PART II

DEFINITIONS

F. LENGTH OF COAL MINE EMPLOYMENT

Length of coal mine employment is an important factor in claims filed under the Act as it determines which presumptions are available to a miner under the Act and regulations. It is also important with respect to determining the identity or existence of a responsible operator. *See* Part II.L. of the Desk Book; 20 C.F.R. §725.493(a)(1).

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. ***Kephart v. Director, OWCP***, 8 BLR 1-185 (1985); ***Hunt v. Director, OWCP***, 7 BLR 1-709 (1985); ***Shelesky v. Director, OWCP***, 7 BLR 1-34 (1984); ***Smith v. National Mines Corp.***, 7 BLR 1-803 (1985); ***Miller v. Director, OWCP***, 7 BLR 1-693 (1985); ***Maggard v. Director, OWCP***, 6 BLR 1-285 (1983). For instance, the Board rejected claimant's argument that he was penalized because he was unable to obtain company records. Claimant has burden of establishing length of coal mine employment regardless of the kind of evidence available. ***Green v. Director, OWCP***, 7 BLR 1-276 (1984).

Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. ***Vickery v. Director, OWCP***, 8 BLR 1-430 (1986); ***Smith v. National Mines Corp.***, 7 BLR 1-803 (1985); ***Miller v. Director, OWCP***, 7 BLR 1-693 (1983); ***Maggard v. Director, OWCP***, 6 BLR 1-285 (1983); ***Trusty v. Director, OWCP***, 4 BLR 1-263 (1981), *aff'd,* No. 81-3718 (6th Cir. Apr. 6, 1983)(unpublished); *see also* ***Hunt v. Director, OWCP***, 7 BLR 1-709 (1985); ***Scott v. Director, OWCP***, 4 BLR 1-398 (1982); ***Wilkerson v. Georgia Pacific Corp.***, 1 BLR 1-830 (1978).

The Board has set out the procedure that the administrative law judge should follow in determining years of coal mine employment pursuant to Parts 410, 718 and 727. *See* ***Dawson v. Old Ben Coal Co.***, 11 BLR 1-58, n.1 (1988)(en banc); ***Director, OWCP v. Cargo Mining Co.***, Nos. 88-3531 and 3578 (6th Cir., May 11, 1989) (unpublished). The administrative law judge, however, must set forth the method of computation utilized to determine length of coal mine employment, *i.e.*, explain what evidence is credited or rejected and the rational therefore. *See* ***Shapell v. Director, OWCP***, 7 BLR 1-304 (1984); ***Fee v. Director, OWCP***, 6 BLR 1-1100 (1984).

The administrative law judge has a duty to make a specific, complete finding on the length of claimant's coal mine employment that may not be satisfied by a determination of an approximate number of years of coal mine employment. ***Boyd v. Director, OWCP***, 11 BLR 1-39 (1988); ***Gibson v. Director, OWCP***, 1 BLR 1-1016 (1978); *see also* ***Reboy v. Director, OWCP***, 2 BLR 1-582 (1979); ***Gurule v. Director, OWCP***, 1 BLR 1-797 (1978); ***Mullins v. Director, OWCP***, 1 BLR 1-773 (1978). For example, the Board vacated an administrative law judge's findings with respect to years of coal mine employment because the administrative law judge failed to explain what evidence supported his finding and the evidence was contradictory. ***Criddle v. Director, OWCP***, 2 BLR 1-209 (1979); ***Bentley v. Director, OWCP***, 1 BLR 1-561 (1978); *see also* ***Bowman v. Director, OWCP***, 7 BLR 1-187 (1985); ***Seibert v. Consolidation Coal Co.***, 7 BLR 1-42 (1984); *cf.* ***Tinney v. Director, OWCP***, 2 BLR 1-21 (1979).

The Board affirmed the administrative law judge's determination regarding length of coal mine employment, although based on miscalculations, because the miscalculations were not prejudicial to either claimant or employer in that claimant was properly credited with over ten years of coal mine employment. ***Justice v. Island Creek Coal Co.***, 11 BLR 1-91 (1988); ***Larioni v. Director, OWCP***, 6 BLR 1-1276 (1984). Similarly, in ***Sertich v. Director, OWCP***, 7 BLR 1-233 (1984), the administrative law judge's error in computing the length of the miner's coal mine employment was harmless since even after corrected it did not total ten years.

CASE LISTINGS

[vacation periods not gratuity but compensation included as coal mine employment] ***Elswick v. The New River Co.***, 2 BLR 1-1109 (1980).

[not working but being carried on payroll for "seniority-time" not coal mine employment] ***Van Nest v. Consolidation Coal Co.***, 3 BLR 1-526 (1981).

[125-day provision of Section 725.493(b) applies exclusively to identify responsible operator] ***Soulsby v. Consolidation Coal Co.***, 3 BLR 1-565 (1981); ***Fletcher v. Director, OWCP***, 2 BLR 1-911 (1980).

[issue for fact-finder when evidence conflicts about amount of time claimed] ***Walraven v. Director, OWCP***, 4 BLR 1-29 (1981).

[finding of less than ten years aff'd: conceded and SSA records confirmed] ***Gibson v. Ryan's Creek Coal Co.***, 4 BLR 1-591 (1982).

[all records must be considered by fact-finder regarding length of coal mine

employment: here employer records not considered] ***Green v. A. G. P. Co., Inc.***, 4 BLR 1-109 (1981); *see also* ***Elswick v. The New River Co.***, 2 BLR 1-1109 (1980); *see also* ***Niccoli v. Director, OWCP***, 6 BLR 1-910 (1984).

[discrediting of claimant's testimony affirmed where he was very old, many years had past and the testimony was very uncertain] ***Yendall v. Director, OWCP***, 4 BLR 1-467 (1982).

[crediting of $362.08 wages, $93.17 wages and $28.11 wages in three separate quarters to total only six months of coal mine employment upheld] ***Hurd v. Director, OWCP***, 5 BLR 1-106 (1982).

[finding of covered coal mine employment where work was 20% hauling coal to consumers/80% doing extraction and preparation work upheld] ***Caldrone v. Director, OWCP***, 6 BLR 1-575 (1983).

[remand due to "the most liberal arithmetic"] ***Flener v. Director, OWCP***, 6 BLR 1-1274 (1984).

[fact-finder may rely on SSA records to establish length of coal mine employment, especially where testimony is unclear] ***Brumley v. Clay Coal Corp.***, 6 BLR 1-956 (1984); ***Tackett v. Director, OWCP***, 6 BLR 1-839 (1984); *see also* ***Clayton v. Pyro Mining Co.***, 7 BLR 1-551 (1984); ***Preston v. Director, OWCP***, 6 BLR 1-1229 (1984); ***Hall v. Director, OWCP***, 2 BLR 1-998 (1980); ***Mullins v. Director, OWCP***, 6 BLR 1-508 (1983); ***Rocchetti v. Jones and Laughlin Steel Corp.***, 1 BLR 1-812 (1978).

[proper admission of affidavit on length of coal mine employment despite hearsay character] ***Williams v. Black Diamond Coal Mining Co.***, 6 BLR 1-188 (1983).

[statements by miner's co-workers regarding the length of his coal mine employment need not be affidavits] ***Vanover v. Director, OWCP***, 6 BLR 1-920 (1984).

[testimony of co-workers may be discounted because of failure to state that miner worked continuously with them] ***Tackett v. Director, OWCP***, 6 BLR 1-839 (1984).

[part-time employment or employment that is not year round must be prorated] ***Shendock v. Director, OWCP***, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988); ***Frost v. Director, OWCP***, 821 F.2d 649 (6th Cir. 1987); ***Bowman v. Director, OWCP***, 7 BLR 1-718 (1985).

[case remanded to consider birth certificates of miner's children listing his occupation as "farmer" in determining years of coal mine employment] ***Smith v. Director, OWCP***, 7 BLR 1-370 (1984).

[fact-finder erred in failing to credit coal mine employment between ages of 9 and 16 because it "would have been a flagrant violation of the child labor laws"] ***Hutnick v. Director, OWCP***, 7 BLR 1-326 (1984); ***Bachert v. Director, OWCP***, 6 BLR 1-640 (1983).

[claimant's testimony concerning his employment history does not constitute a waiver of his right to rely upon the statement of contested issues not listing length of coal mine employment as an issue] ***Chaffins v. Director, OWCP***, 7 BLR 1-431 (1984).

[claimant failed to establish coal mine employment for period where only evidence was his faulty memory and insufficient affidavits] ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985); *see also* ***Brewster v. Director, OWCP***, 7 BLR 1-120 (1984); ***Shelesky v. Director, OWCP***, 7 BLR 1-34 (1984).

[length of coal mine employment properly based on the actual months worked where claimant did not work spring/summer, as mine regularly closed in summer] ***Hunt v. Director, OWCP***, 7 BLR 1-709 (1985).

["History of Coal Mine Employment" form accompanying original application need not be corroborated for fact-finder to give it credence] ***Harkey v. Alabama By-Products Corp.***, 7 BLR 1-26 (1984).

[crediting of original application showing 7-8 years of coal mine employment over claimant's vague and conflicting testimony and in resolving contradictions in remaining evidence was proper] ***Henderson v. Director, OWCP***, 7 BLR 1-866 (1985).

[claimant's uncorroborated and uncontradicted testimony may constitute substantial evidence to establish length of coal mine employment] ***Hutnick v. Director, OWCP***, 7 BLR 1-326 (1984); *see also* ***Bizzarri v. Consolidation Coal Co.***, 7 BLR 1-343 (1984); ***Mullins v. Director, OWCP***, 6 BLR 1-508 (1983); ***Trusty v. Director, OWCP***, 4 BLR 1-263 (1981); ***Hall v. Director, OWCP***, 2 BLR 1-998 (1980); ***Wilkerson v. Georgia Pacific Corp.***, 1 BLR 1-830 (1978).

[fact-finder within discretion to credit claimant widow's testimony regarding length of coal mine employment of husband despite absence of corroborating documentation] ***Coval v. Pike Coal Co.***, 7 BLR 1-272 (1984); ***Lefebure v. Barnes & Tucker Co.***, 7 BLR 1-224 (1984).

[fact-finder not bound to accept party's testimony merely because it is uncontradicted] ***Miller v. Director, OWCP***, 7 BLR 1-693 (1985).

[fact-finder may credit uncontradicted lay affidavit for coal mine employment] ***Harkey v. Alabama By-Products Corp.***, 7 BLR 1-26 (1984).

[Sixth Circuit held that finding of over 25 years of coal mine employment did not meet APA as the administrative law judge failed to explain crediting of conflicting evidence] ***Director, OWCP v. Congleton***, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984).

[time the miner spent performing military service was properly excluded from computation of length of coal mine employment] ***Kosack v. Director, OWCP***, 7 BLR 1-248 (1984).

[inclusion of time the miner was absent from work due to a mine injury but was carried on the payroll in calculation of length of coal mine employment affirmed] ***Boyd v. Island Creek Coal Co.***, 8 BLR 1-458 (1986); ***Verdi v. Price River Coal Co.***, 6 BLR 1-1067 (1984); ***Soulsby v. Consolidation Coal Co.***, 3 BLR 1-565 (1981); ***Van Nest v. Consolidation Coal Co.***, 3 BLR 1-526 (1981).

[claimant had seven years, three months of coal mine employment during twenty-seven years of employment as a coal mine construction worker based on exposure to coal mine dust on specific construction projects] ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985).

[calculation of miner's length of coal mine employment affirmed based on performance of qualifying coal mine employment only three days per week] ***Kephart v. Director, OWCP***, 8 BLR 1-185 (1985); *see also* ***Ritchey v. Blair Electric Service Co.***, 6 BLR 1-966 (1984).

[administration records need not be credited over other evidence where testimony and co-worker affidavits are substantial evidence to support findings] ***Calfee v. Director, OWCP***, 8 BLR 1-7 (1985).

[Sixth Circuit held fact-finder erred by not crediting claimant's testimony and co-worker affidavits concerning periods of coal mine employment not corroborated by SSA records where no evidence was presented to discredit affidavits or testimony] ***Ferrell v. Director, OWCP***, No. 84-3572 (6th Cir., Sep. 17, 1985)(unpublished).

[fact-finder could rely on claimant's statements made on his application for benefits rather than on his testimony at formal hearing, even though claimant was pro se at the hearing] ***Remetta v. Director, OWCP***, 8 BLR 1-214 (1985).

[claimant established at least 10 years coal mine employment where: (1) two doctors reports of at least 20 years; (2) affidavits of co-workers showed at least 10 years; (3) claimant testified employment ran from 1919 to 1934; and (4) even the SSA form Director relied on did not rule out possibility of at least 10 years in the mines] ***Auxier v. Director, OWCP***, 8 BLR 1-109 (1985).

DIGESTS

The Board rejected claimant's argument that the doctrine of collateral estoppel precludes re-litigation of the issue of length of coal mine employment and requires the Department of Labor to accept the Social Security Administration's finding on that issue. ***Wenanski v. Director, OWCP***, 8 BLR 1-487 (1986).

The Board rejected claimant's argument that Part 727 of the regulations does not require that the requisite 10 years of coal mine employment needed to come within its purview be performed within the United States. The Board held that the Act, which gave rise to Part 727, and its legislative history clearly indicate a congressional intent to cover only coal mine employment performed in the United States. ***Shaw v. Cementation Company of America***, 10 BLR 1-114 (1987).

Lay evidence may provide substantial evidence for a finding of length of coal mine employment. ***Justice v. Island Creek Coal Co.***, 11 BLR 1-91 (1988); ***Calfee v. Director, OWCP***, 8 BLR 1-7 (1985).

The Board held that the administrative law judge could properly credit claimant with every calendar quarter in which he earned at least fifty dollars from coal mine employment] ***Justice v. Island Creek Coal Co.***, 11 BLR 1-91 (1988); ***Tackett v. Director, OWCP***, 6 BLR 1-839 (1984). The Board has affirmed the administrative law judge's decision, however, not to credit claimant for a quarter where he earned seventy-five dollars, because there is no requirement that the administrative law judge credit a quarter where Social Security Administration records show at least fifty dollars. ***Guiliano v. Director, OWCP***, 6 BLR 1-1008 (1984); ***Harrell v. Pittsburg & Midway Coal Co.***, 6 BLR 1-961 (1984).

The Board holds that 20 C.F.R. §718.301 provides general regulatory guidelines for the fact-finder to consider in determining the length of coal mine employment, and is not a departure from the fact-finder's duty to apply any reasonable method of calculation provided he considers all relevant evidence and the facts and circumstances of each case. A mere showing of 125 days of coal mine employment does not, in and of itself, constitute one year of coal mine employment. To the extent that ***Merritt v. Morrison-Knudsen Co., Inc.***, 9 BLR 1-170 (1986), a case decided under 20 C.F.R. Part 727, is inconsistent with this holding, ***Merritt*** is **OVERRULED**. Footnote 1 in this case contains a thorough explanation of the process required of the administrative law judge when determining length of coal mine employment. ***Dawson v. Old Ben Coal Co.***, 11 BLR 1-58 (1988)(*en banc*).

The Board rejected claimant's argument that his coal mine employment in Scotland is relevant under the Act. The coal mine employment must have occurred within the coal

mines of the United States to receive coverage under the Act. ***Shaw v. Cementation Co. of America*** 10 BLR 1-114 (1987).

A day or "part of the day" for which the miner receives pay as a miner is a "day" for the purpose of determining length of coal mine employment. ***Griffith v. Director, OWCP***, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

The Board held that time spent by claimant in a voluntary union strike does not constitute coal mine employment under the Act. A miner should be given credit only for those days he actually worked or was excused from work by his employer. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(en banc), *aff'd sub nom.* ***Director, OWCP v. Cargo Mining Co.***, Nos. 88-3531 and 3578 (6th Cir., May 11, 1989)(unpublished).

Because employer failed to contest the issue of length of coal mine employment before the administrative law judge, any errors committed by the administrative law judge in making this determination are harmless error. ***Hoskins v. Shamrock Coal Co.***, 12 BLR 1-117 (1989).

The 125 day rule, *see* Section 718.301(b), is applicable to the determination of length of coal mine employment. ***Yauk v. Director, OWCP***, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989).

Section 725.493(b) should be interpreted in the same manner as Section 718.301 when determining length of coal mine employment. The Board held that the analysis set out in ***Dawson v. Old Ben Coal Co.***, 11 BLR 1-58 (1988)(*en banc*) should be applied in determining the length of coal mine employment under Section 725.493. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom.* ***Director, OWCP v. Cargo Mining Co.***, Nos. 88-3531 and 3578 (6th Cir., May 11, 1989)(unpublished).

Stipulation of fact, such as length of coal mine employment, made by a party is binding upon the parties and upon the trier-of-fact. ***Nippes v. Florence Mining Co.***, 12 BLR 1-108 (1985)(McGranery, J., dissenting).

The Seventh Circuit held that the administrative law judge's finding of "slightly in excess of 10 years" was sufficient where claimant testified that while he worked for 16 years at the coal mine, he did not work full years or full weeks as the mine was closed in the summer and operated only 2 to 3 days per week occasionally. ***Migliorini v. Director, OWCP***, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990).

The Third Circuit held that an absence of SSA records for some years does not necessarily establish that claimant was not employed as a miner for those years. The administrative law judge must give reasons for not crediting this time period. ***Wensel v. Director, OWCP***, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *see also* ***Marx v. Director, OWCP***, 870 F.2d 114, 118-119, 12 BLR 2-199, 2-205 - 2-207 (3d Cir. 1989).

Noting that Sections 718.301 and 725.493 should be consistently construed based upon their almost identical language, the majority held that the 125 day rule set out at 20 C.F.R. §718.301 has no applicability unless an administrative law judge initially determines that the miner has established a calendar year of coal mine employment. The majority noted its disagreement with the decisions of the Seventh and Eighth Circuits in ***Landes v. Director, OWCP***, 997 F.2d 1192, 17 BLR 2-172 (7th Cir. 1993) and ***Yauk v. Director, OWCP***, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989). In ***Landes*** and ***Yauk***, these Courts held that the 125 day rule requires that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. Consequently, except in those cases arising within the jurisdiction of the Seventh and Eighth Circuits, the majority declined to hold that the 125 day rule set out at 20 C.F.R. §718.301(b) mandates that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. Judge McGranery dissented, stating that the fundamental flaw in the majority's analysis is the assumption that 20 C.F.R. §718.301 and 20 C.F.R. §725.493 must be construed in the same way despite differences in purpose and in language. In accordance with the decisions from the Seventh and Eighth Circuits, Judge McGranery would hold that the 125 day rule requires that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. ***Croucher v. Director, OWCP***, 20 BLR 1-67 (1996)(*en banc*)(McGranery, J., dissenting).

For the purposes of calculating a miner's length of coal mine employment pursuant to 20 C.F.R. §725.101(a)(32), *see also* 20 C.F.R. §718.301, a year is defined as one calendar year, or partial periods totaling one year, during which the miner has worked " in or around a coal mine or mines for at least 125 working days." However, a miner is not required to establish that he worked underground for more than 125 days per year or that he was around surface coal dust for a full eight hours an any given day for that day to count towards the 125 day total, but must only show that he worked "in or around a coal mine" for any part of 125 days in a calendar year. ***Freeman United Coal Mining Co. v. Summers***, 272 F.3d 473, 22 BLR 2-266 (7th Cir. 2001).

Section 725.493(b)(2000) contemplates a two-step inquiry into the length of a miner's employment to determine if an employer is the responsible operator. First, the administrative law judge must determine whether the miner worked for employer for one calendar year or partial periods totaling one calendar year. Then, if the administrative law judge finds that the threshold one-year requirement is met, the administrative law judge must determine whether the miner's employment was regular, *i.e.*, whether the miner actually worked as a miner for 125 days during the one-year period. In the case at bar, substantial evidence did not support the administrative law judge's determination based on earnings records that the miner worked for employer for one calendar year pursuant to 20 C.F.R. §725.493(b)(2000). ***Clark v. Barnwell Coal Co.***, 22 BLR 1-275 (2003)(McGranery, J., concurring).

Where the administrative law judge's acceptance of the parties' stipulation to "at least" twenty-nine years of coal mine employment, entitled the miner to the presumption that his pneumoconiosis arose of out of his coal mine employment, the Board affirmed the administrative law judge's conclusion that any discrepancy in the exact number of years of coal mine employment was inconsequential for the purpose of rendering a decision on the merits. The Board noted that although claimant alleged more than forty-three years of coal mine employment, claimant had not demonstrated how the administrative law judge's determination of twenty-nine years was unduly prejudicial. ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*).

07/09