PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

G. LENGTH OF COAL MINE EMPLOYMENT: Section 718.301

In determining the length of coal mine employment pursuant to Part 718, a year is defined as a period or periods of one year of regular employment in or around an employer's coal mine. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11, 1-13 (1988). The administrative law judge should first determine the beginning and ending dates of the miner's coal mine employment. If the administrative law judge determines that the employment was "regular," then the entire period between the beginning and ending dates may be counted. If not "regularly" employed by the putative responsible operator, then the administrative law judge must total the periods of coal mine employment and determine the aggregate amount of coal mine employment, discussing all relevant evidence. ***Tackett*** at 1-13, n.2 *citing* ***Dawson v. Old Ben Coal Co.***, 11 BLR 1-58 (1988)(en banc).

To constitute "regular employment," the miner must have worked for that operator for at least 125 days during that 365 day period. ***Director, OWCP v. Gardner***, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989). *See also* ***Falcon Coal Co. v. Clemons***, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989). Part-time employment or employment that is not year-round must be prorated. ***Frost v. Director, OWCP***, 821 F.2d 649 (6th Cir. 1987). For further information regarding the issue of the length of coal mine employment, *see* Part II.F. of the Desk Book.

CASE LISTINGS

DIGESTS

Although the regulations at Part 718 were inapplicable to this Part 727 case, Section 718.301(b) could still be used to determine length of coal mine employment since it provides a reasonable method of calculation and no specific method was provided in Part 727. ***Merritt v. Morrison-Knudsen Co.***, 9 BLR 1-170 (1986).

Partial working days could not be discounted since Section 718.301(b) provides that a working day includes any partial day in which a miner received pay. ***Griffith v. Director, OWCP***, 12 BLR 2-185 (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).

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