U.S. Department of Labor

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

BRB No. 20-0271 BLA

RONALD S. HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOOLS GOLD ENERGY CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 06/29/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-06163) 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 November 29, 2016.[1]

The administrative law judge found Employer is the properly designated responsible operator. She credited Claimant with nineteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it is the responsible operator. It also contends she erred in finding Claimant is totally disabled and, therefore, invoked the Section 411(c)(4) presumption. It further asserts she erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[3] 20 C.F.R. §725.495(a)(1). The district director is initially charged

[1] This is Claimant's third claim for benefits. The district director denied Claimant's most recent claim on January 10, 2007, because he failed to establish pneumoconiosis. Director's Exhibit 2.

[2] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death

with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Before the administrative law judge, Employer argued Claimant worked for Cavalier Mining (Cavalier) for a cumulative period of more than one year after he worked for Employer. Decision and Order at 4-5; Employer's Post-Hearing Brief at 5-7. Therefore it argued Cavalier should have been named the responsible operator. *Id*.

In support of its argument, Employer contended the administrative law judge should calculate Claimant's employment with Cavalier by applying the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[4] Employer's Post-Hearing Brief at 5-7. Doing so, Employer maintained, would establish Claimant had 189 working days with Cavalier between the years 2005 and 2006. *Id*. Citing the holding of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019), Employer asserted if a miner has at least 125 working days with an operator, the miner has worked for a year of coal mine employment with the operator regardless of the actual duration of the miner's employment for the year. Employer's Post-Hearing Brief at 5-7.

The administrative law judge rejected this argument. Decision and Order at 4-5. She summarily found Claimant worked for Cavalier "from July 2005 to April 2006," less than the "required one calendar year." *Id*. She further found "Employer has not submitted any evidence to demonstrate [Claimant] worked for [Cavalier] for at least one calendar

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must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[4] If the administrative law judge 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, she may apply this formula and divide his 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.*

year, and has not submitted any evidence it does not possess sufficient assets to secure the payment of benefits or that another potentially liable operator did possess such assets." *Id*.

Employer argues the administrative law judge erred in determining the length of Claimant's employment with Cavalier.[5] Employer's Brief at 5-8. We agree. Based on our review of the administrative law judge's Decision and Order, we are unable to ascertain the basis of her finding Cavalier employed Claimant for less than one year. Because the administrative law judge did not explain her finding, consider relevant evidence, or render necessary credibility findings, her responsible operator finding does not satisfy the Administrative Procedure Act (APA).[6] 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (administrative law judge has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for her decision); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

The record in this case contains conflicting evidence as to the length of Claimant's employment with Cavalier. Claimant's Social Security Administration (SSA) earnings record reflects he earned $20,637.22 in the year 2005 and $12,660.20 in the year 2006 with Cavalier. Director's Exhibit 8. Paystubs from Cavalier set forth Claimant's weekly earnings from July 2005 to April 2006. Director's Exhibit 7. A paystub for the dates July 18, 2005 to July 23, 2005 indicates Claimant earned $736.00 in the pay period and $736.00 in the year 2005 to date. *Id*. The final paystub for the dates April 10, 2006 to April 15, 2006 indicates Claimant's year to date earnings of $11,155.20. *Id*. On an employment history form attached to Claimant's Kentucky state workers' compensation application,

[5] The administrative law judge found Cavalier is the operator that last employed Claimant. Decision and Order at 4-5. Although the record includes testimony from Claimant that he worked as a security guard at several coal mines after his work for Cavalier, Director's Exhibit 39 at 11-14, 56 at 16-26, Employer does not challenge the administrative law judge's finding Cavalier is the operator that last employed Claimant. We therefore affirm this finding. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[6] The Administrative Procedure Act 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).

Claimant listed his period of employment with Cavalier as July 2005 to May 2006. Director's Exhibit 52 at 12.

Claimant also testified in multiple depositions, a hearing for his state claim, and the hearing for this claim. He testified in an August 23, 2017 deposition that he "probably" worked with Cavalier for a full year, indicating he "was there for a long time." Director's Exhibit 39 at 51. Later in the same deposition, Claimant stated he worked for Cavalier for "three years, maybe four years," but admitted he did not have a good recollection of his employment history. *Id.* at 58. In an October 25, 2017 deposition, Claimant testified he worked for Cavalier "[p]robably a year, maybe two years," and that he "probably did" work more than 125 days. Director's Exhibit 56 at 38-39, 45. At a July 20, 2009 hearing in his state claim, he testified he worked for Cavalier "almost two years." Director's Exhibit 52 at 19. He also stated his last day with Cavalier was May 16, 2006. *Id*. at 21. In the hearing for this underlying federal claim, he initially stated he worked for Cavalier "probably eight, nine years." Hearing Transcript at 28. After reviewing his SSA earnings record, Claimant conceded he was not sure if he had been employed at Cavalier for more than one year. *Id*. He agreed, however, that he had worked for Cavalier for more than 125 days. *Id.*

The administrative law judge did not discuss this evidence, render any credibility findings as to this evidence, or explain her basis for finding the evidence establishes Claimant worked for Cavalier from July 2005 to April 2006. 30 U.S.C. §923(b); *Addison*, 831 F.3d at 252-53; *Rowe*, 710 F.2d at 254-55 (administrative law judge has duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for her decision); *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

The administrative law judge also erred in finding Employer failed to establish Cavalier is financially capable of assuming liability. Decision and Order at 4-5. If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs (OWCP) has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

The record in this case includes no statement from OWCP pursuant to 20 C.F.R. §725.495(d). Thus Cavalier is presumed to be financially capable of assuming liability for a claim, and the burden is on the Director to establish Cavalier is not financially capable. The administrative law judge thus erred in requiring Employer to do so. 20 C.F.R. §§725.494(e), 725.495(d).

Moreover, the record includes evidence relevant to whether Cavalier is financially capable of assuming liability in this claim. Cavalier filed a response to a Notice of Claim in which it admitted Cavalier and its insurer are financially capable of assuming liability for the payment of benefits. Director's Exhibit 32. Further, Cavalier and its insurer appeared through counsel before the district director, its counsel deposed Claimant, and it filed responses and a Motion to Dismiss on behalf of itself and its insurer. *See* Director's Exhibits 38-41. The administrative law judge erred in failing to consider this relevant evidence. 30 U.S.C. §923(b); *Addison*, 831 F.3d at 252-53; *Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998.

Based on the foregoing errors, we vacate the administrative law judge's responsible operator finding and remand this case for further consideration of this issue. She is instructed to address all relevant evidence and reconsider whether Employer met its burden to prove Cavalier more recently employed Claimant for at least one year or, if necessary, whether the Director has met her burden of establishing Cavalier is not financially capable of assuming its liability for a claim. *See Addison*, 831 F.3d at 252-53; *Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998; 20 C.F.R. §§725.494(c), (e), 725.495(c)(2), (d). We offer no opinion on the weight to be given that evidence, if any, or whether, in spite of that evidence, the administrative law judge may nevertheless employ the formula in 20 C.F.R. §725.101(a)(32)(iii) as Employer argues. The administrative law judge must, however, consider the parties' arguments and explain her findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

Before determining whether Claimant worked at least one year with Cavalier, the administrative law judge must address and clearly explain her determination of the state in which Claimant performed his last coal mine employment. This finding is necessary to ascertain whether the law of the United States Court of Appeals for the Fourth Circuit or Sixth Circuit applies to this case. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

The evidence is conflicting on this issue. Claimant's SSA earnings record lists Cavalier with an address in Vansant, Virginia, while the Claimant's Kentucky state workers' compensation application lists Cavalier's location as Pikeville, Kentucky. Director's Exhibits 8, 25. Claimant testified at deposition that his employment with Cavalier was in Kentucky. Director's Exhibit 39 at 15. At the hearing, Claimant initially indicated he could not recall where he worked for Cavalier. Hearing Transcript at 29. Although he first stated "it might have been Kentucky," he clarified Cavalier was in West Virginia as it "just came to [his] mind." *Id*. The administrative law judge must resolve the conflict in this evidence, render necessary credibility findings, and adequately explain her conclusion. *Hicks*, 138 F.3d at 533; *Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165.

The distinction is relevant to the administrative law judge's responsible operator finding. Employer correctly asserts that under the Sixth Circuit's decision in *Shepherd*, the evidence need not establish a full calendar year employment relationship between a miner and an operator under the definition of "year." *See Shepherd*, 915 F.3d at 401-05; 20 C.F.R. §725.101(a)(32); Employer's Brief at 5-8. The Sixth Circuit explained that "[r]egardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year, if the miner worked for at least 125 days, the miner will be credited with one year of coal mine employment."[7] *Shepherd*, 915 F.3d at 401-02. But the United States Court of Appeals for Fourth Circuit has not adopted *Shepherd* or otherwise held that 125 working days establishes a year-long employment relationship. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (a 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) (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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

In the interest of judicial economy, we address the administrative law judge's entitlement findings.

Employer argues the administrative law judge erred in finding Claimant totally disabled. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

[7] Should the administrative law judge find the law of the United States Court of Appeals for the Sixth Circuit applies to this case, she should give effect to all provisions and options set forth in *Shepherd* when calculating Claimant's employment with Cavalier. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-05 (2019); *see* 20 C.F.R. §725.101(a)(32).

In this case, the administrative law judge found Claimant established total disability based on the pulmonary function studies.[8] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10. She further found the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 10.

Employer argues the administrative law judge erred in weighing the pulmonary function studies. Employer's Brief at 9. We disagree. The administrative law judge considered the results of three pulmonary function studies: a March 28, 2017 study Dr. Green conducted, a September 15, 2017 study Dr. Raj conducted, and an April 19, 2018 study Dr. Fino conducted. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6-7; Director's Exhibits 14, 17, 18. She noted the pulmonary function studies reported differing heights for Claimant. Decision and Order at 6 n.8. Dr. Green recorded a height of 68 inches on the March 28, 2017 study, Dr. Raj recorded a height of 68 inches on the September 15, 2017 study, and Dr. Fino recorded a height of 65 inches on the April 19, 2018 study. Director's Exhibits 14, 17; Employer's Exhibit 1.

Contrary to Employer's argument, the administrative law judge permissibly resolved the evidentiary conflict by "utiliz[ing] the average of the heights listed by the physicians who performed pulmonary function studies to determine [Claimant's] height is 67 inches." Decision and Order at 6 n.8; *see Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). As there was no value for a height of 67 inches in the table at 20 C.F.R. Part 718, Appendix B, she rounded up to the next listed table height of 67.3 inches to determine whether the pulmonary function studies are qualifying.[9] Decision and Order at 6 n.8. Based on Claimant's age at the time of each study, the administrative law judge

[8] The administrative law judge found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 10.

[9] The administrative law judge applied the values in the table at 20 C.F.R. Part 718, Appendix B for a miner who is 67.3 inches in assessing whether the pulmonary function studies are qualifying. Decision and Order at 67. Employer notes that, in a separate part of her Decision and Order, she indicated she would "use the values from the tables for 66.9 inches." Decision and Order at 6 n.8; *see* Employer's Brief at 9. Thus Employer argues it is unclear which height the administrative law judge used. We disagree. Immediately before this sentence, she explained she found the average of the Claimant's listed heights was 67 inches, noted the table contains values for 66.9 and 67.3 inches, and correctly stated Board precedent does not allow a miner's height to be rounded down. Decision and Order at 6 n.8. Therefore the context of the administrative law judge's analysis makes clear that this discrepancy was a "scrivener's error." *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

found all the pulmonary functions studies produced qualifying values for total disability.[10] Decision and Order at 10.

We also reject Employer's argument that the administrative law judge erred in finding the March 28, 2017 and September 15, 2017 studies produced qualifying values for total disability. Employer's Brief at 9.

A pulmonary function study is determined to be qualifying for total disability if it yields an FEV1 value that is qualifying "for an individual of the miner's age, sex, and height," and yields either an FVC or an MVV value that is qualifying, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. §718.204(b)(2)(i). A pulmonary function study performed on a male miner who is 62 years old and 67.3 inches tall is qualifying if it produces an FEV1 value below 1.81 and either an FVC value below 2.31, an MVV value below 72, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. Part 718, Appendix B. A study is qualifying for a male miner with the same height but who is 63 years old if it produces an FEV1 value below 1.80 and either an FVC value below 2.30, an MVV value below 72, or an FEV1/FVC ratio of 55 percent or less.[11] *Id*.

Claimant was 62 when he performed the March 28, 2017 and September 15, 2017 studies. Director's Exhibits 14, 17. The pre-bronchodilator March 28, 2017 study produced an FEV1 value of 1.19, an FVC value of 1.92, and an MVV value of 58. Director's Exhibit 14. Post-bronchodilator, it produced an FEV1 value of 1.32, an FVC value of 2.23, and an MVV of 59. Director's Exhibit 14. The pre-bronchodilator September 15, 2017 study produced an FEV1 value of 1.22, an FVC value of 2.02, and an MVV value of 53. Director's Exhibit 17. Post-bronchodilator, it produced an FEV1 value of 1.33, an FVC value of 2.21, and an MVV of 62. Director's Exhibit 17. Thus contrary to Employer's argument, the administrative law judge correctly found the March 28, 2017 and September 15, 2017 studies qualifying both pre-bronchodilator and post-bronchodilator. Decision and Order at 6.

We also reject Employer's argument that the administrative law judge erred in finding the April 19, 2018 study produced qualifying values pre-bronchodilator. Employer's Brief at 9. Claimant was 63 when he took the April 19, 2018 study. Employer's Exhibit 1. This study produced an FEV1 value of 1.47 and an FVC value of

[10] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[11] None of the studies of record produced an FEV1/FVC ratio of 55 percent or less. Director's Exhibits 14, 17; Employer's Exhibit 1.

2.19 pre-bronchodilator. *Id*. Thus the administrative law judge correctly found this study qualifying pre-bronchodilator. Decision and Order at 6-7.

The administrative law judge erred, however, to the extent she found the April 19, 2018 study produced qualifying post-bronchodilator results. Decision and Order at 6-7. Post-bronchodilator, this study produced a qualifying FEV1 value of 1.67, but a non-qualifying FVC value of 2.65; it did not include any MVV values. Employer's Exhibit 1. Because the study did not include a qualifying FVC, MVV, or FEV1/FVC ratio, it is non-qualifying. We consider the administrative law judge's erroneous finding with respect to the non-qualifying post-bronchodilator April 19, 2018 study to be harmless, however. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). Thus the administrative law judge could not assign more weight to the single, non-qualifying post-bronchodilator result over the three qualifying pre-bronchodilator results. Because all of the pre-bronchodilator studies are qualifying, we conclude substantial evidence supports the administrative law judge's finding that the pulmonary function studies considered alone would establish total disability. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is such evidence that a reasonable mind would accept to support a conclusion); *Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6-7, 10.

The administrative law judge next considered the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10. She correctly noted Dr. Green opined Claimant is totally disabled by a respiratory or pulmonary impairment; thus his opinion does not conflict with the pulmonary function studies. Decision and Order at 10; Director's Exhibit 14. She further noted Dr. Fino opined Claimant is not totally disabled.[12] Decision and Order at 10; Employer's Exhibit 1. Contrary to Employer's argument, she permissibly discredited his opinion because he assumed the pulmonary function testing was non-qualifying, which conflicts with her finding the pulmonary function testing establishes total

[12] Employer argues the administrative law judge erred because she failed to make a finding regarding Claimant's usual coal mine employment and its exertional requirements. Employer's Brief at 10. The administrative law judge did not find Claimant established total disability based on the medical opinions. Nor did she discredit Dr. Fino's opinion because he did not identify the exertional requirements of Claimant's usual coal mine employment. Thus Employer has not explained how the error that it alleges could have made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

disability. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Rowe*, 710 F.2d 251, 255; Decision and Order at 10; Employer's Brief at 10.

Thus we affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence does not undermine the totally disabling results of the pulmonary function studies. Decision and Order at 10. Because there is no evidence undermining the qualifying pulmonary function studies, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 10.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish that Claimant has neither legal nor clinical pneumoconiosis,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not rebut the presumption by either method. Decision and Order at 11.

Employer argues the administrative law judge erred in finding it did not rebut the presumption of clinical pneumoconiosis. Employer's Brief at 10-11. It does not challenge, however, the administrative law judge's determination that it failed to disprove legal pneumoconiosis. Decision and Order at 11. Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

[13] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[14] Therefore, we need not address Employer's contentions of error regarding the administrative law judge's finding that it did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-11.

The administrative law judge also found Employer failed to establish "no part of [the Miner's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 11. We affirm this finding as unchallenged on appeal. S*ee Skrack*, 6 BLR at 1-711. Because we have affirmed the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by either method, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision to remand the claim for the administrative law judge to make necessary findings regarding Claimant's length of coal mine employment with Cavalier Mining for purposes of determining whether Employer is liable for benefits. However, based on the plain language of the definition of "year" at 20 C.F.R. §725.101(a)(32)(i)-(iii), I would instruct the administrative law judge to dismiss Employer as the responsible operator if she finds Claimant subsequently had 125 "working days" with Cavalier, regardless of whether Claimant also had a 365-day employment relationship

with the company. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392 (2019); *Price v. Olga Coal Co.*, BRB No. 18-0570 BLA (June 30, 2020) (Buzzard, J., concurring and dissenting).

The "responsible operator" is the "potentially liable operator" that most recently employed the miner for "at least one year." 20 C.F.R. §§725.494(c), 725.495(a). If the district director fails to identify the proper responsible operator prior to the claim's transfer to the administrative law judge, the improperly-designated operator must be dismissed and the Black Lung Disability Trust Fund must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (the regulations place "the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund").

Importantly, the regulations initially define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). In dicta, the Board has previously interpreted this prefatory clause to mean that 125 working days establishes one year of coal mine employment only if the miner also had a 365-day employment relationship with the coal mine operator.[15] *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003).

The regulation, however, sets forth additional factors for determining whether the miner had a 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 administrative law judge must ascertain the beginning and ending dates of the miner's employment. 20 C.F.R. §725.101(a)(32)(ii). If his employment "lasted for a calendar year . . . it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *Id.* Finally, if the evidence "is insufficient to establish the beginning and ending dates" of the miner's employment, or the

[15] *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, the majority's commentary on the proper interpretation of the revised definition at 20 C.F.R. §725.101(a)(32)(i), (iii) was unnecessary to the resolution of the claim, as the new definition of "year" contained therein had not yet taken effect. *See Clark*, 22 BLR at 1-284 (McGranery, J., concurring); *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-335 (4th Cir 2007) (confirming the formula at 20 C.F.R. §725.101(a)(32)(iii) is inapplicable to claims pending on its effective date).

employment "lasted less than a calendar year," the administrative law judge "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)."[16] 20 C.F.R. §725.101(a)(32)(iii).

The United States Court of Appeals for the Sixth Circuit, in *Shepherd*, is the only federal court to squarely address whether a finding of 125 working days under the revised regulations establishes one year of coal mine employment, even where the miner and employer did not have a 365-day employment relationship. In holding it does, the court determined that the "plain" and "unambiguous" language of the regulation provides four distinct methods to establish one year of coal mine employment and "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *See Shepherd*, 915 F.3d at 402; *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" applicable to invocation of statutory presumptions at 20 C.F.R. §718.201(b) (2000)). "[T]o assign any other meaning to the provisions" would "read out of the regulation §725.101(a)(32)(i)'s recognition that working 125 days in or around a coal mine within a calendar year will count as a year of coal mine employment 'for all purposes under the [Act].'" *Shepherd*, 915 F.3d at 402-403.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a prior iteration of the definition of "year" required a showing of both 125 working days and a 365-day employment relationship. *See 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, 474-475 (4th Cir. 2002) (same). Neither decision, however, forecloses the Sixth Circuit's interpretation of the revised regulation in *Shepherd*.

Like the Board's decision in *Clark*, the Fourth Circuit's decisions involved claims that predated the effective date of the newly-revised definition. *See Mitchell*, 479 F.3d at 334-35; *Armco*, 277 F.3d at 475. While *Armco* stated that the newly-revised prefatory clause "informed" its analysis of what the "earlier, less clearly written regulations were intended to mean," it did not discuss the newly-added subparagraphs (i) through (iii) that

[16] The BLS data is reported at Exhibit 610 of the Coal Mine (Black Lung Benefits Act) Procedure Manual. *See Average Earnings of Employees in Coal Mining*, https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610.pdf. It provides the "daily earnings" and "yearly earnings (125 days)" for employees in coal mining each year from 1961 to 2017. *Id*.

the Sixth Circuit interpreted as providing independent methods for establishing a year of coal mine employment. *See Shepherd*, 915 F.3d at 402. *Mitchell*, on the other hand, involved the factually and legally distinct question of whether "regular" employment (a term excluded from the new definition of "year") could be established based on 125 working days over the course of an *entire* fourteen year career. *See Mitchell*, 479 F.3d at 334-335 ("brief and sporadic" employment of 200 days over an entire fourteen year career is not "regular" coal mine employment with one operator). It also explicitly acknowledged that subparagraph (iii) "by its terms" provides a method for the administrative law judge to calculate a miner's coal mine employment even when "the miner's employment lasted less than one year." *Id*.; *see Shepherd*, 915 F.3d at 402 ("If the . . . calculation [at subparagraph (iii)] yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year.").

Finding the Sixth Circuit's rationale persuasive, not contrary to Fourth Circuit precedent, and supportive of a consistent application of the definition of "year" across all claims under the Act, I would instruct the administrative law judge to apply *Shepherd* when determining whether Cavalier, as opposed to Employer, should have been named the responsible operator.

GREG J. BUZZARD
Administrative Appeals Judge