U.S. Department of Labor

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

BRB Nos. 23-0143 BLA
and 23-0144 BLA

LILLIE A. TILLER (o/b/o and Widow of HAROLD M. TILLER) Claimant-Petitioner v. LEFT FORK COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/12/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Lillie A. Tiller, Richlands, Virginia.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

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

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

Claimant appeals, without representation,[1] District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Denying Benefits on Remand (2015-BLA-05935 and 2017-BLA-05224) rendered on claims 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 5, 2011,[2] and a survivor's claim filed on August 10, 2015,[3] and is before the Board for the second time.[4]

In his initial Decision and Order Denying Benefits dated September 19, 2019, ALJ Johnson (the ALJ) considered the miner's and survivor's claims and adopted ALJ Linda S. Chapman's prior finding that the Miner had 10.07 years of coal mine employment. Thus, he found Claimant could not invoke the rebuttable presumption of total disability due to

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[1] On Claimant's behalf, Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s decision, but he is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

[2] This is the Miner's fifth claim for benefits. In a Decision and Order Denying Benefits dated May 6, 2009, ALJ Linda S. Chapman denied the Miner's most recent prior claim because although he established a totally disabling respiratory impairment and a change in an applicable condition of entitlement, he did not establish the existence of pneumoconiosis. Miner's Claim (MC) Director's Exhibit 4. The Board affirmed ALJ Chapman's denial. *Tiller v. Left Fork Coal Co.*, BRB No. 09-0628 BLA (May 25, 2010) (unpub.). The Miner took no further action until filing his current claim. MC Director's Exhibit 6.

[3] Claimant is the widow of the Miner, who died on July 19, 2014, while his claim was pending before the Office of Administrative Law Judges. Survivor's Claim (SC) Director's Exhibit 9; MC Director's Exhibit 57. She is pursuing the miner's claim on her husband's behalf and her survivor's claim.

[4] We incorporate the procedural history of this case as set forth in the Board's prior decision. *Tiller v. Left Fork Coal Co.*, BRB Nos. 20-0017 BLA and 20-0018 BLA (Nov. 24, 2020) (unpub.).

pneumoconiosis at Section 411(c)(4) of the Act,[5] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718,[6] he found Claimant did not establish the Miner had clinical or legal pneumoconiosis and therefore could not establish a change in an applicable condition of entitlement.[7] 20 C.F.R. §§718.202(a), 725.309. Therefore, he denied benefits in the miner's claim.

Further, the ALJ determined that because the Miner was not entitled to benefits at the time of his death, Claimant was not automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[8] Because he had found Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis, 20 C.F.R. §§718.202(a), 718.304, he denied benefits in the survivor's claim.

In response to Claimant's appeal, the Board vacated the ALJ's determination that Claimant established the Miner had 10.07 years of coal mine employment and therefore could not invoke the Section 411(c)(4) presumption. *Tiller v. Left Fork Coal Co.*, BRB Nos. 20-0017 BLA and 20-0018 BLA, slip op. at 5 (Nov. 24, 2020) (unpub.). The Board also vacated the ALJ's finding that Claimant did not establish the existence of clinical or

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

[6] As the record contains no evidence of complicated pneumoconiosis, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

[7] 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 "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)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish pneumoconiosis in his prior claim, Claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of the Miner's current claim. *Id.*

[8] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

legal pneumoconiosis and remanded the case for further consideration. *Tiller*, BRB Nos. 20-0017 BLA and 20-0018 BLA, slip op. at 7-9.

On remand, the ALJ found the Miner had 11.6 years of coal mine employment and Claimant was therefore unable to invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish the Miner had clinical or legal pneumoconiosis and therefore did not establish a change in an applicable condition of entitlement. Thus, he denied benefits in the miner's claim.

Further, because Claimant did not establish the Miner had clinical or legal pneumoconiosis, 20 C.F.R. §§718.202(a), 718.304, the ALJ denied benefits in the survivor's claim.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[9] 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 had at least fifteen years of underground or "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4); 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. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985).

The Miner's Employment with Mescher Manufacturing Company, Inc.

Following the Board's instructions, the ALJ first considered whether the Miner's employment with Mescher Manufacturing Company, Inc. (Mescher) constituted work as a

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[9] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibits 7; 30 at 5.

"miner," and therefore qualifies as coal mine employment. Decision and Order on Remand at 5-10. A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The Act's implementing regulations provide "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19).[10]

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held work duties that meet situs and function requirements constitute the work of a miner under the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981). The Board has held that all of a miner's work need not be performed at a mine site to satisfy the situs requirement, so long as a "significant portion" of his work takes place "in or around" a coal mine or coal preparation facility. *Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729, 1-736 (1979) (miner met situs requirement despite spending fifteen percent of his time at a laboratory), *aff'd*, 642 F.2d 68 (4th Cir. 1981). Under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Krushansky*, 923 F.2d at 41-42.

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[10] The regulations define a "miner" as:

> [A]ny person who . . . worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who . . . worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.

20 C.F.R. §725.202(a). The regulations define the term "coal mine" as:

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. §725.101(a)(12).

The ALJ considered the Miner's testimony and a September 10, 1999 statement from Mescher's Secretary Treasurer, Harriet C. Matney, in response to an inquiry from the Department of Labor (DOL), Office of Workers' Compensation Programs, about the Miner's employment. Decision and Order on Remand at 6-7. In her statement, Ms. Matney noted Mescher employed the Miner as a "welder/repairman" from at least January 5, 1986, to July 14, 1989. MC Director's Exhibit 9. She further noted that while its earlier employment records were destroyed in a fire, Mescher "would not dispute" that the Miner also worked for it from 1974 to 1976 and the company "could establish" his employment from January of 1976 through mid-June of 1976. *Id.* In addition, she noted Mescher "is not nor has it ever been a mine site" but is "a manufacturer [and] repair shop." *Id.*

During a June 1, 1998 deposition, the Miner testified he worked as a welder from 1974 to 1976, and again for three years and seven months beginning in January 1986. MC Director's Exhibit 1 at 23 (Deposition at 10). He stated the work was for a company that sold and repaired mining equipment for coal mining companies. *Id.* When asked whether the shop was "around the coal mines[,]" he stated "[n]o, it was located right along the highway." *Id.* at 24 (Deposition at 11). He further stated he did not go to the mines to repair equipment, as "[t]hey usually brought it in to the shop all the time." *Id.*

In addition, during his April 30, 2002 deposition, the Miner testified he worked five and a half years at Mescher from 1974 through May 1976, and then from the beginning of 1986 until the seventh month of 1989. MC Director's Exhibit 3 at 75 (Deposition at 8). He stated that some of the work occurred in a building and some of the work occurred at mine sites doing equipment repairs, though he "didn't spend really that much [time] at the mine site." *Id.*

When asked during his September 29, 2006 deposition whether he ever went to mine sites to do welding repairs, the Miner stated "not too many days. A few days." MC Director's Exhibit 4 at 719 (Deposition at 4). At the January 15, 2009 hearing before ALJ Chapman, the Miner stated his work for Mescher occurred inside a shop, and was not in the mines. MC Director's Exhibit 4 at 47 (Hearing Transcript at 29). Finally, in his October 4, 2011 deposition, the Miner again testified he worked five and a half years at a welding shop repairing mining equipment, which included some visits to mine sites "but not very many days." MC Director's Exhibit 30 at 7-8 (Deposition at 6-7).

Considering the situs requirement, the ALJ found the Miner's testimony and the statement from Mescher indicated that while Mescher was a repair shop that serviced mine equipment, it was neither located at nor in proximity to a mine site. Decision and Order on Remand at 9. The ALJ further noted that while the Miner stated he performed some repairs in or around mine sites, he also indicated that such work occurred for only a few days. *Id.* Based on this record, the ALJ permissibly found the Miner's testimony that he

occasionally performed repair work at mine sites not credible because it contradicted his other testimony that the work did not occur at mine sites and Mescher's statement that it was not a mine site. *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); Decision and Order on Remand at 9. Further, even if he accepted the Miner's testimony as accurate, the ALJ found the "few days" he spent at a mine site did not constitute a "significant portion" of his work.[11] Decision and Order on Remand at 9, *citing Musick v. Norfolk and Western Railway Co.*, 6 BLR 1-862, 1-864 (1984) (relying on the Board's holding in *Bower* to find that spending twelve to sixteen days per year at a mine site was not significant). He therefore found the Miner's employment with Mescher did not satisfy the situs requirement, and thus could not qualify as coal mine employment. *Id.* at 9. As substantial evidence supports it, we affirm the ALJ's finding that the Miner's employment with Mescher did not satisfy the situs requirement. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ's function is to weigh the evidence, draw appropriate inferences and determine credibility); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.").

Calculation of Length of Coal Mine Employment

The ALJ next determined the length of the Miner's coal mine employment. The Board will uphold an ALJ's determination on the length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered the Miner's testimony, Employment History Form CM-911a, and Social Security Administration (SSA) earnings records. Decision and Order on Remand at 5-12. He permissibly determined the Miner's SSA earnings records are "more reliable than [the] Miner's recollection years later," and thus based his computation on the earnings records alone. *See Westmoreland Coal Co. v. Stallard*, 876 F.2d 663, 670 (4th

[11] Even had ALJ Johnson (the ALJ) credited the Miner with the specific days he worked at mine sites, those "few days" would not be enough to bring his 11.6 years of coal mine employment history over the fifteen-year threshold for invoking the Section 411(c)(4) presumption. *See* 20 C.F.R. §725.101(32) (defining "working day" as "any day or part of a day for which a miner received pay for work as a miner").

Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Lafferty*, 12 BLR at 1-192; Decision and Order on Remand at 10-12.

For the years prior to 1978, the ALJ credited the Miner with one quarter-year of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators. Decision and Order on Remand at 11; *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). He therefore credited the Miner with one quarter in 1956 for work with Ralston Coal and Supply Co.; eight quarters from 1959 to 1961 for work with Beecher Coal Co., Keen Coal Co., and Farmer Brothers Coal Co.; two quarters in 1972 for work with Vansant Coal Corp.; and seven quarters from 1976 to 1977 for work with Employer, totaling eighteen quarters or 4.5 years of coal mine employment. Decision and Order on Remand at 11; MC Director's Exhibit 11.

The ALJ then addressed the Miner's coal mine employment from 1978 which, after excluding his non-coal mine employment with Mescher, was all performed for Employer. Decision and Order on Remand at 11. He applied the method of computation provided at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days the Miner worked, dividing his yearly earnings as reported in his SSA earnings records by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id.* For years in which the Miner's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id.* If the Miner had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* Based on this method, the ALJ credited the Miner with one full year of coal mine employment for each of the years from 1978 to 1984, and one-tenth of one year for 1985, totaling 7.1 years. *Id.*

Adding the two periods together, the ALJ found Claimant established the Miner had 11.6 years of coal mine employment. Decision and Order on Remand at 12.

Prior to applying the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ did not initially determine, as the regulation requires, whether the beginning and ending dates of the Miner's coal mine employment could be ascertained.[12] *See* Decision and Order on Remand at 10-11. In addition, because this case arises within the Fourth Circuit, the ALJ

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[12] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. 20 C.F.R. §725.101(a)(32)(iii).

erred in failing to consider whether Claimant established a calendar year of coal mine employment prior to applying the regulatory formula, as the Board has long interpreted Fourth Circuit case law as supporting the position that the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 revisions to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).[13] 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.[14] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

Nonetheless, the ALJ's error is harmless and remand is not required on this basis; the ALJ's method of calculation that resulted in 11.6 years of coal mine employment credited the Miner with more years of coal mine employment than if he had done the proper initial, threshold analysis; however, the ALJ still found the Miner had less than fifteen years

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[13] Although our colleague cites to his separate opinion in *Baldwin v. Island Creek Ky. Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (DOL Ben. Rev. Bd. July 14, 2023), where he explained that he would apply 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), in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. To credit a miner with a year of coal mine employment in 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 at 334-35; *Martin*, 277 F.3d at 474-75; *Clark*, 22 BLR at 1-280.

[14] 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).

of coal mine employment. Consequently, we affirm the ALJ's finding that Claimant established the Miner had less than fifteen years of coal mine employment and therefore is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Clinical Pneumoconiosis

"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).

X-ray Evidence

As the Board instructed, the ALJ reconsidered the eleven readings of five x-rays dated September 13, 2011, January 17, 2012, February 29, 2012, December 27, 2012, and April 9, 2013. Decision and Order on Remand at 15-16.

Dr. Forehand, a B reader, and Dr. Tarver, who is dully qualified as a B reader and Board-certified radiologist, read the September 13, 2011 x-ray as negative for pneumoconiosis, while Dr. Alexander, also a dully-qualified radiologist, read it as positive for the disease, profusion 1/0. MC Director's Exhibits 18, 20, 48.

Dr. Meyer, a dually-qualified radiologist, read the January 17, 2012 x-ray as negative for pneumoconiosis, while Dr. Alexander read it as positive for the disease. MC Claimant's Exhibit 8; MC Director's Exhibit 60.

Dr. Adcock, a dually-qualified radiologist, read the February 29, 2012 x-ray as negative for pneumoconiosis, while Dr. Miller, also a dually-qualified radiologist, read it

as positive for the disease, profusion 1/0. MC Employer's Exhibit 2; MC Claimant's Exhibit 10.

Dr. Kendall, a dually-qualified radiologist, read the December 27, 2012 x-ray as negative for pneumoconiosis, while Dr. Miller read it as positive for the disease, profusion 1/1. MC Employer's Exhibit 4; MC Claimant's Exhibit 11.

Finally, Dr. Meyer read the April 9, 2013 x-ray as negative for pneumoconiosis, while Dr. Miller read it as positive for the disease, profusion 1/1. MC Claimant's Exhibit 9; MC Director's Exhibit 61.

Considering the number of x-ray interpretations and the radiological qualifications of the interpreting physicians, the ALJ first found the readings of the September 13, 2011 x-ray by the two dually qualified radiologists in equipoise, but considering the additional negative reading by the radiologist who is only a B reader, permissibly found the weight of the readings of the x-ray is negative.[15] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2015); Decision and Order on Remand at 15-16. Further, he permissibly found the readings of the January 18, 2012, February 29, 2012, December 27, 2012, and April 9, 2013 x-rays to be in equipoise because an equal number of dually-qualified radiologists read each of the conflicting x-rays as positive and as negative. *See Addison*, 831 F.3d at 256-57; Decision and Order on Remand at 16.

Having found one x-ray negative and the readings of the other four x-rays in equipoise, the ALJ permissibly found the preponderance of the x-rays does not support a finding of clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order on Remand at 16. As it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence does not establish the

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[15] Consistent with the regulations, the ALJ gave "consideration . . . to the radiological qualifications of the physicians interpreting" the x-rays. 20 C.F.R. §718.202(a)(1); Decision and Order on Remand at 15-16. Specifically, the ALJ stated he focused on the "objective radiological qualifications" and weighed the x-ray readings based on "whether the readers were B-readers and/or Board-certified radiologists." *Id.* at 16. He was not required to rely on a physician's additional qualifications (such as teaching or publishing articles in the field of radiology). *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc).

existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order on Remand at 16.

Biopsy and Autopsy Evidence

The ALJ next considered postmortem surgical pathology reports from Drs. Grimes, Oesterling, and Caffrey. Decision and Order on Remand at 16-18. Dr. Grimes performed a postmortem examination of the Miner's right lung and diagnosed simple coal workers' pneumoconiosis, noting a gross description that included "diffuse punctuate black areas of discoloration (macules)" but "[n]o areas of fibrosis." SC Director's Exhibit 10. He did not provide a microscopic description. Dr. Caffrey examined slides that Dr. Grimes prepared. He identified focal bronchiolitis and anthracotic pigment on microscopic inspection, but no lesions of coal workers' pneumoconiosis as there was no associated reticulin and collagen. SC Director's Exhibit 12 at 1-2. Dr. Oesterling also examined the slides, as well as Dr. Grimes's photograph of the whole lung. SC Employer's Exhibit 1. He identified minimal patches of black pigmentation on gross examination and opined it indicated minimal dust inhalation. *Id.* at 1. On microscopic examination, he noted minimal black pigmentation and largely intact lung structures, estimating that less than 1% of the imaged lung contained structural damage. *Id.* at 3. He opined the slides did not demonstrate pneumoconiosis due to the lack of structural damage from pigment deposition, though he concluded the limitation of examining tissue from only one lung provided insufficient information to establish a firm diagnosis. *Id.* at 4.

In its prior decision, the Board affirmed the ALJ's finding that Dr. Grimes's autopsy report diagnosing pneumoconiosis was entitled to less weight than the contrary autopsy reports of Drs. Oesterling and Caffrey, but because it had instructed the ALJ to reconsider the x-ray evidence, it also instructed him to resolve any potential conflict between the x-ray and autopsy evidence. *Tiller*, BRB Nos. 20-0017 BLA and 20-0018 BLA, slip op. at 8 n.12.

On remand, the ALJ reiterated his finding that Dr. Oesterling's opinion, as corroborated by Dr. Caffrey, is the most persuasive. Decision and Order on Remand at 18. He thus found the biopsy and autopsy evidence does not establish the existence of clinical pneumoconiosis. *Id.* Further, he found no conflict in the autopsy and x-ray evidence based on his finding that both "weigh against a finding of clinical pneumoconiosis." *Id.* at 18 n.15.

As we find no error in the ALJ's finding that the biopsy and autopsy evidence does not establish pneumoconiosis, we affirm it. 20 C.F.R. §718.201(a)(2). Thus, as we affirm the ALJ's finding that the x-ray evidence and the autopsy evidence do not establish the

existence of clinical pneumoconiosis, we also affirm his finding no conflict in the two types of evidence.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Javed, Piriz, Forehand, Broudy, and Vuskovich. Decision and Order on Remand at 21-27. Dr. Javed provided two letters in which he opined the Miner had severe pneumoconiosis that was complicated by his chronic respiratory failure. SC Director's Exhibit 11 at 2; MC Claimant's Exhibit 12 at 1. Similarly, Dr. Piriz provided a letter stating that he treated the Miner for approximately eleven years and diagnosed him with coronary artery disease, history of peripheral vascular disease, class III obesity, obstructive sleep apnea, and pneumoconiosis. MC Claimant's Exhibit 13 at 1. In contrast, Drs. Forehand, Broudy, and Vuskovich opined the Miner did not have clinical pneumoconiosis. MC Director's Exhibit 18; MC Employer's Exhibits 3 at 3; 6 at 2-3; 8 at 2-3; 9 at 2.

The ALJ permissibly found the opinions of Drs. Javed and Piriz entitled to no weight as they did not provide an explanation for their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 25. Further, he found the opinions of Drs. Forehand, Vuskovich,[16] and Broudy reasoned, documented, and entitled to significant weight. *Id.* Because the ALJ permissibly discredited Drs. Javed's and Piriz's opinions, the only medical opinions that could support a finding of clinical pneumoconiosis, we affirm his finding that the medical opinion evidence does not establish the existence of the disease. Decision and Order on Remand at 25.

[16] The ALJ stated Drs. Forehand's, Oesterling's, and Broudy's opinions that the Miner did not have clinical pneumoconiosis are reasoned and documented. Decision and Order on Remand at 25. This reference to Dr. Oesterling's opinion as opposed to Dr. Vuskovich's opinion appears to be a scrivener's error as the ALJ previously considered Dr. Oesterling's pathology report with the autopsy evidence and summarized the reports of Drs. Javed, Piriz, Forehand, Broudy, and Vuskovich before analyzing the medical opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). In addition, when describing the physicians' qualifications in consideration of the medical opinions, the ALJ found Dr. Oesterling, Board-certified in nuclear medicine and anatomical and clinical pathology, as "board-certified in occupational medicine." *Compare* Decision and Order on Remand at 24, *with* Employer's Exhibits 10 at 2, 13 at 1.

Other Medical Evidence

The ALJ also considered the Miner's treatment records, treatment x-rays, and treatment computed tomography (CT) scans.

Treatment X-rays

The ALJ considered three treatment x-rays from Buchanan General Hospital from October 18, 2005, April 15, 2008, and December 27, 2012. MC Claimant's Exhibit 3. Dr. Patel read the October 18, 2005 x-ray as showing bronchovascular and interstitial lung markings that he attributed to some chronic process, but noted no other signs of acute pathology. *Id.* at 1. Dr. Petrozzo read the April 15, 2008 x-ray as showing "[c]hronic changes . . . in both lungs" but "no acute infiltrates." *Id.* at 2. Dr. Petrozzo also read the December 27, 2012 x-ray as showing "[c]hronic changes and increased markings at the right lung base [as] seen on prior studies" and noted "[d]ifferential [diagnosis] includes recurrent pneumonia versus chronic changes." *Id.* at 3.

The ALJ correctly noted the treatment x-rays made no mention of pneumoconiosis and were not interpreted using the ILO system. Decision and Order on Remand at 21. He therefore permissibly assigned them no weight. *Id.*

Treatment CT scan

The ALJ considered Dr. Ramakrishnan's reading of a March 7, 2012 treatment CT scan. Decision and Order on Remand at 20-21. Dr. Ramakrishnan found no "acute or focal masses, either cystic or otherwise," in the lung fields; "[n]o well-defined cystic lesion" in the lungs; and no pleural effusion. SC Director's Exhibit 11 at 25-26 (unpaginated).

The ALJ correctly noted that Dr. Ramakrishnan's reading of the March 7, 2012 treatment CT scan did not mention pneumoconiosis and further permissibly assigned no weight to the CT scan as there was no evidence presented that it is medically acceptable and relevant to establishing entitlement under the Act as 20 C.F.R. §718.107(b) requires. Decision and Order on Remand at 20, 21 n.16, 22 n.20; SC Director's Exhibit 11 at 25-26 (unpaginated).

Treatment Records

The ALJ further considered the Miner's treatment records from the St. Charles Respiratory Care Center, Tri-State Clinic, Buchanan General Hospital, and Clinch Valley Medical Center spanning from 2010 to 2012, and his death certificate. MC Director's Exhibit 22; SC Director's Exhibit 11; MC Claimant's Exhibits 2, 4, 6. He accurately noted

that several treatment records listed the Miner as having a diagnosis or history of coal workers' pneumoconiosis and/or chronic obstructive pulmonary disease, but they did not list the bases for such diagnoses or include medical opinions supporting them. Decision and Order on Remand at 21; *see* MC Director's Exhibit 22 at 21, 24, 26, 28; MC Claimant's Exhibits 2 at 1-2, 5-7; 4 at 3, 5-29. He thus permissibly assigned no weight to the treatment records because they are not supported by a reasoned medical opinion. *See Looney*, 678 F.3d at 310; Decision and Order on Remand at 21.

As we find no error in the ALJ's determinations, we affirm his finding that the medical opinions and other relevant evidence do not support a finding of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 19-25.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The Fourth Circuit has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Looney*, 678 F.3d at 311; *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Broudy, and Vuskovich.[17] Decision and Order on Remand at 25-27. Dr. Forehand opined the Miner had legal pneumoconiosis in the form of obstructive lung disease related to coal mine dust exposure and cigarette smoking. MC Director's Exhibit 18 at 16. In contrast, Dr. Broudy opined the Miner did not have legal pneumoconiosis but a restrictive impairment caused by his obesity, heart disease, and cigarette smoking, with no significant impairment related to his coal mine dust exposure. MC Employer's Exhibits 3 at 3-4; 6 at 3; 9 at 2. Similarly, Dr. Vuskovich opined the Miner did not have legal pneumoconiosis but an impaired ventilatory capacity due to his obesity, diabetes and diabetic neuropathy, cigarette

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[17] The ALJ noted the Board previously stated that he "accurately found that neither Dr. Javed nor Dr. Piriz specifically addressed whether the Miner had legal pneumoconiosis." Decision and Order on Remand at 26. He therefore did not reconsider their opinions on the issue.

smoking, and the use of beta blocker medications, but unrelated to coal mine dust exposure. MC Employer's Exhibits 7 at 12-13; 8 at 2-3.

Dr. Forehand performed the DOL-sponsored pulmonary evaluation of the Miner. MC Director's Exhibit 18 at 13-16. He diagnosed obstructive lung disease based in part on the pulmonary function study conducted as part of the Miner's examination. *Id.* at 16. Further, he stated the Miner's "obstructive lung disease contributed to by cigarette smoke and coal mine dust is the principal cause of [his] respiratory impairment." *Id.* The ALJ permissibly found Dr. Forehand's opinion conclusory and "fall[s] short of stating a cogent basis for associating the Miner's nondisabling respiratory impairment with coal mine dust exposure."[18] Decision and Order on Remand at 26; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because the ALJ permissibly discredited Dr. Forehand's opinion, we affirm the ALJ's finding that Claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 27.

As Claimant did not establish clinical or legal pneumoconiosis, we affirm the ALJ's finding that Claimant did not establish a change in an applicable condition of entitlement or entitlement under 20 C.F.R. Part 718 in both the miner's claim and the survivor's claim. 20 C.F.R §§718.202(a), 725.309; *see Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; Decision and Order on Remand at 27.

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[18] The ALJ also found Dr. Forehand's opinion, based on data obtained from a single examination, entitled to less weight than the opinions of Drs. Vuskovich and Broudy, as their opinions were based on "more data" and "a more extensive review of the pertinent medical records." Decision and Order on Remand at 26.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority decision except its statement that under Fourth Circuit law a miner cannot be credited with a full year of coal mine employment unless he establishes a 365-day employment relationship with his employer(s). As explained in *Baldwin v. Island Creek Ky. Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (DOL Ben. Rev. Bd. July 14, 2023) (Buzzard, J., concurring and dissenting), a miner is entitled to credit for a full year of coal mine employment "for all purposes under the Act" if he establishes 125 working days in a given year. Notably, the majority's statement that Fourth Circuit law requires a 365-day employment relationship is contrary to the Director's position that the circuit has not issued any binding precedent on the matter. *Id.* at *2 (majority opinion noting the Director's position and concluding that the Board should first "allow the Fourth Circuit to rule on the issue"). Regardless, as the majority concedes, resolving this issue has no bearing on this case. Thus, its holding is dictum. *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (dictum, by definition, is "unnecessary to the decision" and "is, therefore, not controlling").

GREG J. BUZZARD
Administrative Appeals Judge