U.S. Department of Labor

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

BRB No. 24-0281 BLA

CLAUDETTE S. MANN (Widow of BOBBY D. MANN) Claimant-Respondent v. TURNER BROTHERS, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/09/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer.

Simon D. Jacobs (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting

Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2021-BLA-05282) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on March 31, 2017.[1]

ALJ Morris (the ALJ) found the Miner had 18.07 years of coal mine employment, both underground and in strip mines in conditions substantially similar to those in underground mines, and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption

[1] Claimant is the widow of the Miner, Bobby D. Mann, who died on September 15, 2014. Director's Exhibit 17. The Miner filed three living miner's claims and multiple requests for modification prior to his death but was never determined to be eligible to receive benefits during his lifetime. Director's Exhibit 1. He filed his third claim on November 17, 1986, which ALJ Robert S. Amery ultimately denied on February 16, 1995, and the Benefits Review Board and the Unites States Court of Appeals for the Tenth Circuit upheld this denial. *See Mann v. Turner Brothers, Inc.*, BRB No. 95-1197 BLA (Feb. 15, 1996) (unpub.), *aff'd*, *Mann v. Director, OWCP*, No. 96-9509 (10th Cir. Feb. 11, 1997). On April 26, 2011, ALJ Thomas M. Burke denied the Miner's third request for modification of his 1986 duplicate claim, which the Board and Tenth Circuit subsequently upheld. *See Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA (Aug. 29, 2012) (unpub.); *Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA (Mar. 20, 2013) (Order on Recon.) (unpub.), *aff'd*, *Mann v. Turner Bros., Inc.*, No. 13-9553 (10th Cir. Mar. 26, 2014) (unpub.). After the Miner's death, Claimant filed a fourth request for modification on October 21, 2014, which ALJ Carrie Bland ultimately denied because she found Claimant failed to establish a change in conditions or a mistake in a determination of fact. The Board and the Tenth Circuit subsequently upheld the denial. *See Mann v. Turner Bros., Inc.*, BRB No. 17-0399 BLA (May 21, 2018) (unpub.), *aff'd*, *Mann v. Turner Bros., Inc.*, No. 18-9574 (10th Cir. Sept. 3, 2019) (unpub.).

of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in failing to consider its arguments that the doctrine of collateral estoppel bars Claimant from pursuing her survivor's claim and that it is not the responsible operator. On the merits, Employer contends the ALJ erred in calculating the length of the Miner's coal mine employment, in finding Claimant invoked the Section 411(c)(4) presumption,[3] and in consequently applying an incorrect burden of proof when determining whether legal pneumoconiosis was established. Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's collateral estoppel and responsible operator arguments. Employer replied to Claimant's brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Procedural Argument: Collateral Estoppel

Employer argues the ALJ erred in failing to consider its argument that Claimant is collaterally estopped from litigating the issues of clinical and legal pneumoconiosis in her survivor's claim based on the previous final denial of benefits in the miner's claim. Employer's Brief at 3, 6-8; Employer's Reply Brief at 2. We reject Employer's arguments.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

[4] This case arises within the Tenth Circuit's jurisdiction because the Miner performed his coal mine employment in Oklahoma. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

Collateral estoppel bars the "successive litigation of any issue of law or fact 'once [it has] been determined by a valid and final judgment.'" *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 (10th Cir. 2014), *quoting Ashe v. Swenson*, 397 U.S. 436, 443 (1970). A party seeking to rely on the doctrine of collateral estoppel must establish:

> (1) the issue previously decided is identical to the present one; (2) the prior action was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the previous adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the previous adjudication.

Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue, 854 F.3d 1178, 1193 (10th Cir. 2017); *see also Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014).

Further, collateral estoppel does not bar an issue from being litigated "if there has been an intervening change in the applicable legal context." *Boulter v. Noble Energy Inc.*, 74 F.4th 1285, 1290 (10th Cir. 2023), *quoting Herrera v. Wyoming*, 587 U.S. 329, 343 (2019). This is because "relitigation of an issue necessarily and actually litigated in a prior adjudication is only precluded in a subsequent case where the parties or their privies had a full and fair opportunity to litigate the issue. . . . Such 'full and fair opportunity' is not present where the applicable legal principles or standards of proof do not remain the same from the prior to the subsequent proceeding." *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-46 (1988).

Thus, collateral estoppel does not apply in the current claim because the miner's and survivor's claims are subject to different burdens of proof based on an intervening change in the law. The Section 411(c)(4) presumption was not available in the miner's claim because it was filed in 1986 before Congress reinstated the rebuttable presumption;[5] however, the presumption does apply to Claimant's survivor's claim. Consequently, while the Miner had to prove the existence of pneumoconiosis, Claimant's litigation in the current claim of whether the Miner had pneumoconiosis is not barred because Employer has the

[5] Congress amended the Black Lung Benefits Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. These amendments, which became effective on March 23, 2010, include the rebuttable presumption set forth in Section 411(c)(4) that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

burden of proof to disprove pneumoconiosis once she invokes the Section 411(c)(4) presumption. *See Alexander*, 12 BLR at 1-46 (explaining that collateral estoppel does not apply because "the standard of proof . . . applicable to the deceased miner's claim is distinct from the standard of proof . . . applicable to the survivor's claim").

Finally, because the doctrine of collateral estoppel is not applicable, any error in the ALJ's failure to consider Employer's argument is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[6] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director identifies a potentially liable operator, that operator may be relieved of liability only if it shows it is financially incapable of assuming liability for benefits or another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

Initially, Employer does not allege that it submitted before the district director or the ALJ any liability evidence establishing that it was not the most recent potentially liable operator, nor does it argue that extraordinary circumstances exist for its failure to submit such evidence. *See* 20 C.F.R. § 725.456(b)(1). Rather, Employer contends the ALJ erred in not addressing its argument, raised in its February 23, 2023 Notice Regarding Potential Responsible Operator Issue and post-hearing brief before the ALJ, that "[i]f [] the ALJ determines that a 125 day work year controls, [Employer] is not the responsible operator" because Alpine Construction Company (Alpine) subsequently employed the Miner for 189 days in 1985. Employer's Brief at 8-10; Employer's Post-Hearing Brief at 17 n.4;

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Employer's February 23, 2023 Notice Regarding Potential Responsible Operator Issue at 3; *see also* Employer's Reply Brief at 2. It also asserts that the ALJ erred in crediting the Miner's testimony that he worked only nine months at Alpine despite his having more than 125 days' worth of earnings. Employer's Brief at 5-6, 8-10. We disagree that Alpine should have been named as the responsible operator based on the evidence of record.

In determining whether a miner has established at least one year of coal mine employment, the Board has recognized a two-step approach. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007) (one-year employment relationship must be established, during which the miner had 125 working days).[7] Specifically, the ALJ must first determine whether the miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32); *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36. If the threshold requirement of a one-year period is met, then the ALJ must determine whether the miner worked for at least 125 days during that one-year period. *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment).

In this case, in calculating the amount of time the Miner worked for Alpine, the ALJ did not apply the formula at 20 C.F.R. §725.101(a)(32)(iii), as he did for the Miner's other post-1978 employers, because he determined the beginning and ending dates of the Miner's employment at Alpine are ascertainable from the record, including from the Miner's testimony. Decision and Order at 14 n.41. Although Employer cites to instances where it alleges the Miner was inconsistent about the actual number of months he worked with Alpine, Employer fails to cite to any evidence to support its contention that the Miner may have been employed at Alpine for more than one year.[8] *See* Employer's Brief at 5-6, 8-10; Employer's Reply Brief at 2. In the Miner's answers to Employer's

[7] The Board applies the two-step approach outside of cases arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019). No other Circuit – including the Tenth Circuit, within whose jurisdiction this case arises – has adopted the approach set forth in *Shepherd*.

[8] Employer indicates that the Miner's testimony about his Alpine employment "was generalized and inconsistent; he either worked there for 'six months[,]' 'six—seven, or eight months,' or from '3/1985 to 12/1985.'" Employer's Brief at 5-6 (footnotes omitted), *citing* Director's Exhibits 1 at 2388, 4494, 4562; 40 at 34-35.

interrogatories, he indicated that he worked for Alpine from March 1985 to December 1985 – a period of nine months. Director's Exhibit 1 at 2387-88. The Miner's employment history section of his complete pulmonary evaluation and his employment history forms list the same timeframe. *Id*. at 4494, 4562. During a July 19, 1994 formal hearing, the Miner testified both that he worked "about six, seven months" and "about nine months." *Id*. at 4169, 4190.

As Employer has not presented evidence showing the Miner worked at Alpine for at least one full year, Employer has failed to demonstrate how the error it alleges regarding Claimant's subsequent employment at Alpine would make a difference to its responsible operator designation. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Consequently, any error in the ALJ's failure to specifically consider this issue is harmless. *Larioni*, 6 BLR at 1-1278.

Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of the Miner's coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-26 (2011).

Employer contends the ALJ erred in calculating the Miner's coal mine employment based on the Miner's testimony despite his questioning the Miner's credibility. Employer's Brief at 11-15; Employer's Reply Brief at 2-4. Further it asserts that even when calculating the Miner's coal mine employment "*de novo*," his findings do not make sense. Employer's Brief at 15. Thus, Employer argues the ALJ did not utilize a reasonable method of computation and therefore his length of coal mine employment determination cannot be affirmed. *Id*. at 16. Employer's arguments have merit, in part.

In evaluating the length of the Miner's coal mine employment, the ALJ considered the Miner's February 1986 Department of Labor (DOL)-sponsored Medical History and Examination for Coal Mine Workers' Pneumoconiosis report (1986 DOL exam), Social Security Administration (SSA) earnings record, CM-911a Employment History Forms from the current survivor's claim and the Miner's prior claims, and formal hearing testimony from the Miner's prior claims. Decision and Order at 8-18; Director's Exhibits

1, 5, 14; Claimant's Exhibits 4, 6, 15. The ALJ used different methods for calculating three separate periods of the Miner's coal mine employment.

1947 to 1951

The ALJ credited the Miner with four years of coal mine employment from 1947 to 1951 based on his responses to interrogatories, his 1986 DOL exam, his History of Coal Mine Employment (CM-911a) form dated November 6, 1986, submitted in conjunction with the current survivor's claim,[9] and hearing testimony from his prior claims. Decision and Order at 13; Director's Exhibits 1 at 2387, 4494; 5 at 1; Claimant's Exhibits 4 at 19, 15 at 15-18. The ALJ noted the Miner's testimony before ALJ Burke on April 14, 2005, that he worked sixty hours per week between the ages of fourteen and eighteen, and that he was paid in cash. Decision and Order at 13; Claimant's Exhibit 15 at 15-18. He noted ALJ Burke credited the Miner with four years of coal mine employment during that time period and found a total of nineteen years of coal mine employment. Decision and Order at 13. In addition, the ALJ acknowledged the Miner's testimony before ALJ Robert S. Amery at the July 19, 1994 hearing, where the Miner stated his SSA earnings record should be correct and indicate how many years he worked in coal mine employment because he always paid into Social Security when he was employed. Decision and Order at 13-14; Claimant's Exhibit 4 at 19. The ALJ reasoned that the Miner's 2005 testimony did not necessarily undermine his earlier 1994 testimony because the Miner also testified in 2005 that his estimated total coal mine employment was twenty years, which the ALJ found was consistent with ALJ Burke's determination. Decision and Order at 13-14. Furthermore, the ALJ found the Miner's testimony regarding the total length of his coal mine employment bolstered by his response to Employer's interrogatories and the description of his coal mine employment included in his 1986 DOL exam. Decision and Order at 13; Director's Exhibit 1 at 2387, 4494.

We reject Employer's contention that the ALJ erred in relying on the Miner's testimony in evaluating how many years of coal mine employment he had from 1947 to 1951 simply because he discredited it when evaluating the evidence for other time periods. Employer's Brief at 11-12. Unlike the other time periods that Employer highlights,[10] the

[9] The Miner's response to Employer's interrogatories, his 1986 DOL exam, and his History of Coal Mine Employment form all indicate Morris Jones Coal Mine employed him as a digger from 1947 to 1951. Director's Exhibits 1 at 2387, 4494; 5 at 1.

[10] Employer asserts the Miner's testimony is not credible overall as to his years of coal mine employment because the ALJ rejected, based on the Miner's SSA record, the Miner's testimony to the following: that he worked for approximately twenty years and

Miner's SSA record does not show any earnings for the Miner from 1947 to 1951; therefore, it was not inherently unreasonable for the ALJ to rely on the Miner's testimony for this time period, despite his permissible finding that the Miner's SSA record is the most accurate evidence concerning the Miner's coal mine employment. *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *see* Decision and Order at 9, 11, 14.

However, there is merit to Employer's assertion that the ALJ did not adequately explain, as the Administrative Procedure Act (APA) requires,[11] why the Miner's 2005 testimony was more credible than his 1994 testimony.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 13-15. The ALJ indicated the Miner's 1994 testimony did not detract from his 2005 testimony because it was consistent with the length of coal mine employment findings of approximately twenty years by ALJs Burke and Amery, but that does not explain why it was more credible, especially when the ALJ found Claimant established only 18.07 years, including the disputed four years from 1947 to 1951. *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 13-14. Further, as Employer argues, the ALJ did not sufficiently explain how he determined the Miner was entitled to full years of employment for this time period,[13] beginning when the Miner

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that, beginning in 1951, "he worked in union mines for seven years eight hours per day, five days a week, without breaks.".. Employer's Brief at 11-12.

[11] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[12] Employer also contends that the Miner's 2002 hearing testimony is contrary to the ALJ's finding of the Miner's pre-1951 employment because the Miner did not mention it. Employer's Brief at 13, 15. However, at the 2002 hearing, the Miner was only asked about any coal mine work he performed after his time with Employer and his seven years of underground coal mine work. Claimant's Exhibit 6 at 25-26, 30. Thus, Employer mischaracterizes the Miner's testimony, as the Miner did not specifically mention any pre-1951 coal mine employment because he was not asked about it. Moreover, ALJ Wood indicated at the hearing that length of coal mine employment was not listed as a contested issue and that the prior finding of at least fifteen years was "going to control." *Id*. at 18-20.

[13] We note the ALJ found:

was fourteen years old, especially given the ALJ's determination that during the subsequent twenty-three-year period, the Miner did not work full years in coal mine employment. *Wojtowicz*, 12 BLR at 1-165; Employer's Brief at 13-14.

1951 to 1977

For the period from 1951 to 1977, the ALJ credited the Miner with a quarter-year of employment for each quarter in which his SSA earnings record indicates he earned at least $50.00 from coal mine operators.[14] Decision and Order at 14 (citing *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Director's Exhibits 1 at 3794; 14. Employer asserts that the ALJ's use of the "quarter method" for the years from 1951 to 1977 is not a "reasonable method of computation" and that the ALJ "never explained how he arrived at the figures he did." Employer's Brief at 15-16. We disagree.

The Board has recognized that it is reasonable for an ALJ to credit a miner with one-quarter of coal mine employment for every quarter in which his or her Social Security record reflects earnings of at least $50.00 for such employment. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); *see also See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (pre-1978 income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"). Further, Employer's assertion that the ALJ failed to explain instances where he credited the Miner with less than one full quarter is incorrect. *See* Employer's Brief at 15-16. Rather, the ALJ explained that he credited the Miner with the pro-rata amount of a calendar quarter

> Even if a full 4.0 years of coal mine employment between 1947 and 1951 is deemed to be excessive, the undersigned finds that the evidence establishes the Miner had a significant amount of coal mine employment in that time period – certainly more than enough to bring the Miner to a total of more than 15 years of coal mine employment.

Decision and Order at 16 n.60. Given our decision to also vacate the ALJ's length of coal mine employment finding for the Miner's coal mine work post-1978, Claimant may need to prove more than 0.93 years of coal mine employment, and this general assertion is insufficient to meet Claimant's burden of proof. *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11; *Wojtowicz*, 12 BLR at 1-165.

[14] The ALJ reasoned that the Miner's Social Security Earnings Record for these years showed the Miner's earnings each quarter, rather than yearly. Decision and Order at 14.

"based on the ratio of the Miner's earnings from coal mine work to the earnings from all work in that calendar quarter." Decision and Order at 14. Because it was based on a reasonable method of calculation, we affirm the ALJ's determination that Claimant established the Miner had 6.11 years of coal mine employment between 1951 and 1977. *See Muncy*, 25 BLR at 1-27; Decision and Order at 14-16.

Post-1978

In calculating the Miner's post-1978 coal mine employment, for which the Miner's SSA record does not report quarterly earnings, the ALJ indicated he applied the formula at 20 C.F.R. §725.101(a)(32)(iii). He first divided the Miner's yearly earnings, as reported in his SSA record, by the average yearly earnings for coal miners for each year as reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.[15] Decision and Order at 14-16. For each year in which the calculation yielded at least 125 working days, he credited the Miner with a full year of coal mine employment. *Id*. If Claimant had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id*. Using this method, the ALJ credited the Miner with 7.96 years of coal mine employment. *Id*. at 16.

Employer notes the ALJ compared the Miner's "documented earnings to 'Industrial Average (125 Days)' as reflected in DOL Exhibit 610 and awarded a full year's credit whenever [the Miner's] earnings met or exceeded that 125-day average." Employer's Brief at 9. It also asserts that if the case is remanded and the ALJ does not use the 125-day rule, then his eighteen-year coal mine employment calculation must also be reconsidered. *Id*. at 9 n.6.

[15] The ALJ referenced Section 725.101(a)(32)(iii), which provides a method for calculating length of coal mine employment in two situations:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then 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 daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii); *see* Decision and Order at 14-16. The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

To the extent Employer is arguing that the ALJ's application of 20 C.F.R. §725.101(a)(32)(iii) and his use of the yearly average earnings based on 125 days is erroneous, we agree. As noted above, in cases arising outside of the Sixth Circuit, the Board has adopted a two-step approach where the ALJ must first determine whether Claimant established a calendar year of coal mine employment prior to determining whether the Miner worked for 125 days as a miner during that employment. Further, in applying the formula, the ALJ divided the Miner's yearly income by the coal mine industry's average earnings based on 125 days, instead of the coal mine industry's *daily* average earnings for that year, as the regulation requires. *See* Decision and Order at 16. As the ALJ failed to initially consider whether Claimant established a calendar year of coal mine employment and incorrectly applied the formula at 20 C.F.R. §725.101(a)(32)(iii), we must vacate his determination that the Miner had 7.96 years of coal mine employment from 1978 to 1985.

Remand Instructions

On remand, the ALJ must reconsider the length of the Miner's coal mine employment from 1947 to 1951 and post-1978. In doing so, he may utilize any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). However, he must address all relevant evidence and explain all of his material findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR 1-998. Further, if he relies on 20 C.F.R. §725.101(a)(32)(iii) in calculating years of coal mine employment, he must use the average daily earnings figure in Exhibit 610 as the regulation requires.

If the ALJ finds Claimant established the Miner had at least fifteen years of qualifying coal mine employment, she will have invoked the Section 411(c)(4) presumption. In that situation, as Employer does not challenge the ALJ's finding that Employer did not rebut the presumption, aside from contending the ALJ applied an incorrect burden of proof on the issue of legal pneumoconiosis due to finding the Section 411(c)(4) presumption invoked,[16] the ALJ may reinstate the award of benefits. However, if the ALJ finds Claimant has established less than fifteen years of coal mine employment, then he must consider entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205.

[16] Employer argues "the ALJ's medical merits determinations assumed the presumption's invocations and made no alternate findings" and, therefore, "remand is required for a full and fair consideration of the record proof addressing legal pneumoconiosis under the correct respective burdens." Employer's Brief at 16.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge