BRB No. 00-0712 BLA

DENNIS E. DEETER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKER'	)	DATE ISSUED:
	)	
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Timothy S. Williams (Judith E. Kramer, 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: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0038) 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).[1] The administrative law judge found that claimant established "at least" ten

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that claimant failed to establish that he was totally

---

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all parties have responded. Both parties contend that the challenged regulations at issue in the lawsuit will not affect the outcome of the case.

The definition of total disability in regard to whether a miner is totally disabled from engaging in comparable and gainful employment, formerly at 20 C.F.R. §718.204(b)(2) (2000), has not been revised, *see* 20 C.F.R. §718.204(b)(1)(ii), and is not one of the challenged regulations at issue in the lawsuit. Consequently, based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.

[2] Claimant filed a claim on February 25, 1999, Director's Exhibit 1.

disabled from engaging in comparable and gainful employment pursuant to 20 C.F.R. §718.204(b)(2) (2000), as revised at 20 C.F.R. §718.204(b)(1)(ii). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in raising, *sua sponte*, the issue of whether claimant was totally disabled from engaging in comparable and gainful employment, erred in not addressing the merits of claimant's entitlement to benefits, including the medical issue of total disability, and erred in determining the comparability of a miner's present employment with claimant's previous coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*.

The administrative law judge noted that claimant testified that he last worked in coal mine employment in January, 1996, and has since been gainfully employed at Franks Electrical Construction, Incorporated (hereinafter, Franks Electrical), performing work that requires less physical exertion than his previous coal mine employment. Decision and Order at 4-6. The administrative law judge found that, because claimant's annual earnings at Franks Electrical substantially exceed his annual earnings from any of his previous coal mine employment shown in the record,[3] claimant "failed to carry his burden" to establish that his

[3] The administrative law judge noted that claimant's Social Security Earnings Record shows that claimant earned $5,170 in his last year of coal mine employment in 1995 and the highest annual earnings in coal mine employment reflected on claimant's Social Security Earnings Record totaled less than $7,000 in 1978, *see* Director's Exhibit 7; Decision and Order at 4. The administrative law judge further noted that claimant's Social Security Earnings Record shows annual earnings for claimant's current work with Franks Electrical of $13,748.97 in 1996, $12,587.23 in 1997 and $20,390.26 in 1998, the most recent year shown. Decision and Order at 5.

current employment is not comparable to his previous coal mine employment in accordance with the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Echo v. Director, OWCP*, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984). The administrative law judge further found that claimant, "who bears the burden of proof," offered no evidence pertaining to the rate of inflation or any other basis for the conclusion that his current earnings at Franks Electrical have less value than his earnings from his previous coal mine employment. Thus, the administrative law judge found that, even if the medical evidence of record supported a finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), claimant failed to establish that he is totally disabled.

Pursuant to 20 C.F.R. §718.204(b)(1)(ii), formerly 20 C.F.R. §718.204(b)(2) (2000), implementing Section 402(f)(1)(A) of the Act, 30 U.S.C. §902 (f)(1(A), a miner is considered totally disabled due to pneumoconiosis if the disease prevents him from engaging in gainful work requiring skills and abilities comparable to the miner's prior coal mine employment. 20 C.F.R. §718.204(b)(1)(ii), formerly 20 C.F.R. §718.204(b)(2) (2000). The Third Circuit has held that in determining the comparability of a miner's present employment, relative compensation provides an objective standard which should be considered the "prime criterion," *see Echo*, 744 F.2d at 331, 6 BLR at 2-117. The Board has concluded that the Third Circuit's emphasis on the relative compensation factor applies where a miner's current employment is more remunerative or higher paying than his previous coal mine employment, *see Romanoski v. Director, OWCP*, 8 BLR 1-407, 1-409 (1985); *see also Garcia v. Director, OWCP*, 15 BLR 1-8 (1991). However, the Board further noted that the Board did not suggest that any miner who is engaged in more remunerative work than his previous coal mine work is automatically excluded from receiving benefits under the Act, but rather, consistent with the Third Circuit's holding in *Echo*, that the relative compensation factor should be used as a starting point in the comparability analysis, one which will often obviate the need for further subjective inquiry, *see Romanoski*, 8 BLR at 1-409 n. 1; *see also Echo*, 744 F.2d at 332 n. 6, 6 BLR at 2-118 n. 6. While acknowledging that other factors are important to consider, the Third Circuit noted that they are generally reflected in the level of compensation and where compensation is manifestly unequal, comparability is unlikely to be found, *Echo*, 744 F.2d at 331, 332 n. 6, 6 BLR at 2-117, 2-118 n. 6.

Initially, claimant contends that the administrative law judge erred in raising, *sua sponte*, the issue of whether claimant was totally disabled from engaging in comparable and gainful employment, even though claimant contends that the issue was not contested or raised by the Director in her closing brief before the administrative law judge. Thus, because claimant contends that he was never put on notice that this would be a contested issue, or unfair surprise, claimant contends that he was deprived of his due process rights to be heard and present evidence on the issue. In addition, claimant contends that the administrative law judge erred in not addressing the merits of claimant's entitlement to benefits, including the

medical issue of total disability.

Contrary to claimant's contention, total disability was a contested issue before the administrative law judge, *see* Director's Exhibits 23, 25; Hearing Transcript at 4, and 20 C.F.R. §718.204(b)(1), formerly 20 C.F.R. §718.204(b) (2000), defines total disability in terms of inability to engage in both usual coal mine work and comparable and gainful work. 20 C.F.R. §718.204(b)(1)(ii), formerly 20 C.F.R. §718.204(b)(2) (2000). Thus, because the issue of whether claimant was totally disabled from engaging in comparable and gainful employment was raised before the administrative law judge in accordance with 20 C.F.R. §725.421(b) (2000), applicable to the instant claim, *see* 20 C.F.R. §725.2, and 20 C.F.R. §725.463(a), (b), claimant's contention is rejected.

However, the administrative law judge erred in holding that claimant bears the burden of proof to establish that his current employment is not comparable to his previous coal mine employment. The Board has held that it is apparent that if Section 718.204(b)(2) (2000), as revised at Section 718.204(b)(1)(ii), is interpreted as requiring claimant to prove not only inability to perform his usual coal mine work but also inability to perform comparable and gainful work, it would be imposing upon claimant a burden of proof that various Courts of Appeals have not imposed upon claimants under Section 223(d) of the Social Security Act. *See Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87 (1988). Thus, because the criteria in the Secretary of Labor's regulations for determining total disability would be more restrictive than the criteria under Section 223(d) of the Social Security Act, the Board declined to interpret Section 718.204(b) of the implementing regulations in such a manner. Accordingly, the Board held that once claimant has established an inability to perform his usual coal mine employment under Part 718, a *prima facie* case for total disability exists and, thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove that claimant is able to perform comparable and gainful employment as defined pursuant to Section 718.204(b)(2) (2000), as revised at 20 C.F.R. §718.204(b)(1)(ii), *see Taylor, supra*.

Consequently, inasmuch as the administrative law judge erred in holding that claimant bears the burden of proof to establish that his current employment is not comparable to his previous coal mine employment, we vacate the administrative law judge's finding that claimant "failed to carry his burden" to establish that his current employment is not comparable to his previous coal mine employment and remand the case for reconsideration. As claimant contends, the administrative law judge erred in considering whether the evidence establishes whether claimant is able to perform comparable and gainful employment as defined pursuant to Section 718.204(b)(2) (2000), as revised at Section 718.204(b)(1)(ii), without determining whether claimant established an inability to perform his usual coal mine

employment under Part 718 on the merits, *see Taylor, supra*.[4]

Moreover, in order to avoid any possible repetition of error by the administrative law judge on remand, we address claimant's contentions as to the administrative law judge's findings regarding whether claimant's current employment is comparable to his previous coal mine employment. Claimant contends that in determining the comparability of a miner's present employment, the administrative law judge erred in comparing claimant's annual compensation from his current employment with Franks Electrical in 1998 with his annual compensation from his previous last year in coal mine employment in 1995, as opposed to the average earnings of a miner in the same year in 1998 or, alternatively, in 1999 when claimant filed his claim, in accordance with the standard enunciated by the Third Circuit in *Echo*. Claimant further contends that there is nothing in the record to document what was the average compensation for a miner in 1998 and/or to support a finding that the average compensation for a miner in 1998 was less than what claimant earned from his current employment with Franks Electrical in 1998. Thus, claimant contends that the record does not establish that the relative compensation between claimant's current employment and his previous job as a coal miner is "manifestly unequal," *see Echo, supra*.

[4] Although the administrative law judge stated that his finding that claimant failed to establish that he was totally disabled from engaging in comparable and gainful employment pursuant to Section 718.204(b)(2) (2000), as revised at Section 718.204(b)(1)(ii), would be the same "even if the medical evidence of record supported a finding of total disability" pursuant to Section 718.204(c) (2000), as revised at Section 718.204(b)(2), the administrative law judge's finding must be vacated because the administrative law judge erred in holding that claimant bears the burden of proof to establish that his current employment is not comparable to his previous coal mine employment, *see Taylor, supra*. Thus, we reject the Director's contention that the administrative law judge's failure to address the other elements of entitlement on the merits is not required, *see Trent, supra*; *Perry, supra*.

In response, the Director notes that the Third Circuit in *Echo* stated that the administrative law judge should consider and/or compare the "relative earnings of [the claimant's] two jobs" and/or of the claimant's "past and present jobs," *see Echo*, 744 F.2d at 330, 6 BLR at 2-115, 2-116. However, in *Echo*, the claimant last worked in coal mine employment in 1954 and had since worked up through 1980 (apparently, the date of the hearing), for over twenty-six years, in a non-coal mine employment job. Thus, the Third Circuit did not compare, as the Director urges, the earnings of the claimant's last coal mine employment job in 1954 with his current earnings in his present job in 1980, but compared the claimant's hourly earnings in his present job in 1980 with the contemporaneous average hourly wage of a coal miner in 1980 (*i.e.*, the type of job the claimant previously had in 1954), *id*. The Third Circuit took judicial notice of the contemporaneous average hourly wage of a coal miner in 1980 from the Statistical Abstract of the United States published by the U.S. Bureau of the Census. The Director contends that resort to accurate statistics regarding the average wages of miners "may be one way" to determine comparability, but "is not required." Thus, because claimant's annual earnings from his subsequent non-coal mine employment job were more than twice to nearly four times any of the claimant's annual earnings in his previous coal mine employment, the Director urges the Board to affirm the administrative law judge's finding.[5]

Contrary to the Director's contentions, the date of hearing is the date upon which disability is assessed in a living miner's case, *see Parsons v. Black Diamond Coal Co.*, 7

[5] The Director notes that a miner is considered totally disabled due to pneumoconiosis if the disease prevents him from engaging in gainful work "requiring the skills and abilities" comparable to the miner's prior coal mine employment "in which he or she previously engaged," *see* 20 C.F.R. §718.204(b)(1)(ii), formerly 20 C.F.R. §718.204(b)(2)(2000), implementing Section 402(f)(1)(A) of the Act, 30 U.S.C. §902 (f)(1(A). However, the Act and its implementing regulation only requires that a miner's present, gainful non-coal mine employment work have comparable "skills and abilities" to the miner's prior coal mine employment, but does not suggest that the miner's prior coal mine employment earnings be compared to his earnings in his present, gainful non-coal mine employment work.

BLR 1-236 (1984); *Klouser v. Hegins Mining Co.*, 6 BLR 1-110 (1983); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Freeman United Coal Co. v. Benefits Review Board*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Zettler v. Director, OWCP*, 886 F.2d 831 (7th Cir. 1989). Thus, as the Director initially acknowledges in her brief before the Board, the claimant's actual hourly earnings at the time of hearing must be compared with what he "would have been earning"per hour at the time of the hearing had he remained a coal miner, in accordance with the holding of the Third Circuit in *Echo*, *supra*.

The only relevant finding that the administrative law judge made as to what claimant would have been earning at the time of the hearing had he remained a coal miner was that claimant, "who bears the burden of proof," offered no evidence pertaining to the rate of inflation or any other basis for the conclusion that his current earnings in his non-coal mine employment job have less value than his earnings from his previous coal mine employment, Decision and Order at 6 n. 3. The administrative law judge erred, however, in holding that claimant bears the burden of proof to establish that his current employment is not comparable to his previous coal mine employment, *see Taylor*, *supra*. Claimant contends that there is no evidence of record addressing whether claimant's earnings in his current non-coal mine employment job were based on a forty hour work week or included overtime or bonuses. The Director responds, contending that even allowing for inflation, raises and bonuses, claimant's earnings had he remained a coal miner would not have risen to the level of his current non-coal mine employment work and that claimant made far more from his current work than he would have from working as a coal miner. However, there is no evidence in the record regarding what claimant was actually earning at the time of hearing held on February 14, 2000, or what claimant "would have been earning" at the time of the hearing had he remained a coal miner.

Thus, if reached on remand, the administrative law judge may, within his discretion, reopen the record, as claimant requests, if the administrative law judge concludes that the documentary evidence is insufficient to make a necessary determination and/or that further development of the evidence is warranted in this regard, *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). In accordance with the Third Circuit's holding in *Echo*, *supra*, the administrative law judge may take judicial notice of the contemporaneous average hourly wage of a coal miner in 2000, *i.e.*, the date of the hearing, from the Statistical Abstract of the United States published by the U.S. Bureau of the Census.

Finally, claimant contends that the administrative law judge erred in failing to adequately explain his finding that claimant established "at least 10 years" of coal mine employment, Decision and Order at 3-4. Claimant alleged approximately twenty-five years

of coal mine employment, Director's Exhibit 1, based on the evidence of record, including his employment history, Social Security records, pay checks, W-2 forms and pay stubs, *see* Director's Exhibits 2-7, as well as claimant's testimony, *see* Hearing Transcript. Claimant contends that the administrative law judge based his finding exclusively on claimant's Social Security records, without considering the other relevant evidence of record. Finally, although the administrative law judge found at least ten years of coal mine employment established, sufficient to invoke the rebuttable presumption that claimant's pneumoconiosis, if established, arose out of his coal mine employment at 20 C.F.R. §718.203(b), claimant contends that the administrative law judge's failure to make a specific finding is not harmless, because whether claimant actually had twenty-five years of coal mine employment may be relevant in establishing that claimant has a respiratory impairment arising from his coal mine employment.

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, *see Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), but must be based on a reasonable method of computation and be supported by substantial evidence, *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, n. 1 (1988)(*en banc*). Thus, we vacate the administrative law judge's finding as to the length of claimant's coal mine employment and remand the case for the administrative law judge to reconsider his finding as to the length of claimant's coal mine employment pursuant to the holdings in *Dawson, supra*, and *Boyd, supra*, when considering claimant's entitlement to benefits on the merits.[6]

[6] We note that, in this case arising within the jurisdiction of the Third Circuit, part-time employment or employment that is not year round must be prorated, *see Shendock v. Director, OWCP*, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988), and that the Third Circuit has held that the absence of Social Security records for some years does not necessarily establish that claimant was not employed as a miner for those years, *see 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).

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.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge