U.S. Department of Labor

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

BRB No. 21-0547 BLA

ANITA BALDWIN (o/b/o EDDIE DEAN BALDWIN) Claimant-Petitioner v. ISLAND CREEK KENTUCKY MINING and ISLAND CREEK COAL COMPANY C/O SMART CASUALTY CLAIMS Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))	 DATE ISSUED: 7/14/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Johnathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Self-Insured Employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Denying Benefits (2020-BLA-05588) 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 miner's subsequent claim filed on July 24, 2018.[1]

The ALJ found Claimant[2] established 14.14 years of underground coal mine employment, and that the Miner was totally disabled by a respiratory or pulmonary impairment, thereby establishing a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Because Claimant established fewer than fifteen years of coal mine employment, the ALJ found she was unable to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical pneumoconiosis arising out of coal mine employment but did not establish total disability due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). Further finding the record contains no evidence that the Miner suffered from complicated pneumoconiosis, the ALJ found the irrebuttable presumption of total disability due to

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[1] This is the Miner's third claim for benefits. Director's Exhibits 1-3. He filed his initial claim in 1999 but withdrew it. Director's Exhibit 1. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b). Because the record of the Miner's second claim filed in 2001 was not available, the ALJ found the district director denied the claim for failure to establish total disability. Decision and Order at 2, 5; Director's Exhibit 2.

[2] Claimant is the widow of the Miner, who died on January 29, 2021, and she is pursuing the miner's claim on his behalf. Decision and Order at 1 n.1 (granting Claimant's March 12, 2021 Motion to Substitute Party); Director's Exhibit 12.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[4] 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.

pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), inapplicable and denied benefits. 20 C.F.R. §718.304.

On appeal, Claimant argues the ALJ erred in calculating the length of the Miner's coal mine employment and in finding Claimant did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), initially declined to file a substantive response in this appeal.[5]

Upon considering the parties' briefs on appeal, the Benefits Review Board asked the Director to provide briefing in this case. In an Order issued on November 30, 2022, the Board requested the Director discuss his views concerning proper application of, and the appropriate divisor an ALJ should use when applying, Section 725.101(a)(32)(iii) to calculate years of coal mine employment during partial calendar years. The Board asked the Director, in so doing, to address whether any binding precedent forecloses application of *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) to this case arising in the Fourth Circuit, and to specifically address the holdings in *Daniels Co. v. Mitchell,* 479 F.3d 321, 334-35 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002); *Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993); and *Clark v. Barnwell Coal Co.,* 22 BLR 1-277, 1-282-83 (2003).

Regarding the first point of the Board's request, the Director asserts there is no binding authority foreclosing application of *Shepherd* in this case although he further asserts *Shepherd* conflicts with the Fourth Circuit's interpretation of the previous regulation and Board caselaw, as well as the Department's longstanding interpretation of the regulation and practice in administering the Act. The Director further contends that *Shepherd* is wrongly-decided as a matter of regulatory construction and can lead to absurd results. Regarding the Board's second point, the Director responds the ALJ did not adequately explain his use of the 365-day divisor in this case and urges the Board to remand the case for further explanation.

Employer filed a reply to the Director's response arguing the cases that the Director considered as persuasive are actually binding, but even if they are not, it further agrees with the Director they would also be persuasive. It further agrees with the Director that *Shepherd* is wrongly-decided as a matter of regulatory construction. But it disagrees with

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not establish disability causation or invoke the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §§718.204(c), 718.304; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6 n.4, 25-26.

the Director on the second point and argues that the ALJ's use of a 365-day divisor should be affirmed. Claimant did not reply to the Director's brief.

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.[6] 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 the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The 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 addressing the dates and length of the Miner's coal mine employment, the ALJ considered Employer's Employment Verification Letter in conjunction with the Miner's testimony, Social Security Earnings Record, CM-911 Claim Form, and CM-913 Description of Coal Mine work Form. Jan. 20, 2021 Bench Decision[7] at 6-8 (adopting Employer's length of coal mine employment analysis and calculations set forth in its Jan. 8, 2021 Employer's Brief (Er. Br.) at 4-12); Nov. 17, 2020 HT at 17, 33-36; Director's Exhibits 4-10. He found, with the exception of two layoff periods, Employer continuously employed the Miner in its underground mines between May 10, 1976 and December 30, 1991. Jan. 8, 2021 Er. Br. at 4-12. Based on the Miner's employment dates and layoff

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; November 17, 2010 Hearing Transcript (HT) at 16-17.

[7] On January 28, 2021, the ALJ issued an Order Establishing 14.14 Years of Underground Coal Miner Employment, wherein he formally incorporated the findings and conclusions of his January 20, 2021 Bench Decision. Jan. 28, 2021 Order.

periods, the ALJ found Employer employed the Miner for 11 *full* years from 1977 to 1981 and 1986 to 1991 and for five *partial* years in 1976 and 1982 to 1985. *Id.* at 5, 10-11. The ALJ calculated the length of the Miner's employment relationship during his partial years of employment by counting the number of days in each period and dividing by 365 days per year to find the Miner had 3.14 calendar years of employment.[8] *Id.* at 4-11. Adding this sum to the 11 full years of employment, the ALJ determined the Miner's employment relationship with Employer spanned 14.14 years. *Id.* at 11; *see* Jan 28, 2021 Order. As Claimant did not establish at least 15 years of qualifying employment, the ALJ concluded she did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 6.

Claimant asserts the ALJ erred in calculating the Miner's partial years of coal mine employment and in failing to invoke the Section 411(c)(4) presumption. Claimant does not challenge the ALJ's findings as to the beginning and ending dates of the Miner's employment periods and concedes the Miner worked less than a calendar year in 1976 and in each year between 1982 and 1985. Claimant's Brief at 7, 9-10. However, citing the formula under 20 C.F.R. §725.101(a)(32)(iii)[9] and *Shepherd*, 915 F.3d at 402 (if a miner has at least 125 working days with an operator, he has worked for a year of coal mine employment with the operator regardless of the actual duration of his employment for the year), Claimant contends the ALJ erred in finding she established less than fifteen years of

[8] The ALJ found the Miner was employed for 236 days or 0.65 calendar year between May 10 and December 31, 1976; 273 days or 0.75 calendar year between January 1 and September 30, 1982; 132 days or 0.36 year between August 22 and December 31, 1983; 245 days or 0.67 year between January 1 and September 1, 1984; and 260 days or 0.71 year between April 16 and December 31, 1985 (0.65 + 0.75 + 0.36 + 0.67 + 0.71 = 3.14). Jan. 8, 2021 Er. Brief at 4-11.

[9] If the ALJ is unable to ascertain the beginning and ending dates of the miner's coal mine employment, *or the miner's employment lasted less than a calendar year,* he may apply this formula and divide the miner's annual earnings contained in his Social Security Administration earnings records by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

coal mine employment.[10] Claimant's Brief at 9-12. We find the argument unpersuasive in this jurisdiction under the existing state of the law.[11]

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 the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell,* 479 F.3d a 334-35 (a one-year employment relationship must be established, during which the miner had 125 working days); *Martin*, 277 F.3d at 474-75 (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.[12] 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

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[10] Claimant asserts application of the formula at 20 C.F.R. §725.101(a)(32)(iii) yields 4.46 fractional years of coal mine employment for the cumulative years of 1976, and 1982 to 1985. Claimant's Brief at 10. She asserts adding this sum to the established eleven full years of coal mine employment establishes the Miner had 15.46 years of coal mine employment. *Id.*

[11] Whether or not the Fourth Circuit cases are binding, we decline to apply *Shepherd* in its jurisdiction in the first instance. Although recognizing that a circuit split concerning how to apply a fundamental aspect of a national act is extremely problematic and can lead to what may be considered arbitrary results based on where a miner performed his last coal mine employment, we are not writing on a blank slate. Given the relevance of existing Fourth Circuit law, the Board's longstanding interpretation of the regulation in published decisions, and the Department of Labor's position, we believe the better practice is to continue to show restraint and allow the Fourth Circuit to rule on the issue -- without otherwise commenting on the merits of *Shepherd*.

[12] 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).

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.

Further, an ALJ's use of the formula at 20 C.F.R. §725.101(a)(32)(iii) is discretionary, particularly in circumstances such as this case where there is uncontested evidence of the beginning and ending dates of a miner's employment. 20 C.F.R. §725.101(a)(32)(iii). Although the ALJ could have used the formula at 20 C.F.R. §725.101(a)(32)(iii), he was required only to rely on a reasonable method of calculation supported by credible evidence. 20 C.F.R. §725.101(a)(32)(ii), (iii); *Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432. As Claimant concedes the beginning and ending dates of Claimant's partial periods of coal mine employment may be ascertained from the record, she has not demonstrated why it was unreasonable for the ALJ to calculate the length of his employment based on the Miner's established employment dates. *Mitchell,* 479 F.3d at 334-35; *Martin*, 277 F.3d at 474-75; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Claimant's Brief at 9.

We also reject Claimant's argument that the ALJ erred by not using the United Mine Workers of America (UMWA) Benefit Statement to find that the Miner had 15.25 years of coal mine employment between 1976 and 1991. Claimant's Brief at 6, 14-15; Director's Exhibit 7. The ALJ correctly noted the UMWA's calculation does not account for the Miner's known employment dates and layoff periods.[13] Jan. 20, 2021 Bench Decision at 6; Nov. 17, 2020 HT at 17, 33-36, 45. As Claimant identifies no specific error in this finding, we affirm it. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Thus, we affirm the ALJ's conclusion that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b), and we affirm the denial of benefits.

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[13] Specifically, the ALJ observed the UMWA credited the Miner with a full year of coal mine employment if he had at least 1000 service hours in a calendar year, 0.75 year if he had 750 to 999 service hours, 0.50 year for 500 to 749 service hours, 0.25 year for 250 to 499 service hours, and no credit for 250 or fewer service hours. Nov. 17, 2020 HT at 45; Director's Exhibit 7. The ALJ explained, despite the UMWA's calculation of 15.25 years of employment, the Miner could not have had fifteen 365-day employment periods as the Miner confirmed his beginning and ending employment dates span 15 years and 8 months and that one of his two layoffs spanned over 11 months. Jan. 20, 2021 Bench Decision at 6; Nov. 17, 2020 HT at 17, 33-36, 45.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Buzzard, J., concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits by concluding the Miner did not have at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.

To invoke the Section 411(c)(4) presumption, Claimant bears the burden to establish the Miner worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *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).

It is undisputed that the Miner worked in underground coal mine employment during sixteen calendar years (1976 – 1991). *See* Employer's January 8, 2021 Coal Mine Employment Memo. It is also undisputed that eleven of those years constitute full years of coal mine employment for purposes of invoking the Section 411(c)(4) presumption (1977 – 1981, 1986 – 1991). *Id.* at 5, 10-11. The sole question is whether the ALJ properly calculated the Miner as having only 3.14 years of coal mine employment during the remaining five calendar years (1976, 1982 – 1985). *Id.* at 4-10.[14]

The first flaw in the ALJ's analysis is that he based his findings solely on the total length of the Miner's employment relationships during these calendar years, i.e., whether

[14] The ALJ adopted Employer's calculations wholesale. *See* ALJ's January 20, 2021 Bench Order; ALJ's January 28, 2021 Coal Mine Employment Order. My decision

the Miner was considered an employee for 365 consecutive days, thus crediting him with partial years of employment based on the ratio of days employed to 365. For example, in 1982, the ALJ found the Miner was an employee for 273 days (January 1 – September 30, 1982) and thus credited him with .75 years of employment (273 days as an employee divided by 365 days in a year). The regulations, however, require ALJs to base their findings on the number of days "the miner worked in or around a coal mine or mines" during a given year. 20 C.F.R. §725.101(a)(32). A "working day," in turn, is defined as "any day or part of a day for which a miner received pay for work as a miner." *Id.* Having based his findings solely on the number of days the Miner was considered an employee, the ALJ failed to render findings on the number of days the Miner actually worked "in or around a coal mine" as required by the regulations.

The second, more fundamental flaw is that the ALJ's analysis reflects a common, yet mistaken view that a miner cannot be credited with one year of coal mine employment unless he first establishes a 365-day employment relationship with one or more operators during a calendar year. Under this approach, anything short of a 365-day employee-employer relationship entitles a miner to credit for less than one year of coal mine employment and affords whichever ALJ is assigned the case near-absolute discretion to determine how to calculate that partial amount.

This of course, leads to incongruous results within and between claims. A miner who is on an operator's payroll from January 1 through December 31, but receives pay for working "in or around a coal mine" only 125 days that year, is entitled to credit for one full year of coal mine employment towards invoking the Section 411(c)(4) presumption. That same miner, or a miner in a different claim, who is on an operator's payroll from January 1 through September 30, but receives pay for 225 working days that year, will be credited with less than one year, with the specific length of the partial year left to the ALJ's discretion. For example, under the current ALJ's approach, that miner would receive credit for .75 of a year (273 days employed divided by 365 days in a year); another ALJ, however, might credit the miner with .90 of a year (225 working days divided by a presumed 250 work-day-year). *See*, *e.g.*, *Wallace v. E & B Coal Co., Inc.*, BRB No. 19-0078 BLA, 2020 WL 2619430 (Mar. 23, 2020) (unpub.) (ALJ required the claimant to prove 250 working days to be credited with one year, i.e., a 50-week work year and 5-day work week).[15]

In either example, the miner would receive less than one year of coal mine employment despite having eighty percent more "working days" than the miner who was

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therefore cites Employer's memo recommending calculations to the ALJ when discussing the ALJ's findings. *See* Employer's January 8, 2021 Coal Mine Employment Memo.

[15] The Board vacated the ALJ's finding because the claim arose within the jurisdiction of the Sixth Circuit and, as discussed below, violated the court's holding in

credited with a full year (225 working days versus 125). And while the differences in these calculations (.75 year, .90 year, 1 year) might seem relatively minor, they matter a great deal when determining whether a claimant can invoke the Section 411(c)(4) presumption and thereby shift the burden to the employer to disprove either that the miner has pneumoconiosis or that his disability or death is due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Further, requiring a miner to establish a 365-day employment relationship as a prerequisite to earning one year of employment ignores the regulations' clear instruction that if a miner had "at least 125 working days during a calendar year . . . then the miner has worked one year in coal mine employment for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i). Relatedly, if he worked less than 125 days, he "has worked a fractional year based on the ratio of the actual number of days worked to 125." *Id*.

Following the rationale of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), I would hold that a miner who worked 125 days in a given year is entitled to credit for one full year of coal mine employment, without having to also establish a 365-day employment relationship with his or her employer. *See also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) (125 working days equals "one year of work" under the prior definition of "year" for invoking statutory presumptions at 20 C.F.R. §718.201(b) (2000)).

In declining to apply *Shepherd* outside the Sixth Circuit, the Board routinely cites the regulation's initial statement that a "year" is "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). It also relies on dicta in *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003), purporting to interpret this prefatory clause to mean that 125 working days establishes one year of coal mine employment *only* if the miner also had a 365-day employment relationship with the coal mine operator. That interpretation, however, is not controlling. *Clark* involved application of a prior definition of the term "year" for purposes of determining the responsible operator at 20 C.F.R. §725.493 (2000). As set forth in the concurrence in that case, the majority's commentary on the proper interpretation of the revised definition at 20 C.F.R. §725.101(a)(32)(i), (iii) was unnecessary to the resolution of the claim because the new definition of "year" contained therein had not yet taken effect. *Clark*, 22 BLR at 1-284 (McGranery, J., concurring); *see Daniels Co. v. Mitchell*, 479 F.3d

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Shepherd v. Incoal, Inc., 915 F.3d 392 (6th Cir. 2019) that 125 working days establishes one year of coal mine employment.

321, 334-35 (4th Cir 2007) (confirming the formula at 20 C.F.R. §725.101(a)(32)(iii) is inapplicable to claims pending on its effective date).

As the Sixth Circuit recognized in *Shepherd*, the plain text of the revised regulation sets forth additional methods, beyond the prefatory clause, for determining whether a miner had one year of coal mine employment. First, if the miner worked "at least 125 days during a calendar year," he is considered to have worked one year in coal mine employment "for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i). If he worked less than 125 days, he is entitled to credit for a fractional year "based on the ratio of the actual number of days worked to 125." *Id.* Second, "to the extent the evidence permits," the ALJ must ascertain the beginning and ending dates of the miner's employment. 20 C.F.R. §725.101(a)(32)(ii). If his employment "lasted for a calendar year . . . it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment."[16] *Id.* Finally, if the evidence "is insufficient to establish the beginning and ending dates" of the miner's employment, or the employment "lasted less than a calendar year," the ALJ "may divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F.R. §725.101(a)(32)(iii). This data is reported at Exhibit 610 of the Coal Mine Black Lung Benefits Act Procedure Manual, which provides the "daily earnings," and "yearly earnings" for "125 days" of work, for employees in coal mining each year from 1920 to 2022. *See* BLBA Transmittal No. 23-04 (February 16, 2023), revising *Average Earnings of Employees in Coal Mining,* https://www.dol.gov/sites/dolgov/files/OWCP/dcmwc/Exh%20610-Feb2023.pdf.

The Sixth Circuit is the only federal court to squarely address whether a finding of 125 working days under the revised regulations establishes one year of coal mine

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[16] This aspect of the regulations suggests the ALJ was not wrong to attempt to determine the beginning and ending dates of the Miner's coal mine employment during his allegedly partial years of employment. If the employment had lasted a full calendar year, the Miner would have been entitled to a presumption that he worked 125 days that year. But where, as here, the ALJ found the employment lasted less than a calendar year, the Miner is not entitled to the presumption of having worked 125 days. But that does not mean Claimant did not establish a "year" of employment as defined by the regulations. The ALJ instead must look at the evidence to determine the number of days the Miner worked, which "may" include applying the formula at 20 C.F.R. §725.101(a)(32)(iii) by comparing the Miner's wages to the "average daily earnings" in the coal mine industry that year. If the ALJ finds that the Miner worked 125 days in a given year, he must be credited with one year of coal mine employment; if he had less than 125 working days, he is entitled to a fractional year based on the ratio of the number of days worked to 125. 20 C.F.R. §725.101(a)(32)(i).

employment, even where the miner and employer did not have a 365-day employment relationship. In holding it does, the court determined that the "plain" and "unambiguous" language of the regulation provides four distinct methods to establish one year of coal mine employment and "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *Shepherd*, 915 F.3d at 402; *see Landes*, 997 F.2d at 1195. "[T]o assign any other meaning to the provisions" would "read out of the regulation §725.101(a)(32)(i)'s recognition that working 125 days in or around a coal mine within a calendar year will count as a year of coal mine employment 'for all purposes under the [Act].'" *Shepherd*, 915 F.3d at 402-03.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a *prior* version of the definition of "year" required a showing of both 125 working days and a 365-day employment relationship. *See Mitchell*, 479 F.3d at 329-331 (prior definition of year for determining responsible operator requires 365-day employment relationship); *Armco v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (same). Neither decision, however, forecloses the Sixth Circuit's interpretation of the revised regulation in *Shepherd*.

Like the Board's decision in *Clark*, the Fourth Circuit's decisions involved claims that predated the effective date of the current definition of the term "year." *See Mitchell*, 479 F.3d at 334-35; *Armco*, 277 F.3d at 475. 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*, 915 F.3d at 402. *Mitchell*, on the other hand, involved the factually and legally distinct question of whether "regular" employment (a term excluded from the new definition of "year") could be established based on 125 working days over the course of an *entire* fourteen-year career – 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.").

Finding the Sixth Circuit's rationale persuasive, not contrary to Fourth Circuit or Board precedent, and supportive of a consistent application of the definition of "year" across all claims under the Act, I would remand the claim for the ALJ to consider the length

of the Miner's coal mine employment (and thus applicability of the Section 411(c)(4) presumption) consistent with the holding in *Shepherd*.[17]

Consequently, I respectfully dissent from the majority's decision to affirm the denial of benefits.

GREG J. BUZZARD
Administrative Appeals Judge

[17] While Claimant advocates for outright reversal, the ALJ's failure to render necessary findings on the number of "working days" the Miner had in and around coal mines requires remand. Although the ALJ "may" apply the formula at 20 C.F.R. §725.101(a)(32)(iii) when the Miner's employment relationship "lasted less than a calendar year," he is not required to do so. He instead may consider whether additional evidence exists that would allow him to determine the specific number of working days without the formula. For example, the record contains UMWA data indicating the number of hours the Miner worked each year. Director's Exhibit 7. In 1985, a year the Miner was credited with only .75 of a year, the UMWA data reflects 1,254.50 hours of employment. If the Miner worked 8 hours per day, the ALJ could rationally credit him with 156.8 working days – more than enough to establish one full year of coal mine employment. 20 C.F.R. §725.101(a)(32)(i) ("125 working days during a calendar year" entitles a miner to credit for "one year in coal mine employment *for all purposes under the Act*") (emphasis added). The point of this example is not to dictate which method the ALJ must use; the point is to emphasize that it is the ALJ's duty, in the first instance, to analyze the evidence and render findings in accordance with the regulatory requirements. Further, even if the Board were to hold that Claimant unquestionably established at least fifteen years of qualifying coal mine employment, remand would still be required for the ALJ to consider whether Employer rebutted the Section 411(c)(4) presumption.