U.S. Department of Labor

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

BRB No. 23-0042 BLA

GLEN ANDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RED ASH SALES COMPANY INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 06/17/2024
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Francesca Tan and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer's Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J.

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

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

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

Employer's Carrier appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2018-BLA-06327) rendered on a claim filed on April 23, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator and the West Virginia Coal Workers' Pneumoconiosis Fund is the responsible carrier. He credited Claimant with 18.75 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Carrier argues the ALJ erred in finding Employer is the responsible operator. On the merits, it asserts the ALJ erred in finding Claimant established at least fifteen years of underground coal mine employment and thereby invoked the Section

[1] This is Claimant's fifth claim. Director's Exhibits 1-4. His first claim was administratively closed; the claim's file was destroyed in accordance with the Department of Labor's records retention policy, and no additional information on that claim is provided in the record before us. Decision and Order at 2; Director's Exhibit 1. Claimant withdrew his second, third, and fourth claims. Director's Exhibits 2-4. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

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

411(c)(4) presumption.[3] Alternatively, it contends the ALJ erred in finding it did not rebut the presumption. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's responsible operator determination, but also to remand the case for the ALJ to reconsider the length of Claimant's coal mine employment.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §§725.494(c), 725.495(c). The designated responsible operator must submit documentary evidence relevant to its liability before the district director and must notify the district director of any potential witnesses whose testimony pertains to its liability. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1). Failure to do so renders such documentary evidence and testimony inadmissible before the ALJ unless "extraordinary circumstances" exist to excuse the untimely submission. 20 C.F.R. §§725.414(c), (d), 725.456(b)(1).

Carrier asserts the ALJ erred in finding Employer is the responsible operator. Carrier's Brief at 14-21. Specifically, it asserts the ALJ erroneously refused to consider

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §725.309(c); *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[4] This Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21-24; Director's Exhibits 7; 9 at 5.

Claimant's deposition and hearing testimony, which it asserts establish Claimant did not work for Employer for at least one year. *Id.*; *see* 20 C.F.R. §725.495(a)(2)(iii). The Director asserts Employer did not properly identify Claimant as a liability witness while the case was pending before the district director. Director's Response Brief at 4-5. Alternatively, he asserts any error in failing to consider Claimant's testimony was harmless because the ALJ would have reached the same determination even if he had considered Claimant's testimony. *Id.* at 2-5.

On February 16, 2017, the district director mailed Employer and its Carrier a notice of claim providing it ninety days to produce any documentary evidence challenging Employer's designation as a potentially liable operator. Director's Exhibit 33 at 2. Carrier timely responded, denying that Employer was a potentially liable operator, but it did not submit any documentary evidence. Director's Exhibit 39. The district director issued a schedule for the submission of additional evidence (SSAE) on January 24, 2018, designating Employer as the responsible operator and setting a deadline of March 25, 2018, to provide documentary evidence that another operator should have been designated or to identify liability witnesses. Director's Exhibit 54 at 2. On February 1, 2018, Carrier timely replied, contesting Employer's designation as the responsible operator and identifying "Claimant, the Claimant's spouse, any authorized representative of the Claimant or the Claimant's estate, or any authorized representative of the Employer" as potential liability witnesses, but again did not submit any documentary evidence. Director's Exhibit 58 at 1.

Employer's Carrier had previously deposed Claimant on May 25, 2016. Employer's Exhibit 1. Claimant testified Hull Coal Company (Hull Coal) and Employer are the same company, *id.* at 17, and that he worked he worked for Employer for "about ten months." *Id.* at 14-15. The ALJ also noted that Claimant testified in a state claim in 1987 that he believed he worked for the Employer between November 10, 1981 and September 3, 1982, split between Hull Coal and Employer. Employer's Exhibit 13; Decision and Order at 8 n.28.

But the ALJ accurately noted Employer failed to submit this testimony or any evidence to the district director to establish that it is not the responsible operator. Decision and Order at 8; *see also* Decision and Order at 8 n.28 (Employer "failed to notify the [district director] about" Claimant's testimony from his previous state claim).[5] Moreover, the ALJ found Employer did not establish that such previous deposition and hearing

[5] Although Employer's Carrier has identified a distinction in the regulation between documentary and testimonial evidence, it has not explained why the transcript of Claimant's state claim deposition, which is a written document that existed prior to the issuance of the SSAE, is not documentary evidence.

testimony documents would be within the "extraordinary circumstances" exception of 20 C.F.R. § 725.456(b)(1) to excuse their untimely submission. Decision and Order at 8 n.29.

At the February 1, 2022 hearing, Claimant testified he worked for Hull Coal and Employer in combination from November 10, 1981 through September 3, 1982. Hearing Transcript at 34. As noted above, Employer's Carrier timely responded to the SSAE identifying "Claimant, the Claimant's spouse, any authorized representative of the Claimant or the Claimant's estate, or any authorized representative of the Employer" as potential liability witnesses. Director's Exhibit 58 at 1. But the ALJ did not address whether Carrier's identification of Claimant satisfies the requirements of the applicable regulation. *See* 20 C.F.R. §725.414(c); *see also See v. Wash. Metro. Area Trans. Auth.*, 36 F.3d 375, 383-84 (4th Cir. 1994) (ALJ is the factfinder; thus, the Board should not rule on an issue before the ALJ has considered it); *Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (evidentiary limitations set forth in the regulations are mandatory and must be enforced by the ALJ). Further, if Carrier's identification of Claimant does not satisfy the requirements of 20 C.F.R. §725.414(c), the ALJ did not determine whether Employer established that extraordinary circumstances exist for admitting Claimant's hearing testimony regarding his employment with Employer.

Moreover, we disagree with the Director's assertion that any error in failing to consider Claimant's hearing testimony in regard to determining the responsible operator is harmless. Director's Response Brief at 2-5. The Director asserts the ALJ considered Claimant's deposition and hearing testimony in determining the length of his coal mine employment and, having made a credibility determination, still concluded the beginning and ending dates of his coal mine employment cannot be determined. Director's Response Brief at 4-6. Further, the Director asserts the ALJ reasonably determined 125 working days establishes a full year's employment. *Id.* at 4. Thus, the Director asserts the ALJ correctly used the formula at 20 C.F.R. §725.101(a)(32)(iii) and Claimant's Social Security Administration (SSA) earnings record to determine Claimant worked more than 125 days with Employer and therefore established at least one year of employment.[6] Director's Response Brief at 3-4.

[6] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal

The ALJ noted the available evidence relevant to the calculation of Claimant's coal mine employment included his hearing and deposition testimony, but he found the evidence "does not clearly identify the beginning and ending dates of the Claimant's employment" with any of his coal mine employers. Decision and Order at 5-6. But the ALJ did not specifically address Claimant's testimony as to the beginning and ending dates of his employment with Employer or explain why he did not find that testimony credible. *See* Decision and Order at 5-9. Moreover, contrary to the Director's argument, the ALJ did not reasonably determine 125 days establishes a working year but rather expressly relied on the United States Court of Appeals for the Sixth Circuit's holdings in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019).

This case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. Rather, the Fourth Circuit holds that, before determining whether Claimant established a year of coal mine employment with Employer, the ALJ must first determine whether Claimant 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).[7] If the threshold one-year period is met, the ALJ must then determine whether

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mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[7] Although our dissenting colleague would apply *Shepherd's* rationale in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. To credit a miner with a year of coal mine employment in cases arising outside of the Sixth Circuit, the Board has interpreted applicable case law as supporting the position that the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *see also Mims v. Drummond Co., Inc.*, BRB No. 21-0314 BLA, slip op. at 3-6 (Sept. 24, 2023); *Salaz v. Powderhorn Coal Co.*, BRB Nos. 21-0406 BLA and 21-0406 BLA-A (Oct. 31, 2022) (unpub.); *Hayes v. Cowin & Co., Inc.*,

Claimant worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32). Proof that Claimant worked at least 125 days or that his 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 of coal mine employment and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations.[8] *See Clark*, 22 BLR at 1-281. We therefore vacate the ALJ's determination that Employer is the responsible operator and remand this case for further consideration of this issue.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's hearing and deposition testimony, CM-911a Employment History Form, and SSA earnings record. Decision and Order at 4-7; Hearing Transcript; Director's Exhibits 7, 9. The ALJ concluded he was unable to ascertain from the evidence the beginning and ending dates of Claimant's employment with each coal mine employer and then employed the method articulated by the Sixth Circuit in *Shepherd*

BRB No. 20-0156 BLA (May 20, 2021) (unpub.); *Lusk v. Jude Energy, Inc.*, BRB No. 19-0505 BLA (Oct. 21, 2020) (unpub.).

[8] 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 Director'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).

to calculate Claimant's coal mine employment.[9] Decision and Order at 5 (quoting *Shepherd*, 9 F.3d at 401-06). Based on *Shepherd*, the ALJ found Claimant established 18.75 years of coal mine employment by dividing his total earnings by the daily average earnings reported in Exhibit 610 and then dividing that number by 125. *Id.* at 6-7.

Employer argues the ALJ erred in applying *Shepherd* when this case falls under the jurisdiction of the Fourth Circuit, which has not adopted such a method of calculation to establish a year of coal mine employment.[10] Employer's Brief at 5-14. The Director agrees that remand is required for the ALJ to recalculate Claimant's coal mine employment under the correct legal standard. Director's Response Brief at 6. We agree.

The Board has long interpreted Fourth Circuit case law as supporting the position that, before crediting a miner with a year of coal mine employment, the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280. If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[11] 20 C.F.R. §725.101(a)(32). However, 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 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

[9] Based on Claimant's SSA earnings record, the ALJ found he worked for at least 125 working days during fourteen years of employment, thereby establishing fourteen full years of coal mine employment. Decision and Order at 6.

[10] Employer also contends, "the formula under §725.101(a)(32)(iii) should be used for all the coal companies where he worked. The ALJ failed to comply with the formula set forth in §725.10l(a)(32)(iii) by dividing [Claimant's] yearly income by the yearly 125 days earnings in the second column of Exhibit 610, instead of the daily earnings in the third column of Exhibit 610." Decision and Order at 10.

[11] 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).

mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281; Decision and Order at 5-6.

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

Remand Instructions

On remand, the ALJ must first consider whether Carrier complied with the regulation requiring identification of liability witnesses before the district director. 20 C.F.R. §725.414(c). Further, if the ALJ finds that Carrier's identification of Claimant does not satisfy the requirements of 20 C.F.R. §725.414(c), the ALJ should determine if Employer proved extraordinary circumstances exist for admitting Claimant's hearing testimony regarding his employment with Employer. If the ALJ finds Carrier properly identified Claimant as a liability witness or, alternatively, proved extraordinary circumstances exist for admitting Claimant's hearing testimony regarding his employment with Employer, he must consider Claimant's testimony regarding the length of his employment with Employer and weigh it against all other relevant evidence.

Under the two-step inquiry, the ALJ must consider the evidence as a whole to determine whether Claimant was engaged in coal mine employment for a period of one calendar year, that is, 365 days or partial periods totaling one year, with Employer. *Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. If the threshold requirement of a calendar year is established with Employer, then the ALJ must determine whether Claimant worked for at least 125 days in coal mine employment during that one calendar-year period. *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75. If the ALJ determines Claimant was employed by Employer for at least one calendar year during which he worked at least 125 days, the ALJ may reinstate his finding that Employer is the properly designated responsible operator. *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75. If, however, the ALJ finds Claimant did not work for Employer for at least one calendar year during which he worked at least 125 days, he must dismiss Employer and transfer liability to the Black Lung Disability Trust Fund.

The ALJ must also reconsider the length of Claimant's coal mine employment, applying the same two-step inquiry described above to the evidence as to Claimant's coal mine employment with each coal mine employer and sum the total. *Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. If the ALJ again finds Claimant established at least fifteen years of qualifying coal mine employment, the ALJ must then reconsider whether

Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. 20 C.F.R. §§718.201, 718.202, 718.203, 718.204, 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.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. Employer argues it is not the responsible operator because it employed Claimant for less than one year. It also argues Claimant cannot invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis because he has less than the requisite fifteen years of coal mine employment.

Resolution of both issues hinges upon the regulatory definition of the term "year" and how an ALJ should calculate a miner's length of coal mine employment. The majority's decision to remand this claim is based on its belief that Fourth Circuit law prohibits an ALJ from crediting a miner with a full year of coal mine employment unless he establishes a 365-day employment relationship with his employer(s). However, as I explained in *Baldwin v. Island Creek Kentucky Mining*, a miner is entitled to credit for a full year of coal mine employment "for all purposes under the Act" if he establishes 125

working days in a given year.[12] *Baldwin*, BRB No. 21-0547 BLA, slip op. at 8-13 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting).

That conclusion is consistent with the Sixth Circuit's holding that the "plain" and "unambiguous" language of the regulatory definition of "year" "permits a one-year

[12] Notably, the majority's statement that Fourth Circuit law requires a 365-day employment relationship is contrary to the Director's position in *Baldwin* that the circuit has not issued any binding precedent on the matter. *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, slip op. at 6 n.11 (July 14, 2023) (unpub.) (majority opinion in *Baldwin* noting the Director's position and concluding that the Board should first "allow the Fourth Circuit to rule on the issue"). As I discussed in *Baldwin*:

> [T]he Fourth Circuit's decisions [which the majority construes as requiring a 365-day employment relationship] involved claims that predated the effective date of the current definition of the term "year." *See* [*Daniels Co v.*] *Mitchell*, 479 F.3d [321,] 334-35 [(4th Cir. 2007)]; *Armco*, [*Inc. v. Martin*], 277 F.3d [468,] 475 [(4th Cir. 2002)]. While *Armco* stated that the revised prefatory clause in the new definition "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* [*v. Incoal, Inc.*], 915 F.3d [392,] 402 [(6th Cir. 2019)]. *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 -- a fact pattern not at-issue here given the Miner's consistent work history throughout his sixteen calendar years of coal mine employment. *See Mitchell*, 479 F.3d at 334-35 ("brief and sporadic" employment of 200 days over an entire fourteen-year career is not "regular" coal mine employment with one operator). *Mitchell* 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.").

Id. at 12 (Buzzard, J., concurring and dissenting).

employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *see also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) (125 working days equals "one year of work" under the prior definition of "year").

Applying that definition to the present claim demonstrates the ALJ did not err either: 1) in determining Claimant had one full year of employment with Employer, thus defeating its argument that it is not the responsible operator; or 2) in finding he had at least fifteen years of qualifying coal mine employment, thereby invoking the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

With respect to the responsible operator issue, the majority would remand this claim for the ALJ to determine whether Claimant's testimony can be credited as establishing a 365-day employment relationship with Employer.[13] If not, the majority presumes Employer must be dismissed as the responsible operator and liability transferred to the Black Lung Disability Trust Fund. *See England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-145 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984). However, based on the income reported on Claimant's Social Security Earnings Record, the ALJ specifically found Claimant established a total of 217.38 "working days" (i.e., days paid for work as a miner) with Employer in 1981 and 1982, including 191.05 working days in 1982 alone. Decision and Order 7; *see* 20 C.F.R. §725.101(a)(32)(iii) (ALJ may calculate employment by comparing the miner's wages to the average earnings in the coal mine industry that year). Because Claimant had greater than 125 working days with Employer, the ALJ rationally found Employer failed to meet its burden to establish it employed Claimant for less than one year. 20 C.F.R. §725.101(a)(32)(ii); 20 C.F.R. §725.495(c).

Relatedly, the majority would remand the claim for the ALJ to recalculate the entirety of Claimant's coal mine employment history (and thus his entitlement to the Section 411(c)(4) presumption), with instructions that Claimant cannot be credited with a full year of employment unless he establishes full calendar-year employment relationships

[13] To be clear, evidence regarding the beginning and ending dates of a miner's employment with any particular operator is not wholly irrelevant to an ALJ's length of coal mine employment calculation. After all, under the regulation a miner is presumed to have 125 working days, and thus one year of coal mine employment, if his employment relationship lasted a full 365-day period. 20 C.F.R. §725.101(a)(32)(ii). Any error in failing to consider Claimant's testimony in this case is harmless, however, as the ALJ nevertheless properly found Claimant had one full year of coal mine employment with Employer and greater than fifteen years overall. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

with his various employers. But as discussed, under the correct interpretation of the regulation Claimant need only establish he had 125 working days as a miner to be credited with one full "year" of coal mine employment in any given year. 20 C.F.R. §725.101(a)(32)(i); *Shepherd*, 915 F.3d at 402. Applying that definition to the ALJ's detailed findings regarding the number of days Claimant worked as a miner each year reveals Claimant established 18.75 years of coal mine employment, just as the ALJ found. Decision and Order at 6.

I therefore would affirm the ALJ's finding Employer is the responsible operator, affirm his finding Claimant invoked the Section 411(c)(4) presumption, and address the merits of Employer's remaining arguments on entitlement.

GREG J. BUZZARD
Administrative Appeals Judge