

BRB No. 92-1273 BLA

MAE Y. ORR)
(Widow of DONALD ORR))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: _____)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Mark Pelak (Meyer & Swatkoski Associates), Wilkes-Barre, Pennsylvania, for claimant.

Marta Kusic (Thomas S. Williamson, Jr., 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, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH
and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (91-BLA-0586) of Administrative Law Judge Paul H. Teitler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed a survivor's claim on April 11, 1990 and the administrative law judge considered it pursuant to 20 C.F.R. Part 718. The administrative law judge then determined that claimant failed to establish that the deceased was a coal miner within the meaning of the Act. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining that the deceased's duties of loading coal from the breakers and tipples into coal trucks does not constitute preparation of the coal. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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 making his finding that the deceased was not a miner, the administrative law judge considered claimant's testimony regarding the deceased's job duties and the evidence of record on that issue and determined that the deceased's duties of transporting coal from the breakers at various collieries to homes or businesses after shoveling coal onto his truck were not related to the extraction or preparation of coal and thus, did not satisfy the function portion of the two prong test stated in *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3rd Cir. 1988). See Decision and Order

at 4. The administrative law judge supports this finding by referring to a description that the deceased gave of his job duties in which he states that he worked with processed coal. See Director's Exhibit 13. However, in the same description of his duties, the deceased states that he had to "enter the breaker, at times climb up into the pocket to kick coal down sometimes go to the tipper to help in emergencies during coal shortage." See Director's Exhibit 13. As claimant argues, these activities are consistent with the activities discussed in *Hanna, supra*. In *Hanna*, the miner operated a barge that he placed adjacent to the tipple to collect the processed coal which was then to be transported to the consumer. The Court of Appeals for the Third Circuit (the Court), in whose jurisdiction this claim arose, held that the miner's participation in the removal of the coal from the tipple was a step, if only the very last step, in the preparation of the coal. See *Hanna*, 12 BLR at 2-23. The Court further states that the miner's "work of loading coal from the tipple onto the barges was a necessary part of the "work of preparing the coal" for delivery. That work brought him within the Act's definition of miner." See *Hanna, supra*, citing *Mitchell v. Director, OWCP*, 855 F.2d 485, 490 (7th Cir. 1988). The Court did state, in a reference to *Stroh v. Director, OWCP*, 810 F.2d 61 (3rd Cir. 1987), that a worker "would not be a miner if he merely worked to deliver completely processed coal to the ultimate consumer because his function in that instance would serve only to facilitate the introduction of the "finished product" into the stream of commerce." See *Hanna*, 12 BLR at 2-23. However, in this case, the deceased assisted in the loading

of the coal onto the truck which means that the coal was not completely processed. *See Hanna, supra*. Thus, contrary to the Director's argument, the deceased's duties of loading the coal from the tipple and breakers onto the truck for delivery to consumers make him a miner within the meaning of the Act. As a result, the administrative law judge's finding that the deceased is not a miner within the meaning of the Act is reversed and the case is remanded for the administrative law judge to consider the merits of the claim, including the length of claimant's coal mine employment.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

