JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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CHAPTER 6
Definition of Coal Miner and Length of Coal Mine Employment

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I. Coal miner; defined under Part 410 and § 410.490

The term "miner" or "coal miner" is defined as:

> [A]ny individual who is working or has worked as an employee in a coal mine, performing functions in extracting the coal or preparing the coal so extracted.

20 C.F.R. § 410.110(j).

Under Part 410 of the Act, "outside men" such as workers at the tipple and coal mine construction and transportation workers, were not included within the definition of a "miner." However, the 1977 amendments specifically extended coverage to such individuals when they work in conditions substantially similar to those in underground coal mines.

Also, before the 1977 amendments, a self-employed individual was not considered a "miner" within the meaning of the Act. *Montel v. Weinberger*, 546 F.2d 679 (6th Cir. 1976). The same was true of an independent contractor. *Winton v. Director, OWCP*, 2 B.L.R. 1-187 (1979).

II. Coal miner; defined under Parts 718 and 727

A. Generally

1. Prior to applicability of December 2000 regulations

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to such disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner and, in light of the Act's purpose, the definition of "coal miner" was significantly broadened. A "miner" is defined at 20 C.F.R. § 725.202(a) as the following:

> [A]ny person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility.

20 C.F.R. §§ 725.101(a)(26) and 725.202(a).

The regulations at 20 C.F.R. § 725.202(a) specifically provide that a self-employed individual or an independent contractor may be considered a miner. In fact, an individual who picked coal from shale dumps for his family during childhood was considered to have done the work of a "miner" under the Act. *Smith v. Director, OWCP*, 8 B.L.R. 1-258 (1985). However, the legislative intent of the Act provides that an individual's exposure to coal dust which did not occur in or around a coal mining or coal preparation facility is not covered by the Act. S.Rep.No. 95-209 95th Cong., 1st Sess. at 20-1 (1977); Conference Rep. at H.Rep.No. 95-864, 95th Cong. 2d Sess. at 15 (1978).

2. After applicability of December 2000 regulations

The amended regulations contain a clarification that coke oven workers are not considered "miners" under the Act. The regulation at § 725.101(a)(19) provides:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (Dec. 20, 2000). Moreover, the new regulation at § 725.202(a) provides a new rebuttable presumption that certain individuals are miners and it provides the following:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(a) (Dec. 20, 2000).

B. The three-prong test

Based on the language of the Act and its legislative history, Congress intended that the term "miner" include all workers who perform work within the immediate area of a coal mine and whose duties are part of the *extraction* or *preparation* process. Recognizing this, the Board, in *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985), established a three prong test to determine whether a worker is a "miner" within the meaning of the Act. The worker must prove that: (1) the coal was still in the course of being processed and was not yet a finished product in the stream of commerce

(status); (2) the worker performed a function integral to the coal production process, *i.e.*, extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (function); and (3) the work that was performed, occurred in or around a coal mine or coal preparation facility (situs).

Some circuit courts have held that the "status" prong is subsumed in the "function" prong of the analysis and, therefore, an individual is considered a "coal miner" if he or she satisfies the function and situs prongs of the test:

- ***Third circuit.*** The Third Circuit held that the status prong of the analysis was subsumed in the function prong in *Stroh v. Director, OWCP*, 810 F.2d 61 (3d Cir. 1987). The court reiterated its two prong situs and function test for determining whether an individual is a "miner" under the Act in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3d Cir. 1994). Under the facts of *Elliot*, the claimant was determined not to be a "miner" as he "worked out of the main office . . . and was required to travel by company truck among five strip mines within a fifteen mile radius." The claimant did not supervise the mining process; rather, he "was present at the mines on only limited occasions and did not perform the functions of a miner."

- ***Fourth Circuit.*** The Fourth Circuit Court of Appeals has similarly held that the definition of a miner only includes the situs and function prongs. *Collins v. Director, OWCP*, 795 F.2d 368 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935 (4th Cir. 1986).

- ***Sixth and Seventh Circuits.*** The Sixth and Seventh Circuits have generally employed the two-prong, function-situs test as well. *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 485 (6th Cir. 1988); *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988); *Director, OWCP v. Ziegler Coal Co. [Wheeler]*, 853 F.2d 529 (7th Cir. 1988).

- ***Eleventh Circuit.*** The Eleventh Circuit Court of Appeals, in *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), stated that the definition of a miner only includes the situs and function prongs.

1. Status of the coal

The focus of inquiry in the first prong is the status of the coal itself. The coal with which the claimant worked must have been in the extracting, preparing, or processing stage and cannot be a finished product to be used by an ultimate consumer. Thus, in *Foster v. Director, OWCP*, 8 B.L.R. 1-188 (1985), the Board stated that time spent by the claimant "hauling prepared coal to ultimate consumers did not constitute coal mine employment," and the worker could not be considered a miner during that time. *Id*. at 1-189. Along the same lines, a railroad track repairer was not involved in coal mine employment because he was exposed only to processed coal. *Blevins v. Louisville & Nashville Railroad Co.*, 13 B.L.R. 1-69 (1988). *See also Kane v. Director, OWCP*, 10 B.L.R. 1-148 (1987).

2. Function of the miner

The function prong of the Board's test requires that the individual's work contribute to the extraction and preparation of coal. This requirement is satisfied if the individual's activities are found to be an integral or necessary part of the overall coal extraction process. *Canonico v. Director, OWCP*, 7 B.L.R. 1-547 (1984); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979). The phrase "coal extraction" is self-descriptive--encompassing the process of removing coal from its deposits in the earth, including necessary support functions, such as motorman and brakeman. The phrase "coal preparation" is defined at 20 C.F.R. § 725.101(a)(13) as the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine." Coal is beyond the "preparation" stage when it is processed and prepared for the market. *Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38 (4th Cir. 1991). The following list contains some examples of application of the "function" analysis:

a. Construction workers

Construction workers are only considered to be miners to the extent they were exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. § 725.202(a). However, such individuals are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. The presumption may be rebutted by evidence demonstrating either of the following: (1) the individual was not regularly exposed to coal mine dust during his employment in or around a coal mine or coal preparation facility; or (2) the individual was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. § 725.202(a).

Thus, in *Ritchey v. Blair Electric Service Co.*, 6 B.L.R. 1-966 (1984), an administrative law judge properly found that any work performed by the individual as an electrician in a coal preparation facility constituted coal mine construction work, but it was also proper to find that the § 725.202(a) presumption was rebutted by evidence that the claimant was not regularly exposed to coal dust and that such work was not a regular part of his employment. *See also Amax Coal Co. v. Fagg*, 865 F.2d 916 (7th Cir. 1989) (a worker who bulldozed soil at the same time new coal was being mined in a nearby pit was classified as a "miner" because his work was part of the modern process of extracting and preparing coal).

In *George v. Williamson Shaft Construction Co.*, 8 B.L.R. 1-91 (1985), the Board held that coal mine dust and coal dust are identical terms within the meaning of the Act, and that "the employer would have to rebut the presumption of exposure to coal dust by establishing that the [worker] was not regularly exposed to airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine." *Id*. at 1-194. *See also Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986).

In *Glem v. McKinney*, 33 F.3d 340 (4th Cir. 1994), the court held that an electrical construction worker qualified as a "miner" under the Act. In so holding, however, it reasoned that the two-prong test set forth in *Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38, 41-42 (4th Cir. 1991) does not apply to construction workers because such workers would "rarely, if ever,

qualify as miners under the Act." The court concluded that the two-prong test was more applicable to transportation workers because transportation "fits neatly into the concepts of extracting and preparing coal and thus easily lends itself to analysis under the two-step test."

In *R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998), Claimant worked for Employer in coal mine construction. One of the issues before the court was whether claimant was a "miner" within the definition of the Act during the time he worked in construction. In its analysis, the court stated a determination of whether construction work was covered by the Act was, in part, dependent upon whether the worker was exposed to coal dust:

> At R&H, (Claimant) worked at a number of coal mine construction projects. The work involved surface projects and did not involve mining. The dispute in this case is over the exact periods of time during which he was exposed to coal dust while working on the projects, for as we have seen, in order to be classified a miner he had to be exposed to coal dust during one year of his employment.

On this basis, the court reviewed Claimant's testimony as well as that of Employer's officers to conclude that Claimant worked at several different mine sites during his employment with R&H. It found that Claimant was exposed to coal dust for twelve months while working for R&H and, therefore, he was a "miner" within the meaning of the Act and R&H, as the last operator to employ Claimant for one year, was the responsible operator.

b. Consumer coal handler

In *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), the court held that the claimant's work as a coal handler for a consumer of coal, an ore mine power plant, was not integral to the preparation of the coal; therefore, the claimant was not a miner within the meaning of the Act.

c. Federal mine inspector

In *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981), a federal mine inspector was held to be a "miner" within the meaning of the Act since his work concerned health and safety which is integral to the operation of a coal mine thereby satisfying the function test. *But see Southard v. Director, OWCP*, 732 F.2d 66, 70 (6th Cir. 1984); *Dowd v. Director, OWCP*, 846 F.2d 193 (3d Cir. 1988); *Falcon Coal Co. v. Clemons*, 873 F.2d 916 (6th Cir. 1989) (if a worker's tasks are merely convenient, but not vital or essential to the production or extraction of coal, he is generally not classified as a miner).

d. Integral to the process

An individual need not be engaged in the actual extracting or preparing of coal to meet the function test so long as the work he performs is integral to the coal production process. *Ray v. Williamson Shaft Contracting Co.*, 14 B.L.R. 1-105 (1990) (*en banc*); *Tobin v. Director, OWCP*, 8 B.L.R. 1-115, 1-117 (1985). The focus of inquiry is whether the function is integral to extraction or preparation of coal as opposed to being merely ancillary to the delivery and commercial use of processed coal.

e. Inventory work

In *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. 1-109 (1986), the Board held that since levels of inventory inherently affect the level of coal production, the claimant's inventory work satisfies the function test.

f. Transportation workers

Coal transportation workers have presented a special problem for the Board. Traditionally, the Board and the courts have held that a coal mine includes that area between the site of extraction and the site of preparation, which is, generally, the tipple. Therefore, hauling coal from the mine to the tipple or another preparation facility constituted coal mine employment, while hauling processed coal to private consumers did not. *Norfolk & Western Railway Co. v. Director, OWCP*, 5 F.3d 777 (4th Cir. 1993) (upholding *Roberson* to state that delivery of empty coal cars is part of coal preparation); *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 B.L.R. 2-106 (4th Cir. 1990); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Roberts v. Director, OWCP*, 6 B.L.R. 1-849 (1984); *Winton v. Director, OWCP*, 2 B.L.R. 1-187 (1979); *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975).

The Board previously held that where an individual involved in coal transportation spends time loading at the tipple before transporting the coal to private consumers, the time he or she spent at the tipple constituted coal mine employment. *Flenor v. Director, OWCP*, 6 B.L.R. 1-1274 (1984); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Ritchey v. Blair Electric Service Co.*, 6 B.L.R. 1-966 (1984). The Fourth Circuit took the same position. *Amigo Smokeless Coal v. Director, OWCP*, 642 F.2d 68 (4th Cir. 1981); *Sexton v. Matthews*, 558 F.2d 88 (4th Cir. 1976). The Court reasoned that since loading is part of the definition of coal preparation and, since the loading in that case occurred in or around a coal mine, that portion of time the individual spent loading at the tipple constituted coal mine employment.

The Board then changed its approach, specifically overruling *Buckley, supra*. Rather than applying the approach used in *Sexton, supra*, which the Board stated "bifurcates the function of the transportation worker into covered and non-covered periods," the Board adopted the approach enunciated by the Sixth Circuit in *Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984). As stated by the Board, rather than "mechanically applying statutory and regulatory definitions to each of the transportation worker's tasks in a vacuum, this second approach analyzes whether the particular activities assist in functions that are actually part of coal production and, therefore, covered by the Act, or whether the activities are ancillary instead to the commercial delivery and use of the processed coal." *Swinney v. Director, OWCP*, 7 B.L.R. 1-524 (1984).

Thus, a claimant must establish more than the fact that an activity such as loading occurred at the situs. He must also show that the loading was integral to the extraction or preparation of coal. In *Swinney*, the coal hauler's primary purpose was to deliver coal to his customers, not to perform a function integral to the production of coal. His loading was ancillary to his transportation of coal to customers; therefore, the time he spent at the tipple did not constitute coal mine employment. *See also Clifford v. Director, OWCP*, 7 B.L.R. 1-817 (1985).

However, in *Bowman v. Director, OWCP*, 7 B.L.R. 1-718 (1985), the Board held that the claimant was a coal miner while loading coal into his truck from the mine pit apparently because he also used a special fork to screen out unwanted particles before the loading occurred. *See also Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988) (a worker who cleaned railroad cars so that they could be loaded with new coal at the preparation plant was a "miner" as he performed work related to the preparation of coal for delivery to the public); *Hanna v. Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) (loading coal from a processing tipple onto barges was a necessary part of preparing coal for transporting it to consumers); *Stroh v. Director, OWCP*, 810 F.2d 61 (3d Cir. 1987) (self-employed trucker who loaded coal at mine sites and hauled raw coal to processing plant is a "miner" under the Act); *Seltzer v. Director, OWCP*, 7 B.L.R. 1-912 (1985); *Kee v. Director, OWCP*, 7 B.L.R. 1-909 (1985).

3. Situs of the work performed

The situs prong of the test requires that the individual work in or around a coal mine. Twenty C.F.R. § 725.101(a)(23) defines the term "coal mine" as the following:

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, place upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

It is the function of the land, not the individual, that is determinative of whether the situs of the work was in or around a coal mine. Therefore, the focus of inquiry is whether the intended use of the area of land on which the worker is employed is for the extraction or preparation of coal. *McKee v. Director, OWCP*, 2 B.L.R. 1-804 (1980); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979).

Congress extended coverage to facilities which are not located on the actual property of the mine or preparation plant but which are directly involved in the process of coal mining. There is no requirement of contiguity, but the facility or area must be located in the vicinity of the mine which it serves and must be directly involved in one or more of the covered occupations. Thus, an individual's work in a foundry not physically located next to the mine or on mine property adjacent to a coal facility fails the situs test. *Duffy v. Director, OWCP*, 6 B.L.R. 1-665 (1983). Similarly, an individual's work repairing mining equipment in a central shop located "about one mile" from the nearest mine fails the situs test. *Seibert v. Consolidation Coal Co.*, 7 B.L.R. 1- 42 (1984). *But see Baker v. U.S. Steel Corp.*, 12 B.L.R. 2-213 (11th Cir. 1989) (wherein the court rejected a formal distance rule in favor of a case-by-case analysis in which the actual distance from the mine would be a factor for consideration). *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926 (6th Cir. 1989) (central machine shop considered "area around coal mine" where it was located in physical proximity to the mine site and those working in the shop had significant and regular exposure to coal dust).

An individual must spend a "significant portion" of his time at a coal mine site to meet the situs test. Thus, in *Musick v. Norfolk and Western Railway Co.*, 6 B.L.R. 1-862 (1984), the Board held that six to eight weekends per year was not a significant portion of the claimant's work time, and he was, therefore, neither a coal miner nor a coal transportation worker for the period during which he performed such work.

B. Coal dust versus coal mine dust
[II(A)(2)]

1. Prior to applicability of December 2000 regulations

The Board does not draw a distinction between "coal dust" and the broader category of "coal mine dust," but concludes that both phrases refer to airborne particles resulting from the extraction or preparation of coal in or around a coal mine. *Garrett v. Cowin & Co.*, 16 B.L.R. 1-77 (1990); *Pershina v. Consolidation Coal Co.*, 14 B.L.R. 1-55 (1990)(en banc); *George v. Williamson Shaft Contracting Co.*, 8 B.L.R. 1-91 (1985) (definition of coal mine dust may include dust which arises from coal mine construction work). The Third Circuit has held that the terms "coal dust" and "coal mine dust" are interchangeable, but did not define the scope of "coal mine dust." *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986).

The Tenth and Eleventh Circuits, on the other hand, have departed from the Board's viewpoint to hold that the phrases "coal mine dust" and "coal dust" are interchangeable but must be narrowly construed. In *William Brothers, Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987), the Eleventh Circuit held that the term "coal mine dust" does not include any coal dust found at a coal mine site; rather "coal mine dust" is dust generated from the extraction and preparation of coal. *Id.* at 266. The court further held that the claimant was not a "miner" within the meaning of the Act since, as a surface coal mine construction worker on a mine site which was not yet operable, he had not been exposed to "coal mine dust." *Id.* at 266. *See also Bridger Coal Co. v. Director, OWCP*, 927 F.2d 1150 (10th Cir. 1991) (exposure to "coal mine dust" does not include exposure to mine dust that does not contain coal).

2. After applicability of December 2000 regulations

In its amended regulations, the Department changed the language at 20 C.F.R. § 725.101(a)(19), which contains the definition of a "miner," to provide coverage for individuals exposed to "coal mine dust" as opposed to merely "coal dust." 20 C.F.R. § 725.101(a)(19) (Dec. 20, 2000). In its comments, the Department stated that "[t]his change makes the regulation consistent with the Department's long-held position that the occupational dust exposure at issue under the BLBA is a total exposure arising from coal mining, and not only exposure to coal dust itself." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,958 (Dec. 20, 2000).

III. Length of coal mine employment
[II(F)]

The length of time a claimant worked in the mines is relevant to the applicability of the various statutory and regulatory presumptions.

A. Prior to applicability of December 2000 regulations

The Board has often noted that the Act fails to provide any specific guidelines for the computation of a claimant's length of coal mine work. *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984); *Hall v. Director, OWCP*, 2 B.L.R. 1-998 (1980). However, the permanent regulations at 20 C.F.R. § 718.301 include a section which addresses the issue of establishing length of coal mine employment. Subsection 718.301(a) provides that 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. 20 C.F.R. § 718.301(a).

1. Burden of production/persuasion upon claimant

The claimant bears the burden of establishing the length of his or her coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984); *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984); *Rennie v. U.S. Steel Corp.*, 1 B.L.R. 1-859 (1978). The administrative law judge must make a specific, complete finding on this issue. *Boyd v. Director, OWCP*, 11 B.L.R. 1-39 (1988). As an example, in *Gibson v. Director, OWCP*, 1 B.L.R. 1-1015 (1978), a finding of 15 years coal mine employment is sufficient to trigger certain presumptions, whereas a finding of "approximately 15 years" is not specific and complete. On the other hand, a finding of "well over the statutory 15 years" has been upheld. *Dolzanie v. Director, OWCP*, 6 B.L.R. 1-865 (1984).

2. Any reasonable method of computation acceptable

The Board has upheld an administrative law judge's calculation of years of coal mine work when it is based on a reasonable method of computation and is supported by substantial evidence in the record considered as a whole. *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984); *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984). Where an administrative law judge fails to recite the evidence on which he or she relies in reaching a determination or fails to provide a rationale for crediting certain evidence over other evidence, the Board is unable to determine whether the administrative law judge's conclusion is arbitrary or well-reasoned, and therefore, a remand is necessary. *Bowman v. Director, OWCP*, 7 B.L.R. 1-718 (1985); *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984); *Fee v. Director, OWCP*, 6 B.L.R. 1-1100 (1984).

3. The 125-day rule

Because the regulations do not set forth a particular method for computing length of coal mine employment, some circuit courts have utilized the 125-day rule as set forth at 20 C.F.R. § 725.493. This rule, as more fully explained in *Chapter 6*, is normally utilized in determining which operator is responsible for the payment of benefits. Specifically, if an employer demonstrates

that the miner did not work for it for a period of at least 125-days, then it is determined that the miner was not regularly employed by the operator for a period of at least one year.

The Seventh and Eighth Circuits have held that a miner need only be employed for a period of 125 days to be afforded one year of coal mine employment. *Landes v. Director, OWCP*, 997 F.2d 1192 (7th Cir. 1993); *Yauk v. Director, OWCP* 912 F.2d 192 (8th Cir. 1989).

The Board has held that, although intermittent periods of coal mine employment may accumulated to establish one year of coal mine employment, *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986), it has rejected the argument that a year of coal mine employment is anything other than one full cumulative year of employment. *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 (1988)(en banc) (125-day rule is inapplicable); *Gration v. Westmoreland Coal Co.*, 7 B.L.R. 1-90 (1984); *Soulsby v. Consolidation Coal Co.*, 3 B.L.R. 1-565 (1981). *See also Director, OWCP v. Gardner*, 882 F.2d 67 (3d Cir. 1989).

In *Fletcher v. Director, OWCP*, 2 B.L.R. 1-911 (1980), the claimant argued that the 125 day rule should be used in determining length of coal mine employment for the purposes of qualifying for the § 727.203 presumption. The Board rejected the claimant's argument and held that the 125 day rule applies exclusively to identifying a responsible operator and may not be used to determine the length of coal mine employment for other purposes. More recently, the Board held that the 125 day rule does not constitute one year in and of itself, but is a factor to consider with all of the relevant evidence.

The Board reiterated this holding in *Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996)(*en banc*), wherein it rejected Claimant's argument that his length of coal mine employment must be determined using the 125-day rule set forth at § 718.301(b), stating that this provision relates to identification of the proper responsible operator, not the actual length of a miner's employment as is required under § 725.493. The Board noted the following:

> [T]he 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 totaling one year, is satisfied. (citation omitted). 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 has 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. (citation omitted).

In so holding, the Board noted its disagreement in this regard with the Seventh and Eighth Circuits in *Landes* and *Yauk* to state that application of the 125 day rule to determine the miner's length of coal mine employment results in miners receiving "credit for coal mine employment during periods of time where there is no evidence to support any coal mine employment whatsoever."

B. After applicability of December 2000 regulations

The Department amended the regulations to delete 20 C.F.R. § 725.301(b), which provided that "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the new regulations, § 725.301 provides the following:

> The presumptions set forth in Secs. 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.l01(a)(32).

20 C.F.R. § 301 (Dec. 20, 2000). The provisions at § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
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> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.
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> (ii) to the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
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> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average

daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.
(iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

20 C.F.R. § 725.101(a)(32) (Dec. 20, 2000).

In its comments to the changes, the Department "concluded that a single definition with general applicability was appropriate since the calculation of the length of a miner's employment is the same inquiry under both §§ 718.301 and 725.493(b)." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,951 (Dec. 20, 2000).

C. Documentation supporting length of coal mine employment

1. Social Security earnings records

Social Security earnings records are often a part of the record and generally are probative evidence of the length of coal mine employment. However, this source of evidence has its limitations. The first records were kept for 1937 and wages were reported only twice during that year. Further, since 1951 the Social Security Administration only reported earnings up to a certain level, as reflected below. Thus, lack of reported earnings in the fourth quarter of a year does not necessarily mean that the claimant performed no coal mine work during that quarter. Procurement of the Social Security records is not the obligation of the district director. If the earnings statement does not appear in the record, the claimant must obtain the records if he or she intends to rely upon them. *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984).

The regulations at 20 C.F.R. § 404.1047 set forth the annual wage limitation established by the Social Security Administration:

Payments made by an employer to you as an employee in a calendar year that are more than the annual wage limitations are not wages. The annual wage limitation is:

(a) $3,600 for 1951 through 1954;
(b) $4,200 for 1955 through 1958;
(c) $4,800 for 1959 through 1965;
(d) $6,600 for 1966 through 1967;
(e) $7,800 for 1968 through 1971;
(f) $9,000 for 1972;
(g) $10,800 for 1973;
(h) $13,200 for 1974;
(i) $14,100 for 1975;
(j) $15,300 for 1976;
(k) $16,500 for 1977;
(l) $17,700 for 1978;

(m) $22,900 for 1979;
(n) $25,900 for 1980;
(o) $29,700 for 1981; and
(p) after 1981 an amount equal to the contribution and benefits base figured under § 404.1048 for that year.

20 C.F.R. § 404.1047.

It is also important to note that, starting with the calendar year of 1978, the Social Security Administration will only count those quarters in which the claimant earned $250.00, not $50.00. 20 C.F.R. § 404.143(a). Moreover, social security records are only as good as the reporting. Keep in mind that many coal companies in the early years would pay in cash or in company script without withholding money for Social Security.

Based on the method of computation established by the Social Security Administration, the Board has held that counting quarters in which the miner earned $50.00 or more, while not counting the quarters in which he earned less, is a reasonable method of computation. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984); *Combs v. Director, OWCP*, 2 B.L.R. 1-904 (1980); *Reboy v. Director, OWCP*, 2 B.L.R. 1-582 (1979). *See also* 20 C.F.R. § 404.140(b). In *Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996)(en banc), the Board upheld an administrative law judge's method of calculating the length of Claimant's coal mine employment based upon the miner's social security records where the administrative law judge counted only those quarters wherein the miner earned in excess of $50 per quarter from 1937 through 1946. Further, the Board held that it was proper for the administrative law judge to credit the testimony of Claimant's wife to determine the amount of coal mine employment prior to 1937.

The $50.00 rule is not mandatory, however, and the Board has upheld, as reasonable and supported by substantial evidence, an administrative law judge's approximation of the actual time a claimant spent working full-time by crediting some quarters as only one or two months even though over $50.00 was recorded. *Harrell v. Pittsburgh and Midway Coal Co.*, 6 B.L.R. 1-961 (1984). In *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984), the administrative law judge found that the Social Security records reflected minimal earnings for several quarters and that such records did not represent a full quarter of employment. The Board found reasonable the administrative law judge's application of earnings in such a quarter to other quarters which likewise indicated less than full-time employment, to total a full quarter of employment.

2. Affidavits

Affidavits concerning the claimant's length of coal mine work constitute relevant evidence which the administrative law judge may consider within his or her discretion, *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984), despite the hearsay character of the evidence. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983).

3. Coal mine employment form completed by the miner

The record in a black lung case usually contains a history of coal mine employment form completed by the claimant at the time s/he filed an application for benefits on which the miner's coal mine employment is listed. This document does not need to be corroborated to be found credible and, standing alone, may be the basis for a finding of length of coal mine employment. *Harkey v. Alabama By-Products Corp.*, 7 B.L.R. 1-26 (1984).

4. Claimant's testimony

A finding concerning the miner's length of coal mine employment may be based exclusively on the claimant's own testimony where it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984); *Gilliam v. G & 0 Coal Co.*, 7 B.L.R. 1-59 (1984). Similarly, where the Social Security earnings record is found to be incomplete, it is reasonable to credit the claimant's uncontradicted testimony in establishing length of coal mine employment. *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984). However, an administrative law judge may credit Social Security records over the claimant's testimony where the testimony is unreliable. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

5. Other evidence

Evidence concerning the claimant's work status may also be found on other documentation in the record. Birth certificates of the miner's children which list the claimant's occupation, such as "farmer" or "miner," are relevant to a determination of his status at that time. *Smith v. Director, OWCP*, 7 B.L.R. 1-370 (1984). Statements on marriage certificates, census records, hospital records, death certificates, or military discharge records are similarly relevant. Letters from the claimant's coal mine employers listing his period or periods of employment are also highly probative.

E. Periods included in computing length of coal mine employment

1. Vacation time

a. Prior to applicability of December 2000 regulations

A paid vacation is a form of compensation for actual labor performed; therefore, the vacation period should be included as part of the claimant's coal mine employment. *Van Nest v. Consolidation Coal Co.*, 3 B.L.R. 1-526 (1981), *rev'd on other grounds*, Nos. 81-3411 and 81-3463 (6th Cir. 1982)(unpublished).

b. After applicability of December 2000 regulations

The Department amended the regulations to delete 20 C.F.R. § 725.301(b), which provided that "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the new regulations, § 725.301 provides the following:

The presumptions set forth in Secs. 718.302, 718.303, 718.305 and 718.306 apply

only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.l01(a)(32).

20 C.F.R. § 301 (Dec. 20, 2000). The provisions at § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
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> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.
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> (ii) to the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
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> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.
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> (iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

20 C.F.R. § 725.101(a)(32) (Dec. 20, 2000).

In its comments to the changes, the Department "concluded that a single definition with general applicability was appropriate since the calculation of the length of a miner's employment is the same inquiry under both §§ 718.301 and 725.493(b)." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,951 (Dec. 20, 2000). The Department further stated the following:

> The Department now has amended the language of § 725.101(a)(32) to clarify that periods of approved absences count only towards the miner's 'year' of employment, and not to the actual 125 'working days' during which the miner must have worked and received pay as a miner. Thus, in order to have one year of coal mine employment, the regulations contemplates an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,959 (Dec. 20, 2000).

2. Injury or sick time

a. Prior to applicability of December 2000 regulations

The time a miner is carried on a payroll due to "injury time" may be counted in determining length of coal mine employment. The Board held that, as a matter of fairness, this time should be counted because the miner could not work due to an employment-related injury. *Soulsby v. Consolidation Coal Co.*, 3 B.L.R. 1-565 (1981), *rev'd on other grounds*, 679 F.2d 888 (4th Cir. 1982)(per curiam). *See also Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984).

In *Thomas v. BethEnergy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.), the Board held that the time during which the miner was on sick leave for a back injury counted towards his length of coal mine employment with the responsible operator:

> Because the miner's time on sick leave counts towards his employment with Big Mountain, the miner was employed with Big Mountain for more than 125 working days. If the miner was not being paid for his time from work due to the accident or illness or was not excused during his absences from work, Big Mountain failed to establish this fact despite its burden to do so. (citations omitted).

In *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 n. 8 (10th Cir. 1996), the court held that the ALJ properly calculated Claimant's length of coal mine employment to include that time during which "he remained employed by Northern during his sick leave until he was laid off."

b. After applicability of December 2000 regulations

The Department amended the regulations to delete 20 C.F.R. § 725.301(b), which provided that "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the new regulations, § 725.301 provides the following:

> The presumptions set forth in Secs. 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.l01(a)(32).

20 C.F.R. § 725.301 (Dec. 20, 2000). The provisions at § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
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> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly

> income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.
> (iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

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In its comments to the changes, the Department "concluded that a single definition with general applicability was appropriate since the calculation of the length of a miner's employment is the same inquiry under both §§ 718.301 and 725.493(b)." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,951 (Dec. 20, 2000). The Department further stated the following:

> The Department now has amended the language of § 725.101(a)(32) to clarify that periods of approved absences count only towards the miner's 'year' of employment, and not to the actual 125 'working days' during which the miner must have worked and received pay as a miner. Thus, in order to have one year of coal mine employment, the regulations contemplates an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,959 (Dec. 20, 2000).

3. Seasonal employment

It is reasonable for an administrative law judge to credit a miner only with the actual time he spent working as a coal miner, even though, the practice of the mine in which he worked was to close during the summer months. *Hunt v. Director, OWCP*, 7 B.L.R. 1-709 (1985). Claimant had argued that the summer months should also be included because he was, in fact, still listed on the company's records as an employee. However, the Board held the following in *Thomas v. BethEnergy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.):

> [W]e now hold that the administrative law judge properly rejected Big Mountain's argument that the language in Section 725.493(b) requiring the miner to have worked for at least 125 working days in order to establish regular employment was mandatory. We affirm the administrative law judge's finding that the provisions in Section 725.493(b) were included to provide guidance in factually disputed cases on the question of how to calculate a year of employment for purposes of Section 725.493, and were not intended to deny liability where it is uncontested that a miner was carried on the payroll as an employee for a period in excess of one year.

F. Periods not included in computing length of coal mine employment

1. Seniority time

In *Van Nest, supra,* the Board excluded from computation of coal mine employment the period that the miner was carried on the payroll due to "seniority-time."

2. Voluntary strike time

Time spent by a claimant in a voluntary strike does not constitute coal mine employment under the Act. *Tackett v. Cargo Mining Co.*, 12 B.L.R. 1-11, (1988)(*en banc*), *aff'd sub. nom.*, *Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531 and 7578 (6th Cir. May 11, 1989)(unpub.).