**U.S. Department of Labor**

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

BRB No. 23-0425 BLA

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| GARY R. STINSON<br><br>Claimant-Respondent<br><br>v.<br><br>HAROLD KEENE COAL COMPANY, INCORPORATED<br><br>and<br><br>CHARTIS CASUALTY COMPANY<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | **NOT-PUBLISHED**<br><br>DATE ISSUED: 12/23/2024<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Sarah Y.M. Himmel and Joseph N. Stepp (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Granting Benefits (2018-BLA-

05836) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on July 29, 2015, and is before the Benefits Review Board for a second time.[1]

In consideration of Employer's previous appeal, the Board affirmed the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). *Stinson v. Harold Keene Coal Co.*, BRB No. 21-0195 BLA, slip op. at 2 n.2 (Feb. 24, 2022) (unpub.). The Board, however, vacated the ALJ's determination that Claimant had at least fifteen years of coal mine employment and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] *Id.* at 3-4; *see* 30 U.S.C. §921(c)(4) (2018). Thus, the Board vacated the award of benefits and remanded the case for reconsideration. *Stinson*, BRB No. 21-0195 BLA, slip op. at 4-5.

On remand, the ALJ determined Claimant had 16.49 years of qualifying coal mine employment and therefore invoked the Section 411(c)(4) presumption. She incorporated her previous findings to conclude Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant had 16.49 years of qualifying[3] coal mine employment, and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. It further argues the ALJ wrongly determined it failed to rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

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

[1] We incorporate by reference the procedural history as set forth in the Board's prior decision in this case. *Stinson v. Harold Keene Coal Co.*, BRB No. 21-0195 BLA, slip op. at 2-3 (Feb. 24, 2022) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment 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.

[3] The Board previously affirmed the ALJ's determination that all of Claimant's coal mine employment was qualifying. *Stinson*, BRB No. 21-0195 BLA, slip op. at 3-4 n.6.

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 Assocs., Inc*., 380 U.S. 359 (1965).

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days 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.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f 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 . . . ." 20 C.F.R. §725.101(a)(32)(iii).

Originally, the ALJ found Claimant had at least fifteen years of coal mine employment based on the district director's findings. Decision and Order at 3. The Board remanded for the ALJ to explain her method of calculating the length of Claimant's coal mine employment in accordance with the Administrative Procedure Act (APA).[5] *Stinson*, BRB No. 21-0195 BLA, slip op. at 3.

On remand, the ALJ considered Claimant's Social Security Administration (SSA) earnings report, CM-911a Employment History Form, and testimony. Decision and Order on Remand at 3-6 (unpaginated); *see* Director's Exhibits 8, 10, 11; Hearing Transcript at 13-15, 20-32. She found that Claimant did not provide the beginning and ending dates for

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 8, 10; Hearing Transcript at 19.

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

his employment. Decision and Order on Remand at 3 (unpaginated). Thus, for Claimant's employment from 1969 to 1977, the ALJ credited him with a quarter of a year of coal mine employment for each quarter in which his SSA records indicate he earned at least $50.00 in coal mine employment. Decision and Order on Remand at 4 (unpaginated); Director's Exhibit 11. For his employment from 1978 through 2010, the ALJ divided Claimant's yearly earnings from coal mine employers set forth in the SSA records by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*[6] to calculate the number of days Claimant worked.[7] 20 C.F.R. §725.101(a)(32)(iii); Decision and Order on Remand at 3-4 (unpaginated); Director's Exhibit 10. For years when Claimant worked 125 days or more, she credited him with a full year of coal mine employment. Decision and Order on Remand at 3-4 (unpaginated). For years when he worked less than 125 days, she divided his working days by 125 to credit him with a portion of a year. *Id.* Using this method, she found Claimant worked in coal mine employment for a total of 16.49 years with at least fifteen years of qualifying coal mine employment. *Id.* at 4-6.

Employer contends the ALJ erred in finding Claimant had 16.49 years of coal mine employment. Employer's Brief at 15-25. We agree, in part.

Initially, we reject Employer's argument that the ALJ erred in using the "quarterly method" in calculating Claimant's length of coal mine employment prior to 1977.[8]

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[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[7] In the body of her decision, the ALJ stated she compared Claimant's yearly earnings to the average yearly earnings set forth in Exhibit 610. Decision and Order on Remand at 3 (unpaginated). However, the table showing her calculations indicates that she divided his yearly earnings by the daily average earnings. *Id.* at 4. While the ALJ did not specifically indicate she was applying 20 C.F.R. §725.101(a)(32)(iii), the calculation she performed is identical to that set forth in the regulation. *Id.*

[8] Employer alternatively argues Claimant's testimony is a more credible assessment of his coal mine employment from 1969 to 1977 than the method utilized in *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984). Employer's Brief at 21. However, Claimant was not able to recall the dates of his employment on his Form CM-911a Employment History Form and, at the hearing, testified only to the general years of his employment and not as to his rate of pay for this period of employment. Director's Exhibit

Employer's Brief at 21. Both the United States Court of Appeals for the Fourth Circuit and the Board have held it is reasonable to credit a miner for any quarter in which the record shows earnings of at least $50.00 in coal mine employment. *Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984). Thus, we affirm the ALJ's determination that Claimant had 6.75 years of coal mine employment from 1969 to 1977. *Muncy*, 25 BLR at 1-27; Decision and Order at 4.

We agree, however, with Employer's argument that the ALJ, in calculating Claimant's post-1977 employment, erred by using the 125-day method adopted by the United States Court of Appeals for the Sixth Circuit when this case falls under the Fourth Circuit's jurisdiction. Employer's Brief at 17 n.7, 22-25.

In calculating Claimant's post-1977 employment, the ALJ divided his yearly earnings from coal mine employers set forth in the SSA records by the coal mine industry's average daily earnings, crediting him with a full year of employment when he worked 125 days or more, and with partial periods of employment by dividing his working days by 125 to credit him with a portion of a year. Decision and Order on Remand at 3-4 (unpaginated). However, the Board has long interpreted Fourth Circuit case law to require the ALJ to first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35 (a one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280.

If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[9] 20 C.F.R.

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8; Hearing Transcript at 29-32. Nor does Employer cite to any relevant testimony or evidence of the dates of his employment or his wages. Further, Employer's own calculations it provided to the ALJ were based on dividing Claimant's wages by the average daily income from miners in Exhibits 610 and not Claimant's testimony. Employer's Remand Brief, Appendix B. Thus, we reject Employer's argument.

[9] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in

§725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281. Because the ALJ did not make the necessary threshold determination, we vacate her determination that Claimant established 9.74 years of coal mine employment from 1978 to 2010 for a total of 16.49 years of coal mine employment. *Mitchell*, 479 F.3d at 334-36; Decision and Order on Remand at 3-4 (unpaginated). Thus, we vacate her finding that Claimant had at least fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption.

Because we vacate the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment, we must also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits and remand the case for further consideration of this issue.

**Remand Instructions**

On remand, the ALJ must determine the length of Claimant's coal mine employment, taking into consideration all relevant evidence,[10] and explain all material findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In so doing, she may utilize any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). The ALJ may, in her discretion, apply the formula at 20 C.F.R. §725.101(a)(32)(iii) using the daily wage from Exhibit 610 to determine calendar years of coal mine employment.[11] If the threshold finding of a calendar year is established, then she is to consider whether

which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[10] We note that in considering the evidence, the ALJ failed to take into account Employer's evidence as to Claimant's specific dates of employment from October 12, 2009 to October 25, 2010. Director's Exhibit 37 at 3. As all relevant evidence must be considered, she must consider this, along with all other relevant evidence.

[11] If the ALJ relies on Exhibit 610, she should attach the exhibit to the Decision and Order. 20 C.F.R. §725.101(a)(32)(iii).

Claimant worked for 125 days during each one-year period.[12] *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75.

However, prior to using the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ should consider Employer's argument that applying the formula is not reasonable for Claimant's employment at Harold Keene, Raleigh Steele Construction, Twin Ridge Development, and Extra Energy, Incorporated, because Claimant testified as to his hourly wages, hours of employment, and the days of the week he worked, thus providing a way to determine the specific number of days he worked from 2005 to 2010. *See Mitchell*, 479 F.3d at 334-36; Employer's Brief at 18-20; Employer's Brief on Remand to the ALJ at 7; Hearing Transcript at 24-25. Regardless of the method used, in setting forth her calculations, the ALJ must explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes at least fifteen years of qualifying coal mine employment, then he will invoke the Section 411(c)(4) presumption, and the ALJ must then determine whether Employer is able to rebut it.[13] 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

[12] Moreover, as Employer notes, the ALJ stated that she was not including Claimant's employment with C&S Construction in her calculations, as Claimant testified that his reclamation work at C&S Construction did not expose him to coal mine dust. Decision and Order on Remand at 4-6 (unpaginated); Hearing Transcript at 25-26; Employer's Brief at 6-7. However, her employment calculations appear to include Claimant's earnings from this employer from 2001 to 2003. Decision and Order on Remand at 4-6 (unpaginated); Director's Exhibit 10 at 4. Consequently, on remand, she must reconcile her findings.

[13] Because we have vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's argument the ALJ erred in finding the Section 411(c)(4) presumption unrebutted, as the length of coal mine employment finding may cause the burdens of proof to shift or affect the ALJ's credibility findings on rebuttal. Employer's Brief at 25-43.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order on Remand Granting Benefits and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority that remand is required for the ALJ to explain her apparent crediting of Claimant's employment with C&S Construction in 2001, 2002, and 2003, despite also stating Claimant was not entitled to credit for such work.[14] Decision and Order on Remand at 4-6. I disagree, however, with the majority's conclusion that the ALJ cannot credit Claimant with a full year of coal mine employment unless he establishes 365-day employment relationships with his employers.

[14] The ALJ's apparent determination that Claimant was employed at a surface mine by C&S Construction but was not exposed to coal mine dust while working there effectively precludes a finding that this employment is "qualifying" for invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(2) (surface coal mine employment qualifies for the presumption if the miner was "regularly exposed to coal-mine dust while working there"); Decision and Order on Remand at 5-6; Hearing Transcript at 24-25.

As I explained in *Baldwin v. Island Creek Kentucky Mining*, a miner is entitled to credit for a full year of coal mine employment "for all purposes under the Act" if he establishes 125 working days in a given year. *Baldwin*, BRB No. 21-0547 BLA, slip op. at 8-13, 2023 WL 5348588, at *5-8 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting). That conclusion is consistent with the Sixth Circuit's holding that the "plain" and "unambiguous" language of the regulatory definition of "year" "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *see also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) (125 working days equals "one year of work" under the prior regulatory definition of "year").

Notably, the majority interprets Fourth Circuit case law as requiring a 365-day employment relationship. However, as discussed in *Baldwin*, neither the circuit nor the Board has issued binding precedent on the matter. *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, slip op. at 12, 2023 WL 5348588, at *8 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting) (explaining why the Board's decision in *Clark* and the Fourth Circuit's decisions in *Mitchell* and *Armco*, all of which predate the effective date of the current regulation, do not foreclose the Sixth Circuit's *Shepherd* rationale).[15]

GREG J. BUZZARD
Administrative Appeals Judge

[15] The majority's interpretation of Fourth Circuit precedent also differs from the Director's understanding of the law. Although the Director has expressed his disagreement with the Sixth Circuit's holding in *Shepherd*, he nevertheless conceded in *Baldwin* that there is no binding in-circuit precedent that would preclude the Board from adopting *Shepherd's* rationale in cases arising in the Fourth Circuit.