U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0601 BLA
and 17-0601 BLA-A

PATRICIA MILLS (o/b/o STANLEY DARRAN MILLS, deceased) Claimant-Respondent Cross-Petitioner v. PAL COAL, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, c/o WEST VIRGINIA INSURANCE COMMISSION Employer/Carrier-Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/27/2018 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley L. Berg and Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant[1] cross-appeals, the Decision and Order (2013-BLA-05472) of Administrative Law Judge Alan L. Bergstrom awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 3, 2012.

After crediting the miner with less than ten years of coal mine employment,[2] the administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He further found that the

[1] The miner died on November 27, 2015, while his claim was pending before the administrative law judge. Claimant's Exhibit 6. Claimant, the miner's surviving spouse, is pursuing the claim. Hearing Transcript at 5-6.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited the miner with less than fifteen years of coal mine employment, he found that the miner was not entitled to the Section 411(c)(4) presumption. The administrative law judge further found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant 20 C.F.R. §718.204(b), (c), and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer further argues that the administrative law judge erred in finding that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's identification of employer as the responsible operator. In her cross-appeal, claimant argues that the administrative law judge erred in crediting the miner with less than ten years of coal mine employment. Employer has filed a consolidated response and reply brief, reiterating its previous contentions of error.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm the administrative law judge's findings that claimant is not entitled to invocation of the Section 411(c)(3) and Section 411(c)(4) presumptions. *Id.*

[4] The miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

criteria set forth at 20 C.F.R. §725.494(a)-(e), one of which is that the operator must have employed the miner for a cumulative period of not less than one year.

The administrative law judge found that employer was the potentially liable operator that most recently employed the miner for a cumulative year. Although the administrative law judge found that Todco, Incorporated (Todco) employed the miner after he ceased employment with employer, he found the employment lasted for less than a year. Decision and Order at 32. Having found that employer was the last operator to have employed the miner for a cumulative period of not less than one year, the administrative law judge designated employer as the responsible operator. *Id.*

Employer argues that the administrative law judge erred in finding that Todco did not employ the miner for at least one year.[5] The record contains limited information regarding the length of the miner's employment with Todco. The miner completed a CM-911 Employment History form, wherein he indicated that he worked for Todco as a shuttle car operator from "?/88 to ?/90."[6] Director's Exhibit 3. The miner also submitted pay stubs, purportedly from Todco. Several pay stubs from "Todco" document the miner's earnings from June 1 to July 30 of an unspecified year, while others document earnings from April 30, 1989 to May 31, 1989 and from August 1, 1989 to September 15, 1989, but do not identify the employer who issued them. Director's Exhibit 25.

Claimant testified that the miner worked for Todco "between a year and [a] year and a half," working five and six days a week. Hearing Transcript at 17-18. Claimant testified that the miner did not keep all of his pay stubs, and that the ones submitted into evidence were "just a few pay stubs that she and [the miner] happened to save." *Id.* Claimant further testified that the submitted pay stubs looked like the ones that the miner had received from Todco. *Id.* Claimant also testified that the pay stubs from June 1 to July 30 without a specified year were from 1990. *Id.*

Based upon his consideration of the miner's statements on his application materials, the pay stubs, and claimant's testimony, the administrative law judge found that the miner worked as a coal miner for Todco "for the periods of April 30, 1989 to May 31, 1989; August 1, 1989 to September 15, 1989; and June 1, 1990 to July 31, 1990, for a total of 4.50 months." Decision and Order at 30.

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[5] Because employer does not contest the administrative law judge's designation of it as a potentially responsible operator, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[6] Although the miner asserted that he worked for Todco, the miner's Social Security Earnings Statement (SSES) does not reflect this employment. Director's Exhibit 8.

Employer argues that the administrative law judge erred in not crediting claimant's testimony that the miner worked for Todco for at least one year. Employer's Brief at 5-8. The Director responds, asserting that the administrative law judge should not have even considered claimant's testimony regarding Todco's potential liability. Director's Brief at 4 n.4. We agree with the Director.

The regulations require that while the claim is before the district director, "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations in Section 725.414 are mandatory and, thus, are not subject to waiver).

There is no indication in the record, and employer does not argue, that it designated claimant as a liability witness while this claim was before the district director. Moreover, employer did not argue to the administrative law judge that its failure to provide the required notice to the district director should be excused due to extraordinary circumstances. Therefore, claimant's hearing testimony is not admissible for the purpose of contesting employer's liability for the claim.[7] 20 C.F.R. §725.414(c). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pay stubs established that the miner worked for Todco for only a cumulative period of 4.5 months. We therefore affirm the administrative law judge's designation of employer as the responsible operator.

[7] The administrative law judge's consideration of claimant's testimony was harmless because he permissibly found that there was insufficient evidence to support claimant's assertion that the miner worked for at least a year for Todco. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 32.

Part 718 Entitlement

Without the Section 411(c)(3) and Section 411(c)(4) presumptions, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Clinical Pneumoconiosis

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis[8] pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven interpretations of two x-rays taken on February 29, 2012 and August 6, 2012.

Although Dr. Meyer, a B reader and Board-certified radiologist, interpreted the February 29, 2012 x-ray as negative for pneumoconiosis, Director's Exhibit 14, Dr. Miller, an equally qualified physician, and Dr. Rasmussen, a B reader, interpreted the x-ray as positive for the disease. Directors' Exhibits 12, 15.

Dr. Meyer also interpreted the August 6, 2012 x-ray as negative for pneumoconiosis, Employer's Exhibit 2. However, Drs. Miller and Alexander, equally qualified physicians, and Dr. Rosenberg, a B reader, interpreted the x-ray as positive for the disease. Director's Exhibits 13, 16; Claimant's Exhibit 1.

The administrative law judge found that the x-ray evidence established the existence of pneumoconiosis:

> The only negative interpretations of the chest x-rays in the record are that of Dr. Meyer. While Dr. Rasmussen and Dr. Rosenberg's opinions are entitled to less weight than the opinions of the dually qualified physicians because neither are [B]oard[-]certified radiologists, their positive interpretations are consistent with the positive interpretations of Dr. Miller and Dr. Alexander.

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

> Additionally, the positive interpretations are generally consistent in terms of the progression of the disease with all the physicians except Dr. Alexander opining that the disease was Category 1 simple pneumoconiosis. Finally, the positive chest x-ray interpretations are consistent with the chest x-ray and CT scan interpretations present in the [m]iner's treatment records which repeatedly observed the presence of nodules and opacities as early as 2008.
>
> Considering all of the chest x-ray evidence in the record and the professional qualifications of the physicians involved, this presiding [j]udge finds that the [c]laimant has established by a preponderance of the evidence that the [m]iner suffered from clinical pneumoconiosis by chest x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1).

Decision and Order at 34 (Exhibit citations omitted).

Employer argues that the administrative law judge erred in his consideration of the x-ray evidence. We agree. The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order and 34. Because the February 29, 2012 and August 6, 2012 x-rays were each read as both positive and negative for pneumoconiosis by the best qualified physicians, however, the administrative law judge was required to provide an explanation for his weighing of this conflicting evidence.

The administrative law judge provided two reasons for crediting the positive x-ray interpretations over the negative readings, neither of which can be affirmed. First, he found that the positive x-ray interpretations were "generally consistent in terms of the progression of the disease." Decision and Order at 34. The administrative law judge essentially provided claimant with a presumption that positive interpretations of an x-ray are more credible than negative interpretations of the same x-ray, merely because pneumoconiosis is a progressive disease. Neither the regulations nor the case law provides claimants with such a presumption. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984) (holding that an administrative law judge applied the latest evidence rule incorrectly where he credited a positive interpretation of an x-ray over the negative interpretation of an x-ray taken only two weeks earlier).

Second, the administrative law judge credited the positive chest x-ray interpretations because they were consistent with the x-ray and CT scan interpretations in the treatment record "showing nodules and opacities." Decision and Order at 34. Employer accurately notes that none of the x-rays in the miner's treatment records were interpreted as positive for pneumoconiosis. Employer also notes that the administrative law judge found that the

CT scan evidence was negative for pneumoconiosis.[9] *See* Decision and Order at 35. Thus, the administrative law judge erred in finding that the positive interpretations of the February 29, 2012 and August 6, 2012 x-rays were consistent with this evidence. In light of the above-referenced errors,[10] we vacate the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and remand the case for further consideration.

We also agree with employer that the administrative law judge erred in not making a finding as to whether the medical opinion evidence established the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4). Although Dr. Rasmussen diagnosed clinical pneumoconiosis, Drs. Castle and Rosenberg opined that the miner likely did not suffer from the disease.[11] Director's Exhibit 12 at 41; Employer's Exhibits 5 at 10; 9 at 27. Although the administrative law judge summarized the medical opinion evidence, he erred in not determining whether it established the existence of clinical pneumoconiosis. *See Director, OWCP v. Rowe,* 710 F.2d 251 (6th Cir. 1983) (holding that it is the administrative law judge's duty to make factual determinations). On remand, the administrative law judge must consider all of the evidence relevant to clinical pneumoconiosis at 20 C.F.R §718.202(a)(1)-(4), and then weigh the evidence as a whole to determine if clinical pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *Dixie Fuel Co. v. Director, OWCP [Hensley],* 700 F.3d 878, 881 (6th Cir. 2012).

[9] The administrative law judge considered Dr. Meyer's negative interpretations of two CT scans taken on January 17, 2008 and September 4, 2012. Decision and Order at 35; Employer's Exhibit 3. The administrative law judge, however, did not address contrary evidence in the record, namely Dr. Miller's positive interpretations of these CT scans. Claimant's Exhibits 2, 3. On remand, the administrative law judge should address this evidence.

[10] Employer also contends that the administrative law judge erred in not considering whether the academic credentials of Dr. Meyer entitled his x-ray interpretations to additional weight. Employer's Brief at12. We disagree. While an administrative law judge is permitted to assign greater weight to the x-ray interpretation of one physician over another, based on their academic appointments, he is not required to do so. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

[11] Dr. Cohen indicated that he was unable to offer an opinion as to whether the miner suffered from clinical pneumoconiosis. Claimant's Exhibit 7 at 7.

Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic dust disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b).

The administrative law judge considered the medical opinions of Drs. Rasmussen, Cohen, Castle and Rosenberg. Drs. Rasmussen and Cohen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12; Claimant's Exhibits 4, 7. Drs. Castle and Rosenberg, however, opined that the miner did not suffer from legal pneumoconiosis. Director's Exhibit 13; Employer's Exhibits 5, 8, 9. Although Drs. Castle and Rosenberg agreed that the miner suffered from COPD/emphysema, they attributed the disease solely to cigarette smoking. *Id.*

In weighing the conflicting evidence, the administrative law judge discredited the opinions of Drs. Castle and Rosenberg because he found them inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 37. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred. We disagree. The administrative law judge correctly noted that Drs. Castle and Rosenberg eliminated coal mine dust exposure as a source of the miner's COPD/emphysema, in part, because they found a reduction in the miner's FEV1/FVC ratio which, in their opinions, was inconsistent with obstruction due to coal mine dust exposure.[12] Decision and Order at 37. The

[12] Dr. Castle opined that a reduced FEV1/FVC ratio is consistent with an obstruction caused by smoking, while a "parallel" reduction in the FEV1/FVC ratio is more consistent with an impairment due to coal mine dust exposure. Employer's Exhibit 10 at 24-25. Dr. Castle attributed the miner's COPD/emphysema to smoking and not coal mine dust exposure because the miner "had a disparate reduction of a marked degree between the FVC and FEV1." *Id.* Dr. Rosenberg also attributed the miner's COPD/emphysema to smoking and not coal mine dust exposure because the miner had a reduced FEV1/FVC ratio and "[e]pidemiological studies . . . establish that while the FEV1 decreases in relationship to coal mine dust exposure, the FEV1/FVC ratio generally is preserved," and

administrative law judge permissibly discredited their opinions because their reasoning conflicts with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[13] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 37.

We agree with employer that the administrative law judge erred in his consideration of the opinions of Drs. Rasmussen and Cohen, however. As employer accurately notes, the administrative law judge failed to address the bases for their respective opinions that the miner's COPD/emphysema is attributable in part to his coal dust exposure. Consequently, the administrative law judge's analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of the foregoing, we must vacate the administrative law judge's finding and remand the case to the administrative law judge to reconsider the medical opinion evidence. 20 C.F.R. §718.202(a)(4). When considering whether the opinions of Drs. Rasmussen and Cohen establish the existence of legal pneumoconiosis, the administrative law judge should address the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255. If the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he should then weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *See Hensley*, 700 F.3d at 878.

In light of our decision to vacate the administrative law judge's findings of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also vacate his finding

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"[i]n contrast, with smoking-related forms of COPD, the FEV1/FVC ratio is generally reduced." Director's Exhibit 13 at 4..

[13] Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Castle and Rosenberg, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Castle and Rosenberg.

that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue, if necessary, on remand.

Finally, in her cross-appeal, claimant argues that the administrative law judge erred in not crediting the miner with the ten years of coal mine employment necessary to provide her with a presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b). The administrative law judge credited the miner with 7.41 years of coal mine employment from 1977 to 1986 based upon the miner's SSES. The administrative law judge also credited the miner with an additional 4.5 months (0.375 years) of coal mine employment with Todco, for a total of 7.785 years of coal mine employment.[14] Decision and Order at 29-31.

Claimant contends that the district director correctly calculated that the miner was entitled to 8.22 years of coal mine employment from 1977 to 1982 based on his Social Security records. Claimant's Brief at 13. Contrary to claimant's argument, the administrative law judge is not bound by the district director's findings.[15] *See* 20 C.F.R. §725.455(a). Because claimant does not raise any specific error in regard to the administrative law judge's finding the miner's Social Security records established 7.41 years of coal mine employment, this finding is affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant also argues that the administrative law judge erred in not crediting the miner with two years and four months of coal mine employment with McGee Mining (McGee) from May of 1972 to August of 1974. The administrative law judge noted that the miner's employment with McGee is not listed on the miner's SSES. Decision and Order at 30. Although the administrative law judge found that the miner's statements on his application forms as to the time he worked for McGee was credible, he found that there was insufficient evidence to establish that his work was "usual and regular."[16] *Id.* We

[14] The administrative law judge mistakenly calculated the miner's total coal mine employment as 7.86 years of coal mine employment. Decision and Order at 31. It appears the administrative law judge mistakenly calculated the 4.5 months with Todco as 5.4 months, inadvertently crediting the miner with an additional 0.9 month (0.075 year) of coal mine employment.

[15] Because the district director's calculations are not in the record, there is no way to determine how he arrived at his finding.

[16] Claimant concedes that the miner's SSES reveals earnings from other employers in 1972 and 1973. Claimant's Brief at 14.

affirm this determination as unchallenged on appeal. *Sarf*, 10 BLR at 1-120. We therefore hold that the administrative law judge permissibly found that claimant failed to adequately prove the length of time that the miner worked for McGee. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985).

Finally, claimant contends that the miner was entitled to credit for one year and three months of coal mine employment with Todco, instead of the 4.5 months credited by the administrative law judge. Claimant's Brief at 14. We need not address claimant's contention. Even if the miner were credited with an additional 10.5 months of coal mine employment with Todco, the miner would still not be entitled to the ten years of coal mine employment necessary to provide claimant with the presumption set forth at 20 C.F.R. §718.203(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because it is supported by substantial evidence and is based upon a reasonable method of calculation, we affirm the administrative law judge's determination that the miner had less than ten years of coal mine employment. *Kephart*, 8 BLR at 1-186.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge