No. 14-2064

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NBL COAL COMPANY, INCORPORATED,
and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and TROY A. MOORE

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

This appeal is related to Troy A. Moore's claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44. Mr. Moore's entitlement to benefits, however, is no longer at issue. Rather, the question now is whether NBL Coal Company, Incorporated, (the most recent coal-mine operator to employ Mr. Moore) is the "responsible operator"—*i.e.*, the party responsible for paying Mr. Moore's benefits.[1] A Department of Labor (DOL)

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[1] The 2010 amendments to the BLBA, Pub. L. No. 111-148, § 1556 (cont'd . . .)

administrative law judge (ALJ) found that NBL is the responsible operator, and the Benefits Review Board affirmed that decision. NBL has petitioned the Court to review the Board's decision. The Director, Office of Workers' Compensation Programs, responds in support of the decisions below.

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over NBL's petition for review under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated into the BLBA by 30 U.S.C. § 932(a). NBL petitioned for review of the Board's August 7, 2014, decision on October 6, 2014, within the 60-day limit prescribed by Section 21(c). Moreover, the "injury" as contemplated by Section 21(c)—Mr. Moore's exposure to coal-mine dust—occurred in Virginia, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ's decisions under Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as

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(. . . cont'd)
(2010), are not implicated in the identification of a responsible operator and, thus, are not relevant to this appeal.

incorporated. The ALJ issued his first decision on March 26, 2012. NBL filed a notice of appeal with the Board on April 25, 2012, within the 30-day period prescribed by Section 21(a) of the Longshore Act, 33 U.S.C. § 921(a), as incorporated. After the Board remanded the case, the ALJ issued a second decision on September 30, 2013. NBL filed a timely motion for reconsideration with the ALJ on October 15, 2013. *See* 20 C.F.R. § 725.479(b) (providing a 30-day period to seek reconsideration of ALJ decision). The ALJ denied reconsideration on October 25, 2013. NBL then timely appealed to the Board on October 29, 2013. *See* 33 U.S.C. § 921(a); 20 C.F.R. § 725.479(c) (period for appeal to Board suspended and reset by timely motion for reconsideration).

STATEMENT OF THE ISSUE

Coal-mine operators are generally liable for the payment of benefits under the BLBA. The operator which most recently employed a miner will be liable for paying his benefits provided that, among other things, the miner worked for the operator for at least one year. That requirement is satisfied if the miner's employment relationship with the operator lasted for a year or more.

The issue here is: did ALJ correctly determine that Mr.

Moore's employment relationship with NBL continued past his actual last working day (and totaled more than one calendar year) where he was absent due to injury but retained the right to return to work after his last day of actual coal-mine work?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The BLBA provides disability and medical benefits to coal miners who are totally disabled by pneumoconiosis. *See* 30 U.S.C. § 901(a). NBL no longer contests that Mr. Moore is entitled to such benefits. The only dispute is whether NBL is liable to pay them.

For most miners who worked in coal-mine employment after 1969, an individual coal-mine operator—the "responsible operator"—will be liable for approved claims.[2] 30 U.S.C. § 932(b), (c); 20 C.F.R. § 725.490(a), (b). If a miner worked for more than one coal-mine operator during his career, the responsible operator is the most recent operator to employ the miner, provided that the operator qualifies as a "potentially liable operator" under 20 C.F.R.

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[2] Where a responsible operator cannot be identified, benefits will be paid by the Black Lung Disability Trust Fund. 26 U.S.C. § 9501(d)(1)(B), (2).

§ 725.494. 20 C.F.R. § 725.495(a)(1). Under Section 725.494, an operator will be potentially liable if, among other things, the miner worked for the operator for at least one year as defined in 20 C.F.R. § 725.101(a)(32).[3] 20 C.F.R. § 725.494(c).

Under Section 725.101(a)(32):

> *Year* means a period of one calendar year (365 days, or 366 days [as appropriate]) . . . during which the miner worked in or around a coal mine or mines for at least 125 working days. A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year . . . .

20 C.F.R. § 725.101(a)(32). For purposes of BLBA claims,

> "employment" shall be construed as broadly as possible, and should include any *relationship* under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship

[3] The other criteria for potentially-liable-operator status are: (i) the miner's disability or death arose out of employment with that company; (ii) the company operated a coal mine after June 30, 1973; (iii) the miner's employment included at least one working day after December 31, 1969; and (iv) the company is financially capable of assuming liability for the claim. 20 C.F.R. § 725.494(a), (b), (d), (e). NBL does not contest that it meets these other criteria.

> under which an operator derives a benefit from the work performed by a miner.

20 C.F.R. § 725.493(a)(1) (emphasis added). Thus, Section 725.101(a)(32) "contemplates an *employment relationship* totaling 365 days" during which the miner actually worked at least 125 days. 65 Fed. Reg. 79959 ¶ (f)(i) (Dec. 20, 2000) (emphasis added).

Procedurally, BLBA claims begin with proceedings before a district director, who issues a "proposed decision and order" after developing and evaluating the evidence. 20 C.F.R §§ 725.404-.418. This decision "shall reflect the . . . final designation of the responsible operator liable for the payment of benefits." 20 C.F.R. § 725.418(d). If the operator disagrees with the district director's designation, it may request a hearing before an ALJ. 20 C.F.R. §§ 725.419(a), 725.455(a). Before the ALJ, the Director must prove that the miner worked for the designated operator for a period of at least one year. 20 C.F.R. § 725.495(b). Otherwise, liability for the claim falls to the Trust Fund (*i.e.*, no other operator can be designated as the responsible operator). *See* 20 C.F.R. § 725.407(d).

B. Statement of the Facts

Mr. Moore worked as miner for a total of 10.63 years. Joint Appendix (JA) 55; *see* JA 82. His most recent employer was NBL. JA 185. His work with NBL began on March 28, 1992, and his last day of actual work in the mine was March 23, 1993. *See* JA 55, 191. The remaining question is whether his employment relationship with NBL continued after that date.

The relevant evidence on this issue is contained in an opinion from the Virginia Workers' Compensation Commission (VWCC), dated October 27, 1993. JA 192.[4] Mr. Moore had filed a claim seeking state workers' compensation benefits for a back injury sustained on March 23, 1993, his final day of work in the mine. JA 194. The VWCC denied benefits because Mr. Moore failed to prove that he had suffered an injury in the course of his work at NBL. JA 201.

The VWCC opinion, however, details events of March-May 1993 which are germane to whether Mr. Moore's employment

[4] The VWCC opinion appears at multiple other places in the Joint Appendix. For simplicity's sake, we will cite only to the first appearance.

relationship with NBL continued after March 23, 1993. The VWCC heard testimony from Mr. Moore, his wife, Larry Lambert (part-owner of and supervisor at NBL) and Luther Willis (day section foreman for NBL).[5] *See* JA 194-95. According to the VWCC opinion, Mr. Moore testified that he injured his back at work on March 23, but did not report an injury to NBL at that time. JA 194. Willis confirmed that Mr. Moore did not report an injury. JA 195. Mr. Moore's wife stated that she called NBL the next day to report that Mr. Moore had been injured. JA 194. Lambert also testified that Mr. Moore's wife had called NBL on March 24, speaking first to "the outside man" and later to Lambert himself. JA 194-95. According to Lambert, Mr. Moore's wife reported that Mr. Moore had pulled a muscle in his back, but did not know if the injury had occurred at work. JA 195.

Lambert then spoke to Mr. Moore on March 26. *Id.* According to Lambert, Mr. Moore did not know "what happened." *Id.* Mr.

[5] NBL challenges neither the accuracy of the VWCC's summation of the testimony, nor (in relevant part) the veracity of the witnesses' statements to the VWCC.

Moore, however, testified that he told Lambert that he had been injured at work. *Id.* Lambert spoke to Mr. Moore again on May 3. Lambert stated that Mr. Moore informed him that he (Mr. Moore) would return to work the following Monday (May 10), and Lambert told Mr. Moore to bring a physician's release with him. *Id.* On May 10, however, Mr. Moore called Lambert and told him that he would not be able to return to work because he had been arrested. *Id.* There is no indication in the VWCC opinion that NBL terminated Mr. Moore's employment at any point before May 10.[6]

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[6] The record also contains a March 18, 1996, letter from an independent accountant. JA 191. Attached to the letter were NBL payroll records. JA 217-20. The letter states that Mr. Moore's dates of employment with NBL were March 28, 1992, through March 23, 1993, noting that the payroll records "reflect[] these dates." JA 191. The letter does not address the events subsequent to March 23, nor indicate that the accountant was familiar with these events. In any event, while NBL notes the letter in its statement of the facts, its arguments do not rely on it.

In addition to the documentary evidence, Mr. Moore testified at the ALJ hearing regarding the events of March-May 1993. JA 99-101. Because no party had designated Mr. Moore as a "liability witness" while this claim was before the district director, however, his testimony was inadmissible with respect to NBL's liability. *See* 20 C.F.R. § 725.414(c). Neither the ALJ (except for a passing reference) nor the Board relied on this testimony. Likewise, NBL does not now rely on that testimony. As a result, we omit it from this evidentiary summary.

C. Procedural History and Prior Decisions

1. Proceedings Before the District Director. Mr. Moore filed his present claim in 2008.[7] JA 181. He completed a coal-mine-employment-history form, indicating that his last employment was with NBL in 1993. JA 185. Based on the VWCC opinion, the district director ultimately found that Mr. Moore's employment relationship with NBL continued until May 10, 1993, significantly longer than a year after his March 28, 1992, start date. JA 479-80. The district director also found that Mr. Moore had 197 actual working days with NBL. JA at 480. As a result, the district director designated NBL as the responsible operator.[8] JA 470. NBL then requested an ALJ hearing. JA 487.

2. First ALJ Decision. The ALJ issued his first decision in March 2012. JA 50. With respect to the responsible-operator

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[7] He filed a previous claim in 1995, which was finally denied in 1996. Director's Exhibit 1. The district director determined that NBL was the responsible operator on that claim, and NBL contested that determination. *Id.* The issue was not resolved, as Mr. Moore did not contest the denial of benefits.

[8] The district director also found that Mr. Moore is entitled to benefits. JA 471. The ALJ later reached the same conclusion, JA 55-61, and the Board affirmed that determination. JA 44-47.

issue, he stated that "the burden is on [NBL] to . . . disprove the Director's position."[9] JA 55. In effect, he required NBL to prove that Mr. Moore's employment with the company lasted less than a full year. The ALJ concluded that NBL did not meet this burden because "nothing has been proffered that will permit me to find that [Mr. Moore did not work for NBL for a full year]." *Id.*

3. First Board Decision. NBL appealed, and the Board vacated the ALJ's responsible-operator finding in April 2013. JA 40. Agreeing with the Director, the Board remanded the case because the ALJ had misallocated the burden of proof, holding that it is the Director's burden to show that Mr. Moore was employed by NBL for at least one calendar year. JA 42-43. The Board directed the ALJ to make factual findings on whether the Director met this burden. JA 43.

4. Second ALJ Decision. On remand, the ALJ again found that NBL is the responsible operator in a September 2013 decision. JA

[9] NBL contested only that Mr. Moore's employment for the company lasted for a full calendar year, not the district director's determination that he had 197 actual working days with NBL. *See* JA 5, n.4.

35. Relying on the testimony of Larry Lambert (part owner of NBL), as summarized by the VWCC, the ALJ determined that "[Mr. Moore] could return to work [up until May 10, 1993] with the only qualification that he should bring a medical authorization." JA 37. The ALJ also noted that there was no evidence that Mr. Moore was terminated prior to May 10. *Id.* Thus, he concluded that "the unpaid absence after March 23, 1993 until May 10, 1993 will be counted in determining whether [Mr. Moore] worked for [NBL] for a cumulative period of one year." *Id.* Accordingly, because Mr. Moore's employment relationship with NBL extended from March 28, 1992, until at least May 10, 1993, the ALJ found that he had one year of employment with the company and, thus, that NBL is the responsible operator.[10] *Id.*

5. Second Board Decision. NBL appealed, but the Board affirmed the ALJ's decision. JA 3. The Board rejected NBL's argument that the VWCC decision finding that Mr. Moore did not suffer a work-related injury on March 23, 1993, was determinative

[10] The ALJ subsequently denied NBL's reconsideration motion (styled as a motion to set aside the decision). JA 32.

of when his employment ended. JA 6. Rather, the Board held that the relevant inquiry was when his employment relationship with NBL ended. *Id.* The Board then affirmed the ALJ's reliance on Larry Lambert's testimony (and the absence of any evidence that Mr. Moore was terminated) to establish that Mr. Moore's employment relationship with NBL lasted until at least May 10, 1993. JA 6-7. NBL then petitioned the Court to review the Board's decision. JA 507.

SUMMARY OF THE ARGUMENT

The Court should affirm the conclusions of the ALJ and the Board, and hold that NBL is the responsible operator. The ALJ correctly found that Mr. Moore's employment relationship with NBL lasted until at least May 10, 1993, because the miner retained the right to return to work (with medical clearance) until at least that date. This was more than one calendar year after the date he started working for the company (March 28, 1992), thus establishing one calendar year of employment. As there was no dispute that Mr. Moore actually worked at NBL's mine for at least 125 days during that calendar year, the regulatory definition of a "year" was satisfied.

NBL's arguments to the contrary lack merit. The company incorrectly contends that only paid absences (in addition to actual working days) may be included in calculating the length of employment. But whether the miner received pay is only relevant to the "125 working days" prong of the regulatory test. In determining whether a miner was employed for a calendar year, the regulation makes no distinction between paid and unpaid absences, *provided that the employment relationship remains intact*. There is no other basis for NBL's argument that Mr. Moore's absence after March 23, 1993, was unauthorized and so severed his employment relationship. Finally, NBL's contention that Mr. Moore did not actually work as a miner after March 23 is off-point. The issue is whether his employment relationship (and, in particular, his right to return to work) continued after that date. NBL's petition for review should be denied.

ARGUMENT

A. Standard of Review

NBL casts its arguments as legal questions. This Court reviews legal issues *de novo*. *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 288 (4th Cir. 2007). With respect to DOL's BLBA

program regulations, however, the Court defers to the Director's interpretation of the rules. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 159 (1988) (DOL's interpretation of BLBA regulation is "deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation.") (citation and quotation omitted); *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006) (citations omitted); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted).

NBL's contentions also implicate the ALJ's factual findings. In reviewing those findings, the Court "engage[s] in an independent review of the record to determine whether substantial evidence exists to support the ALJ's findings of fact." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 614 (4th Cir. 2006). It is the ALJ, however, who "is charged with making factual findings, including evaluating the credibility of witnesses and weighing contradicting evidence." *Doss v. Director, OWCP*, 53 F.3d 654, 658 (4th Cir. 1995).

B. The ALJ properly found that NBL is the responsible operator on Mr. Moore's claim.

1. Mr. Moore's employment relationship with NBL lasted for at least one calendar year.

The Court should affirm the conclusions of the ALJ and the Board that Mr. Moore was employed by NBL for a full calendar year and, therefore, that NBL is the responsible operator. Mr. Moore began work with NBL on March 28, 1992, and his last day actually working in the mine was March 23, 1993 (361 days later). But the ALJ correctly found that Mr. Moore's employment relationship with NBL continued until at least May 10, 1993, and therefore lasted more than one calendar year.

The responsible operator on a BLBA claim is the coal company that most recently employed the miner for a period of a least one "year," as defined by 20 C.F.R. § 725.101(a)(32). 20 C.F.R. §§ 725.494(c), .495(a)(1). Section 725.101(a)(32), in turn, creates a two-part definition for the one-year requirement—(i) a full calendar year of employment, (ii) during which the miner had at least 125 actual working days. 20 C.F.R. § 725.101(a)(32); *see also Armco, Inc. v. Martin*, 277 F.3d 468, 473-75 (4th Cir. 2002) (employing same two-part test under previous version of BLBA regulations, but

noting that test would also apply under Section 725.101(a)(32)); *accord Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996). NBL does not contest that Mr. Moore had at least 125 working days during his employment with the company. The issue before the Court is whether his employment lasted for a full year.

Section 725.101(a)(32)'s one-year of employment requirement, "contemplates an *employment relationship* totaling 365 days" during which the miner actually worked 125 days. 65 Fed. Reg. 79959 ¶ (f)(i) (emphasis added). And that relationship remains intact so long as the miner retains the right to return to work. *Elswick v. The New River Co.*, 2 Black Lung Rptr. (MB) 1-1109, 1-1113/14 (BRB 1980) ("leave of absence in which the claimant retained his right to employment" properly included in calculating the required one year of employment).

As a result, a miner's employment relationship with an operator may continue beyond the last day of actual work, provided that the miner retained the right to return to work. For example, in *BGL Min. Co. v. Cash*, 165 F.3d 26 (Table), 1998 WL 639171 (6th Cir., Sept. 11, 1998)—the only court of appeals decision to address this point—the miner's last day of actual coal-mine work was on the

364th day after he began work for the operator. *Id.* at *1. He did not report to work on the 365th day because of a pulmonary illness and, in fact, did not return to work for the operator again. *Id.* The operator's policy, however, was to hold open an employee's job for at least three days if he failed to show up for work and to hold it open if he was absent because of sickness. *Id.* Based on these facts, the Sixth Circuit adopted the Board's conclusion in that case, holding that

> [the miner] retained the right to employment [where] the record indicates that [his] employment was not terminated when he went on unannounced sick leave after his last day at the mine, his job was kept open for at least three additional working days thereafter as a matter of company policy, and the claimant retained the right to return to work if his physician had authorized him to do so.

Id. at *4 (quoting Board decision); *see also Elswick*, 2 Black Lung Rptr. (MB) at 1-1113/14 (employment relationship continued during vacation leave subsequent to last day of actual mining); *see generally Trailmobile Division, Pullman, Inc. v. N.L.R.B.*, 379 F.2d 419, 423 (5th Cir. 1967) ("an employee on leave of absence generally continues to be regarded as an employee unless it can be established by overt action or objective evidence that the

employment relationship has been severed").

While the ALJ here did not cite *BGL Mining* (although the Board did), he applied the same principle. He acted within his discretion in concluding that the testimony of Larry Lambert (part-owner of NBL), as summarized in the VWCC opinion, evinced Mr. Moore's continuing right to return to work as late as May 10, 1993. *See Doss*, 53 F.3d at 658 ("The ALJ is charged with making factual findings, including evaluating the credibility of witnesses and weighing contradicting evidence."). After March 23, Mr. Moore (first via his wife, later personally) informed NBL that he had a back injury and was not at work because of that injury. JA 194-95. NBL did not terminate him because of his absence. When he indicated on May 3 that he intended to return to work on May 10, NBL implicitly agreed that he could return on that date, provided only that he obtain medical clearance. Thus, Mr. Moore maintained an employment relationship with NBL at least until May 10, when he informed the company that he could not return to work because of an arrest.

Although the ALJ could, perhaps, have explained his finding in more detail, the path of his reasoning is clear. *See Markus v. Old*

Ben Coal Co., 712 F.2d 322, 327 (7th Cir. 1983) (citations omitted) (ALJ's finding will be affirmed where rationale is discernible). Since the record supports the ALJ's conclusion that Mr. Moore's employment relationship with NBL continued until at least May 10, 1993, the Court should affirm his finding that Mr. Moore was employed by NBL for at least one year and his conclusion that NBL is the responsible operator. *See* 20 C.F.R. §§ 725.494(c), .495(a)(1).

2. Contrary to NBL's argument, Section 725.101(a)(32) does not categorically exclude unpaid absences from the calculation of the length of employment.

NBL's primary argument against this result is that Mr. Moore should not be credited with work for the company for the period after March 23, because he was not paid for any day after that date. Pet. Br. at 17-18, 20-23. Since the final sentence of the initial paragraph of Section 725.101(a)(32) provides for including *paid* sick leave or paid vacation time in determining whether a miner had a calendar year of employment with an operator, NBL contends that *unpaid* time off is necessarily excluded. NBL waived this argument by not making it before the Board. Even if not waived, the argument has no merit.

Before the Board, NBL argued only that Mr. Moore's absence

after March 23 was unauthorized because it was due to a "fictitious" injury, and thus his employment terminated on that date. JA 21-22. It did not argue (as it now does) that all unpaid absences are excluded from the calculation of a miner's employment with an operator under Section 725.101(a)(32). Because NBL failed to raise this issue before the Board, it has waived the issue, and the Court need not consider it. *See Armco* 277 F.3d at 476 (issues not raised before Board are waived).

In any event, NBL is wrong. Properly construed, Section 725.101(a)(32) does not distinguish between paid and unpaid absences for purposes of the calendar-year requirement, provided that a miner's employment relationship with an operator is not severed. NBL improperly takes the final sentence of the initial paragraph of Section 725.101(a)(32) out of context to support its argument.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotations and citation omitted); *accord Chamber of Commerce of*

the U.S. v. N.L.R.B., 721 F.3d 152, 162 (4th Cir. 2013). Thus, in construing a statute, "a reviewing court should not confine itself to examining a particular . . . provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132; *accord Chamber of Commerce*, 721 F.3d at 162. This canon of construction applies equally to the analysis of regulations. *See*, *e.g.*, *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1092 (9th Cir. 2013) (court will "not [ ] give force to one phrase [of a regulation] in isolation") (internal quotation and citation omitted); *Anthony v. U.S.*, 520 F.3d 374, 380 (5th Cir. 2008) (instead of construing regulation based on only a few words, "more [is] required, namely, a consideration of the regulation as a whole and interpreting that phrase in context") (citation omitted).

The first paragraph of 20 C.F.R. § 725.101(a)(32) provides (with sentences numbered for ease of reference):

> [1] *Year* means 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. [2] A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner

> received pay while on an approved absence, such as vacation or sick leave. [3] In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year.

In isolation, the last sentence could be read (as NBL does) to imply that unpaid absences should not be counted toward the calendar-year requirement. Context, however, proves otherwise. The first sentence sets out the general requirements of one calendar year and 125 working days. The second sentence excludes certain paid absences from counting toward the *125 working day* requirement. The third sentence limits the second. Importantly, the third sentence clarifies that, despite the second sentence, those unpaid absences can be counted toward the calendar-year requirement. The third sentence does not mention unpaid absences as includable in the calendar-year calculation because the second sentence does not mention unpaid absences. It does not purport to define all the days that can be counted toward the required calendar year.[11]

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[11] In addition to ignoring the third sentence's context, NBL's interpretation is undermined by its dependence on the unreliable *expressio unius est exclusio alterius* maxim of statutory construction. NBL's theory—because the regulation specifically (cont'd . . .)

At most, NBL has established that the regulation is susceptible to two readings and is therefore ambiguous. But that does the employer no good, because the Director's interpretation of the regulation is entitled to deference so long as it is reasonable and consistent with the regulatory text. *See Island Creek Coal*, 456 F.3d at 421 (where regulation arguably ambiguous, Court defers to Director's interpretation).

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includes one thing (paid absences), it necessarily excludes others (unpaid absences)—is a classic *expressio unius* argument. As this Court has warned, however, "[t]he maxim is to be applied with great caution and is recognized as unreliable." *Director, OWCP v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) (citations omitted). In particular, "courts should not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *U.S. v. Buchanan*, 638 F.3d 448, 456 (4th Cir. 2011) (internal quotation and citation omitted). Here, neither the regulation nor the regulatory history addresses whether unpaid absences (other than layoffs and strikes) are included in the one-year determination. *See* 20 C.F.R. § 725.101(a)(32); 65 Fed Reg. 79959 ¶(f)(i); 64 Fed. Reg. 54983 ¶(f) (Oct. 8, 1999); 62 Fed. Reg. 3349 (Jan. 22, 1997). Hence, the *expressio unius* maxim is inapplicable. By the same token, NBL's suggestion that this Court should ignore *BGL Mining* because it predates the promulgation of the regulation is without merit. Because Section 725.101(a)(32) did not change the law with respect to unpaid absences, *BGL Mining* remains good law. *Cf. Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 864 (D.C. Cir. 2002) (discussing DOL's revised disability-causation regulation that was expressly intended to overturn a Seventh Circuit decision).

The regulation's history confirms the Director's interpretation of it. When DOL first proposed Section 725.101(a)(32), it defined a "working day" as "any day for which a miner received pay for work as a miner, *including any day for which the miner received pay while on approved absence, such as vacation or sick leave*." 62 Fed. Reg. 3387 (Jan. 22, 1997) (emphasis added). DOL explained that such time was credited as "working days" because the miner's employment relationship was "uninterrupted" during paid vacation or sick time, as opposed to time spent on layoff or strike. *Id*. at 3349.

> In response to comments received, DOL ultimately
>
> > amended . . . Section 725.101(a)(32) to clarify that periods of approved absences count only toward the miner's "year" of employment, and not the actual 125 "working days" during which the miner must have worked and received pay as a miner. Thus in order to have one year of coal mine employment, the regulation contemplates an employment relationship totaling 365 days, within which 125 days were spent [actually] working and being exposed to . . . dust, as opposed to being on vacation or sick leave.

65 Fed. Reg. 79959 ¶ (f)(i). As a result, the regulation now provides that a "year" means a calendar year of employment during which the miner was actually exposed to dust on at least 125 working

days for which the miner was paid for doing coal-mine work. Paid vacation or sick leave counts for the calendar-year of employment requirement, as the employment relationship is not severed by the absences, but does not count for the 125-working-days requirement (even where the leave was paid) because the miner was not exposed to dust during the absences.

NBL's theory that the regulation categorically excludes unpaid absences from the calculation of the length of a miner's employment is simply incorrect. As explained above at 16-20, Section 725.101(a)(32)'s one-year requirement requires only an employment relationship totaling at least one calendar year during which the miner actually worked 125 days. 65 Fed. Reg. 79959 ¶ (f)(i). The issue here is simply whether Mr. Moore's employment relationship with NBL continued for at least 365 days, not whether he received pay from the NBL while he was absent due to his back injury.[12]

The Sixth Circuit addressed this issue in *BGL Mining* and squarely held—in agreement with the Director's position in that

[12] The record does not indicate whether NBL even offered paid sick leave to its employees.

case and this one—that "whether the miner received wages while on sick leave is [not] the determinative factor. Rather, the determinative factor is whether an employment relationship continued to exist while the miner was on sick leave." 1998 WL 639171, *3; *see also Elswick*, 2 Black Lung Rptr. (MB) 1-1113/14 (unpaid leave of absence does not sever employment relationship where miner retains right to return to work). As we have demonstrated, the ALJ correctly found that Mr. Moore's employment relationship with NBL continued until at least May 10, 1993, as he retained the right to return to work until that date. Since this was more than one year after he started working for the company, NBL was properly designated as the responsible operator.[13]

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[13] NBL's reliance on the Third Circuit's unpublished decision in *P.T. Mine Servs. v. Director, OWCP*, 412 Fed. Appx. 461 (3d Cir., Jan. 5, 2011) on this point is misplaced, as that decision is inapposite. The issue in *P.T. Mine Services* was whether the designated responsible operator could escape liability by proving that the miner subsequently worked for a later operator for at least one year. 412 Fed. Appx. at 462-63; *see* 20 C.F.R. § 725.495(c)(2). The miner's employment with the later operator was interrupted by a one-month layoff, during which he received unemployment compensation. 412 Fed. Appx. at 463. Absent the layoff period, he did not have a year of employment with the later operator. The Third Circuit held that (cont'd . . .)

3. NBL's remaining arguments are without merit.

NBL also contends that no period after March 23 can be counted as part of Mr. Moore's employment relationship because his absence after that date was "unauthorized," either because Mr. Moore did not suffer a back injury on March 23 or his injury did not occur in the course of his employment with the company.[14] Pet. Br. at 18-19. This argument is also unavailing.

The existence or cause of Mr. Moore's back injury is not relevant to the issue here. The question is whether Mr. Moore's

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(. . . cont'd)
the layoff period should not be counted in determining the length of the miner's employment, as his employment relationship was severed during that period. *Id*. This result was correct, as there was no job for the miner to perform while he was laid off, regardless of his willingness and ability to do so. But while the decision cites Section 725.101(a)(32)'s discussion of paid sick and vacation leave and notes that the miner was not paid during his layoff, 412 Fed. Appx. at 463-64, the issue of unpaid absences that did not sever an employment relationship was simply not presented, nor did the Third Circuit court have occasion to analyze the history and context of the regulation's paid-leave language.

[14] Before the Board, NBL asserted that Mr. Moore's injury was "fictitious." JA 21-22. Notably, the VWCC simply concluded that he failed to prove that he suffered a *work-related* back injury. NBL's brief before this Court is unclear as to whether the company believes that he suffered no injury or merely that his injury was not work-related.

employment relationship with NBL continued after March 23, not whether (or how) he was injured on that date. Crucially, as the ALJ's findings make clear, the record is devoid of any evidence that NBL's policy was to automatically terminate employees who were absent from work because of either "fictitious" or non-work-related injuries, or that it actually terminated Mr. Moore because of his absence. Such evidence, of course, would be uniquely in NBL's possession and control. Rather, as the ALJ found, the evidence here shows that NBL would have permitted him to return to work with medical clearance as late as May 10. This belies any suggestion that Mr. Moore's absence after March 23 was "unauthorized" and resulted in the severing of his employment relationship.

Finally, NBL (citing 20 C.F.R. § 725.493(a)(1)) claims that because Mr. Moore did not actually work as a miner after March 23, no employment relationship could have existed after that date. Pet. Br. at 23-24. Essentially, the company asserts that an employment relationship exists only on those days when a miner is actually working in the mine. This argument ignores the regulatory distinction between a calendar year of employment and 125 actual

working days.

By requiring a full calendar year of employment relationship, but only 125 working days, Section 725.101(a)(32) necessarily contemplates that there will be days during the employment relationship when a miner does not actually work in the mine. For example, miners may not work on weekends or holidays, or days when inclement weather prevents them from reaching the mine, but their employment relationship with an operator is not severed as a result. And there is no requirement that the last day of an employment relationship must be an actual working day.

Here, NBL has never contested that that Mr. Moore actually worked for the company for at least 125 days during the period between March 28, 1992, and March 23, 1993. Thus, the working-days requirement is satisfied. *See* 20 C.F.R. § 725.101(a)(32). The issue then is not whether he actually worked in the mine after March 23, but whether his employment relationship with NBL continued after that date. As we have argued, that relationship lasted until at least May 10, 1993, even though his last actual working day was March 23. Thus, since both the 125-working-days requirement and the requirement of a one-year employment

relationship were met, the ALJ and the Board correctly found that NBL is the responsible operator. *See* 20 C.F.R. §§ 725.494(c), .495(a)(1).

CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and Board designating NBL as the responsible operator.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, an electronic copy of the Director's brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

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