No. 17-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDALEX RESOURCES, INC.,

Petitioner

v.

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

and

EDDIE SMITH,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal is related to Eddie Smith's claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44. Smith's entitlement to benefits, however, is no longer at issue. Rather, the question is whether Smith's employer, Andalex Resources, Inc., is the "responsible operator" – *i.e.*, the party responsible for paying Smith's benefits. A Department of Labor (DOL) administrative law judge (ALJ) found that Andalex is the responsible operator, and the Benefits

Review Board affirmed that decision. Appendix, p. (A.) 56. The Director, Office of Workers' Compensation Programs, responds in support of the decisions below.

STATEMENT OF JURISDICTION

The Court has both appellate and subject matter jurisdiction over Andalex'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). Andalex petitioned for review of the Board's November 22, 2016 decision on January 19, 2017, within the 60-day limit prescribed by Section 21(c). Moreover, the "injury" as contemplated by Section 21(c) – Smith's exposure to coal-mine dust – occurred in Kentucky, 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 incorporated. The ALJ issued his first decision on May 9, 2014. Andalex filed a notice of appeal with the Board on June 6, 2014, 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 February 29, 2016, which Andalex timely appealed to the Board on March 29, 2016.[1]

[1] Andalex's notice of appeal to the Board was postmarked March 29, 2016, making it timely. 20 C.F.R. § 802.207(b).

STATEMENT OF THE ISSUE

A coal mine operator designated as liable for a disabled miner's BLBA benefits can escape liability by proving that it is not the operator that most recently employed the miner for at least one year. After working four and one half years for Andalex, Smith worked for Ikerd Bandy before retiring. The ALJ found that Andalex was properly designated as the liable operator because it failed to establish that Smith spent at least one year mining coal with Ikerd Bandy.

The question presented is whether substantial evidence supports the ALJ's finding that Smith worked for Ikerd Bandy for less than one year.

STATEMENT OF THE CASE

Smith filed this claim for BLBA benefits on April 8, 2010. A.198-201. The ALJ found that he was entitled to benefits, payable by Andalex. A.1-29. Andalex appealed to the Benefits Review Board, which affirmed the award of benefits, but remanded to the ALJ to reconsider whether Ikerd Bandy employed the miner for at least one year following his employment with Andalex. A.34-42. On remand, the ALJ determined that Andalex did not prove that Smith worked for one year with Ikerd Bandy. A.46-49. The Board then affirmed the ALJ's decision. A.56-61. Andalex's petition for review to this Court followed.

STATEMENT OF THE FACTS

A. Legal Background

The Black Lung Benefits Act provides disability and medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." *See* 30 U.S.C. § 901(a). Andalex no longer contests that Smith is entitled to benefits. The only dispute is whether Andalex 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. § 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.[3] 20 C.F.R. § 725.494(c).

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

[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

The BLBA does not delineate a specific methodology for computing the length of a miner's employment; the black lung program regulations, however, provide guidance and propose procedures for doing so. Critically, section 725.101(a)(32) defines a year of coal mine employment as a period of one calendar year, or partial periods totaling one year, during which the miner worked in or around a coal mine for at least 125 working days. 20 C.F.R. § 725.101(a)(32). The regulation further states that the beginning and ending dates of employment must be ascertained if possible, and additionally, that any credible evidence may be used to establish the "dates and length of coal mine employment." 20 C.F.R. § 725.101(a)(32)(ii). If the miner proves work for a calendar year, it is presumed that he worked 125 days within that year.[4] 20 C.F.R. § 725.101(a)(32)(ii).

In cases where the beginning and ending dates of employment cannot be determined (or where the work lasted less than one year), section 725.101(a)(32)(iii) proposes a default calculation:

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financially capable of assuming liability for the claim. 20 C.F.R. § 725.494(a), (b), (d), (e). Andalex does not contest that it meets these other criteria.

[4] If the miner worked fewer than 125 days in a calendar year, he will be credited with a fractional year based on the ratio of actual days worked to 125. 20 C.F.R. § 725.101(a)(32)(i). The black lung program regulations have incorporated the 125-day measure for determining length of coal mine employment since 1978. It derives from the National Bituminous Coal Wage Agreement of 1978, which "credits a miner for a full year of service . . . if the miner has worked 1000 or more hours (125 working days) in a calendar year." 43 Fed. Reg. 36805 (Aug. 18, 1978). The Department has determined that 125 days "represents a reasonable basis for the definition" of "one year" of regular employment. *Id*.

> the adjudication officer may use the following formula: 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).

20 C.F.R. § 725.101(a)(32)(iii); *see also* 62 Fed. Reg. 3349 (Jan. 22, 1997) (section 725.101(a)(32)(iii) method applicable where the best evidence consists of annual income statements).[5] This formula results in an estimate of number of days worked in a year, allowing the fact-finder to ascertain the length of coal mine employment by reference to an approximated number of days worked. The fact-finder may use the information derived from the section 725.101(a)(32)(iii) formula in any reasonable way and should consider it in conjunction with all other available evidence.[6] *See* 65 Fed. Reg. 79959 (Dec. 20, 2000) (noting that section 725.101(a)(32) allows a party to introduce any relevant evidence concerning miner's employment).

Procedurally, BLBA claims begin with proceedings before a district director, who issues a "proposed decision and order" after developing and evaluating the

[5] The BLS average industry earnings table is set forth at A.90, and is also found at Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine Procedure Manual, Average Earnings of Employees in Coal Mining, available at https://www.dol.gov/owcp/dcmwc/exh610.htm. The daily rate is then derived by dividing the average annual earnings by 125.

[6] It is easy to imagine the many difficulties in developing clear and reliable evidence of coal mine employment. For example, the miner's employer may have gone out of business and thus be unable to provide a record of employment. Or the miner may have lost, or not kept, his records of employment. And memories fade or fail over time.

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). If the designated operator seeks to escape liability by proving that the miner was subsequently employed for at least one year by another potentially-liable operator, that burden of proof is reversed. 20 C.F.R. § 725.495(c) ("The designated responsible operator shall bear the burden of proving . . . [t]hat it is not the potentially liable operator that most recently employed the miner.").

Once the claim is referred to an ALJ, no operator other than the designated operator may ultimately be held liable for benefits. If the designated operator successfully proves that the miner was subsequently employed for at least one year by another potentially-liable operator, no new responsible operator may be named and any benefits are paid by the Black Lung Disability Trust Fund. 20 C.F.R. § 725.407(d).

B. Factual Background

The parties agree that Smith worked as a coal miner for a total of 21 years. A.4. Smith's last two coal mine employers were Andalex and Ikerd Bandy. It is

undisputed that he worked for Andalex from July, 1988 until December, 1993. A.37. The only question is whether he was subsequently employed by Ikerd Bandy for at least one year. The record contains the following evidence relevant to this issue:

In his 2010 application for BLBA benefits, Smith stated that he was last exposed to coal dust on March 11, 1994, and that he stopped working in coal mining because he had a heart attack. A.198. Along with his application, Smith completed two additional forms: an Employment History, which indicated he worked for Ikerd Bandy from December, 1993 until March, 1994, A.95; and a Description of Coal Mine Work, which stated he worked as a tipple operator from December, 1993 until March, 1994. A.202.

To document his coal mine employment, Smith submitted his W-2 statements for each year from 1973 through 1995. They show earnings in 1993 of $27,133.43 from Andalex Resources (A.105), earnings in 1994 of $10,705.31 from Ikerd Bandy (A.106), and earnings in 1995 of $2,485.71 also from Ikerd Bandy (A.106). Smith's Social Security Administration Earnings Record mirrors the information contained on his W-2 statements, showing earnings for Andalex from 1988 through 1993, and for Ikerd Bandy in 1994 ($10,705.31) and 1995 ($2,485.71). A.109-110.

Further documentation of Smith's employment came from his state workers' compensation claim against Ikerd Bandy for coal workers' pneumoconiosis. A.206-216. In September, 1995, the parties agreed to settle his claim and signed an Agreed Order identifying March 1994 as the date of last exposure to the inhalation of respirable coal dust – which is also the date the parties agreed that Smith's disability began. A.214.

Smith testified three times about his coal mine employment. In a June 18, 2010 deposition, he was asked how long he worked for Ikerd Bandy. He responded "I'm not for sure, I think they was two years. . . . I think it was around two year I think. I ain't for sure." A.116. He also couldn't remember when he started working for the company, and he was not certain about his last day of work. All he knew was that "the last day I worked was 1994 somewhere." A.117. He then answered "yes" to the question of whether he worked at Ikerd Bandy for more than one year. A.118. He thought he worked at Andalex from 1988 to 1993. A.119. He also stated that his first heart attack was in 1994. A.138.

In a second deposition on October 22, 2012, he stated that he couldn't say for sure how long he worked for Ikerd Bandy, but it was "probably" less than a year. A.145.

Finally, the miner testified at the December 12, 2012 ALJ hearing that he last worked in 1994 and quit that year because he had a heart attack. A.181. When

asked if he worked at Ikerd Bandy from December 1993 until March 1994, Smith responded "that sounds right." A.186.

The last source of information about Smith's employment history comes from four medical reports prepared in connection with Smith's claim for benefits. In an April 23, 2010 report, Dr. Glen Baker recorded that Smith's last coal mine employment of at least one year was working at the tipple for Andalex Resources where he worked from July, 1988 to December, 1993. A.217. He also reported that Smith suffered a heart attack in March, 1994. A.218. In an October 18, 2010 opinion, Dr. Bruce Broudy reported that Smith worked 22 years as coal miner and retired in 1994. A.221. The doctor further noted that "[Smith's] last employer was Ikerd & Bandy. He worked there only 3 months until he stopped when he says he had a heart attack." A.221.

The miner saw Dr. Aqeel Mandviwala for a pulmonary evaluation on February 2, 2011. The doctor reported that the miner quit the mining industry in 1994 after working in it for 22 years. A.228. The doctor stated that Smith suffered his first heart attack in 1994. A.228. Last, Dr. B.T. Westerfield examined the miner on November 11, 2011. Consistent with the other doctors, he reported that the miner "last worked in1994 and left work because of a heart attack. He has not worked since 1994." A.240.

C. Proceedings Below

1. *The district director finds Andalex liable for Smith's benefits.*

The district director issued a proposed decision and order finding Smith entitled to benefits and Andalex liable for them. The district director designated Andalex as the responsible operator because the miner worked for Andalex from July, 1988 through December, 1993, as indicated by the miner's W-2 statements and SSA earnings record. A.87. The district director recognized that while these documents revealed earnings in 1994 and 1995 from Ikerd Bandy, they did not clearly establish one year of coal mine employment because Smith's state worker's compensation claim showed he quit the company in March 1994. A.87. The district director further suggested the 1995 earnings could represent unpaid sick or vacation leave. A.87. The district director thus concluded that Andalex was the most recent coal mine employer that met all the requirements for a responsible operator including employing the miner for at least one year. *Id.*

The district director further determined that Smith was entitled to benefits, which were payable by Andalex. A.86.

2. *The ALJ finds Andalex liable for Smith's benefits.*

The ALJ awarded benefits and found Andalex liable to pay them. A.28. With respect to the responsible operator issue, the ALJ initially acknowledged that Andalex, as the designated responsible operator, bore the burden of proving that

another potentially liable operator subsequently employed Smith for one year. A.4 (citing 20 C.F.R. § 725.495(c)). The ALJ then stated that Smith's Employment History form and Social Security records did not demonstrate that Smith worked for Ikerd Bandy for one year or more. A.8. Moreover, he found Smith's testimony regarding his employment with Ikerd Bandy uncertain and inconsistent and, therefore, worthy of little weight. (He characterized Smith as "not a good historian of his coal mine employment." *Id*.) Consequently, the ALJ concluded that Andalex had not established that Smith worked for Ikerd Bandy for at least one year. *Id*.

The ALJ also rejected Andalex's argument that Ikerd Bandy was a "successor operator" of Andalex, and thus liable for benefits.[7] A.8-9. The ALJ found insufficient Smith's testimony that he worked for the two companies at the same mine site because there were no details regarding a sale or acquisition between the two, and there was no evidence that Smith would have been privy to that sort of information in the first place. A.8. He further observed that Andalex's former president did not remember any details of such a transaction and merely

[7] A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. § 725.492(a). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with a successor operator. 20 C.F.R. § 725.493(b)(1). Thus, *if* Ikerd Brandy were a successor operator to Andalex, Smith's four years of employment with Andalex would have counted against Ikerd Brandy.

speculated that Andalex "might have sold something" to Ikerd Brandy. A.9. And finally, the ALJ noted that Andalex had provided no documentary evidence of a business transaction between the two companies in support of its argument. *Id*. The ALJ thus concluded that Andalex had not established a successor relationship.[8] *Id*.

3. *The Board affirms Smith's entitlement but remands on Andalex's liability.*

On appeal, the Board affirmed Smith's award, but vacated the ALJ's responsible operator determination, and remanded the issue for reconsideration. A.34. The Board upheld the ALJ's finding that a successor relationship had not been established, and his according little weight to Smith's testimony. A.37-38. It ruled, however, that the ALJ had failed to sufficiently explain why Smith's SSA earnings record did not support a finding of one year of coal mine employment with Ikerd Bandy. A.38

4. *The ALJ finds Andalex liable for a second time.*

On remand, the ALJ again determined that Andalex was the responsible operator. A.46. He first noted the Board's affirmance of his decision to accord

[8] Andalex's opening brief (OB) does not challenge the ALJ's finding of no successor relationship, and so has waived the issue on appeal. *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 461 (6th Cir. 2003). Andalex does quote Smith's testimony that he worked at the same mine site after a change in ownership in support its argument that his employment with Ikerd Bandy began in 1994 and extended into 1995. OB 14-15. Regardless, the ALJ reasonably found the evidence insufficient to establish a successor relationship.

little weight to Smith's testimony. A.48. He then described the inconsistency between the miner's Employment History form and the SSA earnings record: the Employment History stated that Smith left Ikerd Bandy in March, 1994, whereas the SSA earnings record and W-2 statements showed earnings for Ikerd Bandy in 1995. *Id*. These earning records, the ALJ recognized, showed some employment with Ikerd Bandy in 1994 and 1995, but they did not establish the beginning and ending dates of Smith's employment or necessarily show that Smith worked at the company for a calendar year. *Id*. He accordingly ruled that the evidence was insufficient to establish that he worked for Ikerd Bandy for over a year beginning in January, 1994. *Id*.

The ALJ further recognized that, where the beginning and ending dates of employment cannot be established, section 725.101(a)(32)(iii) permits the adjudicator to divide the miner's actual earnings by the BLS average daily coal mine earnings to establish the length of the miner's employment. A.48. Applying this formula, the ALJ found that Smith worked for Ikerd Bandy for 75 days in 1994 and 17 days in 1995, for a total of 92 days. *Id*. Thus, the ALJ concluded that even if Smith's relationship with Ikerd Bandy spanned more than one year, he did not have the requisite 125 working days with the company to be credited with one year of employment. *Id*. (quoting 20 C.F.R. § 725.101(a)(32)'s definition of a year of coal mine employment as requiring "a period of one calendar year, or

partial periods totaling one year, during which the miner worked in or around a coal mine for at least 125 working days.") Accordingly, the ALJ found that Andalex had failed to prove employment of more than one year by a later operator, and that Andalex was properly designated as the responsible operator liable for Smith's benefits. A.49.

5. *The Board affirms Andalex's liability for Smith's benefits.*

Andalex appealed, but the Board affirmed the ALJ's decision. A.56. Andalex argued that Smith's SSA earnings record and W-2s, in conjunction with Smith's June 10, 2010 deposition testimony, established more than one year of coal mine employment with Ikerd Bandy, and that the ALJ erred in resorting to the section 725.101(a)(32)(iii) formula to find otherwise. The Board rejected this argument. The Board stressed that an ALJ's length of coal mine employment determination will be upheld if it is based on a reasonable method and supported by substantial evidence. A.60. It then observed that it had previously affirmed the ALJ's finding that Smith's testimony was worth little weight, and confirmed that the SSA earnings record and W-2 statements did not indicate the beginning and ending dates of Smith's employment with Ikerd Bandy. The Board therefore held that the ALJ reasonably applied the section 725.101(a)(32)(iii) formula to find that Smith worked for Ikerd Bandy for a total of 92 days in 1994 and 1995. It thus concluded that substantial evidence supported the ALJ's finding that Smith worked

for Ikerd Bandy for less than one year, and that Andalex was liable for the claim. A.60-61.

SUMMARY OF THE ARGUMENT

To escape liability for Smith's BLBA benefits, Andalex must prove that a later coal mine operator, *i.e.*, Ikerd Bandy, employed Smith for at least one year. The ALJ correctly found that the record evidence neither documents a calendar year of employment with Ikerd Bandy, nor discloses the beginning and ending dates of Smith's employment with the company. Under these circumstances, the ALJ reasonably resorted to formula in 20 C.F.R. § 725.101(a)(32)(iii) to conclude that Smith worked less than one year for Ikerd Bandy. The decisions below assigning liability for the payment of Smith's BLBA benefits to Andalex should therefore be affirmed.

ARGUMENT

A. Standard of Review

Andalex's contentions on appeal implicate the ALJ's factual findings. The Court reviews those findings under the substantial evidence standard. Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 483 (6th Cir. 2012) (quotation marks omitted). A decision that rests within the realm of rationality is supported by substantial evidence. *Id.* (internal

alterations and quotation marks omitted). As the substantial evidence standard implies, an appellate tribunal may not reweigh the evidence or make credibility determinations. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1120 (6th Cir. 1987).

Andalex also challenges the legal sufficiency of the decisions below regarding the application of 20 C.F.R. § 725.101(a)(32)(iii). This Court's review of the Board's legal conclusions is plenary. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998) (citation omitted). The Director's interpretation of the BLBA and its implementing regulations is, however, entitled to deference. This Court will "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Cumberland River Coal Co.*, 690 F.3d at 485 (quoting *Chase Bank U.S.A., N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

B. The ALJ's finding that Ikerd Bandy did not employ Smith for at least one year is supported by substantial evidence and consistent with DOL's regulations; accordingly, Andalex is liable for this claim.

As the designated responsible operator, Andalex was required to prove that another operator more recently employed Smith for at least one year in order to be relieved of liability for Smith's claim. 20 C.F.R. § 725.495(c); *see Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313-314 (6th Cir. 2014) (applying section

725.495(c)'s burden-shifting scheme). The ALJ determined that Andalex failed to meet this burden and held Andalex liable. The Court should affirm.

The ALJ reasonably evaluated the evidence in ruling that Andalex had failed to prove a year of employment between Smith and Ikerd Bandy. He permissibly discounted Smith's inconsistent testimony regarding the length of his employment with Ikerd Bandy. He further correctly recognized that the record evidence neither documented a calendar year of employment with Ikerd Bandy, nor disclosed the beginning and ending dates of Smith's employment with the company. The ALJ thus reasonably resorted to the formula in 20 C.F.R. § 725.101(a)(32)(iii) to find only 92 days of employment with Ikerd Bundy. That figure, as the ALJ ruled, was far below the 125 working days needed for a year of employment. *See* 20 C.F.R. § 725.101(a)(32) (definition of year of coal mine employment). The ALJ therefore permissibly concluded that Smith worked less than one year for Ikerd Bandy.

In *Director, OWCP v. Congleton*, 743 F.2d 428, 429 (6th Cir. 1980), this Court stated that an ALJ's finding concerning length of employment must be affirmed if the finding is based on a reasonable method of calculation and is supported by substantial evidence. The ALJ's finding of less than one year of coal mine employment with Ikerd Bandy easily satisfies this requirement. Andalex is therefore liable for Smith's BLBA benefits

On appeal, Andalex renews its argument that Smith's SSA earnings record and W-2 statements, coupled with Smith's June, 2010 deposition testimony, support the inference that Smith was employed for at least one year with Ikerd Bandy, starting in January, 1994. This contention, at bottom, is merely a request to have the Court reweigh the evidence and reach Andalex's preferred inference. This the Court may not do. *Adams*, 816 F.2d at 1120.

In any event, the ALJ reasonably concluded that Smith's earning records and testimony were inadequate to establish one year of employment. Specifically, the ALJ observed that Smith's 2010 deposition testimony that he may have worked two years for Ikerd Bandy was contradicted by his 2012 testimony that he worked less than one year for the company, and by his hearing testimony that he worked for the company for only four months (December, 1993 until March, 1994). Accordingly, the ALJ reasonably found Smith "not a good historian," (A.8), and declined to rely on his uncertain and inconsistent testimony. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996) (observing that "[s]ince 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"); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994) (ALJ's credibility determinations are entitled to deference); *Oggero v. Director, OWCP*, 7 Black Lung Rep. (MB) 1-860, 1-863 (Ben. Rev. Bd. 1985) (ALJ

permissibly declined to credit claimant's testimony because it was inconsistent and evinced a faulty memory).[9]

With regard to Smith's SSA earnings record and W-2 statements, the ALJ properly identified the critical omission in them: they do not reveal the beginning and ending dates of Smith's employment with Ikerd Bandy. Thus, on their face, they do not document one year of employment with the company. Indeed, his earnings of only $10,705 for 1994 and $2,485 for 1995 are significantly less than the BLS table of average industry earnings for those years (respectively $17,760.00 and $18,440.00).[10] *See* A.90. Moreover, Smith earnings for 1994 and 1995, even if combined, amount to *less than half* his earnings for 1993 ($27,133), when he

[9] There is no merit to Andalex's contention that Smith's June 2010 testimony (that he worked two years for Ikerd Bandy) should be accorded greatest weight because it was closest in time to his employment there. OB 12-13. First, the two year time lapse between his three testimonies is minimal when compared to the sixteen years between his 1994 employment and his 2010 testimony. Moreover, when he applied for federal black lung benefits in April 2010, he stated that he quit Ikerd Bandy in March 1994 (after only three months). *Supra* at 8.

[10] Andalex states that Smith's SSA earnings record and W-2s support the inference of one year of employment with Ikerd Bandy because "the Board has held that counting quarters [of a year] in which a miner earns as little as fifty (50) dollars is a reasonable method of computation." OB 16 (citations omitted). But this computation is premised on proof that the miner had actual earnings in each respective quarter. *E.g.*, *Tackett v. Director, OWCP*, 6 Black Lung Rep. (MB) 1-839, 1-841 n.2 (Ben. Rev. Bd. 1984). Here, the SSA record and W-2s for Ikerd Bandy are not broken down by annual quarters, so it cannot be determined in which quarters Smith worked. A.107-111. (About forty years ago, SSA began reporting wages on an annual, not quarterly, basis, as was done here. *See* 20 C.F.R. § 404.143(c)).

indisputably worked full time for Andalex. These comparisons thus strongly suggest far less than a full year of employment with Ikerd Bandy.

Indeed, the other evidence of record uniformly supports the ALJ's refusal to infer one year of employment. Smith's state workers' compensation settlement agreement, which was entered into in September 1995, states his last exposure to coal dust was in March 1994. DX 9-9. His Employment History, Description of Coal Mine Work, and application for black lung benefits, likewise indicate he quit Ikerd Bandy in March 1994. DX 2, 3, 4. And last, Smith reported to *four* different doctors that he ceased coal mine employment in March, 1994, when he had a heart attack. *Supra* at 10 (describing doctors' opinions). Thus, while Smith's testimony varied as to the total length of time he worked for Ikerd Bandy, he was remarkably consistent about when he quit coal mine work, and that was in March 1994.

Andalex next argues that the ALJ's resort to the section 725.101(a)(32)(iii) formula was incorrect because the regulation applies only to "instances in which the evidence is insufficient to establish more than one year of employment." OB 17. This argument is contradicted by the plain language of the regulation itself, which specifically permits use of the formula "[i]f the evidence is insufficient to establish *the beginning and ending dates* of the miner's coal mine employment…." 20 C.F.R. § 725.101(a)(32)(iii) (emphasis added). Here, as the ALJ observed, the evidence does not establish the beginning and ending dates of Smith's coal mine

employment with Ikerd Bandy; thus, he permissibly utilized the regulation's formula to assist him in determining the length of Smith's employment with the company.

In sum, the ALJ's length of employment determination, as well as his concomitant determination that Andalex is the responsible operator in this case, are supported by substantial evidence and should be affirmed by this Court.

CONCLUSION

Andalex's petition for review should be denied.

Respectfully submitted,

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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 5,351 words, as counted by Microsoft Office Word 2010.

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I hereby certify that on July 10, 2017, 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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