U.S. Department of Labor

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

BRB No. 24-0473 BLA

THOMAS WILLIAM VANCE Claimant-Respondent v. ISLAND CREEK COAL COMPANY and CONSOL ENERGY, INCORPORATED, c/o HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: 12/12/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Jonathan Berry, 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, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-06091), rendered on a subsequent claim filed on November 28, 2016,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.[2]

In his initial Decision and Order, the ALJ found Claimant established 15.31 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] and established a change in an applicable condition of entitlement.[4] 30 U.S.C. §921(c)(4)

[1] Claimant filed his initial claim on August 5, 2008. Director's Exhibit 1 at 2-12. ALJ Donald W. Mosser denied it on March 16, 2010, for failure to establish that he has pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. *Id*.

[2] We incorporate the procedural history of this case as set forth in *Vance v. Island Creek Coal Co..,* BRB No. 22-0464 BLA (Nov. 20, 2023) (unpub.). Administrative Appeals Judge Jonathan Rolfe is substituted on the panel for Administrative Appeals Judge Judith S. Boggs, who is no longer a member of the Board.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R.

(2018); 20 C.F.R. §§718.305, 725.309. Further, he found Employer did not rebut the presumption and awarded benefits.

In consideration of Employer's previous appeal, the Board affirmed, as unchallenged, the ALJ's findings that Claimant performed his coal mine employment underground and that he established total disability. *Vance v. Island Creek Coal Co.*, BRB No. 22-0464 BLA (Nov. 20, 2023) (unpub.), slip op. at 3 n.4, 4 n.6. However, the Board vacated his finding that Claimant established 15.31 years of coal mine employment because the ALJ did not explain his findings in accordance with the Administrative Procedure Act (APA).[5] *Id.* at 7. Consequently, the Board vacated the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and remanded the case for reconsideration. *Id.*; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

On remand, the ALJ again found Claimant established at least fifteen years of coal mine employment. Consequently, he found Claimant invoked the Section 411(c)(4) presumption. He further found that Employer did not rebut the presumption and reinstated the award of benefits.

On appeal, Employer argues the ALJ erred in finding Claimant had more than fifteen years of coal mine employment and therefore improperly invoked the Section 411(c)(4) presumption. It also challenges the ALJ's finding that it did not rebut the presumption and his determination of the onset date for the commencement of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response agreeing that remand is necessary for the ALJ to reconsider his calculation of the length of Claimant's coal mine employment and the onset date for the commencement of benefits. Claimant responds in support of the award of benefits.

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

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§725.309(c)(3). Because Claimant did not establish pneumoconiosis or total disability due to pneumoconiosis in the prior claim, he had to submit new evidence establishing one of these elements to obtain review of his claim on the merits. Director's Exhibit 1.

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision 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).

with applicable law.[6] 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).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in 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 dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence and in accordance with applicable law. 20 C.F.R. §725.101(a)(32)(ii); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 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).

Coal Mine Employment from 1969 to 1977

The Board previously vacated the ALJ's original finding that Claimant had 5.9091 years of coal mine employment from 1969 to 1977 because the ALJ did not explain why he used different formulas to calculate Claimant's employment from 1969 to 1972 and from 1975 to 1977. *Vance*, BRB No. 22-0464 BLA, slip op. at 6-7.

On remand, the ALJ reconsidered his calculations based on Claimant's hearing and deposition testimony, Social Security Administration (SSA) earnings records, and employment history forms. Decision and Order on Remand at 4-8; Director's Exhibits 4-10; Claimant's Exhibit 6. For Claimant's employment from 1969 to 1977, the ALJ credited Claimant with a quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 in coal mine employment. Decision and Order on Remand at 6. Because Claimant earned at least $50.00 in twenty-two quarters from 1969 to 1977, the ALJ credited him with 5.5 years of coal mine employment for that period. *Id.*; Director's Exhibit 9. We affirm this finding as

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Claimant's Exhibit 6 at 6.

unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6.

Coal Mine Employment from 1978 to 1986

The Board previously affirmed, as unchallenged on appeal, the ALJ's finding that Claimant had nine years of coal mine employment from 1978 to 1986. *Vance*, BRB No. 22-0464 BLA, slip op. at 6 n.10. On remand, the ALJ reiterated this finding. Decision and Order on Remand at 6-7.

Employer now argues for the first time that the ALJ erred in applying the method of calculation to establish a year of coal mine employment set forth in *Shepherd v. Incoal, Inc*., 915 F.3d 392, 402 (6th Cir. 2019), when this case falls under the jurisdiction of the Fourth Circuit, which has not adopted such a method. Employer's Brief at 8-10. The Director agrees that remand is required for the ALJ to recalculate the length of Claimant's coal mine employment under the correct legal standard. Director's Response Brief at 2-3. Claimant responds that the ALJ's findings are supported by substantial evidence. Claimant's Response Brief at 6.

Employer forfeited this argument by failing to raise it to the ALJ or the Board in its initial appeal. *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *see Vance*, BRB No. 22-0464 BLA, slip op. at 6 n.10. Thus, because Employer has not set forth any basis for excusing its forfeiture, we see no reason to consider its forfeited argument. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Salmons*, 39 F.4th at 206-07 ("forfeiture is essential to the orderly administration of justice," and not "a mere technicality"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Powell v. Serv. Emps. Int'l, Inc*., 53 BRBS 13, 15 (2019). Consequently, we reject Employer's argument.

Coal Mine Employment in 1992[7]

The Board also previously affirmed, as unchallenged on appeal, the ALJ's finding that Claimant had 0.4009 years of coal mine employment in 1992, comprised of his work

[7] Claimant reported work in 1993 on his employment history and description of coal mine employment forms, during his testimony, and at his examination by Dr. Rosenberg in 2008. Director's Exhibits 1 at 24, 55; 5; 7; Claimant's Exhibit 5 at 5-18. However, the ALJ found this evidence was not sufficient to establish any additional coal mine employment as Claimant did not report this work on his employment history form in the

for Gunther-Nash, Incorporated, CC Mining, Incorporated, Bill Branch Coal Company, Incorporated, and P&W Mine Parts & Services Incorporated. *Vance*, BRB No. 22-0464 BLA, slip op. at 6 n.10; Decision and Order on Remand at 7; Decision and Order at 8; Director's Exhibit 10.

Employer similarly contends for the first time on appeal that the ALJ's 1992 length of coal mine employment calculation is erroneous due to his reliance on *Shepherd*. Employer's Brief at 8-10. As explained above, because Employer has not set forth any basis to excuse its forfeiture of this argument, we reject it to the extent it covers the 0.4009 years the Board previously affirmed for the year 1992. *See Zdanok*, 370 U.S. at 535; *Salmons*, 39 F.4th at 206-07; *Davis*, 937 F.3d at 591; *Powell*, 53 BRBS at 15.

However, on remand, the ALJ determined that he had previously overlooked Claimant's testimony that he was also paid under the table in 1992 when he worked as a contractor.[8] Decision and Order on Remand at 6 n.14; Claimant's Exhibit 6 at 18. As Claimant's SSA earnings record reflects additional self-employment in 1992, the ALJ found that this was also coal mine employment. *Id*. Thus, the ALJ credited Claimant with an additional $2,101.00 in earnings from coal mine employment in 1992 for a total of 0.1191 years of additional coal mine employment. *Id*. In doing so, the ALJ divided Claimant's total earnings by the Daily Average Earnings of Employees in Coal Mine employment to determine the number of days Claimant worked. *Id*. at 6-7. He then divided the number of days Claimant worked by 125 to find the number of years he worked in coal mine employment (approximately 15 days). *Id.* at 7.

As Employer and the Director accurately note, the ALJ's calculations here improperly apply the law of the United States Court of Appeals for the Sixth Circuit's holding in *Shepherd*, 915 F.3d at 402 (125 working days establishes a year of coal mine employment regardless of the duration of that employment) and not the law of the Fourth Circuit, under whose jurisdiction this claim arises. Employer's Brief at 8-10; Director's Response Brief at 2-3.

In cases arising within the jurisdiction of the Fourth Circuit, the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R.

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prior claim and, when questioned, agreed he was not absolutely sure he worked in 1993. Decision and Order at 5 n.9; Claimant's Exhibit 6 at 46.

[8] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant's self-employment in 1992 constitutes coal mine employment. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6 n.14.

§725.101(a)(32)(i); *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); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[9] 20 C.F.R. §725.101(a)(32). However, proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281. Consequently, we vacate the ALJ's finding that Claimant earned an additional 0.1191 years of coal mine employment in 1992 from self-employment. Decision and Order on Remand at 7.

As Claimant has only established a total of 14.9009 years of coal mine employment from 1969 to 1992, not including Claimant's self-employment in 1992, we must therefore also vacate the ALJ's determination that Claimant established at least fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption. *Id.* at 7. Consequently, we vacate the award of benefits and remand the case for further consideration of the remaining balance of Claimant's coal mine employment.

Remand Instructions

On remand, the ALJ must again determine the length of Claimant's remaining coal mine employment, taking into consideration the relevant evidence and using any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. He must explain his findings as the APA requires.[10] *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

[9] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii). While the ALJ acknowledged this threshold requirement, he did not specify which, if any, years of coal mine employment met this threshold prior to determining the number of days Claimant worked in each year. Decision and Order on Remand at 4-8.

[10] The Board also previously instructed the ALJ to explain his finding that Claimant smoked 20-pack-years on remand. *Vance*, BRB No. 22-0464 BLA, slip op. at 7 n.12. On

If the ALJ again finds Claimant established at least fifteen years of qualifying coal mine employment, the ALJ must then reconsider whether Employer has rebutted the Section 411(c)(4) presumption.[11] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718.[12] 20 C.F.R. §§718.201, 718.202, 718.203, 718.204, 718.205. Accordingly, the ALJ's Decision and

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remand, the ALJ summarized relevant evidence and summarily found "the preponderance revealed a smoking history of at least 1 pack of cigarettes per day for twenty years." Decision and Order on Remand at 3. The ALJ did not explain this finding as the APA requires, given the wide range in Claimant's reported smoking history varies from seven years to thirty or more years, and the record does not indicate Claimant ever mentioned a twenty pack-year history. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, the ALJ must reconsider Claimant's cigarette smoking history, render a finding, and explain his basis for doing so. *Id*.

[11] Contrary to Employer's argument, the ALJ appropriately found Claimant established a change in a condition of entitlement since the prior denial by establishing entitlement to benefits. *E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-512 (4th Cir. 2015) (The Section 411(c)(4) presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis.); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95 (7th Cir. 2013) (The existence of pneumoconiosis and disability causation may be established by invocation of the Section 411(c)(4) presumption for the purpose of demonstrating a change in an applicable condition of entitlement at 20 C.F.R. §725.309.); Decision and Order on Remand at 8, 23; Employer's Brief at 10-11. However, as we have vacated the award of benefits, we must also vacate this finding. If Claimant again invokes the presumption on remand and Employer fails to rebut it, Claimant will have established a change in an applicable condition of entitlement. *Toler*, 805 F.3d at 511-512.

[12] We decline to address, as premature, Employer's arguments that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption, as well as its and the Director's arguments concerning the commencement date for benefits. Employer's Brief at 11-18; Director's Response Brief at 3.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge