No. 17-4313

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IMOGENE SHEPHERD

Petitioner

v.

INCOAL, INC.

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

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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v.

INCOAL, INC.

and

AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INC.

Employer-Carrier/Respondent
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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-In-Interest/Respondent

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Imogene

Shepherd, widow of deceased coal miner Tramble Shepherd. On June 30, 2015, Administrative Law Judge Peter Silvain issued a decision denying benefits. Joint Appendix (JA) 141. Mrs. Shepherd filed a timely motion for reconsideration within the ten-day period prescribed by 29 C.F.R. § 18.93, and the ALJ granted the motion on November 1, 2016, awarding benefits against Incoal, Incorporated. JA 185. Incoal appealed this decision to the United States Department of Labor (DOL) Benefits Review Board on November 23, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On November 27, 2017, the Board reversed the award of benefits. JA 274. Mrs. Shepherd petitioned this Court for review of that decision on December 28, 2017. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Mr. Shepherd's exposure to coal mine dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Mrs. Shepherd's petition for review.

STATEMENT OF THE ISSUES

The survivors of totally disabled miners who worked for at least fifteen years in qualifying coal-mine employment are rebuttably presumed to be entitled to BLBA benefits. 30 U.S.C. § 921(c)(4), as implemented by 20 C.F.R. § 718.305. The governing regulation defines a "year" as "a period of one calendar year . . . 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). There is conflicting evidence regarding the length of time Mr. Shepherd worked for various mining employers. The ALJ found that Mr. Shepherd had worked for the required fifteen years without addressing certain evidence suggesting that he was not employed as a miner for periods totaling fifteen calendar years. The Board reversed, crediting evidence that the ALJ had not considered, but without addressing Mrs. Shepherd's testimony, which conflicted with the evidence that the Board credited. The questions presented are:

1. Did the Board correctly rule that periods during which Mr. Shepherd was not employed as a miner cannot be counted toward the fifteen years necessary to invoke the presumption?

2. Did the Board exceed the scope of its review by resolving disputed factual matters rather than remanding the case to the ALJ to address the conflicting evidence?

STATEMENT OF THE CASE

Mrs. Shepherd filed the instant claim in 2008. JA 3. The district director issued a proposed decision and order awarding benefits against Incoal, the responsible operator liable for paying benefits. Following a formal hearing, the ALJ awarded benefits, payable by Incoal. JA 78. The Benefits Review Board vacated the award and remanded for further consideration. JA 129. On remand, the ALJ first denied the claim and then, after Mrs. Shepherd requested reconsideration, awarded benefits. JA 141. The Board reversed the award and denied benefits. JA 274. Mrs. Shepherd then petitioned this Court for review.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

In addition to disability benefits for miners who are totally disabled by pneumoconiosis, the BLBA provides survivors' benefits to the qualifying dependents of miners who die from the disease. 30 U.S.C. §§ 901(a), 922, 932(c). The survivors of miners who were totally disabled by a respiratory or pulmonary impairment and worked in underground mines, or surface mines with similar conditions, invoke a rebuttable presumption of entitlement. 30 U.S.C. § 921(c)(4), as implemented by 20 C.F.R. § 718.305.[1] This is generally referred to as the

[1] In a claim for survivor's benefits, like this one, the party opposing entitlement can

"fifteen-year presumption."

The BLBA's implementing regulations 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). As explained in the preamble to that rule, "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 working and being exposed to coal mine dust." *Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended*, 65 Fed. Reg. 79959 (Dec. 20, 2000). If a miner worked for multiple periods of less than one calendar year, "the partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year." *Id.* at 79960.

To determine the length of a miner's employment, the factfinder should attempt to determine "the beginning and ending dates of all periods of coal mine employment[.]" 20 C.F.R. § 725.101(a)(32)(ii). "The dates and length of

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rebut the presumption by proving that the miner did not have clinical or legal coal workers' pneumoconiosis, or that the miner's pneumoconiosis did not contribute to his death. 20 C.F.R. § 718.305(d)(2).

employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworkers affidavits, and sworn testimony." *Id*. The regulations "do[] not place special weight on any particular type of evidence in determining how long an individual worked as a coal miner. Rather, § 725.101(a)(32)(ii) recognizes that factual findings concerning a miner's work history should be based on all of the credible evidence available to the adjudicator." 65 Fed. Reg. 79959 (citation omitted).

If the beginning and ending dates of a miner's period of employment with a particular coal mine operator cannot be determined, 20 C.F.R. § 725.101(a)(32)(iii) sets out a formula the factfinder may employ: "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[.]" *Id*. Regarding pre-1978 coal mine employment, longstanding Board precedent provides that a miner can be credited with one quarter-year of coal mine employment for each three-month period in which a miner earned at least fifty dollars. *Combs v. Director, OWCP*, 2 Black Lung Rptr. (MB) 1-904, 906-07 (1980) (citing 20 C.F.R. § 404.103 (1979)); *see Hudson v. U.S. Dep't of Labor*, 851 F.2d 215, 217 (8th Cir. 1988).

B. Relevant record evidence

Mrs. Shepherd does not challenge the ALJ's weighing of the medical evidence. JA 280. Accordingly, the Director will summarize only the evidence

relevant to the length of the miner's coal mine employment.

Mr. Shepherd filed an unsuccessful claim for BLBA disability benefits in 1987. *See* JA 80. The miner alleged seventeen years of coal mine employment ending in 1985 in that claim, and provided an employment history. JA 16, 20. In this claim, Mrs. Shepherd also provided a written history of her husband's work that differed from the miner's in several respects. JA 5.

The miner worked for several different coal companies, and the evidence relevant to the length of his employment with each is summarized below. The evidence regarding his work for Allen Fork Coal, Expert Coal, and Hite Preparation is particularly relevant because the Board's decision turned on those periods of employment.

1. Allen Fork Coal: The miner reported that he worked for Allen Fork from May 1963 to July 1963. JA 20. Mrs. Shepherd did not include Allen Fork in her employment history. Social Security records show that the miner earned $107 in the second quarter of 1963, and $6.84 in the third quarter of 1963. JA 7.

2. Hueysville Coal: The miner did not list Hueysville in his employment history, and no such company appears in the Social Security records. Mrs. Shepherd stated that the miner worked for Hueysville from July 1962 to July 1964. JA 5.

3. Expert Coal: The miner reported that he worked for Expert from August

1963 to November 1964, and again from February 1967 to August 1967. JA 20. Mrs. Shepherd wrote in Expert, then scratched it out without adding dates. JA 5. Social Security records show employment in the last two quarters of 1963, all four quarters of 1964, the fourth quarter of 1966, and the first two quarters of 1967. JA 7.[2]

4. Drift Coal: Neither the miner nor Mrs. Shepherd listed Drift on their respective employment histories. Social Security records show the miner earned $81.54 from Drift in the third quarter of 1967. JA 8.

5. Hite Preparation: The miner reported that he worked for Hite from September 1973 to February 1977. JA 20. Mrs. Shepherd listed the dates as May 1971 to January 1977. JA 5. Social Security records show employment in the third quarter of 1967, the final two quarters of 1973, all four quarters of 1974-1976, and the first quarter of 1977. JA 8.

6. Elkhorn: The miner did not list Elkhorn in his employment history form. Mrs. Shepherd stated that the miner worked for Elkhorn from January 1977 to May 1977. JA 5. A letter from Elkhorn states that the miner worked for the company from September 15, 1973 to February 28, 1977. JA 28.

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[2] The miner was in the U.S. Army during the last quarter of 1964 ($111.80), all of 1965 and 1966, the second quarter of 1967 ($105.75), and the fourth quarter of 1968 ($134.24). JA 7-8.

7. Incoal: The miner reported that he worked for Incoal from March 1977 to February 1985. JA 20. Mrs. Shepherd listed the dates as May 1977 to October 1984. JA 5. Social Security records show employment from 1977 into 1985. JA 9. However, only 1977 is broken down into quarters: the miner worked all four quarters of that year. He earned only $3,141.74 from Incoal in 1985. A letter from Incoal states that the miner worked from March 1, 1977, until he was laid off on October 30, 1979; from April 25, 1980 until he suffered an eye injury on May 3, 1982; from June 1982 until he was laid off on June 18, 1982; from July 19, 1982 to August 2, 1982 when he was laid off; from August 23, 1982 until he was laid off on October 29, 1982; from January 31, 1983 until he was laid off February 28, 1983; from May 3, 1983 until he was laid off on November 19, 1984; and from November 26, 1984 until he was laid off December 12, 1984. JA 29.

8. Trojan Mining: The miner reported that he worked for Trojan from March 1985 to June 1985. JA 20. Mrs. Shepherd did not list Trojan in her employment history form. Social Security records show that the miner earned $9,470.76 from Incoal in 1985; the earnings are not broken down into quarters. JA 9. A letter from Trojan states that the miner worked from February 18, 1985 until he was laid off on May 6, 1985; and from June 10, 1985 until he was "Off on Comp." on June 26, 1985. JA 30. Trojan went out of business on October 31, 1985, and it is unclear what type of compensation the miner was receiving after his

last day of work and whether an employee-employer relationship existed after that date. The miner testified that he last worked for Trojan "[b]ack in '85." JA 37.

C. Decisions below

1. ALJ decision awarding benefits (JA 78)

In his 2012 decision awarding benefits, the ALJ found that Mrs. Shepherd had established that her husband worked as a coal miner for 15.25 years. The ALJ accorded Mrs. Shepherd one-quarter year of coal mine employment for each quarter-year in which the miner earned at least fifty dollars. JA 83-84. He found that Mrs. Shepherd had established that the miner had been totally disabled, thus invoking the 20 C.F.R. § 718.305 presumption of entitlement, and that Incoal had failed to rebut the presumption.

2. Benefits Review Board remand (JA 129)

The Board vacated and remanded in 2013. JA 129. The Board held that the ALJ "did not adequately identify the evidence on which he relied and did not set forth his findings in adequate detail, including the underlying rationale[.]" JA 136. More specifically, the Board held that the ALJ had failed to identify the number of qualifying quarters per year, that Social Security records did not list the miner's earnings by quarter after 1977, and that the ALJ did not consider evidence regarding the start and end dates of the miner's various coal mine jobs. *Id*. The Board also ordered the ALJ to determine whether Trojan was Incoal's successor

pursuant to 20 C.F.R. § 725.492. JA 132. The Board affirmed the ALJ's finding that Incoal had failed to rebut the 15-year presumption. JA 137-38.

3. ALJ decision denying benefits (JA 141)

On remand, the ALJ again counted quarters with at least fifty dollars of earnings to find 6.75 years of coal mine employment prior to 1978. JA 152. As for Mr. Shepherd's post-1978 employment, the ALJ decided to "compare the Miner's wages with the table of 125 day average earnings for employees in coal mining[.]" JA 153. Using this method, he determined that Mrs. Shepherd had established another 6.33 years of coal mine employment for a total of 13.08 years. JA 155. He therefore ruled that Mrs. Shepherd was not entitled to the fifteen-year presumption. He also ruled that Mrs. Shepherd had failed to prove, without the benefit of the presumption, that pneumoconiosis caused or hastened her husband's death. JA 174-82. He accordingly denied her claim for BLBA benefits.

4. ALJ decision on reconsideration awarding benefits (JA 185)

Mrs. Shepherd moved for reconsideration. After again recounting the relevant evidence, the ALJ credited the miner with one quarter-year of coal mine employment for every quarter-year in which he earned at least fifty dollars prior to 1978, for a total of 7.25 years of coal-mine employment. JA 193. The ALJ did not consider evidence from the miner, Mrs. Shepherd, Social Security records, and some of the miner's employers regarding the miner's start and end dates with his

various coal mine employers.

For the miner's post-1977 coal mine employment, the ALJ noted the conflicting evidence regarding the start and end dates and, rather than weigh the credibility of that conflicting evidence, compared the miner's annual earnings to the average annual earnings for coal miners during each year to determine how many days the miner worked as a miner and, if the miner worked at least 125 days, credit him with a year of coal mine employment. JA 193-96. The ALJ thus concluded that Mrs. Shepherd had established 7.25 years of pre-1978 coal mine employment and 7.82 years of post-1978 employment for a total of 15.07 years of coal mine employment. JA 196. The ALJ found Mrs. Shepherd entitled to benefits based on the Board's prior holding (JA 137-38). JA 197-200.

5. Benefits Review Board order reversing the award (JA 274)

The Board held that the ALJ had ignored the start and end dates of the miner's employment with Allen Fork, Expert Coal, and Hite Preparation. JA 278-79. According to the Board, the miner's "self-reported and uncontradicted employment history" showed that Mr. Shepherd was not employed as a miner for at least four months that the ALJ had treated him as employed by one of those companies. *Id.* The Board therefore reduced the ALJ's coal-mine employment computation by four months (.32 years) to 14.75 years. JA 280. It did not address Mrs. Shepherd's testimony, which offered a conflicting interpretation of her

husband's work history during the relevant periods.

Because Mrs. Shepherd had not challenged the merits of the ALJ's (pre-reconsideration) finding that she had failed to establish her entitlement to benefits without the fifteen-year presumption's aid, the Board reinstated that finding and denied benefits. *Id*. Finally, the Board declined to address Incoal's argument (and the Director's response (*see* JA 227)) that the ALJ had erred in not reopening the record on remand to allow it to introduce unspecified evidence allegedly discrediting the Department of Labor's evaluation of medical research in the preamble to the BLBA's implementing regulations. JA 280.

SUMMARY OF THE ARGUMENT

The Board reversed the ALJ's finding of fifteen years of coal mine employment, holding that the ALJ had erred in calculating the length of the miner's coal mine employment. Mrs. Shepherd argues that the ALJ's finding was correct, and that so long as she establishes at least 125 working days within a calendar year, she has established a year of coal mine employment even if he was not actually employed as a miner for a part of that year.

Mrs. Shepherd's argument is barred by the plain language of the governing regulation, which defines "year" as (1) a calendar year (or periods totaling a calendar year) of employment as a coal miner during which (2) the miner worked at least 125 days. 20 C.F.R. § 725.101(a)(32). Under that rule, Mrs. Shepherd is

entitled to the fifteen-year presumption only if her husband was employed as a miner for a total of fifteen calendar years *and* actually worked as a miner for at least 125 days during each of those years.

While Mrs. Shepherd's legal argument is incorrect, the case should nevertheless be remanded. In the black lung program, administrative law judges weigh conflicting evidence and make factual findings. The Board correctly held that the ALJ failed to adequately analyze the evidence in the record. But it erred by usurping the ALJ's role and making its own factual findings about the length of Mr. Shepherd's coal mine employment. There is a conflict among the main categories of evidence on that issue (Mr. Shepherd's testimony in his earlier disability claim, Mrs. Shepherd's testimony in this clam, and the miner's social security records). The case should be remanded to allow the ALJ to resolve those conflicts and make a finding as to the length of Mr. Shepherd's coal-mine employment.

ARGUMENT

A. Standard of review

The issue of whether a factfinder can credit a miner with coal mine employment for periods when the miner was demonstrably not working as a coal miner or employed by a coal mine operator is a legal one. The Court exercises plenary review with respect to questions of law. *Caney Creek Coal Co. v.*

Satterfield, 150 F.3d 568, 571 (6th Cir. 1998). In reviewing an appeal from the Board, the Court "review[s] the Board's legal conclusions de novo . . . [and] will not vacate the Board's decision unless the Board has committed legal error or exceeded its scope of review[.]" *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1068 (6th Cir. 2013). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013). Likewise, whether the Board exceeded its scope of review is a legal issue and thus subject to the Court's plenary review.

B. To invoke the fifteen-year presumption, Mrs. Shepherd must prove that her husband was employed as a miner for at least fifteen calendar years, or partial periods totaling fifteen calendar years.

The Board reversed the ALJ's finding that Mr. Shepherd worked for at least fifteen years because it found that the miner's "self-reported and uncontradicted employment history" showed that he was not engaged in coal-mine employment during four months that the ALJ counted toward the presumption. JA 278-79. The Board's claim that the evidence was "uncontradicted" on this point is incorrect and the case should be remanded on that basis. *See infra* at 23-26. But Mrs. Shepherd's primary argument is that it does not matter whether her husband was actually employed as a coal miner for a total of fifteen years. In her view, she

qualifies for the fifteen year presumption so long as he worked for at least 125 days during fifteen different calendar years. Pet. Bf. 19-23. This is incorrect.

To invoke the fifteen-year presumption, Mr. Shepherd must have worked in qualifying employment for at least fifteen "years." 20 C.F.R. § 718.305(b)(1)(i). The BLBA's implementing regulations 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). As explained in the preamble to that rule, "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 working and being exposed to coal mine dust." 65 Fed. Reg. 79959 (Dec. 20, 2000). Thus, under the plain language of the regulations, Mrs. Shepherd must prove that her husband (1) was employed as a miner for a total of fifteen calendar years (or periods totaling fifteen calendar years), and (2) worked for at least 125 days during each of those years. If the Board's interpretation of the facts is correct, Mrs. Shepherd failed to establish the first requirement, and therefore is not entitled to the Section 921(c)(4) presumption.

Section 725.101(a)(32) was adopted after notice-and-comment rulemaking, and is therefore binding "as long as Congress has not spoken directly on the issue and the agency's interpretation is reasonable." *Island Creek Kentucky Mining v.*

Ramage, 737 F.3d 1050, 1058 (6th Cir. 2013) (citing *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Congress has not explicitly defined "year" in the BLBA. And Mrs. Shepherd does not even argue that the regulatory definition is unreasonable. It is therefore entitled to this Court's deference.[3]

Mrs. Shepherd argues that two decisions by this Court—*Aberry Coal, Inc. v. Fleming*, 847 F.3d 310 (6th Cir. 2017), and *Barnett v. Tennessee Consolidated Coal Co.*, No. 16-3983 (6th Cir. Jul. 14, 2017) (unpub.)—compel a different result. Not so.

In *Aberry Coal*, the Court vacated an ALJ's determination regarding the length of a miner's coal mine employment for the eminently sensible reason that the ALJ gave the miner credit for four years of coal-mining work during just two calendar years (1971 and 1989). 847 F.3d at 315-16. At no point, however, did the Court hold that establishing 125 working days establishes a year of coal mine employment even if the miner accrued those days in fewer than 365 days. Indeed, it quoted both the calendar-year requirement and the 125-day requirement from 20 C.F.R. § 725.101(a)(32), and faulted the ALJ for making no effort to determine

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[3] The Department of Labor has the authority to issue regulations implementing the BLBA. *See* 30 U.S.C. §§ 921(b), 932(a), 932(h), 936(a).

the miner's starting and ending dates with his various coal mine employers. 847 F.3d at 313, 315 ("[T]he administrative law judge did not make a determination regarding the specific starting and ending dates for various employers . . . or reconcile employment time periods in instances where the dates are overlapping, or explain how he calculated partial years of employment.") (quoting dissenting Board judge). *Aberry* simply does not conflict with the regulation.

Mrs. Shepherd nevertheless argues that *Aberry* contains a hidden holding in her favor. As she correctly points out, the published decision in *Aberry* superseded an earlier opinion in that case. Pet. Bf. 19-22 (citing *Aberry Coal, Inc. v. Fleming*, No. 15-3999, originally reported at 843 F.3d 219 (6th Cir. Dec. 1, 2016) ("*Aberry I*"). The initial opinion, like the final one, faulted the ALJ for giving the miner credit for four years of work during the years 1971 and 1989. *Aberry I*, slip. op. at 7. But it also noted that the ALJ had erred by giving the miner credit for four months of work in 1970 and 1991 because there was no evidence indicating that the claimant was employed as a miner during those months. *Id.* This latter finding of error was not repeated in the superseding decision.

Mrs. Shepherd argues that this change "effectively recognized that, on remand, [the *Aberry* claimant] *could* prove full years of employment for the disputed calendar years [1970 and 1991], even if the coal-mine employment was

not for a full twelve-month period." Pet. Bf. 21. But this improperly elevates the Court's decision not to address a superfluous issue in a revised opinion into a holding explicitly repudiating the reasoning in the initial decision. And the issue was superfluous. The *Aberry* ALJ originally gave the miner credit for sixteen years and six months of coal-mine employment. *Aberry*, 847 F.3d at 314; *Aberry I*, slip. op. at 5-6. Subtracting the two double-counted years reduces that to fourteen years and six months. Whether the ALJ also incorrectly credited the miner with four months of work in 1970 and 1991 was therefore irrelevant to the question of whether the claimant was entitled to the fifteen-year presumption.[4] In short, neither the text of the final *Aberry* decision nor the interplay between that decision and the withdrawn earlier opinion supports Mrs. Shepherd's claim that months during which her husband was not employed as a coal miner can be counted toward the fifteen-year requirement. *Aberry* is, at best, agnostic on the issue.

Barnett, in contrast, does support Mrs. Shepherd's position. In *Barnett*, the ALJ found that the miner had worked from April 8, 1964, to March 15, 1979, and

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[4] Indeed, the *Aberry* claimant's request for rehearing, which apparently precipitated the revised opinion, explicitly noted that the change would not affect the outcome of that appeal. Claimant-Respondent's Petition for Panel Rehearing, *Aberry Coal, Inc. v. Fleming*, No. 15-3999 (6th Cir. Jan. 13, 2017)

thus had failed to establish the required fifteen years of coal mine employment. Slip op. at 1; Pet. Bf., addendum 14. The Court vacated the finding, explaining that:

> The ALJ overlooked, however, that a miner is entitled to credit for one year of coal mining employment if he worked 'in or around a coal mine' for at least '125 working days' during the year. *See* 20 C.F.R. § 725.101[a](32). Under the regulations, Barnett may be entitled to credit for 15 years of coal mine employment even though he worked for less than 15 actual years in an underground coal mine.

Slip op. at 5; Pet. Bf., addendum 18. This language appears to reflect Mrs. Shepherd's view that miners with less than fifteen years of coal-mine employment can prove their entitlement to the fifteen-year presumption by proving that they worked for at least 125 days during fifteen different years.

As an unpublished opinion, *Barnett* does not bind this court. *See, e.g.*, *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011) ("Unpublished decisions in the Sixth Circuit are, of course, not binding precedent on subsequent panels[.]") (citations omitted). And *Barnett's* persuasive value is limited. It does not discuss the regulatory calendar-year requirement. Moreover, the issue was not presented to the *Barnett* panel in an adversarial context. The Director did not participate in that case, and both our files and PACER's online record indicate that the employer did not file a response brief. The language in *Barnett* that Mrs. Shepherd relies on is therefore not a considered rejection of the regulatory calendar-year requirement.

It does not trump the plain language of the regulation.

In sum, section 725.101(a)(32) makes clear that in cases such as Mrs. Shepherd's, where the record establishes the start and end dates of at least some of the miner's coal mine employment, any days (or months) when the miner was not employed as a coal miner cannot be counted toward the required fifteen years of employment. Section 725.101(a)(32)(ii) states, "To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained." There would be little point in ascertaining the specific dates if 125 working days always established a year of coal mine employment. Just as *Aberry* held that a miner cannot receive credit for two years of coal mine employment for one year of employment during which he worked for two different companies, a miner cannot be credited with coal mine employment for periods if the evidence proves that he was not engaged in coal mine employment at all.[5]

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[5] To be clear, a miner can be credited with coal mine employment even while not actually mining coal so long as the employer-employee relationship exists between the miner and the operator, although that time cannot be deemed a "working day" for purposes of the 125-day calculation. *See* 20 C.F.R. § 725.493(a)(1) ("'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 under which an operator derives a benefit from the work performed by a miner"); 65 Fed. Reg. 79959(f)(1) (Dec. 20, 2000) (section 725.101(a)(32) "contemplates an employment relationship totaling 365 days" during which the miner actually worked at least 125 days); *Armco, Inc. v. Martin*, 277 F.3d 468, 473-75 (4th Cir.

Moreover, it defies common sense and the relevant regulations to credit a miner with coal mine employment for periods during which he was demonstrably not engaged in coal mine employment. A coal 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." 20 C.F.R. § 725.101(a)(19). Thus, there is no logic in crediting miners with coal-mine employment for periods where the record proves that they were not engaged in the extraction or preparation of coal. If there is any ambiguity here—in the Director's view, there is not—the Director's interpretation of section 725.101(a)(32) is entitled to deference so long as it is reasonable and consistent with the regulatory text. *Gray v. SLI Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999) ("The Director's interpretation of regulations that he is responsible for administering is entitled to substantial deference unless it is plainly erroneous or inconsistent with the statute.") (citation and quotation omitted); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991). Reading section 725.101(a)(32) as defining a year of coal mine employment as at least 125 working

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2002) (a year of coal mine employment is at least 125 working days during a calendar year of employment); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996) (same); *BGL Min. Co. v. Cash*, 165 F.3d 26 (Table), 1998 WL 639171 (6th Cir., Sep. 11, 1998) (holding that miner remained in relationship with operator while not working so long as he retained the right to return to work).

days in a calendar year, while excluding periods when the miner was not employed as a miner, is reasonable and consistent with the BLBA.

C. The Board exceeded its scope of review by engaging in factfinding rather than reviewing the ALJ's findings of fact.

Mrs. Shepherd also argues that the Board exceeded its scope of authority in not merely vacating the ALJ's finding regarding the length of the miner's coal mine employment, but in reversing the award upon finding that Mrs. Shepherd had failed to establish at least fifteen years of coal mine employment. Pet. Bf. at 23. The Director agrees.

The Board's scope of review is set out at 20 C.F.R. § 802.301. It states, in relevant part:

> The Benefits Review Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

20 C.F.R. § 802.301(a). The Board held that the ALJ had erred in calculating the length of the miner's coal mine employment based on "the miner's self-reported and uncontradicted history" regarding the "first four months of 1963 or the last month of 1964." JA at 278-279. Additionally, the Board held that the ALJ had erred in calculating the miner's employment during the third and fourth and

quarters of 1973 with Hite Preparation based on "the miner's self-reported and uncontradicted employment history" and employer records. JA at 279.

Although the miner alleged employment with Hite from September 1973 to February 1977, JA 20, Mrs. Shepherd listed the dates as May 1971 to January 1977. JA 5. Contrary to the Board's holding that the miner's self-reported employment history was uncontradicted, Mrs. Shepherd's description of her husband's employment paints a different picture. While the Director takes no position regarding credibility assignments on this issue, such assignment is the ALJ's burden, not the Board's. The Board's job here was "to review the findings of fact and conclusions of law on which the decision or order appealed from was based." 20 C.F.R. § 802.301(a). Instead, the Board ignored the employment history provided by Mrs. Shepherd and instead credited only the miner's description of his coal mine employment. "Since the ALJ has the opportunity to observe the demeanor of a witness, his conclusions with respect to credibility should not be discarded lightly and should be accorded deference." *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996) (quoting *Hardaway v. Secretary of Health and Human Servs.*, 823 F.2d 922, 928 (6th Cir. 1987)).[6]

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[6] To the extent the Board may have assumed that the miner's employment records are inherently more credible than Mrs. Shepherd's testimony, that assumption was unwarranted. *See* 65 Fed. Reg. 79959 (The regulation defining a "year" of coal-

Because the ALJ did not resolve this conflict in the evidence, the Board acted within its scope of review in vacating the ALJ's factual finding on the length of Mr. Shepherd's employment. But remand, not reversal, was the proper outcome.

This case should therefore be remanded to allow the ALJ to resolve this conflict in the evidence. To recapitulate, the ALJ's job on remand is to determine (1) whether Mr. Shepherd was employed as a miner for at least fifteen calendar years (or periods of time totaling fifteen calendar years) during which he (2) worked as miner for at least 125 days. The ALJ should consider all the relevant evidence on this issue and, to the extent the evidence permits, determine the beginning and ending dates of each period of coal-mine employment. 20 C.F.R. § 725.201(a)(32)(ii); *see also* 65 Fed. Reg. 79960 ("[T]he partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year."). Only if the evidence does not establish the beginning and ending dates of Mr. Shepherd's

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mine employment, 20 C.F.R. § 725.101(a)(32), "does not place special weight on any particular type of evidence in determining how long an individual worked as a coal miner. Rather, [it] recognizes that factual findings concerning a miner's work history should be based on all of the credible evidence available to the adjudicator.").

employment may the ALJ resort to a reasonable alternative method of estimating the length of that employment, such as 20 C.F.R. § 725.101(a)(32)(iii)'s average-income test, or (for employment before 1978), the Board's $50-per-quarter test. *See Combs v. Director, OWCP*, 2 Black Lung Rptr. (MB) 1-904, 906-07 (1980); *Hudson v. U.S. Dep't of Labor*, 851 F.2d 215, 217 (8th Cir. 1988).[7]

[7] Incoal may again argue, as it did before the Board, that the ALJ erred in denying its post-remand motion to reopen the record for the admission of evidence allegedly proving that the scientific studies cited in the regulatory preamble are wrong, the argument should be rejected. As the Director explained in his brief to the Board, the argument is without merit. JA 227. First, Incoal waived the argument by not raising it before the ALJ or Board when this case was first before them. *See Blue Mountain Energy v. Director, OWCP*, 805 F.3d 1254, 1262 (10th Cir. 2015) (affirming ALJ's decision not to reopen the record for evidence invalidating the preamble). Second, medical evidence must be exchanged with the other parties at least twenty days before a hearing. 20 C.F.R. § 725.456(b)(2). Third, Incoal did not actually proffer the evidence, and that failure forecloses a later challenge to the exclusion of that evidence. *See Ploys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406-07 (10th Cir. 1991); *McQuaig v. McCoy*, 806 F.2d 1298, 1301 (5th Cir. 1987).

CONCLUSION

The Court should vacate the Board's decision and remand this claim for further consideration.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to Mrs. Shepherd's request for oral argument, but does not think it necessary given the clarity of the facts and law.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 6,458 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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