**U.S. Department of Labor**

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

BRB No. 23-0145 BLA

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| MIKEAL COLEMAN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| WESTBURY COAL MINING PARTNERSHIP | ) | |
| | ) | |
| and | ) | DATE ISSUED: 07/17/2024 |
| | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| 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 Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Olgamaris Fernandez (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 BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge and BOGGS, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-05826) rendered on a subsequent claim[1] filed on April 24, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ first found Employer is the properly designated responsible operator. Next, she credited Claimant with fifteen years of underground coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R.

[1] Claimant filed a prior claim on September 24, 2015, that was denied as abandoned, which is deemed a finding that Claimant did not establish any applicable condition of entitlement. *See* 20 C.F.R. §725.409(a)(3),(c); Director's Exhibits 1, 3. When a claimant files a claim for benefits more than one year after the denial of a prior claim becomes final, the ALJ must also deny the subsequent claim unless she 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. §725.309(c)(3). Because Claimant did not establish any applicable condition of entitlement in his prior claim, he had to submit evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled 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.

§725.309. The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It further contends the ALJ erred in calculating the length of Claimant's coal mine employment and therefore in finding the Section 411(c)(4) presumption invoked.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's responsible operator determination. Employer replied to Claimant's response brief, reiterating its contentions.

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.[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).

**Responsible Operator**

The responsible operator is the potentially liable operator that most recently employed the miner.[5] 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,

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment and thus a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 33.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28-29; Director's Exhibits 6, 7.

[5] 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 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 working 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).

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 proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found that while Employer contested its status as the responsible operator, it failed to offer any evidence or argument to dispute its designation. Decision and Order at 7. She further found it undisputed that Employer last employed Claimant for at least one year and is financially capable of assuming liability; thus, she found Employer was properly designated as the responsible operator. *Id.*

Employer argues the ALJ contradictorily credited Claimant's testimony that he continued to work two to three years after he stopped working for Employer when calculating his length of coal mine employment, but then in her responsible operator analysis found Employer was Claimant's last employer of more than one year. Employer's Brief at 9-10. It contends the ALJ's determination that Claimant worked as a coal miner through 1985 indicates Claimant was employed after his work with Employer, which ended in 1983. *Id.* Thus, Employer argues it must be dismissed as the responsible operator. *Id.* at 11.

As the ALJ found, while Employer generally contested its designation as the responsible operator, it failed to raise any arguments or point to any evidence disputing its designation. Decision and Order at 7; Employer's Closing Argument at 2. Because Employer failed to brief this argument before the ALJ, we will not address it. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (a party cannot raise an argument before the Board for the first time on appeal); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986); *see also 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). Thus, we affirm Employer's designation as the responsible operator.[6] 20 C.F.R. §725.495(c)(2); Decision and Order at 7.

[6] Employer also asserts the ALJ's consideration of Claimant's testimony that he worked after 1983 violates its due process rights, as the parties did not raise another potential subsequent operator as an issue. Employer's Brief at 10-11. As the ALJ did not consider Claimant's testimony to determine the responsible operator issue, we need not reach this issue. In addition, we note that Employer was on notice throughout the litigation of this claim that Claimant contended he had more than fifteen years of coal mine employment and Employer's counsel had an opportunity to cross-examine him about his

**Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment**

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in 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 an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's hearing testimony, application for benefits, Social Security Earnings Statement (SSES), and notations in the medical reports regarding the length of his coal mine employment. Decision and Order at 5; Hearing Transcript; Director's Exhibits 3, 4, 6, 7, 14; Claimant's Exhibit 2; Employer's Exhibit 6. She indicated the record did not establish the exact beginning and ending dates of any period of Claimant's coal mine employment, but his SSES reflects earnings from 1968 to 1983. Decision and Order at 5. However, she found these records were incomplete because Claimant testified that he began working in coal mines when he was seventeen, hand-loading coal, and was paid in cash "under the table" by different coal mine employers for "probably 10 or 12 years." *Id., quoting* Hearing Transcript at 19-20.

The ALJ found Claimant's testimony credible and, together with "other representations in the record," established he worked in underground coal mine employment from 1966 to 1985, a period of nineteen years.[7] *Id.* at 5-6. She then subtracted four years of employment based on Claimant's concession that he worked three or four years in construction work between his coal mining jobs. *Id.* at 6; Hearing Transcript at 36. Thus, the ALJ found Claimant established fifteen years of underground coal mine employment. Decision and Order at 6.

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post-1983 employment. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998) (due process requires notice and the opportunity to respond).

[7] Assuming she counted each year as a full calendar year, 1966 through 1985 would constitute twenty calendar years.

Employer argues the ALJ erred in crediting Claimant with fifteen years of coal mine employment.[8] Employer's Brief at 11-17. Specifically, it contends she failed to explain why she chose 1985 as his last date of employment rather 1983, as reflected by his SSES, or other dates Claimant provided as the last date of his employment, including 1987, "the late [nineteen] eighties," or "the [nineteen] nineties." Employer's Brief at 13; Employer's Reply Brief at 1-5. Further, it contends she did not explain when in 1985 she believed Claimant retired, which would affect her findings given that it seems she found precisely fifteen years of coal mine employment established. Employer' s Brief at 13. Relatedly, it contends the ALJ failed to explain why she credited Claimant's testimony over other contrary relevant evidence. Employer's Brief at 14-17; Employer's Reply Brief at 1-5. Finally, it argues the ALJ, without explanation, provided Claimant with "extra credit" for several years he had only limited earnings reflected on his SSES, including 1968 through 1970. Employer's Brief at 13-14. We agree with Employer that the ALJ has failed to adequately explain her findings and conclusions.

This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position the ALJ must 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 Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (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 v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).[9] 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.[10] 20 C.F.R. §725.101(a)(32). Proof that a miner

[8] We affirm, as unchallenged, the ALJ's finding that Claimant performed all of his coal mine employment in underground coal mines. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

[9] Although our dissenting colleague would apply the rationale for crediting a miner with a full year of coal mine employment as the United States Court of Appeals for the Sixth Circuit set forth in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship.

[10] 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

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.

We agree the ALJ did not adequately explain why she chose 1985 as the year Claimant was last employed in coal mine employment or resolve the apparent conflicts between Claimant's testimony and other relevant evidence in the record. The ALJ noted that Claimant provided varying dates for when he last worked and that he could not specify the year. Decision and Order at 5. She further noted that Claimant also testified that he worked after 1983, consistently indicated that he worked after that date elsewhere in the record, credibly testified that he worked ten to twelve years "under the table," and further testified he worked more than fifteen years in coal mine employment. Decision and Order at 5.

Although the ALJ permissibly credited Claimant's testimony that he had "under the table" employment[11] not reflected on his SSES, the ALJ did not explain why that fact necessarily supports her conclusion that such "under the table" employment continued beyond Claimant's work with Employer in 1983. Decision and Order at 5. Claimant testified that his "under the table" employment occurred "when he was young," beginning when he hand-loaded coal at seventeen years old. *Id.*; Hearing Transcript at 21-22, 33, 49. Further, as Employer argues, while Claimant indicated he believed he worked after 1983, he also consistently testified that his last employment was with Employer. Hearing Transcript at 19, 30, 42, 50-51. Thus, the ALJ has not adequately explained, as the

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

[11] It is within the ALJ's purview to assess the credibility of witness testimony *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility and weight of the evidence, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The ALJ noted Claimant specifically listed four owners he worked for who paid him in cash (Bill Hill, Harvey Coral, Westchester Wright, and James McVey), which she found bolstered the credibility of his testimony that he had "under the table" coal mine employment not reflected in his employment records. Decision and Order at 5 n.4; Hearing Transcript at 19, 21.

Administrative Procedure Act (APA) requires,[12] why Claimant's "under the table" employment extended beyond 1983, the date of his last employment recorded on Claimant's SSES. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with Employer that the ALJ did not adequately explain her calculations, including whether Claimant worked full calendar years in each year she found Claimant worked in coal mine employment. Employer's Brief at 13-14. As Employer notes, there are multiple years in which Claimant's SSES indicates only limited earnings and there are no earnings after 1983. Employer's Brief at 13-16. Thus, it is unclear on what basis the ALJ credited Claimant with a full calendar year of coal mine employment for each of the years she credited. Thus, the ALJ failed to provide a reasoned calculation in determining Claimant had fifteen years of coal mine employment. *Muncy*, 25 BLR at 1-27.

Thus, we vacate the ALJ's finding that Claimant established fifteen years of coal mine employment. Because we cannot affirm the ALJ's finding that Claimant established fifteen years of qualifying coal mine employment, we must also vacate the ALJ's finding that Claimant invoked the rebuttable presumption at Section 411(c)(4) and the award of benefits.[13] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 33, 41-42.

**Remand Instructions**

On remand, the ALJ must reconsider the relevant evidence to determine Claimant's length of coal mine employment, using any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. She must first determine if Claimant has worked a calendar year or partial years totaling a calendar year and then determine whether Claimant worked for 125 days within each calendar year period, adequately explaining her findings as the APA requires. *Daniels*, 479 F.3d at 334-35; *Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Claimant established fifteen or more years of coal mine employment, thereby invoking the Section 411(c)(4) presumption, she may reinstate her

[12] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "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).

[13] We decline to address, as premature, Employer's arguments regarding the ALJ's weighing of the opinions of Drs. Nader and Green regarding pneumoconiosis. Employer's Brief at 17-20; Decision and Order at 39, 41.

determination that Employer has not rebutted the presumption, as Employer has not challenged these findings. 20 C.F.R. §718.305(d)(1); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 41. If Claimant is unable to establish at least fifteen years of coal mine employment, 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority that Employer has forfeited its argument that it is not the responsible operator; thus, the ALJ's finding should be affirmed. I also agree that remand is required because the ALJ did not adequately explain her finding that Claimant established at least fifteen years of coal mine employment. Because the ALJ's findings on remand may impact whether Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, I also agree it is premature to consider Employer's arguments relating to whether it rebutted the presumption.

However, I respectfully dissent from the majority's instruction that the ALJ cannot credit Claimant with a full year of coal mine employment unless he establishes a 365-day employment relationship with his employer(s).

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.[14] *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 definition of "year").

GREG J. BUZZARD
Administrative Appeals Judge

[14] Notably, the majority's citation to Fourth Circuit law as requiring a 365-day employment relationship is contrary to the Director's position in *Baldwin* that the circuit has not issued any 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).