BRB No. 99-0603 BLA

NELLIE P. HARRISON (Widow of ERNEST W. HARRISON) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Edward O. Moody, Little Rock, Arkansas, for claimant.

Jill M. Otte (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (98-BLA-0281) of Administrative Law Judge Thomas M. Burke denying benefits on claims 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 instant case involves both a miner's claim filed on May 20, 1996 and a survivor's claim filed on February 3, 1997. After crediting the miner with a maximum of six

[1]Claimant is the surviving spouse of the deceased miner who died on November 29, 1996. Director's Exhibit 27.

and one-quarter years of coal mine employment, the administrative law judge noted that the Director, Office of Workers' Compensation Programs (the Director), had conceded that the miner suffered from pneumoconiosis and that the miner's death and total disability were due to pneumoconiosis. The administrative law judge, however, found that the evidence was insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim. On appeal, claimant argues that the administrative law judge should have credited the miner with at least ten years of coal mine employment. Claimant, therefore, argues that she is entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The Director responds in support of the administrative law judge's denial of benefits.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Boyd*, *supra*.

Claimant contends that the miner is entitled to be credited with ten years of coal mine employment. 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); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act nor the regulations provides specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method

and supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In determining the length of the miner's coal mine employment, the administrative law judge considered claimant's testimony, the miner's Social Security Administration (SSA) records, the miner's and the survivor's applications for benefits, employment statements and various affidavits. Decision and Order at 2-3. Claimant contends that the SSA records and affidavits establish ten years of coal mine employment.[2] However, inasmuch as claimant has not asserted any specific errors committed by the administrative law judge, her statements 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).

In the instant case, the administrative law judge found that the miner's SSA records entitled him to one and one-quarter years of coal mine employment.[3] S*ee generally Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Decision and Order at 4. The administrative law judge further found that even if he were to credit the miner for the all of the coal mine employment alleged for the period not covered by the miner's SSA records, a total of five years, the miner would only be entitled to credit for a maximum of six and one-quarter years of coal mine employment. Decision and Order at 4-5. Consequently, inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding of six and one-quarter years of coal mine employment.

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[2]The miner's Social Security Administration records indicate that the miner worked for coal companies in 1940, 1945, 1946, 1947 and 1948. Director's Exhibit 3. Claimant also submitted affidavits from the miner's sister and two of the miner's brothers indicating that the miner worked in the coal mines from 1933 to 1940 and for two additional years thereafter. Director's Exhibit 20.

[3]The administrative law judge acted within his discretion in crediting the miner with every quarter in which his Social Security Administration records indicated that he earned at least $50.00 in coal mine employment. Decision and Order at 4.

Inasmuch as the administrative law judge properly found that the miner was entitled to credit for less than ten years of coal mine employment, claimant had the burden of establishing that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Claimant fails to allege any error in the administrative law judge's finding that the evidence is insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.203(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge