**U.S. Department of Labor**

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

BRB No. 20-0260 BLA

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| PHILLIP MICHAEL CLINE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| HANOVER RESOURCES, LLC | ) | |
| | ) | |
| and | ) | DATE ISSUED: 11/21/2022 |
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| BRICKSTREET MUTUAL INSURANCE COMPANY | ) | |
| | ) | |
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| 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 Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC) Lexington, Kentucky, for Employer and its Carrier.[1]

[1] After Mr. Soukup filed his brief, Mr. William S. Mattingly filed a Notice of Appearance on November 2, 2022, stating that Mr. Soukup is no longer employed with

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2017-BLA-05536) rendered on a subsequent claim filed on March 10, 2014,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Employer was the responsible operator. He further credited Claimant with at least fifteen years of underground coal mine employment and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[3] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C.

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Jackson Kelly PLLC and that he would be representing the responsible operator in this claim.

[2] On December 10, 2010, the district director denied Claimant's prior claim, filed on October 29, 2009, for failure to establish total disability. Director's Exhibit 1.

[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 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). Because the district director denied Claimant's prior claim for failure to establish total disability, he was required to submit new evidence establishing that element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[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

§921(c)(4) (2018). He further found Employer failed to rebut the presumption. The ALJ also found Claimant established he has complicated pneumoconiosis arising out of his coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.203, 718.304, 718.309(c). Accordingly, he awarded benefits.

On appeal, Employer asserts the ALJ erred in determining it is the responsible operator. It also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, Employer argues the ALJ erred in finding Claimant totally disabled, and therefore erred in finding he invoked the Section 411(c)(4) presumption. Employer further argues the ALJ erred in concluding it did not rebut the presumption. Finally, it asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), filed a limited response, agreeing with Employer that the case must be remanded for further consideration of the responsible operator issue, but urges the Benefits Review Board to reject Employer's constitutional argument.

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).[7]

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substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 24.04 years of coal mine employment, at least fifteen of which were in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-9.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 41.

[7] Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 37-40. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to

The responsible operator is the potentially liable operator that most recently employed the miner.[8] 20 C.F.R. §725.495(a)(1). The district director is initially charged 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 responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or 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)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

Claimant worked as a miner for Hanover Resources, LLC (Hanover) from 2005 to 2009. Director's Exhibit 8; Director's Response Brief at 3; Employer's Closing Arguments at 1. Claimant was subsequently employed by DB Coal Mining (DB Coal) from February 4, 2011, until June 2013. *Id*. However, DB Coal actively produced coal only until November 2011, during which time Claimant worked as a foreman and ran equipment. Director's Exhibit 45. He continued to work for the mine as a manager until June 2013, maintaining the non-active mine for viewing by prospective buyers. *Id*. The ALJ determined that Claimant's employment from November 2011 to June 2013 was not coal mine employment because his work was not integral to the extraction or preparation of coal, as the mine was not producing coal and the purpose of his job was to preserve the mine for potential buyers.[9] Decision and Order at 9-10, citing *McGlothlin v. Greasy Creek Coal Co.*, BRB No. 17-0529 BLA (July 30, 2018) (unpub.). Consequently, he found DB Coal did not employ Claimant as a miner for at least one year and therefore it was not the

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the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

[8] 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 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).

[9] Despite finding Claimant's work from November 2011 to June 2013 was not coal mine employment for purposes of determining the responsible operator, the ALJ credited Claimant with three years of coal mine employment with DB Coal when calculating the length of his coal mine employment. Decision and Order at 8.

responsible operator. *Id*. He thus determined Hanover is the responsible operator that most recently employed Claimant as a miner for one year, and is responsible for the payment of benefits. *Id*.

Employer contends the ALJ erred in finding that Claimant's work as a mine manager for DB Coal was not coal mine employment. Employer's Brief at 5-11. The Director agrees that Claimant's work as a mine manager constituted coal mine employment so long as the mine was still open even if idle, but not if the mine was sealed off and "Claimant stopped entering the mines." Director's Response at 7-11. Because the record contains conflicting evidence regarding when – if at all – the mine was sealed, the Director contends the ALJ must again determine on remand whether Employer has established DB Coal employed Claimant as a miner for at least one year. *Id*. We agree that remand is necessary for the ALJ to reconsider this issue.

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). There is "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). The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42; *Whisman*, 8 BLR at 1-97.

At the hearing, Claimant testified that, during the time he managed the idle mine, he went underground to take methane readings once a week. Hearing Transcript at 49-50. Claimant explained that the mine's electricity was also kept on and the ventilation fan left running because, in order to shut the fan down, a permit from federal inspectors was required stating the mine was being closed which would require the mine to be sealed up. *Id*. The owners, however, wanted to keep the mine open for inspection by potential buyers. *Id*. at 46. Claimant would also check for signs of theft or vandalism, keep the fan running and, when not actually in the mine, answer phones. *Id*. at 50; Director's Exhibit 45 at 53-55, 66-68. While Claimant testified at the hearing that the mine was never sealed, Hearing Transcript at 46, he testified in an earlier deposition that the mine was sealed prior to his leaving his employment. Director's Exhibit 45 at 56, 47; Director's Response Brief at 10.

The Director concedes Claimant's work with DB Coal was coal mine employment so long as the mine was open, as his job "was meant to maintain the mine in a state where it could readily start producing coal again, and in fact, a group of investors did purchase the mine and extracted coal from it again." Director's Response Brief at 8-9 (citing *Wackenhut Corp. v. Hansen ex rel. Hansen*, 560 F. App'x 747, 750-51 (10th Cir. 2014) (unpub.); *Sammons v. EAS Coal Co.*, 980 F.2d 731 (6th Cir. 1992) (unpub.); *Fagg v. Amax Coal Co*, 12 BLR 1-77 (1988); *cf. Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)). Because the Director concedes to the extent the mine was kept open and Claimant had to go underground "Claimant's work for DB Coal after November 2011 constitute[s] coal mine employment," we reverse the ALJ's determination it was not. Decision and Order at 9-11. As the Director argues, however, there is conflicting evidence regarding whether or when the mine was closed that the ALJ has not resolved. We therefore must remand[10] for the ALJ to determine how long Claimant worked for DB Coal as a miner.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §725.495(c)(2); Director's Exhibit 45; Hearing Transcript at 46.

[10] We decline to address, as premature, Employer's challenges to the ALJ's determinations that Claimant is entitled to benefits. Employer's Brief at 11-37.

[11] The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which a miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the miner's employment "lasted for a calendar year or partial periods totaling a 365-day period amounting to one year," the regulations presume, in the absence of contrary evidence, "that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge