as a result of his employment in or around a coal mine, see Sections 725.101(a)(25), (26), and 725.202(a), and inasmuch as claimant's activities were an essential part of the loading process, we hereby affirm the administrative law judge's finding that claimant qualified as a "miner" pursuant to the Act, as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

LEONARD N. LAWRENCE
Administrative Law Judge

SMITH, Administrative Appeals Judge, dissenting:

I must respectfully dissent from the majority's conclusion that the claimant is a covered employee. The United States Court of Appeals for the Fourth Circuit, the circuit in which this case arises, has clearly enunciated the requirement that claimant satisfy a two-prong test of "situs" and "function" in order to be covered under the Act. See Collins v. Director, OWCP, 795 F.2d 369, 9 BLR 2-58 (4th Cir. 1986); Eplion v. Director, OWCP, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986); Amigo Smokeless Coal Co. v. Director, OWCP, [Bower], 642 F.2d 68, 2 BLR 2-68 (4th Cir. 1981). The sole issue in the instant case is that of "function," or whether claimant has demonstrated that his duties were integrally involved with the extraction or preparation of coal as contemplated by the statute. See Amigo, supra. The United States Court of Appeals for the Fourth Circuit has been equally clear in drawing a line of demarcation for coverage that requires the successful claimant's function to have been involved integrally with the preparation of the coal for market prior to the entry of the coal into the stream of commerce. See Eplion, supra. The administrative law judge never made a specific reasoned "function" finding utilizing these clearly defined criteria. His conclusory finding that claimant was exposed to large quantities of coal dust at a mine site as a coal mine transportation worker does not satisfy the caselaw precedent. In fact, the instant record does not contain evidence sufficient to carry claimant's burden of proving his status as a "miner." The mere fact that he may have been exposed to large quantities of coal dust as a transportation worker at a tipple site, without clear evidence as to the status of the coal, does not satisfy the statutory requirements. Claimant's testimony that as a railroad transportation worker, he positioned railroad cars at the tipple to be loaded, but was not involved with the actual loading of cars, and that he helped move the loaded cars to Cowen, where nothing more was done to the coal before it was transported further to Grafton, in no way supports "miner" status. While the tipple has been cited as the

demarcation point between the mining and marketing of coal, an employee's activities arising on the stream of commerce side of the tipple, especially when he is not involved in the loading process, cannot be considered covered by the Act. When coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce. See Collins, supra. For these reasons, I would reverse the administrative law judge's finding that claimant is a covered transportation worker.

ROY P. SMITH
Administrative Appeals Judge