U.S. Department of Labor

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

BRB No. 22-0226 BLA

NAMON TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAGING BULL COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/29/2024
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor;

Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2016-BLA-05430) rendered on a subsequent claim filed on July 18, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ[2] determined that Employer, Raging Bull Coal Company (Raging Bull), was the responsible operator as the successor operator of JOP Coal Company, Inc. (JOP Coal). He credited Claimant with 18.06 years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement[3] and invoked the rebuttable presumption of total disability due to

[1] The district director denied Claimant's initial claim on May 19, 2010, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 106.

[2] ALJ John P. Sellers, III held a hearing in 2017. 2017 Hearing Transcript. However, after examining the evidence developed as part of Claimant's Department of Labor (DOL)-sponsored complete pulmonary evaluation, he remanded the case to the district director for the DOL examining physician to address total disability. Order of Remand. After the district director obtained the supplemental medical report, the district director returned the claim to the Office of Administrative Law Judges. Director's Exhibits 94 at 312; 96. The case was then assigned to ALJ Jason A. Golden, but the hearing was continued, and subsequently the case was reassigned to ALJ Steven D. Bell (the ALJ). Order Regarding Continuance; 2020 Hearing Transcript.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R.

pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He concluded Employer did not rebut the presumption and therefore awarded benefits.

On appeal, Employer asserts the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2.[5] It further contends the removal provisions applicable to Department of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. In addition, Employer argues the ALJ erred in finding it is a successor operator to JOP Coal and thus the responsible operator. As to the merits of Claimant's entitlement to benefits, it contends the ALJ erred in calculating Claimant's years of coal mine employment and in finding Claimant established a totally disabling respiratory or pulmonary impairment, and thus erred in finding he invoked the Section 411(c)(4) presumption. Further, Employer contends the ALJ erred in finding it did not rebut the presumption.[6] Claimant responds, urging affirmance of the award of benefits.

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§725.309(c)(3). Claimant's prior claim was denied because he failed to establish total disability; therefore, to obtain review of the merits of his subsequent claim, he had to establish a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1 at 106.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that all of Claimant's coal mine employment was underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional, responsible operator, and length of coal mine employment arguments. Employer filed reply briefs addressing the arguments that Claimant and the Director raise.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 362 (1965).

Appointments Clause and Removal Protections

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. 237 (2018).[8] Employer's Brief at 32-36; Employer's Reply to the Director at 9-10. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[9] but maintains the ratification was insufficient

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); 2020 Hearing Transcript at 12; 2017 Hearing Transcript at 11; Director's Exhibit 8.

[8] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). In *Lucia*, the United States Supreme Court held that, similar to the Special Trial Judges at the Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The DOL has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Bell.

to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 34-36. It also generally challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 39-42. Even assuming, arguendo, that Employer did not forfeit these arguments by failing to raise them below, Director's Response at 8-10, we reject Employer's arguments for the reasons set forth in *Johnson v. Apogee Coal Co.*, 26 BLR 1-1, 1-5-7 (2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Successor liability also is created when an operator ceases to exist due to a reorganization, a liquidation into a parent or successor corporation, or a sale of substantially all its assets, or as a result of merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). When an operator is considered a successor operator, any employment with a prior operator "is deemed to be employment with the successor." 20 C.F.R. §725.493(b)(1). If the successor operator independently employed the miner after the

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

transaction that gave rise to the successor operator's liability, it is primarily liable for the payment of benefits. *Id.*

The ALJ determined the evidence established that JOP Coal employed Claimant for at least one year, transferred substantially all of its assets to Employer, and thus established a successor operator relationship. The ALJ also determined the evidence established that Employer then employed Claimant at its mine. Decision and Order at 29; 20 C.F.R. §725.492(a). Thus, the ALJ found Employer was correctly identified as the responsible operator liable for the payment of benefits. Decision and Order at 29.

Judicial Estoppel

Employer first argues the Director was judicially estopped from arguing below that it was a successor operator. Employer's Brief at 15-20. It contends the Director's position before the ALJ that Claimant's testimony established a successor operator relationship "cannot be reconciled" with the Director's position in other cases where, Employer alleges, the Director took "a hardline stance" that a miner's testimony did not establish a transfer of substantially all of a prior operator's assets. *Id.* at 16, 18. We need not address this issue. Employer forfeited its judicial estoppel argument by failing to raise it with the ALJ in the first instance. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ); Employer's Post-Hearing Brief at 12-14 (Feb. 10, 2021) (arguing only that the evidence did not establish a successor relationship).

Successor Operator Relationship Under 20 C.F.R. §725.492(a) - Employer's Acquisition of Substantially All of JOP Coal's Assets

Employer argues it is not the responsible operator because it did not employ Claimant for at least one year and there is no successor operator relationship with the prior operator, JOP Coal.[11] The Director contends the ALJ permissibly found the evidence established Employer acquired substantially all of JOP Coal's assets and, therefore, established a successor operator relationship between Employer and JOP Coal under 20 C.F.R. §725.492(a). Director's Response at 5-7. We agree with the Director's position.

The ALJ reviewed Claimant's testimony and Social Security Earnings Statement (SSES) when considering Employer's argument that it is not a successor operator to JOP

[11] The parties agree that JOP Coal employed Claimant for more than one year, from 1987 to 1990. Decision and Order at 30; Director's Exhibit 7; Employer's Brief at 5; Director's Response at 2. Further, Employer does not contend that it is financially incapable of assuming liability for benefits. Decision and Order at 31.

Coal. Decision and Order at 30. Specifically, the ALJ noted Claimant's testimony that once JOP Coal's mine was "worked out," JOP Coal's employees moved all but one piece of its equipment[12] to Employer's mine and all of JOP Coal's employees were transferred to work there. Decision and Order at 31; Director's Exhibits 1 at 36-37; 30; Hearing Transcript at 23-24, 33-35. The ALJ found Claimant's testimony in multiple depositions as well as at the hearing was consistent and credible. Decision and Order at 30-31. Moreover, the ALJ found these facts similar to those in *Kentland Elkhorn Coal Corp v. Hall*, 287 F.3d 555, 565 (6th Cir. 2002), where the Sixth Circuit held that "moving all of the equipment from one mine to another and operating it under a different name or corporate structure, would quality as a 'transfer of assets,' even if there were no written purchase agreement or other documentation facilitating the transfer." Decision and Order at 31 (quoting *Hall*, 287 F.3d at 565). In addition, he noted Claimant's SSES lists the same address for Employer and JOP Coal. Decision and Order at 30-31; Director's Exhibit 7.

Based on *Hall*, we reject Employer's argument that Claimant's testimony is insufficient to establish a transfer of substantially all of JOP Coal's assets to Employer. Employer's Brief at 20-23. Contrary to Employer's contention, there is no requirement for documentation to corroborate Claimant's uncontradicted testimony, which the ALJ found credible, that JOP Coal transferred all but one piece of its equipment and all of its employees to Employer's mine. *See Hall*, 287 F.3d at 565. Therefore, we affirm, as supported by substantial evidence, the ALJ's finding that the evidence establishes Employer acquired substantially all of JOP Coal's assets.[13] 20 C.F.R. §725.492(a).

[12] Claimant testified that the only equipment not moved to Employer's mine from JOP Coal was the cutting machine. Hearing Transcript at 30-31.

[13] Employer also argues that its due process rights were violated because the burden of proof should not have shifted to Employer to disprove it is the responsible operator because the Director's initial investigation was insufficient, as it asserts it lacked required documentary evidence of a transfer of assets. Employer's Brief at 21 n.9. Due process requires that Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). The Director has the initial burden to identify and notify operators that may be liable for benefits, and then must identify the "potentially liable operator." 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the Director named Employer as the potential responsible operator, the burden shifted to Employer to show another, financially capable operator more recently employed Claimant for more than one year. 20 C.F.R. §725.495(c). Employer has not argued it was not given sufficient notice of its potential liability. Further, it has not argued

The Director Did Not Need to Prove that JOP Coal Ceased to Exist After Employer Acquired Substantially All of Its Assets

Employer contends the Director did not meet his burden to establish Employer is a successor operator as a matter of law because there is no evidence that JOP Coal ceased to exist after any alleged transaction or transfer of assets to establish such a relationship. Employer's Brief at 20-23; Employer's Reply to the Director at 5-7.

In response, the Director argues that establishing that the prior operator ceased to exist is not required to create successor operator liability in all cases. Director's Response at 6 n.5. While acknowledging that 20 C.F.R. §725.492(b) describes corporate transactions where the prior operator ceasing to exist may *also* create successor operator liability, the Director notes that 20 C.F.R. §725.492(a) does not *require* the prior operator to cease to exist and contends it applies to this case. Director's Response at 6 n.5. We agree with the Director's interpretation of the legal requirements to establish a successor operator relationship.

The regulations, which largely track the Act,[14] provide in 20 C.F.R. §725.492(a) that:

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that it did not have the opportunity to develop evidence or even that it attempted to, but only generally contends it lacks the "means or ability to refute DOL's blanket assertions." Employer's Brief at 21 n.9. Thus, we reject Employer's argument that its due process rights were violated.

[14] The Act provides:

> During any period in which this section is applicable to the operator of a coal mine who on or after January 1, 1970, acquired such mine or substantially all the assets thereof, from a person (hereinafter . . . "prior operator") who was an operator of such mine, or owner of such assets . . . such operator shall be liable for . . . the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be an operator of a coal mine.

30 U.S.C. §932(i)(1). The Act then explains that for purposes of paragraph (1), "the provisions of this paragraph shall apply to corporate reorganizations, liquidations, and such other transactions as are specified in this paragraph" and provides that the resulting

> [a]ny person who . . . acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all the assets thereof, shall be considered a 'successor operator' with respect to any miners previously employed by such prior operator.

Then, 20 C.F.R. §725.492(b) provides that "[t]he following transactions shall *also* be deemed to create successor operator liability," (emphasis added), listing transactions in which an operator ceases to exist (by reorganization, liquidation, or sale of substantially all its assets, or as a result of merger, consolidation, or division).

Thus, the Act and regulations provide different avenues by which a successor operator relationship may be created: first, under 20 C.F.R. §725.492(a), by acquiring a mine or mines or the coal mining business of a prior operator, "or substantially all the assets thereof," and second, under 20 C.F.R. §725.492(b), when specified corporate transactions occur where an operator ceases to exist. Requiring that a prior operator cease to exist in all cases for successor operator liability to be created would merge the two subsections into one, disregarding the language providing that certain transactions "*also*" create a successor operator relationship under 20 C.F.R. §725.492(b) (emphasis added).[15]

The circuit courts that have addressed the issue have come to the same conclusion. In *Hall*, the Sixth Circuit found evidence of the operator's acquisition of substantially all of the prior operator's assets and its subsequent employment of the miner "likely supports" a finding of a successor operator relationship, without requiring evidence that the prior operator ceased to exist. 287 F.3d at 565. Similarly, in *C&K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit addressed a situation in which the successor operator acquired substantially all of the prior operator's assets and then also employed the miner. The Third Circuit rejected, "as based on an erroneous reading of the Act," the successor operator's argument that if the prior operator

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successor operator or corporate or business entity is liable when an operator ceases to exist as a result of the specified transaction. 30 U.S.C. §932(i)(3)(A)-(D).

[15] Additionally, requiring that the prior operator cease to exist in all cases to create successor operator liability would be at odds with 20 C.F.R. §725.493(b)(1), which presupposes that both the prior operator and the successor operator can be liable for the payment of benefits, and assigns primary liability based upon whether the successor operator independently employed the miner.

"continued as a viable entity following the sale of substantially all its mining assets, the [prior operator] remains primarily liable."[16] *Taylor*, 165 F.3d at 256.

Thus, under 20 C.F.R. §725.492(a), there is no requirement that the prior operator cease to exist to establish a successor operator relationship.[17] Further, 20 C.F.R. §725.492(b), addressing situations where the prior operator ceases to exist as a result of various corporate transactions, expands the definition of a successor operator rather than contracts it. We therefore affirm the ALJ's determination that Employer acquired substantially all of JOP Coal's assets, thereby creating a successor operator relationship under 20 C.F.R. §725.492(a). *See Hall*, 287 F.3d at 565; *Taylor*, 165 F.3d at 256; Decision

[16] While both cases applied the 1999 regulations, which have since been amended, the regulatory revisions did not change the circumstances creating a successor operator. *See* 65 Fed. Reg. 79,920, 80,007 (Dec. 20, 2000) (noting the revised regulation largely tracks the Act and that the Department wished to "clarify" the successor operator definition to "give effect to Congress' demonstrated interest in ensuring that a wide variety of commercial transactions was sufficient to give rise to successor liability" under the Act).

[17] Employer contends the Director's position in this case regarding the requirements to establish a successor operator relationship under 20 C.F.R. §725.492(a) is irreconcilable with his position in a prior case before the Board, *Huff v. DM&M Coal Co.*, BRB No. 21-0531 BLA (May 11, 2023) (unpub.), *recon. denied*, BRB No. 21-0531 BLA (Sept. 6, 2023) (Order). Employer's Reply to the Director at 6-7. It points to the Director's argument in *Huff* that "the concurrent operation of [an] employer and [another operator] preclude[s] the application of successor liability." *Id.* at 6 (quoting Director's Brief in *Huff*). While the Board had not yet issued its decision in *Huff* at the time of Employer's Reply to the Director in this case, we note the panel in *Huff* agreed with the Director's position there, reversing the ALJ's finding of successor operator liability and holding as a matter of law that there could not be a successor operator relationship given the facts of that case. *See Huff*, BRB No. 21-0531 BLA, slip op. at 5-6.

We note the Director's argument in *Huff* could be read as addressing reorganization under 20 C.F.R. §725.492(b) rather than under 20 C.F.R. §725.492(a), as is the case here, given the named responsible operator's contention that the alleged successor operator not only transferred "substantially all" of its assets to the other company, but that the alleged successor was the same company in every aspect. *Huff*, BRB No. 21-0531 BLA, slip op. at 6. However, even if the Director's position in *Huff* was broader and encompassed 20 C.F.R. §725.492(a) as Employer suggests, the Director's argument and the Board's analysis in *Huff* were not based on any analysis of the Act or regulations, nor was the opinion precedential. Thus, it is not binding here.

and Order at 30-31. Because Employer is considered a successor operator, Claimant's employment with the prior operator, JOP Coal, is also "deemed to be employment with" Employer. 20 C.F.R. §725.493(b)(1). Additionally, as the parties have not disputed that Employer independently employed Claimant after the transfer of assets transaction, we also affirm the ALJ's finding that Employer is primarily liable for benefits as the successor operator and thus is the correctly named responsible operator. *Id.* ("In a case in which the miner was independently employed by the successor operator after the transaction giving rise to successor operator liability, the successor operator shall be primarily liable for the payment of any benefits."); Decision and Order at 31.

Invocation of the Section 411(c)(4) Presumption — Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of his coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold the ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's Employment History forms from his current and prior claims and SSES to determine the length of Claimant's coal mine employment. Decision and Order at 6-7; Director's Exhibits 1, 4, 7. First, the ALJ credited Claimant with full quarters of coal mine employment when he earned at least $50.00 from a coal mine operator in the years prior to 1978. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984); Decision and Order at 6-7. On this basis, he credited Claimant with 1.5 years of coal mine employment in 1968, 1969, and 1971; 2.5 years of coal mine employment for the last two quarters of 1972 and the years 1973 and 1974; and three years between 1975 and 1977. Decision and Order at 6. Thus, he concluded Claimant had seven years of coal mine employment before 1978. *Id.*

For 1978 onward, the ALJ applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[18] Decision and Order at 6-7. For each year in which Claimant's

[18] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R.

earnings met or exceeded the average yearly earnings for 125 days of employment as found in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, the ALJ credited Claimant with a full year of coal mine employment. *Id.* at 7. For the years in which Claimant's earnings fell short of 125 days, the ALJ credited him with a fractional year, calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings. *Id.* Applying this formula, the ALJ credited Claimant with an additional 11.06 years of coal mine employment. *Id.* Adding those 11.06 years to Claimant's pre-1978 years, the ALJ credited Claimant with a total of 18.06 years of coal mine employment. *Id.*

Employer argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment. Specifically, Employer asserts the "$50-per-quarter method" is derived from the Social Security Act and is neither included nor incorporated into the Act or its regulations. Employer's Brief at 26-27. It further contends "simply tallying the quarters" in which Claimant earned at least $50.00 fails to "discuss all relevant evidence in the record."[19] *Id.* at 6, 23-28; Employer's Reply to the Director at 8. We disagree.

Contrary to Employer's argument the ALJ permissibly applied the method in *Tackett*, 6 BLR at 1-841 n.2, to Claimant's employment between 1968 and 1977 by crediting him with a full quarter-year of coal mine employment for each quarter in which he earned at least $50.00. The Sixth Circuit has not precluded the application of the *Tackett* method, but it acknowledged that "as quarterly income approaches that floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019). The court also noted the need for ALJs to attempt to ascertain the beginning and ending dates of employment and that if the ALJ determines a miner was not employed by a coal mining company for a full calendar quarter, then the quarter method cannot be used. *Id.* at 406.

Employer does not contend that there is evidence establishing the beginning and ending dates of Claimant's employment. Further, while Employer argues there are variations in Claimant's earnings that would tend to demonstrate he worked less in the

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§725.101(a)(32)(iii). Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* (titled *Average Earnings of Employees in Coal Mining*) sets forth the average "daily earnings" of miners and the "yearly earnings (125 days)" by year for employees in coal mining, as reported by the BLS.

[19] Employer argues the discrepancy in pay between quarters for the same employer must demonstrate that in those quarters with less pay, Claimant worked only a fraction of a quarter. Employer's Brief at 6.

mines in certain quarters than others, all the quarters credited by the ALJ indicate earnings well above the "floor" of $50.00.[20] *Shepherd*, 915 F.3d at 406; Decision and Order at 6; Director's Exhibit 7.

Moreover, even assuming the ALJ insufficiently considered Claimant's earnings prior to 1978 when applying the *Tackett* method, Employer has failed to explain how this alleged error made a difference in the outcome. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). According to Employer's own calculations, Claimant had 6.5 years of coal mine employment from 1968 to 1977, a difference of approximately one-half year.[21] Employer's Brief at 28. As discussed below, we affirm the ALJ's calculation of the remaining years of Claimant's coal mine employment of 11.06 years. Thus, adding Employer's calculations for the period 1968 to 1977, the total would be 17.44 or 17.56 years and, therefore, still greater than fifteen years of coal mine employment. Therefore, any error in the ALJ's use of the *Tackett* method would be harmless. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next asserts the ALJ erred in finding 125 days is sufficient to establish one year of coal mine employment, as it contends this determination comes from dicta in *Shepherd*. It contends *Shepherd* held only that "all evidence" of record must be assessed in determining a miner's years of coal mine employment. Employer's Brief at 24. The Director responds that the court's determination in *Shepherd* that 125 working days constitutes a year of coal mine employment is not dicta. Director's Brief at 13-14. We agree with the Director's position.

Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar-year employment relationship, is not dicta. Employer's Brief at 23-28. In *Shepherd*, the court expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," 915 F.3d at 407, including Section 725.101(a)(32)(i), which the court held provides that 125 working days constitutes a year of coal mine employment under the Act. *Id.* at 401. Thus,

[20] For instance, Employer notes that Claimant earned $928.13 in the fourth quarter of 1975, $950.00 in the first quarter of 1976, and "just 31% of the earnings" in the third quarter of 1977 as compared to the third quarter of 1977 ($1,109.55). Employer's Brief at 6; Director's Exhibit 7. We note Claimant worked for the same employer from the last quarter of 1974 through the last quarter of 1977. Director's Exhibit 7.

[21] Elsewhere, Employer indicates the length of coal mine employment for the years 1968 to 1977 should total 6.38 years. *See* Employer's Brief at 6, 27.

regardless of Employer's disagreement with the court's interpretation of the regulation, the ALJ in this case was bound by the Sixth Circuit's holding in *Shepherd*. As the ALJ was bound by *Shepherd*, we also reject Employer's additional arguments about the correct interpretation of what constitutes "a year" of coal mine employment.

Because the ALJ used reasonable methods to calculate Claimant's coal mine employment and provided the bases for his calculations, we affirm his finding of 18.06 years of underground coal mine employment. *See Shepherd*, 915 F.3d at 401-02; *Muncy*, 25 BLR at 1-26; *Tackett*, 6 BLR at 1-841 n.2; Decision and Order at 6-7.

Invocation of the Section 411(c)(4) Presumption — Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must also establish that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work[22] and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)–(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the medical opinion evidence.[23]

The ALJ considered the medical opinions of Drs. Leke-Tambo, Raj, Nader, and Tuteur. Decision and Order at 14-23; Director's Exhibits 11, 21, 80, 94; Claimant's Exhibits 3, 4; Employer's Exhibits 2, 12. Drs. Leke-Tambo, Raj, and Nader opined that Claimant is unable to perform his usual coal mine employment. Director's Exhibits 11, 80, 94; Claimant's Exhibits 3, 4. Dr. Tuteur opined that while Claimant is totally disabled due to his progressive breathlessness and restrictive abnormality, it is not a pulmonary

[22] The ALJ found Claimant consistently reported that his coal mine employment required lifting 50 to 100 pounds and crawling through low coal and that it was "pretty heavy work." Decision and Order at 23.

[23] The ALJ found the pulmonary function study evidence was inconclusive. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 22. He also found the arterial blood gas study evidence failed to establish total disability and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii),(iii); Decision and Order at 21.

impairment, but is due to coronary artery disease, obesity, and diabetes. Director's Exhibits 21; 94 at 256; Employer's Exhibits 2, 12. The ALJ found all the experts' opinions are well-reasoned and documented and support a finding of total disability. Decision and Order at 22-23.

Employer argues the ALJ erred by finding Dr. Tuteur's opinion supports a finding of total disability.[24] It contends the physician attributed Claimant's disability to coronary artery disease, which is a non-compensable disability and thus does not support total disability "as a matter of law." Employer's Brief at 29-30. We disagree.

Employer conflates the issues of total disability and disability causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co*., 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson*, 26 BLR at 1-11. Thus, the ALJ permissibly found Dr. Tuteur's opinion supports a finding of total disability, as the doctor stated that Claimant "is clearly totally and permanently disabled from returning to work in the coal mine industry or work requiring similar effort" due to his restrictive abnormality and progressively worsening shortness of breath. *See* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."); Employer's Exhibits 2 at 2; 12 at 2; Decision and Order at 18-19, 23. We therefore affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

As Employer raises no further arguments regarding the ALJ's findings on total disability, we affirm the ALJ's finding that the evidence, when weighed together, establishes total disability by a preponderance of the evidence. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 23. We therefore also affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 24.

[24] We affirm, as unchallenged on appeal, the ALJ's findings that Drs. Leke-Tambo's, Raj's, and Nader's opinions are reasoned and documented and support a finding of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[25] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[26]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds this standard requires Employer to show the miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relied on Dr. Tuteur's opinion to rebut the presumption of legal pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 4, 12. Dr. Tuteur opined Claimant does not have legal pneumoconiosis but has variable restrictive and obstructive abnormalities due to heart disease, obesity, and diabetes. Director's Exhibit 21; Employer's Exhibits 2, 12. The ALJ found Dr. Tuteur's causation opinion was not well-reasoned or documented and accorded it little probative weight. Decision and Order at 27.

[25] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[26] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 27.

Employer argues the ALJ erred in discrediting Dr. Tuteur's opinion. It contends the ALJ discredited the physician's opinion solely because he failed to consider the decline in Claimant's pulmonary function from 2017 to 2020, but without addressing evidence that the 2019 and 2020 pulmonary function studies were invalid.[27] Employer's Brief at 30-31. Employer's argument is unpersuasive.

Contrary to Employer's argument, the ALJ did not discredit Dr. Tuteur's opinion solely because he did not consider Claimant's decreasing pulmonary function study values from 2017 until 2020. Rather, the ALJ also found Dr. Tuteur's opinion undermined because he did not adequately explain why the alleged variability in Claimant's pulmonary function studies necessarily excluded a finding of legal pneumoconiosis, as he did not explain why coal mine dust did not exacerbate the ventilatory abnormalities he acknowledged were present. Decision and Order at 27. We affirm that credibility determination as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because the ALJ permissibly discredited Dr. Tuteur's opinion, the only opinion that legal pneumoconiosis is not present, we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 27. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28-29. Employer raises no contention of error on this issue beyond those we rejected regarding legal pneumoconiosis; thus, we affirm the ALJ's finding that Employer failed to disprove disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (ALJ permissibly discounted physician's disability causation opinion because he did not

[27] Dr. Tuteur opined the December 9, 2019 pulmonary function study was invalid, and noted that Claimant coughed when he took deep breaths during the January 10, 2020 pulmonary function study, but did not opine the study was invalid. Employer's Exhibits 2 at 2; 12 at 2. However, he relied on both studies to reach his conclusions, finding restriction and obstruction present. *Id.* The ALJ correctly noted that Dr. Tuteur did not address the February 25, 2017 pulmonary function study. Decision and Order at 27; Director's Exhibit 94 at 227, 256; Employer's Exhibits 2, 12.

diagnose legal pneumoconiosis, contrary to the ALJ's finding that the employer failed to disprove the disease); Decision and Order at 28-29.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge