BRB No. 94-2238 BLA

DANNIE CROUCHER (DECEASED)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER *EN BANC*

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Marian M. Burns (Burns, Burns, Walsh & Walsh, P.A.), Lyndon, Kansas, for claimant.

Karen N. Blank (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, United States Department of Labor.

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

HALL, Chief Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order on Remand (86-BLA-0367) of

[1]Claimant died on October 27, 1993. By Order dated February 28, 1994, Administrative Law Judge Donald W. Mosser reformed the caption in the instant

Administrative Law Judge Donald W. Mosser 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). This case is before the Board for

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case to reflect Dannie Croucher (Deceased) as the claimant.

the second time. In a Decision and Order dated September 22, 1989,[2] Administrative Law Judge V.M. McElroy, after noting that the interim regulations set

[2]The relevant procedural history is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on January 13, 1971. Director's Exhibit 38. The SSA denied this claim on March 31, 1971 and May 30, 1973. *Id.* Claimant subsequently filed a claim with the Department of Labor (DOL) on February 25, 1976. Director's Exhibit 1. The district director denied claimant's 1976 claim on October 16, 1980. Director's Exhibit 29. In a letter dated September 14, 1981, claimant indicated his intention to submit additional medical evidence in support of his claim. Director's Exhibit 30. In a letter dated October 7, 1981, claimant requested an extension of time in which to submit additional medical evidence. Director's Exhibit 32. On October 21, 1981, the district director informed claimant that because he had failed to submit additional evidence within one year of the October 16, 1980 denial, no further action could be taken on his claim. Director's Exhibit 33. In a letter dated January 28, 1982, claimant requested that the DOL inform him of the status of his claim. Director's Exhibit 34. On February 3, 1982, the district director informed claimant that his claim was "closed." Director's Exhibit 35. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 36, 37. Administrative Law Judge V.M. McElroy conducted a hearing on March 30, 1983.

In a Decision and Order dated March 2, 1984, Judge McElroy credited claimant with eight years and seven months of coal mine employment. Director's Exhibit 45. In his consideration of whether the evidence was sufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D, Judge McElroy found the evidence insufficient to establish total disability due to pneumoconiosis. *Id.* Accordingly, Judge McElroy denied benefits. *Id.* In a Decision and Order dated May 22, 1984, Judge McElroy denied claimant's motion for reconsideration. Director's Exhibit 48.

After claimant filed a motion for modification, Judge McElroy, by Order dated November 30, 1984, remanded the case to the district director for his consideration. Director's Exhibits 49, 51. After the district director denied the claim on April 17, 1985 and July 31, 1985, Director's Exhibits 55, 58A, claimant requested a formal hearing. Director's Exhibit 59. After a hearing was held on May 23, 1986, claimant filed a third claim on July 1, 1986. In a Decision and Order of Remand dated March 18, 1987, Judge McElroy remanded the case to the district director to address the merits of claimant's 1986 claim. However, in a Decision and Order dated September 22, 1989, Judge McElroy granted the Director's motion for reconsideration and held that claimant's 1986 claim had merged with his earlier 1976 claim. Judge McElroy, therefore, considered claimant's 1976 claim on the merits.

forth at 20 C.F.R. Part 727 had been rendered invalid, found that the evidence was insufficient to establish invocation of the presumption pursuant to 20 C.F.R. §410.490(b)(1). Judge McElroy further found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414. Accordingly, Judge McElroy denied benefits. By Decision and Order dated January 29, 1993, the Board held, *inter alia*, that Judge McElroy erred in finding that the regulations contained at 20 C.F.R. §727.203 were invalid. *Croucher v. Director, OWCP*, BRB No. 89-3421 BLA (Jan. 29, 1993) (unpublished) (McGranery and Lawrence, J. J., concurring). The Board also instructed Judge McElroy, on remand, to make a specific length of coal mine employment determination. *Id.*

On remand, Administrative Law Judge Donald W. Mosser[3] (the administrative law judge) credited claimant with six and one-half years of coal mine employment, and consequently, found the interim presumption at 20 C.F.R. §727.203(a) inapplicable. The administrative law judge also found that the evidence was insufficient to establish invocation of the presumption pursuant to 20 C.F.R. §410.490(b)(1). The administrative law judge then reviewed the claim under 20 C.F.R. Part 410, Subpart D and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414. Accordingly, the administrative law judge denied benefits. Claimant presently argues that the administrative law judge should have computed the length of his coal mine employment by applying the 125 day rule set forth at 20 C.F.R. §718.301(b). The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge's error, if any, in failing to utilize the 125 day rule in calculating the length of claimant's coal mine employment, is harmless.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

[3]Due to Judge McElroy's unavailability, the case was reassigned to Judge Mosser on remand.

Claimant, citing 20 C.F.R. §718.301(b), argues that the administrative law judge erred in not crediting him with one year of coal mine employment for each calendar year in which he worked for 125 days or more in a coal mine. We disagree. Section 718.301,[4] which provides guidelines for establishing the length of a miner's coal mine employment for the purpose of determining the miner's entitlement to certain presumptions, contains almost identical language to that found at 20 C.F.R. §725.493,[5] a provision which provides criteria for identifying a responsible operator.

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[4]Section 718.301, entitled "Establishing Length of Employment as a Miner," provides:

> (a) The presumptions set forth in §§718.302, 718.303, 718.305 and 718.306 apply only if a miner has been employed in one or more coal mines for specified periods. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period.
>
> (b) For the purposes of the presumptions described in this subpart, a year of employment means a period of one year, or partial periods totalling one year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. A "working day" means any day or part of a day for which a miner received pay for work as a miner. If an operator or other employer proves that the miner was not employed in or around a coal mine for a period of at least 125 working days during a year, such operator or other employer shall be determined to have established that the miner was not regularly employed for a year for purposes of this section. If a miner worked in or around one or more coal mines for fewer than 125 days in a calendar year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125. No periods of coal mine employment occurring outside the United States shall be credited toward the use of any presumption contained in this part.

20 C.F.R. §718.301.

[5]Section 725.493(a)(1) provides that:

> Subject to the provisions of paragraphs (a)(2) and (3) of this section, and provided that the conditions of §725.492(a)(2) through (a)(4) are met, the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year, as

Inasmuch as the language of these two provisions is significantly the same, the Board has held that they must be consistently construed.[6] *See Tackett v. Cargo Coal Mining Co.*, 12 BLR 1-11 (1988).

In determining the length of a miner's coal mine employment under both Section 718.301 and Section 725.493, the Board has consistently held that an

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> determined in accordance with paragraph (b) of this section, shall be the responsible operator.

20 C.F.R. §725.493(a)(1).

Section 725.493(b) provides that:

> From the evidence presented, the identity of the operator or other employer with which the miner had the most

recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. For purposes of this section, a year of employment means a period of 1 year, or partial periods totalling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for the purposes of paragraph (a) of this section. A "working day" means any day or part of a day for which a miner received pay for work as a miner (see §725.202(a)).

20 C.F.R. §725.493(b).

[6]Both Section 725.493(b) and Section 718.301: (1) define a year of coal mine employment as one year, or partial periods totalling one year, during which a miner was employed in or around a coal mine; (2) define a "working day" as any day or part of a day for which a miner received pay for work as a miner; and (3) contain a provision that if an employer can establish that a miner was not employed in or around a coal mine for a period of at least 125 working days during a year, that employer will be determined to have established that the miner was not regularly employed for a year. 20 C.F.R. §§718.301; 725.493.

administrative law judge may apply any reasonable method of calculation. *Tackett*, *supra*; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*). The Board has further explained that:

> 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 the administrative law judge determines that the employment was not "regular," then he must total the periods of coal mine employment, and determine the aggregate amount of coal mine employment. In making this determination, the administrative law judge must discuss all relevant evidence.

Tackett, 12 BLR at 1-12 n.2 (citing *Dawson*, *supra*).

The Board has held that the 125 day provision set out at Section 725.493(b) may be applicable once the threshold requirement that the miner be employed for at least one year, or partial periods totalling one year, is satisfied. *See Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984). Once that requirement is satisfied, employer is provided an opportunity to establish that the miner's employment was not regular by proving that the miner had not worked for employer for a period of at least 125 working days. Thus, the Board has held that a mere showing of 125 days of coal mine employment does not, in and of itself, establish one year of coal mine employment under 20 C.F.R. §725.493. *Tackett*, *supra*.

We similarly hold 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. Once a miner establishes a calendar year of coal mine employment, the party opposing entitlement is provided an opportunity to establish that the miner's employment was not regular by proving that the miner was not employed in or around a coal mine for a period of at least 125 working days during the year. However, even where the party opposing entitlement is able to prove that the miner was not employed in or around a coal mine for 125 working days during the calendar year, Section 718.301 insures that a miner will be credited with a fractional year based on the ratio of the actual number of days worked to 125. *See* 20 C.F.R. §718.301(b).

We note our disagreement with the decisions of the United States Court of Appeals for 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. Neither of these courts, however, considered whether the 125 day rule of 20 C.F.R. §718.301(b) should be applied only after the miner has established a calendar year of coal mine employment. As a result, the miners in *Landes* and *Yauk* received credit for coal mine employment during periods of time where there was no evidence to support any coal mine employment whatsoever.[7] Consequently, except in those cases arising within the jurisdiction of the United States Court of Appeals for the Seventh and Eighth Circuits, we decline 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.[8]

In determining the length of claimant's coal mine employment in the instant

[7]For example, both the Seventh and Eighth Circuits, utilizing the 125 day rule, calculated that the respective miners, having established by virtue of Social Security records coal mine employment in one quarter (66 working days, allowing 22 working days per month) during a calendar year, were entitled to credit for one-half of a year of coal mine employment. *Landes v. Director, OWCP*, 997 F.2d 1192, 1198 n.6, 17 BLR 2-172, 2-181 n.6 (7th Cir. 1993); *Yauk v. Director, OWCP*, 912 F.2d 192, 195, 12 BLR 2-339, 2-344 (8th Cir. 1989). The Eighth Circuit similarly calculated, under the 125 day rule, that the miner in *Yauk*, having established two quarters of coal mine employment (132 working days) during a calendar year, was entitled to credit for one full year of coal mine employment. *Yauk*, 912 F.2d at 195, 12 BLR at 2-344. Both courts relied upon Social Security records to determine the number of quarters of coal mine employment and then gave credit for 66 working days for each quarter. The courts then used this number of days in making use of the 125 day rule whether or not the miners actually worked the full 66 days or a lesser number during the quarter. No comment was made that under 20 C.F.R. §718.301, a "`working day' means any day or part of a day for which a miner received pay for work as a miner." 20 C.F.R. §718.301. Only days in which the miner physically worked are counted as "working days." The courts apparently credited the miners with every quarter in which their Social Security records indicated that they earned at least $50.00 in coal mine employment and construed this as 66 days. Many of the days, therefore, were "paper" working days and not the actual working days required by the 125 day rule. The courts, in effect, parlayed two separate and incompatible rules to arrive at their computation of years of coal mine employment.

[8]The instant case arises within the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See* Director's Exhibit 2.

case, the administrative law judge found that for the years 1937 until 1946, claimant's Social Security records were the most reliable evidence regarding his coal mine employment. Decision and Order on Remand at 5; Director's Exhibit 3. The administrative law judge credited claimant with the ten quarters in which his Social Security Administration earnings statement indicated that he earned at least $50.00. *Id.* The Board has held that this is a reasonable method of calculation. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

The administrative law judge also noted that claimant's Social Security records indicated minimal earnings (less than $50.00) in five additional quarters from 1937 until 1946.[9] Decision and Order on Remand at 5; Director's Exhibit 3. The administrative law judge, therefore, credited claimant with a total of six months of coal mine employment for these quarters. *Id.* We hold that this calculation is also reasonable.

[9]Claimant earned $6.05 during the fourth quarter of 1937; $10.50 during the third quarter of 1938; $23.66 during the third quarter of 1939; $37.74 during the third quarter of 1940; and $9.14 during the fourth quarter of 1940. Director's Exhibit 3.

In regard to claimant's employment prior to 1937, the administrative law judge credited claimant's wife's testimony that claimant was employed during the winter months, mainly from September of one year to April of the next. Decision and Order on Remand at 5. The administrative law judge, assuming that claimant worked from September of 1932 to April of 1933 and did so in every year thereafter up to January 1, 1937, calculated that claimant would have worked approximately forty months in coal mine employment.[10] *Id.* Adding this three years and four months of coal mine employment to the three years he found documented by claimant's Social Security records, the administrative law judge credited claimant with approximately six and one-half years of coal mine employment. *Id.* Inasmuch as it is based upon a reasonable method of calculation and is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established approximately six and one-half years of coal mine employment. Consequently, claimant is not entitled to have his claim considered under 20 C.F.R. Part 727.

The administrative law judge also found that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410,

[10]Assuming that claimant was employed from September of 1932 to April of 1933 and was employed for a similar length of time in every year thereafter up to January 1, 1937, we note that claimant would have been employed for a total of only thirty-six months in coal mine employment from 1932 until the end of 1936, not the forty months found by the administrative law judge. The administrative law judge appears to have miscalculated the number of months of coal mine employment during this period. However, under the facts of the instant case, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Subpart D. Decision and Order on Remand at 9-12. Claimant's statements regarding these findings merely point to evidence favorable to his position and amount to no more than a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's findings that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D.[11]

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

[11]In light of our affirmance of the administrative law judge's findings that claimant was not entitled to benefits pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D on the merits, we need not address the Director's arguments regarding the administrative law judge's failure to address whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310. *See Larioni*, *supra*; Director's Brief at 5 n.6.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's opinion interpreting 20 C.F.R. §718.301. I think 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. Section 725.493 sets forth the analysis to be used in determining the responsible operator and Section 718.301 sets forth the analysis to be used in calculating a miner's years of coal mine employment to determine eligibility for various presumptions.

Because the purposes of the regulations are different, their language is different in crucial respects. Thus, Section 725.493(a)(1) provides that the responsible operator or employer is the one "with which the miner had the most recent periods of cumulative employment of not less than 1 year...." 20 C.F.R. §725.493(a)(1). And subsection (b) explains that "a year of employment means a period of 1 year, or partial periods totalling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer." 20 C.F.R. §725.493(b). That subsection further provides, however, that the designated most recent employer to have employed claimant for a year or more shall not be held the responsible operator if it can prove that it did not employ claimant "for a period of at least 125 working days [because] such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer...." *Id.*

The Board has construed Section 725.493 to mean that the most recent employer to have employed the miner for a cumulative period of a year or more is the responsible operator unless it is able to show that the miner was employed for fewer than 125 days. *Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984). The Board's construction of the regulation reflects a reasonable interpretation of the statutory language. From the standpoint of policy it also makes sense that the responsible operator be the one to have employed the miner over a full year or more and to have exposed the miner to coal dust for at least 125 working days.

Because the Board held in *Tackett v. Cargo Coal Mining Co.*, 12 BLR 1-11 (1988) that Sections 725.493 and 718.301 should be interpreted consistently, since they both contain 125 day rules, the majority now reads into Section 718.301 the requirement that a miner be employed for at least a full year (twelve months or four quarters) before he can be credited with a year's employment, or a fractional part of a year's employment. This construction, however, has no support in the language of the regulation.

The Board's interpretation of Section 718.301 ignores the precise words of the regulation which were clearly intended to provide miners with flexibility in combining periods of coal mine employment to accumulate the number of years necessary to take advantage of statutory presumptions. Thus, Section 718.301(b) provides that "a year of employment means a period of one year, or partial periods totalling one year, during which the miner was regularly employed...." 20 C.F.R. §718.301(b). The regulation reflects a reasonable limitation on the miner's ability to establish a year's coal mine employment, *i.e.*, if employer can prove that the miner worked "fewer than 125 days in a calendar year [the miner will not be credited with a full year of coal mine employment, but] he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125." *Id.* The obvious inference from this provision is that a year of coal mine employment, for purposes of the statutory presumptions, is a twelve-month or four-quarter period during which the miner worked 125 or more days. That is the construction given to Section 718.301 by the only courts which have considered the issue, the United States Court of Appeals for the Seventh Circuit in *Landes v. Director, OWCP,* 997 F.2d 1192, 17 BLR 2-172 (7th Cir. 1993), and the United States Court of Appeals for the Eighth Circuit in *Yauk v. Director, OWCP,* 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989). By contrast, the majority's interpretation of Section 718.301 would thwart its beneficent purpose.

In the majority's view, if the miner had not been on an employer's payroll for a full year, the 125 day rule would not become operative, and depending upon the

administrative law judge's method of calculation, the miner might not get credit for a full year, regardless of the number of days worked. Thus, the thousands of miners to whom only seasonal coal mine employment was available would not be able to take advantage of the 125 day rule because they are not carried on the payroll year round. Yet it was clearly these people who were intended to benefit from Section 718.301's provision authorizing the combination of fractions of a year without regard to the number of calendar years spanned.

Furthermore, both courts held that application of the 125 day rule is mandatory in calculating claimant's years of coal mine employment. As the Seventh Circuit explained:

> While [the administrative law judge's] method of computation may have been reasonable prior to the promulgation of the 125-day rule in 20 C.F.R. §718.301, once that rule became effective and gave guidance concerning how the length of coal mine employment should be computed, it was no longer acceptable for [the administrative law judge] to calculate the length of [claimant's] employment without consideration and application of such guidance.

Landes, 997 F.2d at 1198, 17 BLR at 2-181.

The Secretary of Labor, pursuant to Section 411(b) of the Act, 30 U.S.C. §921(b), has the authority to promulgate regulations implementing the purposes of the Act. Both the Seventh and Eighth Circuits upheld application of the 125 day rule because it was more consistent with the remedial purposes of the Act than application of the quarter-method. *Landes*, 997 F.2d at 1199, 17 BLR at 2-182; *Yauk*, 912 F.2d at 195, 12 BLR at 2-343. The majority's interpretation of Section 718.301 eviscerates the regulation and undermines its remedial purpose.

In accordance with the decisions from the United States Courts of Appeals for the Seventh and Eighth Circuits, I 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 and that "[i]f a miner worked in or around one or more coal mines for fewer than 125 days in a calendar year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125." 20 C.F.R. §718.301(b). I would remand the case to the administrative law judge to reconsider claimant's length of coal mine employment in light of the 125 day rule. Even though the Director assures us that application of the rule would not give claimant the requisite ten years to invoke the interim presumption, Director's Brief at 2-3, it is not clear that the Director would apply the rule in the same way as the administrative law judge, *see Yauk*, *supra*, and it is appropriate for the administrative law judge to make this factual determination.

I concur in all other respects in the majority opinion.

REGINA C. McGRANERY
Administrative Appeals Judge

Desk Book Sections: Parts II.F and VII.G.

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***, BLR , BRB No. 94-2238 BLA (Aug. 29, 1996)(en banc) (McGranery, J., dissenting).