U.S. Department of Labor

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

BRB No. 20-0341 BLA

WILLIAM M. MATNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
YOUNGS BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/24/2022
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk, PLLC), Beckley, West Virginia, for Claimant.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer and its Carrier.

Erik Vande Stouwe (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05211) rendered on a subsequent claim filed on March 1, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with 11.4 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718,[3] the ALJ accepted the parties' stipulation that Claimant is totally disabled and thereby found he established a change in applicable condition of entitlement under 20 C.F.R. §725.309(c). The ALJ further found Claimant established he is totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a), 718.204(b), (c).

On appeal, Employer argues the ALJ lacked authority to preside over the case because she has not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and that the removal provisions applicable to the ALJ render her appointment unconstitutional.[4] On the merits, Employer argues the ALJ erred

[1] Claimant filed a prior claim for benefits on September 19, 1985, but the record for that claim is unavailable. Director's Exhibit 1. Because Claimant's prior claim record is unavailable, the ALJ assumed the claim was denied for failure to establish any element of entitlement. Decision and Order at 3 n.4; Hearing Transcript at 6.

[2] Section 411(c)(4) of the Act 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The ALJ found no evidence of complicated pneumoconiosis; therefore, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 16 n.11.

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

in finding it is the responsible operator, erred in concluding the destruction of Claimant's prior claim record did not prevent Employer from mounting a meaningful defense to this subsequent claim, erred in admitting Claimant's testimony regarding years in which he was paid cash for his coal mine employment, and erred in calculating a coal mine employment history of 11.4 years. Additionally, Employer challenges the ALJ's findings that Claimant has legal pneumoconiosis and is totally disabled by it. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's assertions concerning the ALJ's appointment, its opportunity to mount a meaningful defense, and the admission of Claimant's testimony about the length of his coal mine employment.[5] The Director, however, urges the Board to remand the case for further consideration of the responsible operator issue. Claimant filed a limited response, generally urging affirmance of the award and specifically addressing Employer's argument that the ALJ erred in admitting Claimant's length of coal mine employment testimony. Employer filed a reply to the Director's response.[6]

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).

> [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.

[5] The Director explicitly declined to address Employer's assertions of error concerning the ALJ's entitlement findings. Director's Brief at 1 n.1.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 39.

[7] The Board will apply the law of the Fourth Circuit, as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 31, 45-46; Director's Exhibit 7.

Appointments Clause

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. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 6-10; Employer's Reply at 2-6. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[10] Employer's Brief at 8-10; Employer's Reply at 4-6.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance with the Appointments Clause. Director's Brief at 7-9. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 8 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an

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[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor 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 of Labor issued a letter to the ALJ on December 21, 2017, stating:

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

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

[10] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Timlin and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Timlin. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Timlin "as an Administrative Law Judge." *Id*.

Employer generally asserts there is "no indication" that the Secretary "conducted the personal vetting process that is expected in a constitutionally authorized selection of an inferior officer" but does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Timlin's appointment. Employer's Brief at 9-10. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[11] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-

[11] While Employer notes the Secretary's ratification letter was "signed in autopen," Employer's Brief at 9, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 8. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Timlin's appointment, which we have held constituted a valid exercise of his authority, thereby bringing her appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 10-12; Employer's Reply at 6-9. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 11. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 11-12; Employer's Reply at 6-9.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held

responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[12] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1136.

[12] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Due Process

Employer requests that the Board vacate the ALJ's Decision and Order and transfer liability for benefits to the Black Lung Disability Trust Fund because evidence in the prior claim was not made part of the record as required by regulation.[13] Employer's Brief at 13; *see* 20 C.F.R. §718.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."). It alleges a general due process violation pertaining to its ability to mount a meaningful defense against the claim. Employer's arguments are without merit.

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer has not met this burden.

We reject Employer's contention that, without the prior claim record, the ALJ was unable to properly determine whether Claimant established a "material" change in conditions "because she did not have an 'anchor in the past' to compare [C]laimant's current conditions." Employer's Brief at 14-15 (quoting *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc), *rev'g* 57 F.3d 402 (4th Cir. 1995)); 20 C.F.R. §725.309(c). Employer appears to reference the prior regulation in using the term "material." Employer's Brief at 14-15; *see* 20 C.F.R. §725.309(d) (2000) (requiring a miner to establish a *material change* in *conditions*). Under the revised version of the regulation, which is applicable to this claim filed after January 19, 2001, a claimant no longer has the burden of proving a "material change in conditions." *See* 20 C.F.R. §§725.2(c), 725.309(c). Rather, a claimant must show that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" by submitting new evidence that establishes an element of entitlement upon which the prior denial was based. 20 C.F.R. §725.309(c); *see Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511 (4th Cir. 2015);

[13] At the hearing, the ALJ overruled Employer's assertions of prejudice, explaining that Claimant must establish each element of entitlement "from scratch" because of the prior record's absence. Hearing Transcript at 6.

Consol. Coal Co. v. Williams, 453 F.3d 609, 617 (4th Cir. 2006) ("[O]nly new evidence following the denial of the previous claim, rather than evidence predating the denial can sustain a subsequent claim."); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). We agree with the Director that the ALJ established a necessary "anchor" in this case in accordance with *Rutter* by reasonably presuming all elements of entitlement were denied in the prior claim. *See Rutter*, 86 F.3d at 1363 (presumption that prior claim holdings "are correct when made and continue to be correct through time" until proven wrong by new evidence, establishes the necessary "anchor in the past" with which to compare current conditions); Director's Brief at 11; Decision and Order at 3 n.4.

As discussed below, the physicians offering medical opinions agree Claimant is totally disabled and the ALJ permissibly found Claimant established each element of his claim, thereby proving both a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and his entitlement to benefits overall.[14] *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c).

Further, Employer has failed to adequately explain how it was prejudiced. Although Employer speculates that medical evidence from the prior 1985 claim record might have been helpful to its medical experts in rendering their opinions, it neither alleges that the prior record was unavailable due to deliberate misconduct[15] nor explains how it was

[14] A claim can be denied for reasons unrelated to a miner's physical condition, such as the failure to establish that his work constitutes that of a miner. *See* 20 C.F.R. §725.309(c)(3). On appeal, however, Employer only asserts that the unavailability of the evidence from the prior 1985 claim deprived it and its medical experts of additional evidence *regarding Claimant's medical condition*. Employer's Brief at 15-16. Although Employer also alleges it was deprived of prior evidence concerning Claimant's length of coal mine employment, it does not challenge Claimant's status as a miner, assert that the employment evidence in Claimant's prior 1985 claim differed in any way from the employment evidence in this case, or otherwise explain how the unavailability of this evidence prejudiced its defense in this case. *See Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000).

[15] The Director notes that the Federal Records Center presumably destroyed Claimant's 1985 claim record in accordance with the Office of Workers' Compensation Program's records retention schedule, which calls for documents to be retained for thirty years after the end of the fiscal year in which the case was closed. Director's Brief at 1; *see* National Archives and Records Administration, Request for Records Disposition Authority, https://www.archives.gov/files/records-

deprived of a fair opportunity to mount a meaningful defense in this case.[16] *Borda*, 171 F.3d at 184; *Oliver*, 555 F.3d at 1219. We therefore reject its assertions that it was deprived of due process and that liability should be transferred to the Trust Fund.

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *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 an ALJ's determination on the length of coal mine employment 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 a 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). If the miner's employment "lasted for a calendar year or partial periods totaling a 365-day period amounting to one year," the regulations presume, in the absence of contrary evidence, "that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). The regulations further provide that an ALJ may 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).

On his claim form and employment histories, Claimant alleged 14.5 years of coal mine employment and submitted his Social Security Administration (SSA) earnings record for the years 1963 through 1978. Director's Exhibits 4, 8, 9. At the hearing, Claimant alleged he had additional coal mine employment not reflected in his SSA earnings records. He testified he worked for Ben-El Coal Company (Ben-El Coal) for "roughly six years" between the ages of thirteen and nineteen in 1957 to 1962, and was paid $10.00 per day in cash. Employer objected to the admission and consideration of Claimant's testimony

mgmt/rcs/schedules/departments/department-of-labor/rg-0271/daa-0271-2017-0004_sf115.pdf, last accessed on Feb. 14, 2022.

[16] As the Director notes, notwithstanding the destruction of the prior claim record, Employer had the opportunity to "develop and submit evidence, and appear and participate in the hearing." Director's Brief at 11.

regarding his alleged coal mine work with Ben-El Coal because he had not disclosed this information in his responses to Employer's interrogatories. Hearing Transcript at 17, 50-53. The ALJ overruled Employer's objection. Order Admitting Testimony at 2.

In her Decision and Order, the ALJ found Claimant demonstrated "thirteen calendar years" of "largely uninterrupted coal mine employment" for multiple employers in 1963-1966, 1969-1976, and 1978.[17] Decision and Order at 11. Having found Claimant established "periods of coal mine employment encompassing full calendar years and various partial calendar years totaling more than one year," the ALJ determined whether Claimant had 125 working days during those years. *Id.* Applying Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* and the formula at 20 C.F.R. §725.101(a)(32)(iii),[18] the ALJ credited Claimant with a full year of coal mine employment in each of the six years (1969 and 1971-1975) that his income exceeded the industry's 125-day average earnings. Decision and Order at 12-13. For the remaining years where Claimant's wages were less than the 125-day average - 1963 to 1966, 1970, 1976, and 1978 - the ALJ credited him with fractional years based on the ratio of days worked to 125 days, totaling 3.9 years during those periods. 20 C.F.R. §725.101(a)(32)(i), (iii); Decision and Order at 12-13. She therefore concluded Claimant established 9.9 years of coal mine employment between 1963 and 1978.

Additionally, the ALJ credited Claimant with 1.5 years of cash employment in coal mine work from 1957 to 1962, when Claimant testified he worked for Ben-El Coal. Decision and Order at 11. Based on Claimant's testimony that he attended school and only worked intermittently in the mines during this period, the ALJ credited him with one-quarter year of coal mine employment for each of the six years that he testified he worked with Ben-El Coal, amounting to 1.5 years. Adding this total to her prior finding of 9.9 years, the ALJ found Claimant worked 11.4 years of coal mine employment. *Id.* at 14.

[17] The ALJ considered the following relevant evidence in assessing Claimant's length of coal mine employment: Claimant's claim form, employment history forms, testimony, and Social Security earnings records. Decision and Order at 7-10.

[18] The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information currently is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base."

Employer argues that "[t]he 125-day rule is not to be utilized to calculate the length of coal mine employment to [invoke] the 15-year presumption" and that it "applies exclusively to the identification of the responsible operator." Employer's Brief at 20. Employer proposes using 251 working days per calendar year. Employer's Brief at 20-21. Based on this method, Employer maintains Claimant worked no more than 7.34 years of coal mine employment between 1963 and 1978.[19] We disagree with Employer that the 125-day rule applies uniquely with respect to the identification of the responsible operator.

The regulations specifically provide that "if the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added). Thus, contrary to Employer's argument, the regulatory definition of working in coal mine employment is the same for purposes of identifying the responsible operator and determining the applicable presumptions under the Act. *See* 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability").

Employer also asserts the ALJ erred in admitting Claimant's testimony concerning his cash employment in coal mine work between 1957 and 1962, and crediting Claimant with an additional 1.5 years of employment for this period. Employer's Brief at 16-19. Employer raises procedural and due process challenges related to Claimant's testimony that we need not reach.[20] At the hearing, Employer objected to Claimant's testimony regarding his alleged and previously unidentified additional coal mine employment because Employer contested that Claimant had at least fifteen years of qualifying coal mine employment. But that issue is moot because the ALJ found Claimant established less than fifteen years of employment and, therefore, cannot invoke the Section 411(c)(4) presumption.

Moreover, although Employer contends the ALJ's overall findings on the length of Claimant's coal mine employment influenced her weighing of the medical opinions on

[19] Employer does not contend that the ALJ failed to properly determine the number of calendar years within which Claimant worked at least 125 days or that she incorrectly calculated whether Claimant worked 125 days or more within each calendar year. Rather, Employer argues that the 125-day rule does not apply.

[20] We do not take due process concerns lightly. However, as explained below, under the unique facts of this case, any error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

legal pneumoconiosis, any error by the ALJ is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed below, Claimant established legal pneumoconiosis based on the medical opinion of Dr. Go, who considered a coal mine employment history of "at least 9 years and 11 months," (9.916 years).[21] Claimant's Exhibit 4 at 8. The evidence on which Dr. Go based his assumption of "at least 9 years and 11 months" of coal mine employment did not include the employment period with Ben-El Coal that Employer challenges. *Id*. at 1, 8 (referencing Director's Exhibit 5). The ALJ's reasons for the weight she accorded the medical opinions were independent of her findings on Claimant's length of coal mine employment beyond 9 years and 11 months. As such, the ALJ's determination that Claimant's testimony establishes 1.5 years of coal mine employment by Ben-El Coal is immaterial to the disposition of this case.

Entitlement - 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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). The ALJ considered five medical opinions. Decision and Order at 18-32. Drs. Porterfield, Forehand, and Go diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, which they attributed to both coal mine dust exposure and cigarette smoking. Director's Exhibit 17; Claimant's Exhibits 3, 4. Drs. Fino and Zaldivar diagnosed emphysema due solely to smoking, with Dr. Zaldivar additionally opining Claimant also has asthma unrelated to coal mine dust exposure. Employer's Exhibits 1, 14. In finding Claimant established legal pneumoconiosis, the ALJ credited Dr. Go's

[21] Moreover, Employer stipulated that Claimant had 9 years and 11 months of coal mine employment. Hearing Transcript at 8.

opinion as well-reasoned and documented, and rejected the contrary opinions of Drs. Fino and Zaldivar.[22] Decision and Order at 27-28, 31-32.

Employer raises several challenges to the ALJ's crediting of Dr. Go's opinion. First, it notes Dr. Go did not examine Claimant and contends the ALJ failed to explain why she relied on his opinion over the opinions of examining physicians. Second, Employer alleges Dr. Go improperly presumed a causal connection between Claimant's COPD and coal mine employment, failed to explain how he apportioned smoking and coal dust as etiologies of Claimant's impairment, and "did not differentiate the effect[s] of [C]laimant's exposure before [and] after the regulations [reducing the permissible level of respirable coal mine dust] went into effect." Employer's Brief at 23-24. Third, Employer asserts Dr. Go's opinion is equivocal and legally insufficient to satisfy Claimant's burden of proof. We reject Employer's arguments as they are without merit.

Contrary to Employer's assertion, there is no requirement that a non-examining physician's opinion be assigned less weight than the opinion of an examining physician. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Further, Employer has not shown that Dr. Go improperly applied a presumption that Claimant has legal pneumoconiosis. As the ALJ noted, Dr. Go referenced the objective evidence as well as epidemiological studies and discussed Claimant's specific condition. He diagnosed COPD and a disabling obstructive impairment based on Claimant's pulmonary function testing, and attributed Claimant's respiratory condition to both smoking and coal mine dust. Claimant's Exhibit 4 at 8-9. Dr. Go explained that scientific studies establish a direct relationship between the quantity of coal dust exposure and loss of lung function; coal dust exposure and smoking cause comparable losses in FEV1 on pulmonary function testing; and the effect of dust exposure on FEV1 results is highly significant in both smokers and non-smokers. *Id.* at 9-10. He also noted that while Claimant has a significant smoking history of at least forty-two pack years, Claimant worked "at least 9 years and 11 months of underground coal mine employment, including work at a time predating the [March 30,

[22] The ALJ noted Drs. Porterfield and Forehand diagnosed legal pneumoconiosis but found their opinions merited "less than normal weight" because they each considered an inflated coal mine employment history of fourteen or fifteen years. Decision and Order at 26-27. We need not address Employer's contentions regarding Drs. Porterfield's and Forehand's opinions as Dr. Go's opinion constitutes substantial evidence to support the ALJ's finding that Claimant has legal pneumoconiosis and the ALJ permissibly discredited the contrary opinions. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

1970] enactment of permissible exposure limits for coal mine dust."[23] *Id.* at 9. Dr. Go specifically stated that Claimant's lung disease is due "in significant part" to his coal mine dust exposure, consistent with the legal standard. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012).

The ALJ permissibly found Dr. Go's opinion reasoned and documented because he reviewed a "substantial portion of the medical evidence of record," his diagnosis of obstructive lung disease is consistent with Claimant's treatment records and medical evidence, and he considered accurate smoking and coal dust exposure histories.[24] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Akers*, 131 F.3d at 441; *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 27-28. Thus, we affirm the ALJ's determination that Dr. Go's opinion is credible and sufficient to support a finding that Claimant has legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Looney*, 678 F.3d at 311-12 (physician's opinion that lung disease arose from "a combination of" coal mine dust exposure and smoking is sufficient to establish legal pneumoconiosis); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); Decision and Order at 31-32; Claimant's Exhibit 4 at 8-10.

[23] Employer alleges the ALJ failed to consider how much time Claimant worked in coal mine employment before the enactment of dust controls on March 30, 1970. However, we are not persuaded that such a determination affects the credibility of Dr. Go's opinion because the Act recognizes coal dust exposure, regardless of whether it occurred before or after the enactment of dust controls, may cause pneumoconiosis. We also see no error in the ALJ's ultimate conclusion that nine years and eleven months of coal mine employment, in conjunction with the other evidence that Dr. Go considered, is adequate to support a finding of legal pneumoconiosis, as Dr. Go maintained.

[24] The ALJ found Claimant had a forty pack-year smoking history, while Dr. Go considered a thirty-four to forty-two pack year smoking history. Decision and Order at 5, 17; Claimant's Exhibit 4 at 8. In finding Dr. Go considered an "accurate" coal mine employment history of at least nine years and eleven months (9.916 years), the ALJ permissibly explained that Dr. Go's understanding of Claimant's coal mine dust exposure "is reasonably similar to the 11.40 years Claimant has proven." Decision and Order at 27. As Employer does not challenge the ALJ's findings that Dr. Go considered accurate smoking and coal mine employment histories, we affirm them. *See Skrack*, 6 BLR at 1-711.

We also reject Employer's argument that the ALJ did not adequately explain the weight she accorded its experts' opinions. Dr. Fino stated Claimant's pulmonary function studies demonstrate a "severe obstructive ventilatory defect" and diagnosed Claimant with "severe emphysema." Employer's Exhibit 1 at 6, 7. He opined smoking is the "major" or "clinically significant cause" of Claimant's disabling emphysema. Employer's Exhibit 10 at 16. He reasoned Claimant continued to smoke for twenty-two years after leaving coal mine employment in 1978, and stated it is "unlikely" Claimant would still be alive "some 40 years later" if he had a "significant abnormality in lung function" due to coal mine dust exposure. *Id.* at 15-16. Further, Dr. Fino calculated that coal dust exposure caused only seven percent of Claimant's loss in FEV1, and therefore concluded Claimant does not have legal pneumoconiosis. Employer's Exhibit 1 at 14.

Contrary to Employer's contention, the ALJ permissibly discounted Dr. Fino's opinion because he did not account for the regulatory definition of pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *Hicks*, 138 F.3d at 528; Decision and Order at 29. We therefore affirm the ALJ's finding that Dr. Fino's opinion is not adequately reasoned on the issue of whether Claimant has legal pneumoconiosis.

Dr. Zaldivar diagnosed asthma and emphysema related solely to smoking. He excluded coal mine dust exposure as a causative factor for Claimant's emphysema because he found no radiographic evidence for clinical pneumoconiosis. Employer's Exhibit 14. The ALJ permissibly found Dr. Zaldivar's rationale inconsistent with the regulations that provide "[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray." 20 C.F.R. §718.202(a), (b). The ALJ also correctly noted the science found credible by the DOL in the preamble to the 2001 revised regulations recognizes emphysema with associated impairments due to coal dust exposure can exist in the absence of clinical pneumoconiosis. Decision and Order at 31 (citing 65 Fed. Reg. at 79,940-43); *see Looney*, 678 F.3d at 314-16; *Hicks*, 138 F.3d at 528. Thus, we see no error in the ALJ's finding that Dr. Zaldivar's opinion is not credible as to the existence of legal pneumoconiosis.

As the trier of fact, the ALJ determines the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999). Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the ALJ acted within her discretion in rendering her credibility determinations, we affirm her finding that Claimant established

legal pneumoconiosis.[25] *See* 20 C.F.R. §718.202(a); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 31-32.

Disability Causation

To establish he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on his respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer contends the ALJ erred in considering whether legal pneumoconiosis contributed, rather than substantially contributed, to Claimant's totally disabling pulmonary impairment. It also asserts the ALJ erred in discrediting the opinions of Drs. Fino and Zaldivar on this issue. Employer's Brief at 34-35. We disagree.

There is no dispute that Claimant's COPD is totally disabling, and Employer does not allege he is totally disabled by a respiratory condition other than COPD. Thus, the ALJ's permissible determination that Claimant's COPD constitutes legal pneumoconiosis necessarily encompassed a finding that Claimant is totally disabled due to legal pneumoconiosis. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

Moreover, we see no error in the ALJ's permissible finding that Dr. Go's reasoned opinion regarding the etiology of Claimant's COPD is sufficient to establish disability causation. Dr. Go specifically stated that "to a reasonable degree of medical certainty," legal pneumoconiosis significantly contributed to Claimant's respiratory disability.

[25] As the ALJ gave valid reasons for discrediting the opinions of Drs. Fino and Zaldivar, we need not address all of Employer's contentions regarding her additional findings with respect to these physicians' opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4.

Claimant's Exhibit 4 at 12; *see* Decision and Order at 41; *see generally Cochran*, 718 F.3d at 322-23; *Looney*, 678 F.3d at 311.

Further, Drs. Fino and Zaldivar offered no explanation why Claimant was not totally disabled due to legal pneumoconiosis other than their belief that he does not have the disease, contrary to the ALJ's finding. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) ("such opinions can carry little weight" and may not be credited absent "specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding" as to the presence of pneumoconiosis). We therefore affirm the ALJ's determination that Claimant established he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 41. Consequently, we affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718, and affirm the award of benefits. Decision and Order at 41.

Responsible Operator

The district director is charged with determining which of a miner's "potentially liable operator[s]" is the "responsible operator" liable for benefits. 20 C.F.R. §§725.407(a), 725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for at least one year and be financially capable of assuming liability for the payment of benefits.[26] 20 C.F.R. §725.494(e). The "responsible operator" is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1).

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

[26] The regulation at 20 C.F.R §725.494 further requires the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

The designated responsible operator may be relieved of liability only if it proves it is either 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). If the district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly designated operator must be dismissed and the Black Lung Disability Trust Fund must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (the regulations place "the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund").

In addressing Claimant's overall length of coal mine employment, the ALJ found Claimant demonstrated a calendar year of coal mine employment with Olga Coal in 1975. Decision and Order at 11. The ALJ explained her finding was "[b]ased on the reviewed materials," which included Claimant's SSA earnings record[27] and hearing testimony.[28] Decision and Order at 4, 9-11; *see* Director's Exhibit 9; Hearing Transcript at 30. She further found Claimant's testimony does not clearly demonstrate the beginning and ending dates of his employment and that application of the formula at 20 C.F.R. §725.101(a)(32)(iii) yielded more than 125 working days with Olga Coal in 1975, so she credited Claimant with a full year of coal mine employment in 1975. Decision and Order at 12-13. Despite Claimant's employment with Olga Coal that post-dated his employment

[27] Claimant's SSA earnings record reflects earnings with Olga Coal totaling $43.95 in the fourth quarter of 1974 and earnings totaling $14,100.00 over the first three quarters of 1975. Director's Exhibit 9 at 8.

[28] At the hearing, Claimant recalled working for Olga Coal for "a little over three years" after he worked for Youngs Branch. Hearing Transcript at 30. In response to subsequent questioning, Claimant was unable to recall the date he stopped working for Olga Coal, but confirmed that he worked for Olga Coal for over one year. *Id.* at 41-43. Although the ALJ did not specifically address the credibility of his statement, she found his hearing testimony generally credible, explaining that "Claimant is a reasonably reliable historian of his coal mine employment history. He was able to remember names and locations of mines where he worked, and the nature of the work he did." Decision and Order at 10 (citation omitted).

with Youngs Branch, in her separate analysis of the responsible operator issue, the ALJ found Youngs Branch was properly designated as the responsible operator.[29] *Id.* at 15-16.

As the regulatory definition of working in coal mine employment is the same for all purposes under the Act, 20 C.F.R. §725.101(a)(32)(i), Employer and the Director correctly note that the ALJ's responsible operator determination is inconsistent with her determination to credit Claimant with a full year of coal mine employment with Olga Coal in 1975. Employer's Brief at 12-13; Employer's Reply at 3; Director's Brief at 2-3. But Employer and the Director disagree as to the appropriate remedy. Employer asserts liability should transfer to the Trust Fund as Claimant's testimony supports the ALJ's finding that Olga Coal subsequently employed Claimant for a full year. Employer's Brief at 12-13; Employer's Reply at 3. By contrast, the Director contends transfer of liability to the Trust Fund is premature; he asserts the case should be remanded for the ALJ to "consider what the Social Security earnings record show[s] about the beginning and ending dates of [Claimant]'s employment with Olga Coal," and to resolve the conflict between this evidence and Claimant's testimony.[30] Director's Brief at 2-4. We agree with Employer's position as we see no conflict in the evidence.

The Director's assertion, that the lack of reported earnings in the fourth quarter of 1975 indicates Claimant had less than a calendar year of employment in 1975, incorrectly assumes that Olga Coal would have reported Claimant's fourth quarter earnings on its quarterly federal tax return. Contrary to the Director's assumption, however, because Claimant's reported earnings in the first three-quarters of 1975 match the maximum amount subject to Social Security tax as reported in Exhibit 609 of the *Black Lung Benefits Act* [*BLBA*] *Procedure Manual*, Olga Coal was not required to report Claimant's fourth quarter earnings and therefore no inference can be drawn regarding when Claimant's

[29] In addressing Claimant's possible post-Youngs Branch coal mine employment, the ALJ considered only whether Claimant worked for a cumulative period of one year with various Massey Energy subsidiaries in 1976 and 1978. Decision and Order at 15-16. She did not assess whether Olga Coal employed Claimant for a regulatory year.

[30] The Director contends Claimant's SSA earnings records establish Claimant worked less than a calendar year for Olga Coal in 1975 because they report "one day" of earnings in the fourth quarter of 1974 and only report earnings in the first three quarters of 1975. He contends the absence of reported earnings in the fourth quarter "demonstrate[s]" Claimant "did not work for Olga Coal at all in the fourth quarter" and therefore Olga Coal is not a potentially liable operator. Director's Brief at 4 (citing 20 C.F.R. §725.494(c)). But the Director does not challenge the ALJ's finding that Claimant's SSA earnings records reflect at least 125 days of coal mine employment in 1975.

employment ended in 1975.[31] *See Osborne v. Eagle Coal Co.*, 25 BLR 1-105, 1-203-04 (2016) (purpose of Exhibit 609 of the *BLBA Procedure Manual* "is to caution that the Social Security earnings record may underreport a miner's true wages because the earnings record 'will not normally show income greater than the [maximum taxable] amount for a given year.'" (citation omitted)); *see also* Office of Retirement and Disability Policy, U.S. Social Security Admin., Bulletin Vol. 69 No. 3, Social Security Administration's Master Earnings File: Background Information 29, 38-39 (2009) (prior to 1978, only data on earnings up to the taxable maximum were collected because any earnings over this amount did not factor into the Social Security benefits formula). Because Claimant's SSA earnings record shows he had earnings with Olga Coal in 1974 in addition to his earnings in the first three quarters of 1975, this evidence is consistent, rather than in conflict, with Claimant's testimony that he worked for Olga Coal for over a calendar-year. *See Osborne*, 25 BLR at 1-203-04. We therefore affirm, as supported by substantial evidence, the ALJ's finding that Claimant had a regulatory year of coal mine employment with Olga Coal in 1975. 20 C.F.R. §725.101(a)(32)(iii); *see Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997) (substantial evidence is more than a scintilla, but only such evidence that a reasonable mind could accept as adequate to support a conclusion); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (the ALJ has discretion to assess witness credibility and the Board will not disturb her findings unless they are inherently unreasonable); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (the ALJ may rely on a miner's testimony especially if the testimony is not contradicted by any documentation of record). Further, because the record does not contain a statement from the district director regarding Olga Coal's financial incapability to assume liability for benefits despite its having more recently employed Claimant than Youngs Branch, we reverse the ALJ's finding that Youngs Branch is the responsible operator. *See* 20 C.F.R. §725.495(c), (d). Liability thus transfers to the Trust Fund. 20 C.F.R. §725.495(d).

[31] Between 1938 and 1977, SSA (and its predecessor, the Social Security Board) required employers to report wages for each worker up to the maximum amount subject to Social Security tax on a quarterly basis. Office of Retirement and Disability Policy, U.S. Social Security Admin., Bulletin Vol. 69 No. 3, Social Security Administration's Master Earnings File: Background Information 29, 34 (2009). "If an employee reached the taxable maximum during the year, the employer was not required to report any information on that employee in subsequent quarters." *Id.* at 36.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed with regard to Claimant's entitlement, reversed with regard to the responsible operator, and remanded to the ALJ to modify her Order concerning the terms of payment.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' rejection of Employer's Appointments Clause, Removal Provisions, and Due Process arguments, as well as their decision to affirm the ALJ's award on the merits of entitlement.

As for liability, I agree with the majority that Employer must be dismissed as the responsible operator, but I reach that conclusion for reasons unrelated to whether Claimant had a full calendar year, 365-day employment relationship with Olga Coal. Based on the plain language of the definition of "year" at 20 C.F.R. §725.101(a)(32)(i)-(iii), and the ALJ's unchallenged finding that Claimant had 238.01 working days with Olga Coal in 1975, Employer satisfied its burden to establish that another potentially liable operator more recently employed Claimant for at least one year. 20 C.F.R. §725.495(c)(2); *see Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019); *Price v. Olga Coal Co.*, BRB No. 18-0570 BLA (June 30, 2020) (Buzzard, J., concurring and dissenting). Therefore, as the majority holds, liability must transfer to the Trust Fund.

The "responsible operator" is the "potentially liable operator" that most recently employed the miner for "at least one year." 20 C.F.R. §§725.494(c), 725.495(a). If the

district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly-designated operator must be dismissed and the Black Lung Disability Trust Fund must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (the regulations place "the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund").

Importantly, the regulations initially define "year" as "a period of one calendar year (365 days, or 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). In dicta, the Board has previously interpreted this prefatory clause to mean that 125 working days establishes one year of coal mine employment only if the miner also had a 365-day employment relationship with the coal mine operator.[32] *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003).

The regulation, however, sets forth additional factors for determining whether the miner had a year of coal mine employment. First, if the miner worked "at least 125 days during a calendar year," he is considered to have worked one year in coal mine employment "for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i). If he worked less than 125 days, he is entitled to credit for a fractional year "based on the ratio of the actual number of days worked to 125." *Id.* Second, "to the extent the evidence permits," the ALJ must ascertain the beginning and ending dates of the miner's employment. 20 C.F.R. §725.101(a)(32)(ii). If his employment "lasted for a calendar year . . . it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *Id.* Finally, if the evidence "is insufficient to establish the beginning and ending dates" of the miner's employment, or the employment "lasted less than a calendar year," the ALJ "may divide the miner's yearly income from work as a miner by

[32] *Clark* involved application of a prior definition of the term "year" for purposes of determining the responsible operator at 20 C.F.R. §725.493 (2000). As set forth in the concurrence in that case, the majority's commentary on the proper interpretation of the revised definition at 20 C.F.R. §725.101(a)(32)(i), (iii) was unnecessary to the resolution of the claim, as the new definition of "year" contained therein had not yet taken effect. *Clark*, 22 BLR at 1-284 (McGranery, J., concurring); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-335 (4th Cir 2007) (confirming the formula at 20 C.F.R. §725.101(a)(32)(iii) is inapplicable to claims pending on its effective date).

the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)."[33] 20 C.F.R. §725.101(a)(32)(iii).

The United States Court of Appeals for the Sixth Circuit, in *Shepherd*, is the only federal court to squarely address whether a finding of 125 working days under the revised regulations establishes one year of coal mine employment, even where the miner and employer did not have a 365-day employment relationship. In holding it does, the court determined that the "plain" and "unambiguous" language of the regulation provides four distinct methods to establish one year of coal mine employment and "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *Shepherd*, 915 F.3d at 402; *see Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir.1993) (125 working days equals "one year of work" under the prior definition of "year" applicable to invocation of statutory presumptions at 20 C.F.R. §718.201(b) (2000)). "[T]o assign any other meaning to the provisions" would "read out of the regulation §725.101(a)(32)(i)'s recognition that working 125 days in or around a coal mine within a calendar year will count as a year of coal mine employment 'for all purposes under the [Act].'" *Shepherd*, 915 F.3d at 402-403.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a prior iteration of the definition of "year" required a showing of both 125 working days and a 365-day employment relationship. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 329-331 (4th Cir 2007) (prior definition of year for determining responsible operator requires 365-day employment relationship); *Armco v. Martin*, 277 F.3d 468, 474-475 (4th Cir. 2002) (same). Neither decision, however, forecloses the Sixth Circuit's interpretation of the revised regulation in *Shepherd*.

Like the Board's decision in *Clark*, the Fourth Circuit's decisions involved claims that predated the effective date of the current definition. *See Mitchell*, 479 F.3d at 334-35; *Armco*, 277 F.3d at 475. While *Armco* stated that the revised prefatory clause "informed" its analysis of what the "earlier, less clearly written regulations were intended to mean," it did not discuss the newly-added subparagraphs (i) through (iii) that the Sixth Circuit interpreted as providing independent methods for establishing a year of coal mine employment. *See Shepherd*, 915 F.3d at 402. *Mitchell*, on the other hand, involved the factually and legally distinct question of whether "regular" employment (a term excluded

[33] The BLS data is reported at Exhibit 610 of the Coal Mine (Black Lung Benefits Act) Procedure Manual. *See Average Earnings of Employees in Coal Mining*, https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610.pdf. It provides the "daily earnings" and "yearly earnings (125 days)" for employees in coal mining each year from 1961 to 2017. *Id*.

from the new definition of "year") could be established based on 125 working days over the course of an *entire* fourteen-year career. *See Mitchell*, 479 F.3d at 334-335 ("brief and sporadic" employment of 200 days over an entire fourteen-year career is not "regular" coal mine employment with one operator). It also explicitly acknowledged that subparagraph (iii) "by its terms" provides a method for the ALJ to calculate a miner's coal mine employment even when "the miner's employment lasted less than one year." *Id*.; *see Shepherd*, 915 F.3d at 402 ("If the . . . calculation [at subparagraph (iii)] yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year.").

Finding the Sixth Circuit's rationale persuasive, not contrary to Fourth Circuit precedent, and supportive of a consistent application of the definition of "year" across all claims under the Act, I would hold the ALJ's finding that Claimant worked 238.01 days with Olga Coal is determinative of Employer having been improperly designated as the responsible operator.

Consequently, I agree with the majority that Employer must be dismissed from this case and the Black Lung Disability Trust Fund must assume liability for Claimant's benefits.

GREG J. BUZZARD
Administrative Appeals Judge