

BRB No. 97-0275 BLA

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

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Abrahamsen, Moran & Conaboy, P.C.), Scranton, Pennsylvania, for claimant.

Gary K. Stearman (J. Davitt McAteer, Acting 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (96-BLA-0551) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge credited claimant with two and one-half years of coal mine employment. In reaching this figure, the administrative law judge excluded claimant's twenty-one months of employment as a coal truck driver because he found that it did not constitute the work of a miner under the Act. The administrative law judge then concluded that the medical evidence failed to establish the existence of pneumoconiosis

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<sup>1</sup> Claimant is Stanley J. Stasium, the miner, who filed this application for benefits on March 15, 1994. Director's Exhibit 1.

pursuant to 20 C.F.R. §718.202(a). In so doing, the administrative law judge relied on his finding of two and one-half years of coal mine employment to discredit the opinions of two physicians who relied on a longer coal mine employment history to diagnose pneumoconiosis.<sup>2</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that his employment as a coal truck driver did not constitute coal mine employment under the Act. The Director, Office of Workers' Compensation Programs (the Director), moves for remand for the administrative law judge to reweigh claimant's employment evidence and the medical opinion evidence.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant and the Director contend that the administrative law judge erred in determining that claimant's employment as a coal truck driver did not constitute the work of a miner under the Act. Claimant's Brief at 3; Director's Motion at 2-3. The Director asserts specifically that the administrative law judge failed to apply the proper legal standard to determine whether claimant performed the work of a miner. Director's Motion at 2-3.

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has outlined a two-pronged, situs and function test for determining whether employment qualifies as that of a miner. *Elliot Coal Mining Co. v. Director, OWCP [Kovalchick]*, 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994); *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-12 (3d Cir. 1987). To meet the "situs" test, a claimant must have worked in or around a coal mine or coal preparation facility, and to meet the "function" test, a claimant

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<sup>2</sup> Dr. Majernick relied on a history of five and three-quarter years of coal mine employment. Claimant's Exhibit 1. Dr. Aquilina relied on a history of seven years of coal mine employment. Director's Exhibit 23; Claimant's Exhibit 2.

<sup>3</sup> We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

must have been involved in coal extraction or preparation. *Id.* Both tests must be satisfied for a claimant to be considered a miner under the Act. *Id.* The Third Circuit court has held that a coal transportation worker who participates in loading coal at the tipple for delivery to consumers meets the situs and function tests, and therefore is a miner under the Act. *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988).

The record indicates that for the time period at issue, claimant loaded coal from the tipple or breaker onto his truck and delivered the coal to dealers for sale to consumers. Director's Exhibits 5, 6; Hearing Transcript at 40. Claimant indicated that he opened a gate that sent the coal from the tipple down a chute and into his trailer. *Id.* The administrative law judge's finding that this work did not constitute coal mine employment under the Act was based solely on claimant's description of the coal as "processed," and not on an analysis of the specific tasks that claimant performed. Decision and Order at 3; Director's Exhibits 4, 5.

To establish the "situs" requirement, a coal transportation worker must prove that he spent a significant portion of his day working in or around a coal mine or a coal preparation facility, and that he was exposed to coal dust as a result of such employment. *Clifford v. Director, OWCP*, 7 BLR 1-817, 1-819; 30 U.S.C. §902(d). The Director notes in this regard that claimant spent one to three hours a day at the tipple where the empty truck trailers were loaded. Director's Motion at 2 (citing Director's Exhibits 4, 5; Hearing Transcript at 40). Claimant indicated that he was exposed to coal dust during these one- to three-hour periods. Director's Exhibits 4, 5. Because the administrative law judge did not consider this evidence under the situs test, we must vacate his finding and remand the case for him to consider all relevant situs evidence pursuant to *Stroh, supra*, and *Hanna, supra*.

Regarding the "function" requirement, in *Hanna, supra*, the Third Circuit court held that a claimant's work loading coal onto a barge at the tipple for delivery to a consumer made him a miner under the Act because his work was necessary in preparing the coal for delivery. *Hanna*, 860 F.2d at 92, 12 BLR at 2-22-23. The court rejected the Director's contention that coal enters the stream of commerce at the point when the coal is placed into the tipple, reasoning that removal of the coal from the tipple is the final step in the preparation of the coal for transport into the stream of commerce. *Id.* Here, claimant indicated that he loaded coal onto his truck at the tipple. Director's Exhibits 4, 5. Under the function test as applied to coal transportation workers in *Hanna*, claimant's description of removing the coal from the tipple for delivery is sufficient, if credited, to constitute coal preparation, which would make him a miner under the Act for the time during which he performed this task. Therefore, we instruct the administrative law judge on remand to weigh the relevant evidence under *Hanna* to determine whether claimant's work meets the function test.

The Director notes that if on remand the additional twenty-one months of employment are credited to claimant, he will have four and one-quarter years of coal mine employment. Director's Motion at 2-3. This amount is not significantly less than the five and three-quarter years or the seven years relied on by the physicians who diagnosed

pneumoconiosis, and who the administrative law judge discredited as relying on an inaccurate length of coal mine employment. See *McMath v. Director, OWCP*, 12 BLR 1-6; *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Therefore, the administrative law judge on remand must reweigh the medical opinions pursuant to Section 718.202(a)(4) if he credits claimant with more coal mine employment than he previously found established.

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

SO ORDERED.

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BETTY JEAN HALL  
Chief Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge