U.S. Department of Labor

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

BRB No. 20-0429 BLA

IMOGENE SHEPHERD (Widow of TRAMBLE SHEPHERD) Claimant-Respondent v. INCOAL, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 4/27/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., 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, ROLFE and GRESH, Administrative Appeals Judges.

ROLFE and GRESH, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits on Remand (2009-BLA-05618) 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 survivor's claim filed on August 27, 2008,[1] and is before the Benefits Review Board for the third time.[2] The relevant issue is whether Claimant may invoke the rebuttable presumption that the Miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018).

In *Shepherd v. Incoal, Inc*., BRB No. 17-0081 BLA (Nov. 27, 2017) (unpub.), the Board vacated the ALJ's finding that Claimant established 15.07 years of coal mine employment and modified his determination to reflect the Miner had only 14.75 years. Based on this recalculation, the Board held Claimant was unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018). Further relying on the ALJ's unchallenged findings that the evidence was insufficient to establish the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c), the Board reversed the award of benefits.

[1] Claimant is the surviving spouse of the Miner, who died on July 31, 2008. Director's Exhibit 11.

[2] We incorporate by reference the relevant procedural history set forth in our prior decisions in this case. *Shepherd v. Incoal, Inc.*, BRB No. 17-0081 BLA (Nov. 27, 2017) (unpub.); *Shepherd v. Incoal, Inc.*, BRB No. 12-0403 BLA (Apr. 19, 2013) (unpub.).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death 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 impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The Board has affirmed the ALJ's finding that Claimant is totally disabled and that Employer is unable to rebut the Section 411(c)(4) presumption. *Shepherd*, BRB No. 12-0403 BLA, slip op. at 11.

Claimant appealed and the United States Court of Appeals for the Sixth Circuit[4] vacated the Board's decision. The court held that the ALJ and the Board erred in calculating the Miner's length of coal mine employment under 20 C.F.R. §725.101(a)(32)[5] and further erred in failing to consider Claimant's account of the Miner's work history which, if credited, would establish additional coal mine employment between 1962 and 1963, and 1967 and 1973. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02, 407 (6th Cir. 2019). The court remanded the case for the ALJ to first resolve the conflict in the evidence as to the periods of time that the Miner performed coal mine employment and then determine whether he accumulated the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. The court directed the ALJ, in calculating the Miner's length of coal mine employment, to give full effect to the four alternative calculation methods provided in 20 C.F.R. §725.101(a)(32). *Id.* at 407.

On remand, the ALJ found Claimant established the Miner worked in qualifying coal mine employment for at least fifteen years and therefore invoked the Section 411(c)(4) presumption. As the Board had previously affirmed his finding that Employer failed to rebut the presumption, the ALJ again awarded benefits.

On appeal, Employer requests that the Board hold this case in abeyance pending the United States Supreme Court's decision in *California v. Texas*, 593 U.S. , 141 S. Ct. 2104 (2021). Employer also contends the ALJ erred in crediting the Miner with at least fifteen years of coal mine employment. Claimant responds in support of the ALJ's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject Employer's assertions that the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) is dicta. Employer replied, reiterating its previous contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] In interpreting this regulation, the court held that a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship, to establish one year of coal mine employment under 20 C.F.R. §725.101(a)(32)(i) or (iii). *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019).

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

Citing *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), and *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 and argues the case should be held in abeyance pending the Court's decision on the constitutionality of the ACA. Employer's Brief at 22 n.9 (unpaginated). Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. 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*, 141 S. Ct. at 2120.

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The ALJ provided alternative length of coal mine employment calculations. Initially, the ALJ assessed only the periods when beginning and ending employment dates could be ascertained and applied the following presumptions: 1) if the Miner worked at least 125 days in or around the coal mines, the ALJ presumed he worked one year in coal mine employment; and 2) if a coal mining company employed the Miner for a calendar year, the ALJ presumed that absent evidence to the contrary, he worked at least 125 days and therefore may be credited with one year of coal mine employment. Decision and Order at 6-7 (referencing 20 C.F.R. §725.101(a)(32)(i), (ii)).

The ALJ found Claimant's statement, which she certified as true and correct to the best of her knowledge, that the Miner worked for Hueysville Coal Company (Hueysville) for ten months between July 1962 and May 1963 to be uncontradicted; therefore, he found the Miner worked "over 125 days" for Hueysville and credited him with one year of coal mine employment from 1962 to 1963. Decision and Order at 7; Director's Exhibit 4. Based on the Miner's employment history form and Social Security Earnings Statements (SSES) reflecting consecutive years of employment as a welder with R & S Truck Body Company (R & S) between the second quarter of 1969 and third quarter of 1973, the ALJ credited the Miner with four years of coal mine employment. Decision and Order at 6; Living Miner's Claim (LM) at 387; Director's Exhibit 7 at 3. Based on the employment dates

outlined in correspondence from coal companies that employed the Miner, the ALJ credited the Miner with another nine full calendar years and 2.88 partial years of coal mine employment with: Hite Preparation Company (Hite) between September 15, 1973, and February 28, 1977 (3.94 years); Incoal Incorporated sporadically between March 1, 1977, and December 12, 1984 (6 full years and 1.4 partial years); and Trojan Mining Company between February 18 and May 6, 1985, and June 10 and 26, 1985 (0.54 year). Decision and Order at 6 n.17, 7 n.20; LM at 380-82. The ALJ thus found the Miner had 16.88 years of coal mine employment from 1962 to 1963 and 1969 to 1985.[6] Decision and Order at 7.

With regard to his second calculation, the ALJ applied 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days that the Miner worked in coal mine employment from 1963 through 1985.[7] He divided Claimant's yearly earnings as reported in his SSES 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*. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average "yearly" earnings, the ALJ credited him with a full year of coal mine employment. For the years in which the Miner's earnings fell short, the ALJ credited him with a fractional year, calculated by dividing his annual earnings by the average yearly earnings. Applying this method, the ALJ credited the Miner with sixteen years of coal mine employment between 1969 and 1984 and 3.12 partial years from 1963 to 1968 and in 1985; therefore, he found Claimant established the Miner worked for 19.12 years in coal mine employment. Decision and Order at 8-9. The ALJ ultimately concluded this latter method was the "most credible" because "the beginning and ending dates could not be ascertained for all of the Miner's coal mine employment." *Id*. at 9. Thus, the ALJ found

[6] The Miner's SSES indicates coal mine employment earnings with Allen Fork Coal Company and Export Coal Mining Company from 1963 to 1964 and 1966 to 1967. Director's Exhibit 7. The ALJ did not factor this work into his calculation, presumably because he could not determine the beginning and ending employment dates. Decision and Order at 6-7.

[7] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

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

20 C.F.R. §725.101(a)(32)(iii).

Claimant established at least fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption.

Employer contends the ALJ improperly ignored the beginning and ending dates of the Miner's employment, as indicated in the record, and erred in crediting him with coal mine employment for those years when the above calculation yielded 125 working days, but not an actual calendar year. Employer's arguments are without merit. As the Sixth Circuit made clear in *Shepherd*, "[i]f the quotient from that calculation 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." *Shepherd*, 915 F.3d at 402.

We also reject Employer's assertion that the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) is not relevant to the outcome of this case and, therefore, its holding that 125 days may constitute a year of coal mine employment under the regulations is dicta.[8] Although Employer is correct that the court remanded the case for consideration of all relevant evidence, it explicitly rejected Employer's interpretation and application of 20 C.F.R. §725.101(a)(32)(iii). *Shepherd*, 915 F.3d at 403. As the Director correctly notes, "the court expressly instructed the ALJ to 'give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)' when evaluating the Miner's length of coal mine employment." Director's Brief at 1-2 (unpaginated) (quoting *Shepherd*, 915 F.3d at 407). Thus, we agree with the Director that, regardless of Employer's disagreement with the court's interpretation of the regulations, "the ALJ here was bound by the Sixth Circuit's holding in this case[,]" and the court's interpretation of the regulation constitutes "controlling law in cases arising within the court's jurisdiction."[9] Director's Brief at 2; *see*

[8] Employer contends the "court did not remand or vacate [the Board's application of] the regulation [to the facts of the case], and did not apply the regulation to Mrs. Shepherd's claim." Employer's Brief at 8 (unpaginated). Rather, Employer asserts the court remanded the case because the ALJ failed to consider and weigh all relevant evidence as to the Miner's periods of coal mine employment and the court's analysis of 20 C.F.R. §725.101(a)(32) is unessential to this holding. *Id.*; Reply Brief at 3.

[9] It is well-settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both expressed and implied, without altering, amending, or examining the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it."

Briggs v. Pennsylvania R.R., 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

We further reject Employer's arguments that the ALJ erred in crediting portions of Claimant's recollection of her husband's employment history and in counting non-coal mine employment to reach the 15-year threshold. Employer's Brief at 23-27 (unpaginated); Reply Brief at 7-10. In its decision, the Sixth Circuit recognized that if Claimant's "recollection of her late-husband's coal mine employment is given credence" then "the additional months of coal mine employment would be sufficient to justify invocation of the 15-year presumption." *Shepherd*, 915 F.3d at 406.

In his most recent decision, the ALJ followed that guidance, finding "credible Claimant's uncontradicted recollection of the Miner's coal mine employment" and clarifying that, in so doing, he incorporated his prior findings *only* to the extent they did not conflict with the Sixth Circuit court's decision or his current findings. Decision and Order at 3, 7 (citations omitted). As a result, Claimant satisfied her burden. *Id.* at 9.

Employer argues the ALJ erred because other documentary evidence better supports portions of the Miner's version of his employment history with Hueysville and because the Miner's work as a welder with Elkhorn Industrial Products (Elkhorn) and R & S cannot qualify as coal mine employment. Employer Brief at 23-26 (unpaginated); Reply Brief at 7-9. But neither of those arguments justify remanding this now 14-year-old claim for what would be a fifth ALJ decision on the same issue under the uniquely difficult circumstances this case presents. *See, e.g.*, Claimant's Brief at 11 (noting the inherent problems the Miner's death caused, that most of the record was compiled before the implementation of the 15-year presumption, and that both the Miner and his widow necessarily presented imperfect recollections of his decades-old employment history).

First, Employer's argument that other documents better support portions of the Miner's account of his coal mine employment history does not require the ALJ to credit the Miner's version of it over the widow's version. While Employer contends that the Miner's SSES better corroborates various portions of the Miner's description, Employer's Brief at 23-26 (unpaginated), it never articulates how any of those differences would affect reaching the 15-year threshold, particularly given that the Miner also indicated he had over fifteen years of coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

Regardless, the ALJ was not required to accept Employer's assessment of those

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Hall, 12 BLR at 1-82; *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

periods of the Miner's employment history. It cannot be reasonably said that the ALJ has not considered all of the relevant evidence on this issue in his four decisions now spanning a decade. *See* 2012 ALJ Decision and Order at 6-7 (finding 15.25 years); 2015 ALJ Decision and Order at 7-15 (finding 13.08 years); 2016 ALJ Decision and Order on Reconsideration at 3-11 (revising finding to 15.08 years); and 2020 ALJ Decision and Order at 3-9 (finding 16.88 years under one method of calculation and 19.12 under another). His evaluation of it after all that time passes muster.

That is because substantial evidence is only such relevant evidence "as a reasonable mind might accept as adequate to support a conclusion." *Karst Robbins Coal Co. v. Director, OWCP* [*Rice*], 969 F.3d 316, 323 (6th Cir. 2020). While a reasonable trier-of-fact may agree with Employer's version of the Miner's employment history, it is not the only rational version to be inferred from these facts, as the Sixth Circuit court stressed in highlighting the widow's testimony regarding the Miner's time with Hueysville. *Shepherd*, 915 F.3d at 406. Her testimony is at times inconsistent with the Miner's and uncorroborated by the available employment records. But it is also unrebutted and not directly contradicted. And that provides a sufficient basis for the ALJ to credit her version under the Sixth Circuit court's guidance and our precedent: a Claimant's credible but uncorroborated testimony has long been accepted as substantial evidence of coal mine employment. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting a miner's uncorroborated testimony that employer characterized as "hazy and contradictory"); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (an ALJ "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984).[10]

Second, the ALJ likewise acted in his discretion in crediting the Miner's periods of employment with Elkhorn and R & S as qualifying coal mine employment. To qualify as

[10] Our dissenting colleague asserts the ALJ did not adequately explain why the Miner's testimony and SSES should not be credited over the widow's account. *See below* at 13. But it cannot reasonably be said the ALJ has not considered that evidence; he simply decided to credit the widow in spite of it -- which the court explicitly recognized remained in his discretion to do. *Shepherd*, 915 F.3d at 406. As the court further explained in this case, we "may not reweigh [that] evidence, substitute [our] judgment for that of the administrative law judge, or reverse the administrative law judge's decision simply because '[we] would have taken a different view of the evidence were [we] the trier of facts.'" *Id.*, at 398 (quoting *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 (6th Cir. 1985)). Had the court found the record could not reasonably support the widow's testimony as being devoid of "any indicia of reliability," *see below* at 12-13, it could have simply affirmed the Board's denial instead of remanding the claim. *Shepherd*, 915 F.3d at 406.

coal mine employment, the work must occur "in or around a coal mine" (situs) and it "must have been in the extraction or preparation of coal" (function). *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929 (6th Cir. 1989) (citation omitted). Given that "coal cannot be extracted without properly functioning equipment," shop work can qualify as coal mine employment where it is "located in the general vicinity of one or more extraction sites in order to avail itself of the economies of an on-site repair facility." *Id.* at 935.[11]

Employer's argument that the Miner and his widow at times characterized his occupation as welding and his work industry as "building scoops" and "truck beds" thus has no bearing on his employment status. Employer Brief at 26-27 (unpaginated); Reply Brief at 7-9. As Claimant points out in her brief, the Miner testified the scoops and truck beds "were the same pieces of equipment that he operated as an [underground] miner." Claimant's Brief at 10, n.2. It therefore remained within the ALJ's discretion to credit his work at Elkhorn and R & S building "working equipment" that was "integral to the extraction of coal" as meeting the function requirement. *Petracca*, 884 F.2d at 935; *see Rice*, 969 F.3d at 323 (substantial evidence is such relevant evidence "as a reasonable mind might accept as adequate to support a conclusion.").

Similarly, Claimant presented evidence to the ALJ that R & S was a "small local job shop" that "catered to local mines" and was located within an overall geographic "range" covering only those mines. Claimant Brief at 10, n.2. In response, Employer speculates that R & S was "not located at a mine" and therefore did not satisfy the situs test

[11] Notably, surface work at an underground mine qualifies as coal mine employment for the purposes of the 15-year presumption. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee working at an underground coal mine). The parties agree that all of the Miner's work occurred at underground mines or mines with substantially similar conditions, but Employer argues his work for Elkhorn and R & S does not meet the situs and function tests to qualify as coal mine employment. Employer's Brief at 26 (unpaginated). In calculating the Miner's length of coal mine employment as 19.12 years, the ALJ credited him with 5.52 years of qualifying employment between 1969 and 1973 with both employers: 1.28 years of qualifying employment at Elkhorn between 1967 and 1969 and 4.24 years of qualifying employment at R & S between 1969 and 1973. Decision and Order at 8; Director's Exhibit 7.

-- based on when it assumes the Miner worked with R & S and where it assumes the R & S shop was located at that time. Reply Brief at 9 (citing R & S's current website).[12]

But Employer has not otherwise attempted to show the ALJ exceeded his wide discretion in inferring that R & S was in the "general vicinity" of "one or more extraction sites." *Petracca*, 884 F.2d at 935 (recognizing that because of "inevitable" situations where a shop is "considerably distant" from an extraction site, vicinity "determinations must necessarily be left to the reasoned decision making of the administrative law judges" and are overturned only in cases of "clear error."). Employer's (and our colleague's) mere speculation on the location of R & S over fifty years ago as gleaned from its current website is insufficient to establish such an error. [13]

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[12] While objecting to R & S's situs based on its characterization of facts found on its website, Employer does not specifically challenge Elkhorn's situs. Employer Brief at 26-27 (unpaginated); Reply Brief at 7-9.

[13] Our colleague's assertion that we have mischaracterized the record is puzzling. Claimant presented evidence that the Miner built the same equipment as a welder that he operated in underground mining and argued -- under *Petracca* -- the shop was close enough in proximity to those mines "to avail itself of the economies" of an onsite facility. 884 F.2d at 935. Both Claimant and the Miner further certified he was exposed to coal dust in that employment. The ALJ found no contrary evidence. While Employer argues Claimant has not met her burden, it has not identified any evidence that casts any doubt on their representations, which we have long held are sufficient, in the absence of contradictory evidence, to establish dust exposure for qualifying coal mine employment. *See Tackett*, 12 BLR at 1-14; *Bizarri*, 7 BLR at 1-344-345; *Hutnick*, 7 BLR at 1-329. Our colleague simply ignores those representations in asserting Claimant put forth no evidence to satisfy the situs test.

In light of those representations, our colleague's allegations that the Miner may not have been exposed to dust because R & S's website characterizes its facility at the time as a "job shop" instead of a "repair shop," and because manufacturing and repair shops do not automatically fit under the regulatory definition of a coal mine under another federal program, remain unexplained and immaterial. *See below* at 16, citing *Maxxim Rebuild Co. v. Fed. Mine Safety & Health Review Comm'n,* 848 F.3d 737, 743 (6th Cir. 2017) (Offsite shop that manufactured and repaired mining equipment was not a coal mine under regulatory definition implementing the Mine Act and therefore subject to Occupational Safety and Health Administration, instead of Mine Safety and Health Administration, regulation). Instead, Claimant is correct that the Board "has no license to set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis." *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 634

Finally, whether the ALJ's current decision regarding this portion of the Miner's employment history conflicts with portions of his previous four decisions cannot change this analysis or the ALJ's determination. The ALJ specifically stated that he adopted his prior findings only to the extent that they do not conflict with his most recent findings. Decision and Order at 3. Moreover, the Sixth Circuit court's remand reset the table; the ALJ was no longer legally bound by his previous findings as law of the case. *See, e.g.*, *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-119-120 (1985) (an ALJ is not bound by previous credibility findings in a vacated decision).

There have been four previous attempts to analyze the same record in the fifteen years since the filing of this claim, each ultimately finding over fifteen years of employment established. Employer originally agreed to seventeen years before the enactment of the 15-year presumption made two of those years possibly material to the outcome. LM at 27-28. Remanding this case with another set of circuitous instructions for the ALJ to draft a fifth attempt -- one that somehow "more" reasonably harmonizes the record and his previous four attempts -- would be to create the kind of Sisyphean task that courts have long lamented plague this subsistence level benefits program. *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992) ("As so often in black lung cases, the processing of the claim has been protracted scandalously . . . delay in processing these claims is especially regrettable" because most black lung claimants "are middle-aged or elderly and in poor health and therefore quite likely die before receiving benefits if their cases are spun out for years"); *Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997) ("many cases languish while waiting for an [administrative law judge] or the [Benefits Review Board] to hear them" such that "the magnitude of the delays is likely to affect the legal representation available to claimants") (citation omitted).

Fortunately, it is unnecessary. As the ALJ's finding that the Miner worked in qualifying coal mine employment for at least fifteen years is supported by substantial evidence under the unique facts of this case, and in accordance with the Sixth Circuit's holding in *Rice*, 969 F.3d at 323 (substantial evidence is such relevant evidence "as a reasonable mind might accept as adequate to support a conclusion"), we affirm it.[14]

(6th Cir. 2009) (quoting *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999)).

[14] Significantly, apart from crediting .83 months of additional employment with Hueysville and 5.52 years of employment with Elkhorn and R & S, Employer does not challenge the remaining 13.59 years of the Miner's coal mine employment. While the ALJ did not err in crediting any of the Miner's time with these entities, Claimant need only establish parts of it to cross the 15-year threshold. For example, the Miner's additional 4.24 years with R & S alone puts Claimant over the finish line (13.59 + 4.24 = 17.83).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully and reluctantly dissent from the decision of my colleagues to affirm the ALJ's length of coal mine employment finding as the ALJ did not adequately explain his findings or heed the Sixth Circuit's remand instructions. The Sixth Circuit instructed the ALJ to consider and weigh "*all evidence* related to the beginning and ending dates of each of the [M]iner's stints of coal mine employment, including the evidence submitted by Imogene Shepherd – evidence that the [ALJ] and BRB failed to discuss." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 407 (6th Cir. 2019) (emphasis in original) (referencing Director's Exhibit 4 and the unresolved conflict between it and the Miner's employment history form);[15] *see* Employer's Brief at 28-29 (unpaginated). The Court further noted that

Alternatively, the additional ten months (0.83 years) in 1962 - 1963 with Hueysville in conjunction with his 1.28 years of employment with Elkhorn in 1967 – 1969 also does the same (13.59 + 0.83 + 1.28 = 15.7).

[15] The Sixth Circuit noted Claimant's account of the beginning and ending dates of the Miner's coal mine employment differed from the Miner's account, which the ALJ and Board had relied upon as uncontradicted, and that Claimant's account, if credited, could add forty-two months to the Miner's overall length of coal mine employment. Specifically, the court noted: 1) a ten-month discrepancy as to whether the Miner's initial coal mine employment period began in July 1962 with Hueysville Coal Company (Hueysville) or May 1963 with Allen Fork Coal Company (Allen Fork); and 2) a thirty-two-month discrepancy as to whether the Miner, after ending his non-coal mine employment with R

claims of coal mine employment "can be supported by earnings statements, pay stubs, specific remembrances, or other indicia of reliability. *Id.* at 407. On remand, the ALJ credited Claimant's certified account that the Miner's initial period of coal mine employment began in July 1962 with Hueysville. Decision and Order at 7; Director's Exhibit 4. As Employer asserts, however, the ALJ did not assess the credibility of, or resolve the conflict between, Claimant's statement that the Miner's employment with Hite began in May 1971 and the Miner's statement that this employment began in September 1973, considering all the evidence as the Sixth Circuit had directed him to do. *Shepherd*, 915 F.3d at 406-07; Employer's Brief at 23-26 (unpaginated).

Additionally, I agree with Employer that the ALJ did not adequately explain why he credited Claimant's statement that the Miner had an additional ten months of coal mine employment with Hueysville from July 1962 to May 1963 as establishing "over 125 working days." Employer's Brief at 23-26 (unpaginated); Reply Brief at 5-9; Decision and Order at 7; Director's Exhibit 4. As Employer correctly notes, although Claimant indicated the Miner worked for Hueysville from July 1962 to July 1964, the Miner certified that his coal mine employment began in May 1963 with Allen Fork.[16] LM at 387-388; Director's Exhibit 4; Employer's Brief at 24 (unpaginated). As Employer further notes, the Miner's Social Security Earnings Statement (SSES) shows no earnings with Hueysville in any year and his first coal mine employment earnings were with Allen Fork in the second quarter of 1963. Employer's Brief at 24 (unpaginated); Director's Exhibit 7. Because the ALJ did not address these apparent contradictions and inconsistencies, I cannot agree with my colleagues' decision to affirm the ALJ's determination to credit the Miner with "over 125 days" of coal mine employment with Hueysville from July 1962 to May 1963. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 7 n.22; *see generally Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203 n.10 (2016) (alleged unreported employment earnings may be accepted where absence of earnings record can be satisfactorily explained).

I further find merit in Employer's assertion that the ALJ did not adequately explain why he included the Miner's earnings with Elkhorn Industrial Products (Elkhorn) and R & S Body Shop (R & S), began coal mine employment with Hite Preparation Company (Hite) in May 1971 or September 1973. *Shepherd*, 915 F.3d at 406-07.

[16] The Miner also certified that his employment with Allen Fork spanned from May 1963 to July 1963 and that he worked in coal mine employment with Export Coal from August 1963 to November 1964. Living Miner's Claim (LM) at 387-388.

S in 1967 through 1973 in his coal mine employment calculation.[17] As Employer correctly notes, the ALJ previously found the Miner's description of his employment as a welder building scoops and truck beds for Elkhorn and R & S "do[es] not qualify as prior coal mine employment." 2016 ALJ Decision and Order on Reconsideration at 7 n.33; Employer's Brief at 27 (unpaginated). In his most recent decision, however, the ALJ counted the Miner's employment with Elkhorn as coal mine employment without explanation and credited his employment with R & S as coal mine employment "absent any evidence to the contrary." Decision and Order at 6, *see id.* at 7-8. Although the ALJ had discretion to recalculate the Miner's length of coal mine employment for these years, Employer correctly asserts the ALJ's determination to, without explanation, credit both jobs as coal mining employment, constitutes "fundamental error." Reply Brief at 7-8. The Administrative Procedure Act (APA) requires the ALJ to explain the basis for his findings.[18] U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). None was provided. *McCune*, 6 BLR at 1-998.

Absent any explanation for the ALJ's finding, a reviewing body cannot discern whether the ALJ reconciled the conflicts in evidence with the burden improperly placed on Employer to disprove the Miner's employment is qualifying employment, or with the burden properly placed on Claimant to establish the qualifying nature of the Miner's employment. 20 C.F.R. §718.305(b)(1)(i); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (In deciding whether substantial evidence supports the ALJ's finding, "we consider whether the ALJ adequately explained the reasons for crediting certain testimony and documentary evidence over other testimony and documentary evidence."). Indeed, the ALJ's determination that the Miner's employment with R & S is coal mine employment "absent any evidence to the contrary" belies the majority's and Claimant's assertions that the ALJ properly exercised his discretion, *i.e.*, reasoned judgment, in counting the Miner's employment with either employer as qualifying coal

[17] In calculating the Miner's length of coal mine employment as 19.12 years, the ALJ credited him with 5.52 years of coal mine employment with Elkhorn and R & S from 1967 to 1973. Decision and Order at 8; Director's Exhibit 7. Subtracting the Miner's employment with these companies from the ALJ's length of coal mine employment calculation yields less than fifteen years (19.12 – 5.52 = 13.59), apart from the contested employments with Hueysville and with Hite counted by the ALJ.

[18] The Administrative Procedure Act provides 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).

mine employment.[19] Because it is Claimant's burden to establish the Miner's employment is qualifying coal mine employment,[20] it was incumbent on the ALJ to explain the basis on which he found that burden was met. 20 C.F.R. §718.305(b)(1)(i), *see Martin*, 400 F.3d at 305.

Moreover, I disagree with the majority's characterization of the record. Employer did not agree that the Miner was exposed to coal mine dust in his employment with R & S and Elkhorn,[21] nor did Claimant state that R & S was a "small local repair shop."[22] Nor

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[19] The ALJ's determination to credit the Miner with full years of coal mine employment with R & S between 1971 and 1973 also disregards the Sixth Circuit's instruction to consider and weigh all evidence related to the beginning and ending dates of each period of coal mine employment as it conflicts with Claimant's statements that the Miner's employment with R & S ended, and his employment with Hite began, in May 1971. *Shepherd*, 915 F.3d at 406-07; Director's Exhibit 4.

[20] Contrary to the majority's contention, Employer has consistently contested the Miner's length of coal mine employment and the qualifying nature of his employment between the fourth quarter of 1967 and the third quarter of 1973. *See* Employer's 2011 Closing Brief at 5; Employer's Brief at 26-27 (unpaginated); Reply Brief at 7-10.

[21] Employer did not agree the Miner's employment with R & S and Elkhorn occurred at underground mines or in mines with substantially similar conditions. *See* Employer's Brief at 26-27 (unpaginated) (characterizing the ALJ's statement that "neither party contests that any coal mine employment which the Miner should be credited was either underground or in mines with substantially similar conditions" as "accurate" inasmuch as "any of Shepherd's actual employment at coal mines should be considered qualifying coal mine employment;" but also explicitly stating, "[t]he record documents that Shepherd worked from 1967 until 1973 in non-coal mining jobs" that "were not in coal mines."); Employer's 2011 Closing Brief at 5 (Employer excluding the Miner's earnings between the fourth quarter of 1967 and second quarter of 1973 from its length of coal mine employment calculation); Reply Brief at 7-10 (argument briefing Employer's assertion that "[t]he ALJ erred by counting two of Tramble Shepherd's jobs – at Elkhorn Industrial Products and R&S Godwin Truck Body Company – as coal mining employment when they were not").

[22] In her 2015 Motion for Reconsideration, Claimant pointed the ALJ to the history of R & S detailed on its website. She quoted the "about us" page as stating that R & S "began in 1968 as a small local *job shop* catering to the Eastern Kentucky coal industry with a marketing range of only a couple hundred miles. Building [truck] bodies for the coal industry could be very good business as long as the coal industry was growing." Claimant's Memorandum in Support of Reconsideration at 2 n.3 (emphasis added) (citation

does Employer limit its challenge to the ALJ's counting this employment as coal mine employment to speculation that the R & S shop was not located at a mine. Rather, Employer explicitly argues on appeal that none of the Miner's employment with Elkhorn or R & S occurred at a covered situs. In addition to stating this employment was not at a mine, Employer explained that Claimant's and the Miner's responding "yes" this employment involved "exposure to dust, gases, or fumes" on their CM-911a employment history forms is not determinative of the Miner's having been exposed to *coal mine* dust in these "welder" positions, which they both characterized as "*building*" coal mine equipment as opposed to *repairing* dust-covered equipment that had been used at a coal mine. Employer Brief at 26-27 (unpaginated); Reply Brief at 7-9; Claimant's Brief at 10 n.2; Living Miner's Claim (LM) at 387; Director's Exhibit 4; *see Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 934-35 (6th Cir. 1989) (holding "where a mine operator maintains a repair shop in the general vicinity of one or more extraction sites in order to avail itself of the economies of an on-site repair facility, the shop should be presumed to be 'around a coal mine;'" machine shop where machinery covered with coal dust is brought for repair and painting fell within the statutory definition of the area "around the coal mine" because "[i]ts close physical proximity with the mine site and the significant and regular exposure of those working in the shop to coal dust make their inclusion in the protection of the Act entirely just and reasonable"); *see also Maxxim Rebuild Co. v. Fed. Mine Safety & Health Review Comm'n*, 848 F.3d 737, 743 (6th Cir. 2017) (distinguishing manufacturers and repairers of mining equipment from miners and mine operators; explaining the Mine Act is "'tailored to the dangers that arise from handling coal' and other minerals, not the generic dangers of making mining equipment") (citing *Power Fuels, LLC v. Fed Mine Safety & Health Rev. Comm'n*, 777 F.3d, 214, 217 (4th Cir. 2015).[23]

As the ALJ's determination to credit the Miner with over five years of coal mine employment with Elkhorn and R & S is both unexplained and material to his finding that the Miner had at least fifteen years of qualifying coal mine employment,[24] and as he failed

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omitted); Claimant Brief at 10, n.2 (reiterating R & S was a "job shop"). As a "job shop" manufactures small batches of customized products, it is unclear whether R & S repaired mining equipment covered with coal dust.

[23] Although the majority rejects, as speculative, Employer's evidence as to the location of R & S, neither the majority nor the ALJ points to any evidence that R & S was in close physical proximity with a mine site or that those working at R & S were regularly exposed to coal mine dust.

[24] The Sixth Circuit observed Claimant would exceed the threshold fifteen years of coal mine employment if the ALJ were to credit Claimant's testimony, that the Miner had thirty-two additional months of coal mine employment with Hite between May 1971 and

to resolve other conflicts in the evidence relating to the Miner's employment with those employers, Hueysville, and Hite, I reluctantly cannot agree with my colleagues' decision to affirm the ALJ's decision, despite the lengthy procedural history of this claim. The evaluation of the evidence is for the ALJ to make on remand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The Board does not have the authority to award benefits merely because of a lengthy delay in the adjudicatory process of a claim. *See Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997); *Mancia v. Director, OWCP*, 130 F.3d 579, 593 (3d Cir. 1997); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 524 (4th Cir. 1995); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995). I would remand the case for the ALJ to reconsider the issue of the Miner's length of coal mine employment, resolve the conflicts in the evidence, and provide explanations for his determinations as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see McCune*, 6 BLR at 1-998.

I agree with the majority in all other respects.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

September 1973, over the Miner's testimony that his employment with Hite began in September 1973. *Shepherd*, 915 F.3d at 406-07. However, as footnoted *supra*, the ALJ did not address the conflict in this evidence. Instead, he credited the Miner with full years of coal mine employment with R & S between 1971 and 1973, in direct conflict with Claimant's testimony that the Miner's employment with R & S ended, and his employment with Hite began, in May 1971. Director's Exhibit 4. Although the ALJ credited Claimant's testimony with regard to the Miner's employment with Hueysville in 1962-1963, he apparently did not find her testimony regarding the Miner's additional employment with Hite similarly creditable. The ALJ's unexplained crediting of Claimant, when there is contrary evidence, in some instances but not others, underscores the need for adequate explanation of his determinations.