U.S. Department of Labor

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

BRB Nos. 20-0147 BLA
and 20-0148 BLA

VIRGINIA D. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 6/29/2022
	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (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 JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, and JONES:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-05840, 2019-BLA-06148) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 2, 2014,[1] and a survivor's claim filed on April 22, 2019.[2]

The ALJ initially found Heritage Coal Company (Heritage),[3] self-insured through its parent company, Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. She credited the Miner with 16.85 years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] and established a change in an applicable condition of entitlement.[5] 30 U.S.C. §921(c)(4)

[1] This is the Miner's third claim for benefits. ALJ Richard A. Morgan denied his most recent claim on October 9, 2008, because he failed to establish pneumoconiosis. Miner's Claim (MC) Director's Exhibit 2.

[2] Claimant, the Miner's widow, is pursuing the miner's claim on his behalf as well as her own survivor's claim. The Benefits Review Board consolidated Employer's appeals in the miner's and survivor's claims for purposes of decision only.

[3] The Miner worked for Peabody Coal Company, but this entity changed its name to Heritage after the Miner retired. Director's Brief at 2. For the purposes of this decision, we will refer to the responsible operator as Heritage.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless "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 the Miner's most recent prior claim was denied for failure to establish pneumoconiosis,

(2018); 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because he found the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[7] It further argues the ALJ erred in finding it liable for the payment of benefits. It also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant established at least fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption. Finally, it asserts the ALJ erred in finding it did not rebut the presumption.[8]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to

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Claimant had to establish this element of entitlement in order to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; MC Director's Exhibit 2.

[6] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

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

U.S. Const. art. II, § 2, cl. 2.

[8] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2).

reject Employer's constitutional arguments. The Director also contends the ALJ properly determined Employer is responsible for payment of benefits.

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.[9] 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).

Appointments Clause

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), Employer argues that the district director lacked the authority to identify the responsible operator and process this case because the district director is an inferior officer of the United States not properly appointed pursuant to the Appointments Clause. Employer's Brief at 14-21.

We conclude Employer forfeited its Appointments Clause challenge. Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

The regulations implementing the Act clearly set out the steps a party must take to preserve an issue before the district director, ALJ, and Board. After a claim is filed, the district director shall take such action as is necessary to develop, process, and make determinations with respect to the claim. 20 C.F.R. §725.401. As the district director processes a claim, the parties have opportunities to raise issues, make arguments, and submit evidence. *See, e.g.*, 20 C.F.R. §§725.408, 725.410, 725.412, 725.414. "After the evidentiary development of the claim is completed and all contested issues, if any, are joined," the district director must issue a proposed decision and order "which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director." 20 C.F.R. §725.418.

"Upon receiving a proposed decision and order from the district director, a party, to seek further review, must object to that proposal by 'specify[ing] the findings and conclusions [of the district director] with which the responding party disagrees.'" *Joseph*

[9] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Survivor's Claim (SC) Employer's Exhibit 18 at 6-7.

Forrester Trucking v. Director, OWCP [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021), *quoting* 20 C.F.R. §725.419(b). The party must then request a hearing before the Office of Administrative Law Judges (OALJ) and, in doing so, specifically "highlight the 'contested issue[s] of fact or law' to be addressed at the hearing." *Davis*, 987 F.3d at 588, *quoting* 20 C.F.R. §725.451. In any claim in which a hearing is requested "and with respect to which the district director has completed evidentiary development and adjudication without having resolved all contested issues," the district director must refer the claim to the OALJ for a hearing. 20 C.F.R. §725.421(a).

Failure to contest an issue at this stage has consequences. In any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The "hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An ALJ may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director."[10] 20 C.F.R. §725.463(b). Absent application of the exception for issues not reasonably ascertainable, the failure to contest an issue before the district director constitutes forfeiture of the issue. *Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003) (holding 20 C.F.R. §725.463(a) is among the "provisions [that] define the outer limit of the scope of the hearing, preventing its expansion"); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985).

The Board's review of legal questions, in turn, is limited to "conclusions of law on which the decision or order appealed from was based." 20 C.F.R. §802.301(a); *Davis*, 987 F.3d at 588. Thus, the Board routinely declines to consider arguments not properly raised below, including untimely Appointments Clause challenges. *See, e.g.*, *Davis*, 987 F.3d at 588 (affirming Board's holdings that three employers forfeited Appointments Clause arguments as consistent with Board's decades-long, "near black-letter" application of "the principle that issues not raised before the ALJ are forfeited"); *Powell v. Service Employee Int'l, Inc.*, 53 BRBS 13, 15 (2019) (Appointments Clause argument not raised to the ALJ is forfeited); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019) (Appointments Clause argument forfeited when first raised in a motion for reconsideration to the ALJ).

[10] Where an issue is not reasonably ascertainable, a party may raise it "at any time after a claim has been transmitted by the district director to the [OALJ] and prior to decision," and an ALJ may "in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue." 20 C.F.R. §725.463(b).

The record establishes Employer did not preserve the issue for Board review by complying with the applicable regulatory requirements at 20 C.F.R. §§725.419(b), 725.451. After the district director issued a Proposed Decision and Order on March 13, 2017, Employer responded by rejecting the district director's findings, requesting a hearing before an ALJ, and contesting its designation as the responsible operator and Claimant's entitlement to benefits. Miner's Claim (MC) Director's Exhibits 63, 67-68. Employer did not, however, identify the district director's authority to process claims as a contested issue the ALJ must resolve.[11] *Id*.

Thus, unless the issue was a new one that was not "reasonably ascertainable" while the claim was before the district director, under the terms of the regulation Employer had no entitlement to have the issue considered by the ALJ. 20 C.F.R. §725.463; MC Director's Exhibit 72. Employer has not alleged, let alone presented evidence and argument, before us or the ALJ[12] that the issue is a new one that was not reasonably ascertainable by the parties at that time.

[11] On July 18, 2018, Employer informed the ALJ that it was preserving the issue of whether the ALJ was properly appointed under the Appointments Clause. July 18, 2018 Notice of Issue Preservation. Despite being aware of the substantive law underpinning its argument that the district director's appointment was also unconstitutional, Employer did not raise the issue in its July 18, 2018 Notice or at the March 13, 2019 hearing conducted in this matter. Instead, it waited until filing its post-hearing brief to raise the issue for the first time. Employer's Post-Hearing Brief at 2, 20-22. The ALJ did not list this issue as one for adjudication. Decision and Order at 3-4. Nor did she address it in her Decision and Order, but instead simply noted Employer raised "constitutional issues for purposes of appeal" in its post-hearing brief. *Id*. at 4 n.7.

[12] In its post-hearing brief, Employer argued that extraordinary circumstances exist "to mandate the reopening of the record for submission of documentary evidence" relevant to the liability issue. Employer's Post-Hearing Brief at 20-22. It asserted if the ALJ did not reopen the record and allowed the district director's liability determination to stand, then the district director would be acting "as inferior officer, subject to the Supreme Court's holding in *Lucia*." *Id*. Thus, Employer maintained an "[e]xtraordinary circumstance is also created by the Court's extraordinary holding in *Lucia*." *Id*. However, Employer waited more than a year after *Lucia* was issued to raise its argument for the first time. Moreover, an issue is "reasonably ascertainable" to a party if, with due diligence, the party could have obtained all the necessary information to raise it. *See Rockwood Casualty Insurance Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1217-18 (10th Cir. 2019). Employer's argument that the district director is an inferior officer subject to the Appointments Clause is based entirely on the "significant authority" test from *Freytag v. Comm'r*, 501 U.S. 868 (1991), a case decided more than thirty years ago. The Supreme

In light of the above, we conclude Employer forfeited its right to challenge the district director's authority to identify the responsible operator and process this case. Because this issue was not listed as a contested issue in the transmission of the record from the district director to the OALJ, the ALJ was precluded from addressing it unless it was "not reasonably ascertainable." 20 C.F.R. §725.463(b). Employer did not argue before the ALJ and does not contest before us that it was. *Davis*, 987 F.3d at 590 ("party must touch each base of the preservation process during the administrative and court proceedings"); 20 C.F.R. §725.463(b). Nor has it shown the regulation's terms are inapplicable or should be waived. Because it failed to comply with the regulation, Employer forfeited its challenge and is not entitled to our consideration of the issue. We therefore decline to address it.[13]

Responsible Insurance Carrier

We now turn to Employer's arguments on the merits of why it believes it cannot be held liable for this claim.

Heritage employed the Miner in coal mine employment from 1978 to 1994, and it was the last potentially liable operator to do so.[14] Director's Brief at 2 n.2, *citing* MC Director's Exhibits 6-9. By the end of his employment, Heritage was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy. Director's Brief at 2;

Court made clear in *Lucia* that *Freytag* "says everything necessary to decide" whether an official is an inferior officer. *Lucia*, 138 S. Ct. at 2053. Thus, arguably, Employer should have been aware of the issue even prior to the issuance of the *Lucia* decision. In any event, it was reasonably ascertainable once the *Lucia* decision was issued in April 2018, making Employer's argument untimely.

[13] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 43-45. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[14] Although the Miner's Social Security Administration records show earnings with Pine Ridge Coal Company in 1994 and 1995, MC Director's Exhibit 6, the ALJ found Employer failed to establish that another potentially liable operator that is financially capable of assuming liability more recently employed him for at least one year. Decision and Order at 29-36; 20 C.F.R. §725.495(c). We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

Employer's Brief at 31 ("Peabody Energy was previously authorized to self-insure its obligations . . . on [the Miner's] last date of exposure.").

In 2007, thirteen years after the Miner's coal mine employment ended, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). MC Director's Exhibit 28 (Separation Agreement). On March 4, 2011, DOL authorized Patriot to self-insure "retro-active to July 1, 1973" for black lung liabilities, including for claims filed before Patriot purchased the Peabody Energy subsidiaries. MC Director's Exhibit 29 (Steven Breeskin's March 4, 2011 Letter to Patriot; Decision Granting Authority to Act as a Self-Insurer).[15] This authorization determined the amount of potential liability to insure the obligation, acknowledged Patriot's deposit of U.S. Treasury funds with the Federal Reserve Bank on behalf of the DOL in satisfaction of the liability obligation, and released a letter of credit Patriot financed under Peabody Energy's self-insurance program.[16] *Id.* In 2015, Patriot went bankrupt. Director's Brief at 2; MC Director's Exhibit 30.

Employer does not directly challenge Heritage's designation as the responsible operator.[17] Rather, it asserts the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 21-45.

To support its assertion that Patriot is the liable carrier, Employer submitted deposition testimony from David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation (DCMWC) officials, marked MC Employer's

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[15] Steven Breeskin is the former Director of the Division of Coal Mine Workers' Compensation (DCMWC).

[16] The monetary values are redacted. MC Director's Exhibit 29; Employer's Exhibit 4.

[17] Heritage Coal Company (Heritage) qualifies as a potentially liable operator because it is undisputed that: (1) the Miner's disability arose at least in part out of employment with Heritage; (2) Heritage operated a mine after June 30, 1973; (3) Heritage employed the Miner as a miner for a cumulative period of at least one year; (4) the Miner's employment included at least one working day after December 31, 1969; and (5) Heritage is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Heritage was the last potentially liable operator to employ the Miner, the ALJ designated Heritage as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 36.

Exhibits 1-2 and 15-16.[18] It also submitted documentary evidence marked MC Employer's Exhibits 5-9. [19]

The ALJ excluded the depositions of Messrs. Benedict and Breeskin because Employer failed to timely identify them as liability witnesses and did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §§725.414(c), 725.457(c)(1); May 3, 2019 Order Denying Employer's Motion to Admit (May 3, 2019 Order). She also excluded MC Employer's Exhibits 5-9 because they were not submitted to the district director, and Employer did not establish extraordinary circumstances for failing to do so.[20] *See* 20 C.F.R. §§725.414(d), 725.456(b)(1); May 3, 2019 Order; Oct. 29, 2019 Order Excluding Evidence Post-Hearing (Oct. 29, 2019 Order). The ALJ rejected Employer's argument that Patriot is the liable carrier, and she concluded Heritage and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 29-26.

Employer argues the ALJ erred in excluding the depositions of the two former DCMWC officials and MC Employer's Exhibits 5-9. Employer's Brief at 21-29. Therefore it requests the Board remand the case for the ALJ to admit the evidence and reconsider the responsible carrier issue. *Id*. Employer also argues the ALJ erred in finding it liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) before transferring liability to Peabody Energy, DOL must establish it exhausted any available funds from the security Patriot gave to secure its self-insurance status; (3) DOL released Peabody Energy from liability; and (4) the Director is equitably

[18] Employer's Exhibits 15 and 16 are the *ex parte* deposition transcripts.

[19] The documentary evidence includes Employer's Exhibit 5, a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 6, an undated letter from Michael Chance regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 7, a March 4, 2011 indemnity agreement releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance because the DOL had either lost or destroyed it; Employer's Exhibit 8, documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Exhibit 9, Peabody's indemnity bond. MC Employer's Exhibits 5-9.

[20] The ALJ also noted Employer's Exhibits 5 and 6 were attached to the deposition transcripts of Messrs. Benedict and Breeskin and thus excluded those exhibits based on her exclusion of the deposition testimony. Oct. 29, 2019 Order Excluding Evidence Post-Hearing.

estopped from imposing liability on the company. *Id*. at 29-25. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.[21] *Id*.

Exclusion of Evidence

The district director issued a Notice of Claim on February 19, 2016, designating Heritage, self-insured through Peabody Energy, as a "potentially liable operator." MC Director's Exhibit 38. The notice gave Employer ninety days to submit evidence disputing its own designation as a potential liable operator. *Id*. Employer responded to the Notice of Claim and denied liability, but did not submit any liability evidence. MC Director's Exhibit 44. Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE) identifying Heritage as the designated responsible operator and Peabody Energy as its insurer. MC Director's Exhibit 56. The district director informed Employer it had until July 31, 2016 to submit evidence relevant to the liability issue and until August 30, 2016 to submit evidence responsive to evidence submitted by another party. *Id*. The district director also stated Employer should identify any witnesses it intended to rely on if the case was referred to the OALJ. *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3, *citing* 20 C.F.R. §725.456(b)(1). *Id*.

Employer responded to the SSAE and contested liability. MC Director's Exhibits 44, 58. On June 29, 2016, Employer designated as liability witnesses 1) Robert Fenley, a Peabody Energy representative, and 2) the Secretary of Labor or an unidentified DOL representative with "current knowledge of the Patriot bankruptcy." MC Director's Exhibit 46. It also stated all of Peabody Energy's liabilities for black lung claims had been transferred to Patriot by contract, and thus the Trust Fund was responsible for paying benefits because of Patriot's bankruptcy. *Id*. On August 30, 2016, it submitted a 2007 Separation Agreement between Peabody Energy and Patriot to support its controversion of liability. MC Director's Exhibit 28. After Employer requested an extension of time, the district director granted it until September 15, 2016, to meet the SSAE deadlines. MC Director's Exhibits 60-61. On September 20, 2016, five days after the new deadline, Employer identified Mr. Breeskin and Mr. Benedict as potential liability witnesses. MC

[21] Employer also argues that an ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) would be misplaced, stating that other ALJs have held these regulations preempt "Peabody [Energy's] foregoing arguments." Employer's Brief at 43-45. The Director correctly observes that, in the case at bar, neither the ALJ nor the Director relied on either of these regulations. Thus, we need not address these arguments.

Director's Exhibit 29. It also submitted the DCMWC's decision authorizing Patriot to self-insure, and a March 4, 2011 letter from Steven Breeskin to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program. *Id*.

Employer filed a request for the production of documents with the Director on January 25, 2017, related to Patriot's application for self-insurance, its bankruptcy, and the status of the security deposits it submitted "to cover its liability as a self-insurer." MC Director's Exhibit 47. The Director responded on February 23, 2017, and declined to produce the requested documents. MC Director's Exhibit 48. However, on March 9, 2017, the Director produced approximately 800 pages of documents in response to identical discovery requests in another case. Employer's Brief at 21-22, 28-29. Employer did not attempt to submit any additional documentation to the district director regarding its liability or seek another extension of the prior deadline.

The district director issued a Proposed Decision and Order on March 13, 2017, finding Heritage, self-insured through Peabody Energy, is the responsible operator. MC Director's Exhibit 63. Employer requested a hearing, and the case was forwarded to the OALJ on April 11, 2017. MC Director's Exhibits 67, 68, 72.

After the case was transferred to the OALJ, Employer filed documentary evidence marked MC Employer's Exhibits 3 through 9 pertaining to the responsible operator issue. *See* Nov. 5, 2018 Submission of Additional Documentary Evidence. Thereafter it submitted transcripts of depositions of Messrs. Breeskin and Benedict that it conducted as part of other black lung claims. *See* Feb. 22, 2019 and Mar. 8, 2019 Supplemental Notices of Filings.

The ALJ excluded the depositions of Messrs. Benedict and Breeskin because Employer failed to timely identify them as liability witnesses and did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §§725.414(c), 725.457(c)(1); May 3, 2019 Order. She admitted MC Employer's Exhibits 3 and 4 because Employer submitted them to the district director in MC Director's Exhibit 29. May 3, 2019 Order. But she excluded MC Employer's Exhibits 5 through 9 because she found Employer did not submit them to the district director and did not establish extraordinary circumstances for failing to do so. *See* 20 C.F.R. §725.456(b)(1); May 3, 2019 Order; Oct. 29, 2019 Order.

Employer initially contends it properly identified Messrs. Breeskin and Benedict as potential liability witnesses while the claim was before the district director. Employer's Brief at 21-25. We disagree.

Citing 20 C.F.R. §725.457(c)(1), Employer contends the regulations only require that it designate its liability witnesses at any point while the claim is before the district director and not pursuant to the deadlines set by the district director. Employer's Brief at

23-24. It argues that, to the extent the ALJ determined the "more restrictive time deadlines in the SSAE trump the less restrictive deadlines in [20 C.F.R. §725.457(c)(1)] , this would constitute impermissible rulemaking . . . ." *Id*. This argument lacks merit. Section 725.457(c) specifically provides, "No person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory . . . unless that person meets the requirements of [20 C.F.R.] §725.414(c)."[22] 20 C.F.R. §725.457(c). Section 725.414(c), in turn, provides, in "*accordance with the schedule issued by the district director*, all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c) (emphasis added). "Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances." *Id*. This language specific to liability testimony takes precedence over the more general language Employer cites at 20 C.F.R. §725.457(c)(1). *See D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling"). Thus the ALJ correctly determined Employer was required to designate Messrs. Benedict and Breeskin as its liability witnesses based on the deadline set by the district director,[23] and Employer failed to do so by the extended deadline of September 15,

[22] Employer cites 20 C.F.R. §725.457(c)(1), which states in "the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director." Employer's Brief at 23-24. It ignores the preceding and specific language found in 20 C.F.R. §725.457(c), which precludes an individual from testifying unless they meet the "requirements of [20 C.F.R.] §725.414(c)." 20 C.F.R. §725.457(c).

[23] Employer contends the Director did not object to its untimely designation of Messrs. Benedict and Breeskin when this claim was before the district director, and the district director included the September 20, 2016 designation letter in the record when transferring the claim to OALJ. Employer's Brief at 24. Thus it argues the Director has waived any objection to its liability witnesses designation. *Id*. We disagree. The regulations provide that documents transmitted to the ALJ shall be placed into evidence but are "subject to objection by any party." 20 C.F.R. §725.456(a). As the Director notes, he objected at the "first reasonable opportunity" – when Employer sought to admit the relevant deposition transcripts. Director's Brief at 19. Thus the ALJ did not err by considering this issue when it was before her.

2016.[24] 20 C.F.R. §§725.414(c), 725.457(c); May 3, 2019 Order; MC Director's Exhibit 61.

Employer also argues the ALJ erred in excluding the deposition transcripts and the documentary evidence because evidence pertaining to the "correct insurer" is not subject to the limitations set forth at 20 C.F.R. §§725.414, 725.456(b)(1). Employer's Brief at 25-26. We disagree. A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its liability for the payment of benefits. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the ALJ properly found the regulations require that, absent extraordinary circumstances, liability witness designations must be made within the deadlines set by the district director and liability evidence pertaining to the responsible carrier must be timely submitted to the district director.[25] 20 C.F.R. §§725.414(c), (d), 725.456(b)(1), 725.457(c); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000); May 3, 2019 Order; Oct. 29, 2019 Order.

Employer asserts the ALJ erred in applying the extraordinary circumstances standard for the admission of documentary evidence contained in MC Employer's Exhibits 5-9. Employer's Brief at 26-27. It argues that because the Director is a party to the claim, and possessed but did not voluntarily share these exhibits with Employer, it need only show good cause for failing to timely exchange its evidence with the Director. *Id.*, *citing* 20

[24] Employer also argues its general identification of an unidentified DOL representative with "current knowledge of the Patriot bankruptcy" on June 29, 2017, constitutes a timely identification of Messrs. Benedict and Breeskin. Employer's Brief at 23-24; MC Director's Exhibit 46. Contrary to Employer's argument, the applicable regulation requires Employer to notify the district director of the specific "name[s] and current address[es]" of its liability witness. 20 C.F.R. §725.414(c). Because its general June 29, 2017 designation did not include the pertinent information, Employer did not comply with the regulations.

[25] Employer contends the Board has never interpreted the applicable regulations to require employer "to provide evidence or [identify] witnesses pertaining to a coverage dispute before the district director." Employer's Brief at 25. Contrary to Employer's contention, the Board has consistently held the regulations regarding liability evidence apply to carriers as well as to operators. *See Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, slip op. at 4 (Sept. 19, 2012) (unpub.); *J.H.B.* [*Boyd*] *v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, slip op. at 5 (June 30, 2009) (unpub.).

C.F.R. §725.456(b)(3) (if a party does not demonstrate good cause for failing to exchange documentary evidence, including medical reports, twenty days prior to the hearing, the ALJ must either exclude the evidence or remand the case to the district director for consideration of that evidence). Contrary to Employer's contention, 20 C.F.R. §725.456(b)(3) addresses the admission of other types of documentary evidence, such as medical reports, not exchanged twenty days before the hearing; the applicable regulation for liability evidence at 20 C.F.R. §725.456(b)(1) explicitly requires a showing of "extraordinary circumstances" for failing to submit it to the district director. 20 C.F.R. §725.456(b)(1).

Employer next argues the ALJ erred in finding it failed to establish extraordinary circumstances for not timely designating its liability witnesses or submitting its liability evidence to the district director. Employer's Brief at 27-29. Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer asserts extraordinary circumstances exist because the Director was in possession of the liability evidence but did not provide it to Employer prior to the September 15, 2016 extended deadline for submitting evidence to the district director. Employer's Brief at 27-29. However, the mere fact that the DOL possessed liability evidence does not establish extraordinary circumstances. It is Employer's responsibility, not the Director's, to submit any evidence relevant to its liability by the deadline set forth in the SSAE. *See* 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1).

Further, the ALJ addressed Employer's argument that the Director's failure to cooperate with its discovery requests constitutes extraordinary circumstances. May 3, 2019 Order. The ALJ noted Employer propounded its request for documents to the Director on January 25, 2017, after the September 15, 2016 extended deadline for submitting evidence to the district director, and ultimately received the requested documents in March of 2017 in another case. May 3, 2019 Order at 5-6; *see* MC Director's Exhibit 47.

With respect to Employer's failure to timely designate liability witnesses, the ALJ also rejected Employer's argument that the Director's failure to cooperate with its discovery requests constitutes extraordinary circumstances. She noted Employer designated Messrs. Benedict and Breeskin on September 20, 2016, well before it first propounded discovery on the Director and five days after the September 15, 2016 deadline set by the district director. May 3, 2019 Order at 5-6; *see* MC Director's Exhibits 29, 47. Thus she found "Employer obviously knew that the testimony of Messrs. Benedict and Breeskin may be relevant to Peabody's liability before that document production [request] because it identified [them] as liability witnesses in September 2016." *Id*. Because she found Employer failed to adequately explain its untimely witness designation, the ALJ

permissibly found Employer failed to establish extraordinary circumstances to excuse its failure to timely identify Messrs. Benedict and Breeskin as liability witnesses. *Blake*, 24 BLR at 1-113; 20 C.F.R. §§725.414(c), 725.457(c)(1); May 3, 2019 Order at 5-6.

With respect to the documentary evidence contained in Employer's Exhibits 5-9, the ALJ acknowledged Employer "did not receive (at least some of) these documents prior to the issuance of the Proposed Decision and Order in this case." May 3, 2019 Order at 6. She permissibly found, however, that Employer failed to establish extraordinary circumstances because it "made only one attempt - in January 2017, well after the deadline for submitting liability evidence to the district director - to request these documents, and the record does not reflect any follow-up efforts."[26] *Id.*; *see Blake*, 24 BLR at 1-113; 20 C.F.R. §725.456(b)(1); May 3, 2019 Order; Oct. 29, 2019 Order.

Because the ALJ did not abuse her discretion in finding Employer failed to establish extraordinary circumstances in this case, *Blake*, 24 BLR at 1-113, we affirm the ALJ's decision to exclude the depositions of Messrs. Benedict and Breeskin contained in MC Employer's Exhibits 1-2 and 15-16, and the documentary evidence contained in MC Employer's Exhibits 5-9. 20 C.F.R. §§725.414(c), 725.456(b)(1), 725.457(c)(1); May 3, 2019 Order; Oct. 29, 2019 Order.

Letter of Credit and Indemnity Agreement

Employer maintains Mr. Breeskin's March 4, 2011 letter to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program absolves it from potential liability under the Act. Employer's Brief at 30-32, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibits 28, 29. Employer asserts the applicable regulations establish "that self-insured operators must meet a number of pre-requisites to qualify as a potential self-insurer," including the posting of security. Employer's Brief at 31. The "submission of that security by the operator," Employer argues, "establishes its liability." *Id*. Insofar as the DOL "releases said security," Employer contends "the self-insurer's obligations under the Act are terminated, as the security previously proffered by the self-insurer no longer exists." *Id*. Because the DOL informed Patriot it was releasing "the letter of credit financed under Peabody Energy's self-insurance program," Employer argues the DOL released Peabody Energy's liability. *Id*. at 31-32.

The ALJ permissibly rejected this argument. She correctly found neither the Act nor the regulations support Employer's argument that liability is created when a self-

[26] As discussed above, in response to Employer's only request for an extension of time to submit evidence, the district director granted Employer until September 15, 2016. MC Director's Exhibit 61. There is no indication Employer sought any additional extensions from the district director.

insurer posts a security and that the subsequent release of a self-insurer's security absolves it from liability. Decision and Order at 33. As the ALJ noted, operators are authorized to self-insure if, among other requirements, they obtain security approved by the DOL. 20 C.F.R. §726.101(a), (b)(4). In addition to obtaining "adequate security," a self-insurance applicant "shall [also] as a condition precedent to receiving such authorization, execute and file . . . an agreement . . . in which the applicant shall agree" to "pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners." 20 C.F.R. §726.110(a)(1). Further, Employer's liability is created by statute, which requires that during any period after December 31, 1973, coal mine operators "shall be liable for and shall secure the payment of benefits."[27] 30 U.S.C. §932(a), (b).

Thus, we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits." Director's Response at 27. Before the ALJ, and now before the Board, Employer has failed to cite any authority expressly allowing the DOL to release a designated responsible operator from liability, notwithstanding the DOL's release of its posted security.[28] Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.

Lastly, Employer contends that, in executing an indemnity agreement with Bank of America on March 4, 2011, DOL terminated Peabody Energy's self-insurance status and became contractually bound to hold Peabody Energy and its surety harmless. Employer's Brief at 38-39. As the Director notes, the indemnity agreement was contained in Employer's Exhibit 7, which the ALJ excluded from the record. Director's Brief at 28; Oct. 29, 2019 Order. This evidence therefore cannot support Employer's argument.

[27] For the same reasons, the DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973, does not release Peabody Energy from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1).

[28] Further, as the Director correctly argues, Employer concedes its self-insurance authorization was established by both a letter of credit and an indemnity bond. Director's Brief at 26. Employer specifically states Peabody Energy "was previously an entity authorized to self-insure its obligations under the Act. Its obligations were secured via an indemnity bond and a letter of credit in the amount of $13,000,000.00." Employer's Brief at 32. The regulations allow an operator to post security in the form of "a letter of credit issued by a financial institution," but clarify that "a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part." 20 C.F.R. §726.104(b)(3). Employer does not cite any evidence that the DOL also released the indemnity bond that Peabody Energy posted.

Notwithstanding the exclusion of this evidence, we fail to see how the execution of the indemnity agreement supports Employer's contentions. This agreement was between DOL and Bank of America, which issued the letter of credit. Employer's Exhibit 7. In the agreement, the DOL simply requested cancellation of the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The indemnity agreement is not a communication to Peabody Energy, nor does it mention the company. As the Director argues, the agreement "does not release any party from liability (aside from Bank of America), nor is it an agreement to hold Peabody [Energy] and its surety harmless, or not to seek payment from Peabody [Energy]." Director's Brief at 28. Based on the foregoing, we reject Employer's argument that the execution of the indemnity agreement or the DOL's release of the letter of credit absolves Peabody Energy of liability.

20 C.F.R. § 725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[29] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief at 33-35. We do not find this argument persuasive.

If the operator that most recently employed a miner may not be considered a potentially liable operator pursuant to 20 C.F.R. §725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). An operator is not a potentially liable operator if it is incapable of assuming its liability for the payment of benefits. 20 C.F.R. §725.494(e). If the most recent operator, however, was authorized to self-insure and no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator, and liability falls on the Director as the administrator of the Trust Fund. 20 C.F.R. §725.495(a)(4).

[29] Under 20 C.F.R. §725.495(a)(4):

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495(a)(3)] shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

Employer argues the Trust Fund is liable because Patriot should be considered the Miner's last employer, was authorized to self-insure, and no longer possesses sufficient funds to meet its liabilities. Employer's Brief at 33-35, *citing* 20 C.F.R. §§725.495(a)(4), 725.494(e). As the ALJ recognized, however, the Miner retired thirteen years before Patriot was created and never worked for Patriot. Decision and Order at 35-36. Thus, 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language. The ALJ properly found Employer meets the requirements for liability under the Act: Heritage, a mine operator, employed the Miner in coal mine employment for one year or more; the Miner was not employed by any other potentially liable operator after Heritage; and Heritage was self-insured through Peabody Energy on the Miner's last day of employment with Heritage. Decision and Order at 30-36. Employer identifies no error in these findings. *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). The ALJ also correctly found Employer did not present any evidence that Peabody Energy is unable to assume liability for benefits. Decision and Order at 35; 20 C.F.R. §§725.494(e), 725.495(a)(3).[30]

Employer raises two additional arguments – (1) DOL violated Employer's due process rights by not maintaining adequate records with respect to Patriot's bond and (2) the ALJ was required to find the DOL exhausted Patriot's bond before Peabody Energy could be held liable. These arguments are without merit for the same reasons. Employer's Brief at 29-30, 45. As to the second argument, the ALJ correctly determined Employer presumes Patriot is the responsible carrier in this claim. Decision and Order at 32. She permissibly determined Employer's contention is misplaced, however, because the issue before her involved the identification of Heritage as the potentially liable operator to last employ the Miner and whether it was financially capable of paying benefits through its self-insurer. 20 C.F.R. §§725.494(e), 725.495(a)(1); Decision and Order at 32. As previously indicated, the ALJ permissibly found Employer satisfied those criteria. Decision and Order at 30-36.

Equitable Estoppel

Employer argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 36-43. To invoke equitable estoppel, Employer must show DOL engaged in affirmative misconduct and Employer reasonably relied on DOL's action to its detriment. *Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny*

[30] Employer also argues the Director failed to comply with his duty to monitor Patriot's financial health. Employer's Brief at 29-30. As Employer has not established Patriot is liable in this case and relies on evidence properly excluded from the record, we need not address its argument.

& Ohio Coal Co., 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *See U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer again alleges that the Director released Peabody from liability "through a hold harmless agreement" and did so "without securing proper funding by Patriot." Employer's Brief at 37-39. It argues this release constitutes affirmative misconduct. *Id.* Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Thus, the ALJ properly rejected this argument. Decision and Order at 33-34; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Finally, as the Director correctly asserts, Employer does not allege DOL acted either intentionally or recklessly. Director's Brief at 35; *see Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. The ALJ found there is "no basis on which to conclude that the [DOL] or its officials engaged in any dishonest wrongdoing." Decision and Order at 34. Employer does not challenge this finding and thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this finding, the ALJ rationally concluded "Employer certainly has not established that the [DOL] intended Peabody [Energy] to rely or act upon on its conduct to Peabody [Energy's] detriment." Decision and Order at 34; *Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. Because Employer failed to establish the necessary elements, we affirm the ALJ's rejection of Employer's equitable estoppel argument.

For the foregoing reasons, we affirm the ALJ's determination that Employer is liable for this claim.

Miner's Claim

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 50. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner 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 the Miner 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).

In calculating the length of the Miner's coal mine employment, the ALJ considered his Social Security Administration (SSA) earnings records, employment history forms, and deposition testimony. Decision and Order at 8-9; MC Director's Exhibits 4, 6, 8-9; Employer's Exhibit 18. The ALJ found the Miner was "largely consistent in his accounts of his coal mine employment," but found his testimony and statements insufficient to establish the specific beginning and ending dates of his coal mine employment. Decision and Order at 8. She therefore found his SSA records are the most accurate evidence regarding the length of his coal mine employment. *Id.*

Because she could not ascertain the beginning and ending dates of the Miner's coal mine employment, the ALJ attempted to apply the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[31] Decision and Order at 8-9. She divided his yearly earnings as reported in his SSA records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[32] *Id*. at 12-14. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, she credited him with a full year of coal mine employment. *Id*. For the years in which the Miner's earnings fell short, she credited him with a fractional year, calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings. *Id*. In applying this formula, the ALJ credited the Miner with 16.85 years of coal mine employment. *Id.*

[31] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[32] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

We agree with Employer that the ALJ applied an improper method of calculation in finding the evidence establishes at least fifteen years of coal mine employment. Employer's Brief at 48-49. To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment 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, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). *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.[33] 20 C.F.R. §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.[34] *See Clark,* 22 BLR at 1-281.

In attempting to apply the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ failed to acknowledge the threshold inquiry of whether the record establishes a calendar year of employment prior to determining whether the Miner worked at least 125 days in that

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

[34] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of *days* that a miner worked in a given year, but it does not establish such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii). Under the ALJ's method of calculation, the evidence can be said to have established at least 125 working days, but not that such work occurred during "a period of one calendar year . . . or partial periods totaling one year." 20 C.F.R. §725.101(a)(32).

year.[35] *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281. We therefore vacate[36] the ALJ's finding that Claimant established 16.85 years of coal mine employment.[37] *See* 30 U.S.C. §923(b); *Mitchell*, 479 F.3d at 334-36; Decision and Order at 12-14.

[35] Employer contends the ALJ should have applied the calculation at 20 C.F.R. §725.101(a)(32)(iii) by using Exhibit 609 of the *BLBA Procedure Manual*, rather than Exhibit 610. Employer's Brief at 47-48. We disagree. In *Osborne v. Eagle Coal Co.*, 25 BLR 1-195 (2016), the Board observed that Exhibit 609, entitled "*Average Wage Base*," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R. §725.101(a)(32)(iii). Rather, Exhibit 609 reports the SSA's wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax. *Id.* The Board, therefore, held that reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry.

[36] In calculating the length of a miner's coal mine employment, an ALJ must consider all relevant evidence. 30 U.S.C. §923(b); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). We disagree with our dissenting colleague that there is only one conclusion that can be reached, taking all the relevant evidence into account. For example, our dissenting colleague indicates the ALJ would credit the Miner with 100.5 working days in 1994. *See infra*. The Miner testified, however, that in 1994 he only worked in the month of January and worked for eight days before retiring. SC Employer's Exhibit 18 at 11. The ALJ did not discuss this evidence or render a factual finding that the credible evidence establishes the Miner had partial periods of employment with coal mine companies in the years 1978, 1993, and 1995 totaling one year. Further, contrary to our dissenting colleague's analysis, which assumes giving full credibility to all of Claimant's testimony concerning duration of employment, the ALJ may on remand find some, all or none of Claimant's testimony credible for these purposes. Moreover, she relied on an improper method of calculation by crediting the Miner with a year of coal mine employment if he had 125 working days. Thus we believe remand is necessary. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune*, 6 BLR at 1-998 (1984) (Board lacks the authority to render factual findings to fill gaps in the ALJ's opinion).

[37] The ALJ found the Miner's coal mine employment was entirely performed underground or in surface coal mine employment in conditions substantially similar to those in an underground mine. Decision and Order at 10. Because this finding is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Consequently we must vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits in the miner's claim.[38] 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we address Employer's arguments regarding rebuttal. Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, she shifted the burden to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[39] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[40]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ considered the medical opinions of Drs. Zaldivar and Rosenberg that the Miner did not suffer from legal pneumoconiosis[41] and found their opinions unpersuasive.

[38] Because we have vacated the award of benefits in the miner's claim, we must vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §923(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[39] "Legal pneumoconiosis" includes any "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[40] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 12.

[41] The ALJ accurately found the opinions of Drs. Rasmussen, Forehand, and Go diagnosing legal pneumoconiosis do not aid Employer in meeting its burden on rebuttal. Decision and Order at 27; MC Director's Exhibits 13, 15, 20; MC Claimant's Exhibit 8. Thus, we decline to address Employer's arguments regarding the ALJ's weighing of these opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how

Decision and Order at 24-27; MC Director's Exhibit 19; SC Employer's Exhibits 12, 13, 17. We reject Employer's arguments that the ALJ erred in discrediting their opinions.[42]

Dr. Zaldivar

Dr. Zaldivar diagnosed the Miner with a severe obstructive respiratory impairment due to emphysema and asthma. MC Director's Exhibit 19. He opined these diseases were caused by the Miner's cigarette smoking history and childhood exposure to second-hand smoke, and are unrelated to coal mine dust exposure. *Id.*; *see* MC Employer's Exhibit 17 at 19-20. He cited recent medical literature that sets forth the adverse effects cigarette smoking has on an individual's lungs. MC Director's Exhibit 19.

During his deposition, Dr. Zaldivar reiterated that the "intensity and duration" of the Miner's smoking history is sufficient to have caused the degree of his respiratory impairment. MC Employer's Exhibit 17 at 19-20. He also noted the Miner may have had a genetic component to the development of asthma because his father had the disease. *Id.* at 19-20, 22. On cross-examination, Dr. Zaldivar conceded that the studies he cited to support his opinion only addressed the effects of smoking on an individual's lungs and did not account for occupational exposure to coal mine dust. *Id.* at 36-37.

In weighing his opinion, the ALJ noted Dr. Zaldivar "explained why he believes [the] Miner's impairment [was] related to his smoking habit (and, possibly, genetic factors)," but she permissibly found his opinion unpersuasive because he "failed to explain why cigarette smoking and coal [mine] dust exposure could not both have contributed to [the Miner's] emphysema and/or asthma." Decision and Order at 26; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017) (ALJ permissibly discredited

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the "error to which [it] points could have made any difference"); Employer's Brief at 54-55.

[42] Employer argues the ALJ applied the wrong legal standard in weighing the opinions of Drs. Zaldivar and Rosenberg on legal pneumoconiosis. Employer's Brief at 53-54. We disagree. The ALJ correctly stated Employer can rebut the presumption of legal pneumoconiosis by establishing the Miner did not have a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 22, 25; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Moreover, she discredited their opinions because she found they are not adequately reasoned, not because they fail to meet a heightened legal standard. *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 22-26.

medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Employer does not identify any specific rationale Dr. Zaldivar provided for opining the Miner's emphysema or asthma were not significantly related to, or substantially aggravated by, coal mine dust exposure. Employer's Brief at 53-54. It generally argues Dr. Zaldivar provided a "well-reasoned and documented opinion, and the [ALJ] should have [found] that Miner did not suffer from legal pneumoconiosis." *Id*. It contends Dr. Zaldivar's rationale that cigarette smoking can explain the Miner's impairment is sufficient to rebut the presumption in this case. *Id*. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Dr. Rosenberg

Dr. Rosenberg diagnosed the Miner with chronic obstructive pulmonary disease and emphysema due to cigarette smoking and unrelated to coal mine dust exposure. MC Employer's Exhibits 12, 13. He explained cigarette smoking reduces the FEV1 value on pulmonary function testing "much farther than the FVC," and coal mine dust exposure reduces the FEV1 and FVC values "in equal measure." Employer's Exhibit 12 at 6-7. He excluded legal pneumoconiosis, in part, because the Miner's "FEV1 in relationship to FVC [was] reduced" around thirty percent. *Id*. The ALJ discredited Dr. Rosenberg's opinion as inconsistent with the studies cited by the DOL in the preamble to the 2001 revised regulations that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. at 79,943; Decision and Order at 25-26. Employer does not challenge this credibility finding. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

Because the ALJ acted within her discretion in discrediting the opinions of Drs. Zaldivar and Rosenberg, the only opinions supportive of Employer's burden, we affirm her finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 25-26. Employer's failure to rebut the presumption of legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. The ALJ permissibly discredited the disability causation opinions of Drs. Zaldivar and Rosenberg because they failed to diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 27-28. Thus we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

Remand Instructions

On remand, the ALJ must determine the length of the Miner's coal mine employment taking into consideration the relevant evidence and using any reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. She must determine whether the record evidence shows the Miner worked a calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(iii). She must also explain her findings in accordance with the Administrative Procedure Act.[43] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ finds Claimant established fifteen or more years of coal mine employment and invokes the Section 411(c)(4) presumption, she may reinstate the award of benefits in both claims.[44] If Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R.

[43] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must 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).

[44] Employer raises no specific challenge to the ALJ's finding that Claimant is derivatively entitled to survivor's benefits if she establishes entitlement to benefits in the miner's claim. Thus we affirm this finding. 30 U.S.C. §923(*l*); *see Thorne*, 25 BLR at 1-126; *Skrack*, 6 BLR at 1-711.

Part 718 in both claims. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c), 718.205.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Buzzard, J., concurring and dissenting

I concur in my colleague's decision to affirm the ALJ's responsible operator and carrier findings, along with her findings that Claimant established the Miner was totally disabled and Employer failed to rebut the Section 411(c)(4) presumption. I also agree there is no merit to Employer's challenge to the constitutionality of the Affordable Care Act, which reinstated the presumption. However, I respectfully dissent from the majority's decision to vacate the award of benefits by concluding the ALJ erred in crediting the Miner with at least fifteen years of coal mine employment necessary to invoke the presumption.

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner 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 the Miner 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 noted the Miner alleged sixteen years of coal mine employment between January 1978 and January 1994 on his employment history forms. Decision and Order at 8; MC Director's Exhibits 4, 6. She further noted he testified that he worked in coal mine employment from April 1978 to January 1994. Decision and Order at 8; SC Employer's Exhibit 18 at 11. Finally, she found that his Social Security Administration (SSA) earnings records show income from coal mine employment each year from 1978 to 1995. Decision and Order at 8; MC Director's Exhibits 8, 9.

In calculating the length of the Miner's coal mine employment, the ALJ considered the relevant evidence and permissibly found his SSA earnings records are the most accurate evidence regarding the length of his coal mine employment. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA records over testimony and other sworn statements); Decision and Order at 8-9. She further determined she could not ascertain the specific beginning and ending dates of his employment, and thus chose to apply the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[45] Decision and Order at 8-9.

In doing so, the ALJ divided the Miner's yearly income as reported in his SSA records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[46] *Id*. at 12-14. Where the Miner's earnings met or exceeded the industry's average yearly earnings for 125 days of employment, she credited him with a full year of coal mine employment. *Id*. If his earnings did not exceed average yearly earnings for 125 days of employment, she divided his annual earnings by the Exhibit 610 average yearly earnings, thus crediting him with a fractional year based on a 125-day work year. *Id*. Utilizing this method, the ALJ found the Miner had 16.85 years of coal mine employment for the years

[45] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[46] The "average yearly earnings" figures in Exhibit 610 reflect multiplication of the "average daily wage" by 125 days.

1978 to 1995. *Id.* The ALJ's method of calculation was reasonable and supported by substantial evidence. *Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432.

I disagree with my colleagues that the ALJ was required to first render a threshold finding that the Miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, prior to crediting the Miner with a year of coal mine employment based on a finding of 125 working days. Following the rationale of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), I would hold a miner who works 125 days in a given year is entitled to credit for one full year of coal mine employment, without having to also establish a 365-day employment relationship with his employer. *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" for invoking statutory presumptions at 20 C.F.R. §718.201(b) (2000)).

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.[47] *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003).

The regulation, however, sets forth additional criteria for determining whether a miner had one 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

[47] *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).

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 the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)."[48] 20 C.F.R. §725.101(a)(32)(iii).

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*, 997 F.2d at 1195. "[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 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

[48] 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*.

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 [calendar] 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 affirm the ALJ's finding the Miner had 16.85 years of coal mine employment based on her application of the formula at 20 C.F.R. §725.101(a)(32)(iii).

Moreover, even if the majority's interpretation of 20 C.F.R. §725.101(a)(32) were correct, I would still conclude remand for reconsideration of this issue is unnecessary as substantial evidence supports the ALJ's finding that the Miner worked at least fifteen years in coal mine employment based on the methodology the majority advocates. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The unrebutted evidence in this case establishes the Miner worked for only one coal mine operator from 1978 to 1994 and had no other employers during this time. The Miner listed one operator, "Peabody," as his employer from January 1978 until January 1994 on his employment history form. MC Director's Exhibit 6. He testified that all of his coal mine employment was with the same mine in West Virginia, and clarified he started working there in April 1978 and stopped in January 1994.[49] SC Employer's Exhibit 18 at 6-7. The SSA records establish the Miner earned wages on a yearly basis with "Armco Incorporated" from 1978 to 1983 and then Heritage Coal from 1984 to 1994. MC Director's Exhibits 8-9.

The Miner's testimony reflects Armco, Peabody, and Heritage operated the same mine that changed names multiple times. The Miner testified when he first started working in coal mine employment in 1978, the mine was called "Armco Incorporated." SC Employer's Exhibit 18 at 11. The mine was "bought and sold a lot," and at one point Peabody purchased it. *Id*. The Miner interchangeably referred to this mine as "Heritage and Peabody." *Id*. at 11-12, 14. Other than time he spent on strike from May 1993 to

[49] Although the SSA records include coal mine earnings in 1995 with Pine Ridge Coal Company, the Miner could not recall working in coal mine employment that year. MC Director's Exhibits 8-9; SC Employer's Exhibit 18 at 17-18.

December 1993, his "employment was consistent, five days a week without layoffs." *Id.* at 12.

The ALJ permissibly credited the Miner's SSA earnings records as the most reliable evidence, and found they are "generally corroborated" by the Miner's "largely consistent" testimony and claims forms documenting his coal mine employment. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

1979 to 1992

Given the ALJ's credibility findings, there is no basis in the record to conclude the Miner had anything less than fourteen years of coal mine employment for the years 1979 to 1992. Although the ALJ found the evidence does not establish when exactly the Miner began working in 1978 or when he stopped working in 1994, and the Miner testified he was on strike from May to December of 1993, there is no dispute that the Miner was continually employed as a coal miner on an uninterrupted basis for the calendar years 1979 through 1992. As reflected in the SSA records, the Miner started earning wages with Armco/Peabody/Heritage in 1978, earned wages in every year from 1979 to 1993, and earned wages in his final year of employment with this operator in 1994. MC Director's Exhibit 8. The Miner did not earn wages from any other employer in the years 1979 to 1992. MC Director's Exhibit 8; SC Employer's Exhibit 18 at 12.

Although not required under the Sixth Circuit's *Shepherd* analysis, Claimant in this case established the Miner had a calendar year employment relationship with his coal mine employer for each year from 1979 to 1992. As the Miner's testimony and SSA records reflect, Armco/Peabody/Heritage employed the Miner continually from 1979 to 1992. Because a full calendar-year employment relationship was established, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" thus entitling him to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii). There is no evidence contradicting this presumption; instead, as the ALJ found, the Miner's SSA-reported earnings exceeded the industry average for 125 working days in each of those years. Decision and Order at 7-9. Thus, substantial evidence supports the ALJ's finding that the Miner had fourteen years of coal mine employment from 1979 through 1992. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 7-9.

1978, 1993, and 1994

For the years 1978, 1993, and 1994, the record establishes more than one additional year of coal mine employment in total. The ALJ could not ascertain when the Miner started

working for Armco/Peabody/Heritage in 1978 and when he stopped working in 1994; the only period he was not mining coal was during a strike from May 1993 to December 1993. Decision and Order at 8; SC Employer's Exhibit 18 at 6-7; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc) (time spent by a miner in a voluntary union strike does not constitute coal mine employment under the Act). As the record does not establish the precise beginning or ending dates for these years, or the Miner's employment lasted less than a calendar year, the ALJ permissibly applied the formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 8. That formula reveals 171 working days in 1978, 133.49 working days in 1993, and 100.5 working days in 1994[50] – a total of 404.99 working days – easily exceeding a 365-day employment relationship and 125 working days within that period.[51]

As the record establishes a minimum of fourteen years of coal mine employment for the years 1979 to 1992 and one year of coal mine employment for 1978, 1993, and

[50] The majority advocates for remand because it maintains there is conflicting evidence with respect to the Miner's coal mine employment in the year 1994, citing his testimony that he worked for one month in that year (the month of January) and no more than eight working days. *See supra* n. 36, *citing* Employer's Exhibit 18 at 11-12. The ALJ made clear, however, that she was relying on the Miner's earnings from his SSA records as the most reliable evidence in conjunction with formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 8-9. Even if she had relied on his testimony alone, that evidence would still establish a year of coal mine employment. Beyond stating he was only employed in coal mining for one month in 1994, the Miner also testified he began working in coal mining in April 1978 and worked through December 1978 (totaling nine months), and also worked from January 1993 to April 1993 before going on strike (totaling five months). Employer's Exhibit 18 at 11-12. Thus, the Miner's own testimony establishes partial periods totaling more than one calendar year for 1978, 1993, and 1994 (1+9+5=15 months), which, under the regulations, is presumed to be one year of coal mine employment. 20 C.F.R. §725.101(a)(32)(ii) ("If the evidence establishes that the miner's employment lasted for . . . partial periods totaling a 365-day period amounting to one 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.* As set forth herein, the Miner had at least 125 working days during this period, notwithstanding his testimony that he worked for only eight days in 1994.

[51] 1978: $13,741.35 (Miner's income) / $80.31 (Exhibit 610 average daily wage) = 171 working days; 1993: $17,764.98/$133.08 = 133.49 working days; 1994: $14.284.35/$142.08 = 100.5 working days. Under this formula, the Miner would also be entitled to credit for an additional 0.01 year of coal mine employment in 1995 with Pine Ridge Coal. MC Director's Exhibit 8-9.

1994, substantial evidence supports the ALJ's finding of at least fifteen years of coal mine employment. Therefore, remand for further consideration of the length of coal mine employment is unnecessary. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

As Employer does not challenge the ALJ's finding that all of the Miner's coal mine employment was qualifying, i.e., underground or in substantially similar dust conditions aboveground, *see Skrack*, 6 BLR at 1-711; Decision and Order at 8, I would affirm her finding that Claimant invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305, and the award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge