U.S. Department of Labor

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

BRB No. 20-0389 BLA

LEONIS COOPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A & M COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/16/2021
Employer-Petitioner	)	
	)	
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.

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

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

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-05422) rendered on a claim filed on May 8, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Employer is the properly designated responsible operator. She credited Claimant with twenty-five 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 rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). 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 it failed to rebut the Section 411(c)(4) presumption.[2] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.[3] 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).

[1] 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established twenty-five years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-10.

[3] The Board will apply the law of United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[4] 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 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 contested its designation as the responsible operator by arguing Claimant worked for Powell Mountain Coal Company (Powell Mountain) for a cumulative period of more than one year after he worked for Employer. Employer's Post-Hearing Brief at 6-7. Therefore, it argued Powell Mountain should have been named the responsible operator. *Id*.

Employer conceded Claimant's employment relationship with Powell Mountain lasted from March 11, 2005 to January 11, 2006, a period of only ten months. Employer's Post-Hearing Brief at 6-7; *see* Hearing Tr. at 16. It asserted, however, the administrative law judge should calculate the length of this period of employment by applying the formula at 20 C.F.R. §725.101(a)(32)(iii).[5] Employer's Post-Hearing Brief at 6-7. Doing so, Employer maintained, would establish Claimant had approximately 315 working days with

[4] 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).

[5] 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.* 20 C.F.R. §725.101(a)(32)(iii).

Powell Mountain 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, 401-02 (6th Cir. 2019), Employer asserted that if a miner has at least 125 working days with an operator, he has worked for a year of coal mine employment with the operator regardless of the actual duration of his employment for the year. Employer's Post-Hearing Brief at 6-7. Therefore, Employer contended the district director improperly designated it as the responsible operator. *Id.*

The administrative law judge rejected this argument. Decision and Order at 4-5. Because this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, she declined to apply *Shepherd*. Decision and Order at 4-5. Thus she explained that to credit Claimant with a year of coal mine employment with Powell Mountain, she must first determine whether he was engaged in coal mine employment with this operator for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Id.*; *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); 20 C.F.R. §725.101(a)(32)(i). If she found the threshold one-year period met, she would then determine whether Claimant worked as a miner for Powell Mountain for at least 125 working days within that one-year period. Decision and Order at 4-5; *see* 20 C.F.R. §725.101(a)(32). Because the record establishes Claimant worked for Powell Mountain from March 11, 2005 to January 11, 2006, the administrative law judge found Employer failed to establish Powell Mountain employed Claimant for one year.[6] Decision and Order at 4-5; *see* Hearing Tr. at 16.

Employer's challenges this finding, arguing the administrative law judge should have applied the formula at 20 C.F.R. §725.101(a)(32)(iii) and the holding of *Shepherd* to calculate the length of Claimant's employment with Powell Mountain. Employer's Brief at 5-8, *citing Shepherd*, 915 F.3d at 401-02. Its argument has no merit. As the administrative law judge correctly found, this case arises out of the jurisdiction of the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 working days establishes a year-long employment relationship. *See Mitchell*, 479 F.3d at 334-35 (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); Decision and Order at 4-5. Further, an administrative law judge's use of the formula at 20 C.F.R. §725.101(a)(32)(iii) is discretionary, particularly in circumstances such as this case where

[6] The administrative law judge also found Employer submitted no evidence that Powell Mountain Coal Company (Powell Mountain) is financially capable of assuming liability for benefits. Decision and Order at 5.

there is uncontested evidence of the beginning and ending dates of a claimant's employment. 20 C.F.R. §725.101(a)(32)(iii); *see* Hearing Tr. at 16. Employer has not demonstrated why it was unreasonable for the administrative law judge to decline to use the formula at 20 C.F.R. §725.101(a)(32)(iii). *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

Thus we affirm, as supported by substantial evidence, the administrative law judge's finding that Employer is the responsible operator, as it failed to establish a more recent operator employed Claimant for one year.[7] 20 C.F.R. §§725.494, 725.495; *see Mitchell*, 479 F.3d at 334-35.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[8] nor clinical pneumoconiosis,[9] 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 failed to establish rebuttal by either method.[10]

[7] Employer argues the administrative law judge erred in alternatively finding it did not establish Powell Mountain is financially capable of assuming liability. Employer's Brief at 16-17. Insofar as Employer failed to establish Powell Mountain employed Claimant for one year, we need not address this alleged error. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.495(c).

[8] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] "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).

[10] The administrative law judge found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 12.

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 9-11. We disagree.

To disprove legal pneumoconiosis, Employer must establish Claimant does not have 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relied on the medical opinions and deposition testimony of Drs. Jarboe and Dahhan. Director's Exhibit 14; Employer's Exhibits 1, 3, 4. Both physicians opined Claimant has an obstructive ventilatory impairment due to cigarette smoking. *Id*. They opined the impairment is unrelated to coal mine dust exposure. *Id*.

Dr. Jarboe specifically opined Claimant's obstructive respiratory impairment is unrelated to coal mine dust exposure because it is partially reversible after the administration of bronchodilators. Employer's Exhibit 1 at 7-9. He explained coal mine dust exposure does not cause a reversible obstructive impairment, and thus the obstruction is caused by smoking. *Id.* The administrative law judge noted that even if the impairment showed improvement, Claimant's pulmonary function testing is qualifying for total disability both before and after the administration of a bronchodilator.[11] Decision and Order at 12-13. She permissibly found Dr. Jarboe's reasoning unpersuasive because he failed to adequately explain why the irreversible portion of Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[12] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland*

[11] Dr. Jarboe indicated the FEV1 and FEV1/FVC values on the pulmonary function study Claimant performed were qualifying both before and after bronchodilator administration. Employer's Exhibit 1 at 9.

[12] Dr. Jarboe stated Claimant "may have intrinsic asthma" because Claimant indicated during the relevant examination that he "may have had asthma as a child." Director's Exhibit 1 at 8. The administrative law judge discredited Dr. Jarboe's opinion because "there is no documentation of asthma in the treatment notes." Decision and Order at 12-13. As Employer does not challenge this finding, it is affirmed. *See Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

River Coal Co. v. Banks, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 12-13.

Dr. Jarboe also opined Claimant's obstructive respiratory impairment is due to cigarette smoking and unrelated to coal mine dust exposure because the pulmonary function testing reveals a disproportionate FEV1/FVC ratio, which is not a pattern of impairment consistent with legal pneumoconiosis. Employer's Exhibit 1 at 7-8. The administrative law judge permissibly discredited this rationale as insufficient to exclude legal pneumoconiosis. Decision and Order at 12, *citing Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017) (administrative law judge permissibly discredited medical opinion inconsistent with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

Dr. Dahhan opined Claimant's obstructive respiratory impairment is not "caused by, related to, contributed to, or aggravated by [the] inhalation of coal [mine] dust." Director's Exhibit 14 at 3. He stated Claimant's cigarette smoking history is "sufficient to cause this pulmonary impairment that is demonstrated on the pulmonary function studies." Employer's Exhibit 3 at 10-11. The administrative law judge found Dr. Dahhan "did not explain how Claimant's [twenty-five] years of coal dust inhalation had no impact on his ventilatory impairment." Decision and Order at 12. Employer argues this credibility finding is not supported by substantial evidence because Dr. Dahhan did provide an explanation for why Claimant's obstructive impairment is not caused by coal mine dust exposure in his medical report and deposition. Employer's Brief at 11.

Although there is merit to Employer's argument that the administrative law judge erred in finding Dr. Dahhan provided no explanation for excluding legal pneumoconiosis, we decline to remand this case for further consideration of this issue. We consider this error to be harmless on this record as weighed by the administrative law judge. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Dahhan opined Claimant's obstructive impairment evidenced by pulmonary function testing showed "significant reversibility [after bronchodilators] which is a finding that is inconsistent with the permanent fixed adverse effect of coal dust on the respiratory system." Director's Exhibit 14 at 3. He repeated this rationale in his deposition, explaining that the improvement in Claimant's impairment after the administration of a bronchodilator "is not consistent with an airway obstruction caused by coal [mine] dust inhalation" because coal mine dust causes an irreversible impairment. Employer's Exhibit 3 at 11.

As discussed above, the administrative law judge found Claimant's pulmonary function testing evidences only a partially reversible obstructive impairment. Decision and Order at 12-13. She also found Dr. Jarboe's citation to the reversibility of the impairment unpersuasive because he did not adequately explain why the irreversible portion of Claimant's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Stallard*, 876 F.3d at 673-74 n.4; *Swiger*, 98 F. App'x at 237; *Banks*, 690 F.3d at 489; *Barrett*, 478 F.3d at 356; Decision and Order at 12-13. A review of Dr. Dahhan's opinion reveals no discussion by the doctor as to why Claimant's twenty-five years of coal mine dust exposure does not contribute to, or aggravate, the irreversible portion of his obstructive impairment, nor has Employer identified any such explanation. Director's Exhibit 14; Employer's Exhibit 3. Thus Dr. Dahhan's opinion suffers from the same defect the administrative law judge found with Dr. Jarboe's opinion. *Stallard*, 876 F.3d at 673-74 n.4; *Swiger*, 98 F. App'x at 237; *Banks*, 690 F.3d at 489; *Barrett*, 478 F.3d at 356; Decision and Order at 12-13. We decline to remand this case for the administrative law judge to reconsider Dr. Dahhan's opinion, as the outcome of a remand is preordained. *See Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

We also reject Employer's assertion that the administrative law judge violated the Administrative Procedure Act[13] by failing to make a specific finding on the length of Claimant's smoking history. Employer's Brief at 10-11. Although the administrative law judge did not render a specific finding, she reviewed Claimant's testimony and the medical opinions regarding his smoking history.[14] Decision and Order at 3, 7-9. Employer does

[13] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "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).

[14] The administrative law judge determined "Claimant has a smoking history of approximately [fifty-four] years of one to two packs per day." Decision and Order at 2, *citing* Hearing Tr. at 26. She noted Dr. Ajjarapu, in his May 18, 2015 report, noted a smoking history of "one pack daily beginning in 1965." Decision and Order at 7; Director's Exhibit 11. In his February 9, 2017 report, Dr. Ajjarapu reported a cigarette smoking history of "[one] pack per day" "for over 50 years." Director's Exhibit 11. In his March 21, 2017 report, Dr. Dahhan stated "[Claimant] began smoking at the age of [eighteen] averaging a pack per day and continues to do so." Director's Exhibit 14. In a June 25, 2018 report, Dr. Jarboe reported Claimant "started [smoking cigarettes] in 1965 and continued to consume [one] pack daily" and thus has "a [fifty]-pack-year history." Employer's Exhibit 1.

not contest the accuracy of the administrative law judge's summaries. Moreover, the administrative law judge did not reject Dr. Jarboe's and Dr. Dahhan's opinions for relying on an inaccurate smoking history. Rather, as discussed above, she provided an affirmable rationale for rejecting their opinions for reasons unrelated to the specific number of years Claimant smoked: Employer's physicians' explanations are insufficient to establish rebuttal because they failed to adequately explain why Claimant's obstructive respiratory impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See* Decision and Order at 12-13. Employer has therefore failed to demonstrate how the identification of a specific smoking history would have made any difference to the administrative law judge's conclusions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As the administrative law judge provided valid reasons for discounting Dr. Jarboe's and Dr. Dahhan's opinions, any error in not rendering a specific finding on Claimant's years of smoking is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni*, 6 BLR at 1-1278.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 322; *Looney*, 678 F.3d at 315-16. Because it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that Dr. Jarboe's and Dr. Dahhan's opinions fail to satisfy Employer's burden to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); Decision and Order at 13. Employer's failure to disprove legal pneumoconiosis[15] precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, we affirm the administrative law judge's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established "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); Decision and Order at

[15] Employer argues the administrative law judge erred in failing to consider Claimant's treatment records. Employer's Brief at 10. Contrary to Employer's argument, the administrative law judge fully summarized the treatment records and noted they include diagnoses of chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Decision and Order at 13. Employer does not identify any medical opinion in the treatment records that assists it in rebutting the existence of legal pneumoconiosis, nor do we discern any such evidence. Employer's Brief at 10; Claimant's Exhibit 6.

13. She discounted the disability causation opinions of Drs. Jarboe and Dahhan because neither physician diagnosed legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. Decision and Order at 13. Because Employer raises no specific allegations of error regarding the administrative law judge's findings on disability causation, we affirm her determination that Employer failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Skrack*, 6 BLR at 1-711; Decision and Order at 13.

As Employer has not rebutted the Section 411(c)(4) presumption, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that Employer is the responsible operator. 20 C.F.R. §§725.494, 725.495. Because Claimant had working days with Powell Mountain Coal Company (Powell Mountain) between 2005 and 2006, after he worked for Employer, I would remand the case for the administrative law judge to make necessary findings regarding Claimant's length of coal mine employment with Powell Mountain for purposes of determining whether Employer is liable for benefits. 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 Powell Mountain, 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.[16] *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 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)."[17] 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

---

[16] *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 v. Barnwell Coal Co.*, 22 BLR 1-277, 1-284 (2003) (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).

[17] 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*,

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 Daniels Co. v. Mitchell*, 479 F.3d 321, 329-331 (4th Cir 2007) (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 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

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*.

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 Powell Mountain, as opposed to Employer, should have been named the responsible operator.

GREG J. BUZZARD
Administrative Appeals Judge