U.S. Department of Labor

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

BRB No. 23-0421 BLA

JAMES P. ESTEP Claimant-Petitioner v. ABBY CONTRACTORS, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/12/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

James P. Estep, Richlands, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

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

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) William P. Farley's Decision and Order Denying Benefits (2020-BLA-05853) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 11, 2019.[2]

The ALJ found Claimant established 11.12 years of qualifying coal mine employment and thus found he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, and therefore denied benefits. 20 C.F.R. §718.202(a).

[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's seventh claim for benefits. Director's Exhibits 1-6. Claimant withdrew two of his prior claims. Director's Exhibits 4, 6. Withdrawn claims are considered not to have been filed. 20 C.F.R. §725.306(b).

The district director denied Claimant's most recent prior claim, filed on February 21, 2014, for failing to establish total disability. Director's Exhibit 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 deny the subsequent claim unless he finds "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 district director denied Claimant's prior claim for failure to establish total disability, he had to submit new evidence establishing this element in order to warrant a review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 5.

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

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 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. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *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 Claimant's coal mine employment, the ALJ considered Claimant's testimony, CM-911a Employment History Form, and Social Security Administration (SSA) earnings record. Decision and Order at 8-11; *see* Hearing Transcript at 15-16; Director's Exhibits 11, 13, 14. The ALJ also considered Employer's stipulation to 9.66 years of coal mine employment and the district director's finding of 10.37 years in the Proposed Decision and Order. Decision and Order at 8; *see* Director's Exhibit 38 at 9; Hearing Transcript at 6. After considering Claimant's self-reported evidence and the relevant records, the ALJ determined that Claimant demonstrated "largely uninterrupted" coal mine employment from 1976 to 1980 and 1999 to 2006, and that he was paid wages in "all fiscal quarters" in 1974 and 1977.[5] Decision and Order at 9.

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

[5] The ALJ acknowledged Claimant's testimony that he had fifteen years of underground coal mine employment and twenty years of total coal mine employment and

For each employer the ALJ considered to be a coal mine operator, the ALJ compared Claimant's yearly earnings as reported in his SSA earnings record to the yearly earnings for miners who worked 125 days as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* to determine whether Claimant's wages demonstrate full or partial calendar years of coal mine employment.[6] Decision and Order at 7-11. Specifically, he divided Claimant's SSA-reported annual earnings by the coal mine industry's daily average as set forth in Exhibit 610 to calculate the number of days Claimant worked in coal mine employment for each year. *Id.* at 9-11. For the years in which Claimant's earnings reflected at least 125 working days, the ALJ credited him with a full year of coal mine employment; for those years where his earnings reflected less than 125 working days, the ALJ credited him with a fractional year of coal mine employment by dividing the number of days he worked by 125. *Id.* at 10-11. Based on that method, the ALJ found Claimant established 11.12 years of coal mine employment. *Id.* at 11.

Prior to calculating the number of days Claimant worked each year, the ALJ did not initially determine, as the regulation requires, whether he could ascertain the beginning and ending dates of Claimant's coal mine employment. 20 C.F.R. §725.101(a)(32)(ii), (iii); Decision and Order at 9-11. Additionally, to credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law to require the ALJ to first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002)

---

his statement in his post-hearing brief that "the Department of Labor [years of coal mine employment] figure is more accurate than that of the [E]mployer." Decision and Order at 8 (quoting Claimant's Post-Hearing Brief at 2 (unpaginated)); Hearing Transcript at 15-16.

[6] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained or the miner's coal mine 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 by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). While the ALJ did not specifically indicate he was applying this formula, the table showing his calculations indicates that he divided Claimant's yearly earnings by the daily average earnings as reported by the BLS to determine the number of days Claimant worked in a year—the formula set forth at 20 C.F.R. §725.101(a)(32)(iii). *See* Decision and Order at 9-11. The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*.

(recognizing the 2001 revisions 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). 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.[7] 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. *See Clark*, 22 BLR at 1-281.[8] While the ALJ acknowledged this threshold requirement, he did not specify which, if any, years of coal mine employment met this threshold prior to determining the number of days Claimant worked in each year.[9] Decision and Order at 7-11.

Nonetheless, the ALJ's errors are harmless and remand is not required on these bases; the ALJ's method of calculation that resulted in 11.12 years of coal mine employment[10] credited Claimant with at least as many, if not more, years of coal mine

[7] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 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).

[8] Although our colleague would apply the rationale of the United States Court of Appeals for the Sixth Circuit in its decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. *See also Mims v. Drummond Co., Inc.*, BRB No. 21-0314 BLA, slip op. at 3-6 (Feb. 24, 2023) (unpub.); *Salaz v. Powderhorn Coal Co.*, BRB Nos. 21-0406 BLA and 21-0406 BLA-A (Oct. 31, 2022) (unpub.); *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA (May 20, 2021) (unpub.); *Lusk v. Jude Energy, Inc.*, BRB No. 19-0505 BLA (Oct. 21, 2020) (unpub.).

[9] The ALJ noted earnings reported for 1992, 2007, 2008, 2012, 2013 and 2015 "appear to represent partial years of employment." Decision and Order at 9 n.68. This appears to be a scrivener's error because there is no other mention of earnings reported in these years in the record, Claimant specifically testified his last day working in a coal mine was December 29 or 30, 2005, and the ALJ did not use these years in his calculations. Decision and Order at 8-11; Hearing Transcript at 18; Director's Exhibits 11-14.

[10] The ALJ determined Claimant's work at Estep & Hurley in 1979 was not coal mine employment. Decision and Order at 6, 8 n.66. Specifically, Claimant listed work as

employment than if he had done the proper initial, threshold analysis.[11] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 11. Consequently, we affirm the ALJ's finding that Claimant established fewer than fifteen years of coal mine employment and therefore is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 11, 22-23.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits.[12] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ found Claimant did not establish the existence of clinical or legal pneumoconiosis.[13]

---

an underground mine foreman on his Employment History Form, but he testified to working as an owner, boss, and mechanic at the hearing. Hearing Transcript at 15-16, 22; Director's Exhibit 11. We need not address any possible error in the ALJ's finding as crediting Claimant with one year of coal mine employment with Estep & Hurley would still not amount to fifteen years of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 8 n.66.

[11] The ALJ credited Claimant with $700.00 of earnings from Knox Creek Coal Corporation in 1973; however, the SSA earnings record indicates Claimant earned $294.00 from Knox Creek Coal Corporation in 1973. Decision and Order at 8; Director's Exhibit 13 at 4. As this apparent typographical error overestimates Claimant's coal mine earnings in 1973, we consider it to be harmless. *See Larioni*, 6 BLR at 1-1278.

[12] The ALJ accurately found there is no evidence of complicated pneumoconiosis, and therefore Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 12-14, 23.

[13] "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

Clinical Pneumoconiosis

The ALJ considered thirteen readings, including two rehabilitative reports, of five x-rays dated June 9, 2016, May 6, 2019, February 19, 2020, March 2, 2020, and September 11, 2020. Decision and Order at 11-14, 24-27. All of the physicians who interpreted the x-rays are dually qualified as Board-certified radiologists and B readers. Director's Exhibit 21; Claimant's Exhibits 1, 2, 4; Employer's Exhibits 1 at 31-35; 3.

Dr. Miller read the June 9, 2016 x-ray as positive for simple pneumoconiosis, while Dr. Simone interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 5. The ALJ found the readings of the June 9, 2016 x-ray to be in equipoise for the presence or absence of pneumoconiosis. Decision and Order at 25.

Dr. Miller read the May 6, 2019 x-ray as positive for simple pneumoconiosis, while Dr. Simone interpreted it as negative. Director's Exhibit 24; Claimant's Exhibit 5. Dr. DePonte interpreted it as having 0/1 profusion and checked a box indicating the presence of parenchymal abnormalities consistent with pneumoconiosis. Director's Exhibit 21. The ALJ noted accurately that Dr. DePonte's 0/1 reading does not support a finding of pneumoconiosis.[14] Decision and Order at 25-26 (citing 20 C.F.R. §718.102(d)(3)). Thus, the ALJ found a preponderance of the readings of the May 6, 2019 x-ray weigh against a finding of clinical pneumoconiosis. *Id.* at 25-26.

Dr. Miller read the February 19, 2020 x-ray as positive for simple pneumoconiosis, while Dr. Simone interpreted it as negative. Director's Exhibit 25; Claimant's Exhibit 3. The ALJ found Dr. Simone's subsequent rehabilitative report, and in particular Dr. Simone's criticism of Dr. Miller's reading, was not well-documented. Decision and Order at 26; Employer's Exhibit 3. Therefore, giving equal weight to the two physicians'

---

tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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 significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[14] The regulation at 20 C.F.R. §718.102(d)(3) specifically states that "[a] chest radiograph classified under any of the foregoing [International Labour Organization] classification systems as Category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(d)(3); *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984).

interpretations, the ALJ found the February 19, 2020 x-ray readings to be in equipoise for the presence or absence of pneumoconiosis. Decision and Order at 26.

Dr. Ramakrishnan read the March 2, 2020 x-ray as positive for simple pneumoconiosis, while Dr. Simone interpreted it as negative. Claimant's Exhibit 2; Employer's Exhibit 6. The ALJ found the March 2, 2020 x-ray readings to be in equipoise for the presence or absence of pneumoconiosis. Decision and Order at 26-27.

Dr. Crum read the September 11, 2020 x-ray as positive for simple pneumoconiosis, while Dr. Adcock interpreted it as negative. Claimant's Exhibit 4; Employer's Exhibit 1. Dr. Adcock authored a rehabilitative report disagreeing with Dr. Crum's reading and reasserting his opinion that the x-ray is negative. Employer's Exhibit 4. Finding Dr. Adcock's supplemental report and his criticism of Dr. Crum's conclusions not well-reasoned, the ALJ gave equal weight to the two physicians' initial interpretations and found the September 11, 2020 x-ray readings to be in equipoise for the presence or absence of pneumoconiosis. Decision and Order at 27.

Having permissibly found one x-ray negative and the readings of four others in equipoise, the ALJ rationally concluded that Claimant did not satisfy his burden to prove the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); Decision and Order at 27. Because the ALJ conducted both a qualitative and quantitative analysis of the conflicting x-ray readings and rendered permissible findings that are supported by substantial evidence, we affirm his determination that Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[15] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 11-14, 24-27.

The ALJ also considered the medical opinions of Drs. Forehand, Fino, and Sargent and Claimant's treatment records. He correctly observed that none of the physicians diagnosed clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 27-31; Director's Exhibits 21, 25; Employer's Exhibits 1, 2; Claimant's Exhibit 8. Because there is no other evidence supportive of Claimant's burden of proof, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 27-31.

[15] As there is no biopsy evidence in the record, Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). In addition, Claimant cannot invoke the presumptions under 20 C.F.R. §§718.304 and 718.305 and therefore cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The ALJ considered Dr. Forehand's opinion that Claimant has legal pneumoconiosis and the opinions of Drs. Fino and Sargent that he does not.[16] Decision and Order at 16-21, 27-31; Director's Exhibits 21, 25; Employer's Exhibits 1, 2.

Dr. Forehand performed the Department of Labor (DOL) complete pulmonary evaluation of Claimant on May 6, 2019, and diagnosed a restrictive lung disease based on Claimant's symptoms of shortness of breath and pulmonary function study results. Director's Exhibit 21 at 3-4. He opined Claimant's eleven years of working at the face of poorly-ventilated, underground mines substantially contributed to his restrictive lung disease. *Id.* at 4. Further, he opined that Claimant's more than twenty years of smoking did not contribute to his restrictive lung disease because cigarette smoke does not cause or contribute to restrictive lung diseases and instead only contributes to obstructive lung disease. *Id.*

Dr. Fino diagnosed Claimant with a mild oxygen transfer impairment and a moderate obstructive ventilatory impairment. He opined Claimant's "disability is due to smoking" and unrelated to coal mine dust exposure. Director's Exhibit 25 at 13-15. Dr. Sargent opined Claimant has oxygen desaturation with exercise and "possibly [has] an obstructive ventilatory impairment, although the current lung function testing clearly underestimates his true lung function." Employer's Exhibit 1 at 2. Dr. Sargent opined he was unable to determine a definite cause for the obstruction but concluded there is nothing to suggest that Claimant's impairment, which started around 2019, had "anything to do" with coal dust exposure, which ended in 2006. *Id.*; Employer's Exhibit 2 at 15.

The ALJ gave all of the medical opinions "lesser or little weight" on the issue of legal pneumoconiosis and concluded Claimant did not establish the disease by a preponderance of the evidence. Decision and Order at 30. Specifically, the ALJ discredited Dr. Forehand's opinion because he excluded smoking as a potential cause for Claimant's disability based on the general premise that smoking does not cause restrictive lung diseases. *Id.* at 28-29. Noting that Dr. Forehand did not cite any medical evidence or literature supporting this contention, the ALJ found his opinion not well-documented. *Id.* at 29. The ALJ also found Dr. Forehand's opinion undermined by his reliance on an

[16] The ALJ accurately noted Claimant's treatment records do not include a diagnosis of legal pneumoconiosis. Decision and Order at 31; Claimant Exhibit 8.

inaccurate smoking history of twenty-four years (without reference to number of cigarettes smoked per day), contrary to the ALJ's finding of 15.1 pack years. *Id.* We cannot affirm the ALJ's findings.

The ALJ acknowledged that Dr. Forehand relied on an accurate coal dust exposure history and explained how that specific exposure contributed to Claimant's restrictive disease. However, in analyzing the physician's opinion, the ALJ focused almost exclusively on Dr. Forehand's rationale for eliminating smoking as a cause of Claimant's impairment, thus overlooking the doctor's independent explanation for diagnosing legal pneumoconiosis.[17] Director's Exhibit 21 at 4; *see* Decision and Order at 28-29. A physician need not apportion the causes of a miner's lung disease to establish the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). Rather, a physician need only credibly diagnose a chronic 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).

Here, the ALJ did not analyze the credibility of Dr. Forehand's explanation for why coal mine dust exposure was a substantial contributing cause to Claimant's impairment. Nor did the ALJ explain how Dr. Forehand's understanding of Claimant's smoking history

---

[17] Regarding the etiology of Claimant's restrictive lung disease, Dr. Forehand stated:

> Claimant's exposure to freshly fractured respirable silica. and coal dust on a regular basis for up to 6 days a week and frequent double shifts for 11 years working at the face of poorly ventilated underground coal mines: (curtains not hung, brattices not kept up) in seams down to 30" as a belt foreman, roof bolt operator (frequent blowouts, dust box inoperable, working on the return side), scoop operator, shuttle car operator, joy loader operator, and cutting machine operator (no water) did cause him to inhale into his lungs reactive coal mine dust particles triggering an inflammatory reaction in his lungs leading to stiffness of his lungs, which substantially contributed to his RESTRICTIVE LUNG DISEASE. Claimant did meet the definition of legal coal workers' pneumoconiosis. Cigarette smoke causes OBSTRUCTIVE LUNG DISEASE. Claimant's exposure to cigarette smoke for 20+ years did not substantially contribute to his RESTRICTIVE LUNG DISEASE. Cigarette smoke does not cause or contributed to RESTRICTIVE LUNG DISEASE.

Director's Exhibit 21 at 4.

and his opinion regarding whether smoking can cause a restrictive impairment undermines his explanation that coal mine dust exposure substantially contributed to Claimant's impairment.[18] Decision and Order at 28-29; Director's Exhibit 21 at 4; *see* 20 C.F.R. §718.201(b); *see also Gross*, 23 BLR at 1-17.

As the ALJ did not fully consider Dr. Forehand's rationale for why Claimant has legal pneumoconiosis or explain how the physician's opinions on smoking necessarily undermine his opinion on legal pneumoconiosis, the ALJ's credibility finding does not satisfy the Administrative Procedure Act (APA).[19] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Addison*, 831 F.3d at 252-53 (ALJ must conduct an appropriate analysis of the evidence to support his conclusion and render necessary credibility findings); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Director's Exhibit 21 at 4.

We therefore vacate the ALJ's weighing of the evidence regarding legal pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.202(a)(4); Decision and Order at 27-32.

Remand Instructions

On remand, the ALJ must first determine whether Claimant can establish a change in an applicable condition of entitlement by establishing total disability based on new evidence, in order to warrant a review of his current claim on the merits. *See* 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). If Claimant fails to show a change in an applicable condition of entitlement, the claim must be denied. 20 C.F.R. §725.309(c).

If Claimant establishes total disability and a change in an applicable condition of entitlement, the ALJ must reconsider whether Claimant established legal pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.201(a)(2). Specifically, the ALJ

[18] Although an inaccurate understanding of a miner's smoking history may affect the credibility of a physician's opinion on legal pneumoconiosis, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988), the ALJ failed to explain why Dr. Forehand's understanding of Claimant's smoking history undermines his conclusion that Claimant's coal mine dust exposure substantially contributed to his impairment.

[19] The APA 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).

must assess whether the medical opinions are adequately reasoned and documented, taking into consideration the physicians' credentials, their specific diagnoses, the explanations for their conclusions, their understanding of Claimant's smoking and work histories, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

If Claimant establishes legal pneumoconiosis, the ALJ must determine whether pneumoconiosis is a substantially contributing cause of his total respiratory disability. 20 C.F.R. §718.204(b), (c).

In reaching all his determinations on remand, the ALJ must adequately explain the bases for his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority decision except its conclusion that an ALJ cannot credit a coal miner with a full year of employment unless he establishes employment relationships with his employers lasting at least 365 days.

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

Notably, the majority interprets Fourth Circuit case law as requiring a 365-day employment relationship. However, as discussed in *Baldwin*, neither the circuit nor the

Board has issued any binding precedent on the matter. BRB No. 21-0547 BLA, slip op. at 12, 2023 WL 5348588, at *8 (Buzzard, J., concurring and dissenting) (explaining why the Board's decision in *Clark* and the Fourth Circuit's decisions in *Mitchell* and *Armco*, all of which predate the effective date of the current regulation, do not foreclose the Sixth Circuit's *Shepherd* rationale).[20] Regardless, given the majority's holding that the ALJ's alleged error in this case is harmless, my colleagues' mis-assessment of the law is, itself, harmless.

I thus concur in the remainder of the decision.

GREG J. BUZZARD
Administrative Appeals Judge

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