BRB No. 23-0432 BLA

JOHNNY M. TURNER Claimant-Respondent v. HONEY CAMP COAL COMPANY 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: 03/14/2025 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

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Jeffrey S. Goldberg (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 BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Granting Benefits (2021-BLA-05289) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer, Honey Camp Coal Company, is the properly designated responsible operator. She credited Claimant with 15.6 years of qualifying coal mine employment and found that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in determining it is the responsible operator. Employer also contends the ALJ erred in admitting Dr. Forehand's supplemental opinion under the Department of Labor's (DOL) pilot program. On the merits, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling impairment, and thus erred in invoking the Section 411(c)(4) presumption. It also contends she erred in finding it failed to rebut the presumption. Claimant has not responded. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's responsible operator and pilot program arguments. Employer replied to the Director's brief, reiterating its contentions on the issues raised.

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.[2] 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, 361-62 (1965).

[1] 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); *see* 20 C.F.R. §718.305(b).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2;

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[3] 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 designates a potentially liable operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

If the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id.* In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id.* If the district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly designated operator must be dismissed, and the Black Lung Disability Trust Fund (Trust Fund) must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d); 65 Fed. Reg. 79,920, 79,985 (Dec. 20, 2000) (regulations place "the risk that the district director has not named the proper operator on the [Trust Fund]").

Here, the district director identified Employer as a potentially liable operator. Director's Exhibit 42. The district director acknowledged that Employer was not the most

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Hearing Transcript at 18, Director's Exhibit 4.

[3] 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).

recent operator to employ Claimant for more than one year. Director's Exhibits 47, 64. Claimant's most recent coal mine employment for one year was with Liberty Mining Co., Inc. (Liberty Mining), from 1988 to 1990. Director's Exhibits 4, 12. Heritage Mining Company (Heritage Mining) was the next most recent operator, employing Claimant from 1983 to 1988. Director's Exhibits 4, 12. Prior to Heritage Mining, Claimant worked for Employer from 1982 to 1983. Director's Exhibits 4, 12. However, the district director explained that neither Liberty Mining nor Heritage Mining was designated the responsible operator because neither was covered by an insurance policy or operating under an approved self-insurer plan at the time of Claimant's last day of employment with each operator. *See* 20 C.F.R. §725.495(d); Director's Exhibits 47, 64. Heritage Mining's insurance carrier, Rockwood Insurance (Rockwood), liquidated in August 1991. Director's Exhibit 35. Liberty Mining's insurance carrier, Virginia Independent Coal Operator's Group (VICOG), liquidated in 1994.[4] Director's Exhibit 36.

The ALJ determined that the district director properly designated Honey Camp Coal Co. (Honey Camp) as the responsible operator. Decision and Order at 6-7. She noted the district director properly provided statements regarding why the more recent employers were not designated as responsible operators, as 20 C.F.R. §725.495(d) requires. *Id.* at 7. Further, she found Employer failed to rebut this prima facie evidence that the more recent operators are financially incapable of assuming liability and did not show that Honey Camp is financially incapable of assuming liability. *Id.*

Employer does not contend that Honey Camp is not a potentially liable operator or that it is financially incapable of assuming liability. It asserts the ALJ, in violation of the Administrative Procedure Act (APA),[5] failed to address its arguments pertaining to liability. Employer's Brief at 12. Employer asserts the Trust Fund should be liable for benefits because the DOL failed to notify the Virginia Uninsured Employer's Fund (Uninsured Employer's Fund) and Virginia Property and Casualty Insurance Guaranty Association (Guaranty Association) of their potential liability for this claim. Employer's Brief at 13-21. It contends that in failing to address its arguments, the ALJ implicitly determined those entities could not be found liable, which she is not permitted to do under

[4] The parties agree that Liberty Mining and Heritage Mining employed Claimant for more than one year and do not contend that either Rockwood or VICOG is financially capable of assuming liability.

[5] The APA provides 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).

the regulations; rather, Employer contends, the district director must notify those entities regarding their potential liability, and they must submit their own affirmative defenses. *Id.* at 18-20.

The Director responds that the Uninsured Employer's Fund applies only to cases arising under the Virginia Workers' Compensation Act, not federal law, and he is not obligated to notify a party that cannot be held liable as a matter of law. Director's Response at 7-8. Similarly, the Director asserts that Guaranty Association coverage is not available given that VICOG was self-insured and the claim was filed after the 1992 bar date for insolvent insurers. *Id.* at 9-10, 13. Thus, while the Director concedes that the ALJ did not specifically address Employer's arguments, he contends the error is harmless. *Id.* at 8. We agree with the Director's position.

The Virginia legislature created the Uninsured Employer's Fund to "provid[e] funds for [state workers'] compensation benefits awarded against any uninsured or self-insured employer." Va. Code Ann. § 65.2-120l(A). The statute expressly provides that the Virginia Workers' Compensation Commission may order a payment from the Uninsured Employer's Fund only for benefits awarded "in accordance with the provisions of *this chapter* and all applicable provisions of *this title*." Va. Code Ann. § 65.2-1203(A)(l) (emphases added); *see also id.* at § 65.2-1203(A)(2) (Commission shall order payment from the Uninsured Employer's Fund only "[a]fter an award has been entered against an employer for compensation benefits under any provision of *this chapter*") (emphasis added); *Redifer v. Chester*, 720 S.E.2d 66, 69 n.4 (Va. 2012) ("The [Uninsured Employer's Fund] ensures the payment of compensation benefits owed by an uninsured employer that fails to pay *benefits ordered by the Commission*.") (emphasis added). Because this claim arises under the federal Black Lung Benefits Act, not Virginia state law, we reject Employer's assertion that the Uninsured Employer's Fund guarantees Rockwood or VICOG's liability for this claim.[6] *See* Va. Code Ann. § 65.2-1203(A)(l), (2).

[6] Further, Employer identified no evidence before the ALJ establishing that Rockwood or VICOG claims fall within the coverage of the Uninsured Employer's Fund. Employer's Post-Hearing Brief at 9-14. Employer cites Virginia state cases to support its argument that the Uninsured Employer's Fund could be responsible for this claim. Employer's Brief at 18 n.4; 20 (citing *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1998) and *Uninsured Employer's Fund v. Flanary*, 497 S.E.2d 913 (Va. Ct. App. 1998), *aff'd*, 257 Va. 237 (Va. 1999)). Neither case supports Employer's argument because both involved Virginia state workers' compensation claims, not federal black lung claims.

Next, the Virginia legislature established the Guaranty Association to "provide prompt payment of covered claims to reduce financial loss to claimants or policyholders resulting from the insolvency of an insurer." Va. Code Ann. § 38.2-1600. A "covered claim" is defined as "an unpaid claim . . . submitted by a claimant, that arises out of and is within the coverage and is subject to the applicable limits of a *policy covered by this chapter* and issued by an *insurer* who has been declared to be an *insolvent insurer*." *Id.* at § 38.2-1603 (emphases added). An "insolvent insurer" is defined as an insurer "licensed to transact the business of insurance in the Commonwealth," "against whom an order of liquidation with a finding or insolvency has been entered . . . by a court of competent jurisdiction." *Id.*

Under Virginia law, self-insurance is not considered insurance. *See Farmers Ins. Exch. v. Enter. Leasing Co.*, 708 S.E.2d 852, 856-57 (Va. 2011) (recognizing distinctions between insurance and self-insurance, and between insurance companies and self-insurers: "With self-insurance, there is neither an insured nor an insurer. In fact, self-insurance does not involve the transfer of a risk of loss, but rather a retention of that risk, making it the 'antithesis of insurance.'"); *see also Yellow Cab v. Adinolfi*, 134 S.E.2d 308, 312 (Va. 1964) (insurance company writing motor vehicle liability insurance, and not a self-insurer, is required to provide uninsured motorist coverage because the statute mandating such coverage assumes the existence of insurance policies and "it is obvious that a self-insurer does not issue liability insurance policies"), *on other grounds superseded by statute, as stated in William v. City of Newport*, 397 S.E.2d 813 (Va. 1990); *Northland Ins. Co. v. Va. Prop. & Cas. Ins. Guar. Ass'n*, 392 S.E.2d 682, 685 (Va. 1990) ("insurer" means an insurance company engaged in the business of making contracts of insurance). As the Director notes, VICOG was a self-insurance association. Director's Response at 9-10; Director's Exhibit 39 at 8-9. Thus, we reject Employer's assertion that VICOG is an insurer whose liabilities are guaranteed by the Guaranty Association. Employer's Brief at 14-20.

Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed the Guaranty Association's coverage of claims against Rockwood, an insolvent insurer. *See Mullins*, 842 F.3d 279. The court explained the Guaranty Act provides that a covered claim "'shall not include any claim filed with the [Guaranty Association] after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.'" *Id.* at 282 (quoting Va. Code Ann §38.2-1606(A)(1)(b)). The Fourth Circuit noted that, following Rockwood's insolvency, the liquidator set the final date for filing claims against it as August 26, 1992. *Id.* The court then held that, because the claimant filed his claim in 2009, seventeen years after the final date to file a claim against Rockwood had passed, his claim was not a "covered claim" under the Guaranty Act, and the Guaranty Association was under no obligation to pay it. *Id.* at 284. Likewise, Claimant filed this claim in 2018, twenty-six years after the final date

to file a claim against Rockwood passed; thus, the Guaranty Association by operation of law does not cover it.[7] *See id*; Director's Exhibit 2.

We additionally reject Employer's assertion that the Act, which requires all insurers and reinsurers to assume full liability for black lung claims, preempts Virginia law to the extent it limits the Guaranty Association's liability for Claimant's claim. Employer's Brief at 20 (citing 30 U.S.C. §933 (requiring an insurer to "pay benefits required under section 932 of this title, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments")); 20 C.F.R. §725.203(a). The Fourth Circuit has rejected this argument, holding that the Guaranty Association is not an insurer within the meaning of the Act and, thus, is not covered by the Act. *Mullins*, 842 F.3d at 284-85.

Thus, as the Uninsured Employer's Fund and the Guaranty Association cannot be liable for this claim as a matter of law, we reject Employer's assertion that the district director was obligated to notify either entity as potentially liable parties to this claim.[8] *See*

[7] Employer's reliance on *Boyd* and *Bowling* for the proposition the Guaranty Association is liable for this claim is misplaced. Employer's Brief at 15-16, 20. *Boyd & Stevenson Coal Co. v. Director, OWCP*, 407 F.3d 663, 664, 667 (4th Cir. 2005) is distinguishable from this case because the claim was filed in 1989, before the final date for filing claims against Rockwood. *Island Fork Construction v. Bowling*, 872 F.3d 754, 759-60 (6th Cir. 2017), a Sixth Circuit case which is not binding here, analyzed whether the Kentucky Insurance Guaranty Association was liable for a black lung claim but said nothing about time-barred claims.

[8] Although Employer cites various cases in which ALJs determined the district director erred in failing to name a Virginia state guaranty fund for an insolvent self-insurer, ALJ decisions are not precedential and, unlike *Mullins*, do not bind the Board. *See Briggs v. Pa. R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993); Director's Response at 13 n.3; Employer's Brief at 16-17. The Director further correctly notes 20 C.F.R. §725.494(e)(1) does not support Employer's assertion that the regulation requires the district director to put a state guaranty fund on notice for the liability of an operator where the operator's carrier was insolvent. Employer's Brief at 14-15; *see* 20 C.F.R. §725.494(e)(l) (providing that when an employer's carrier "has been declared insolvent and its obligations for the claim are not otherwise guaranteed," the employer is not considered financially capable of assuming liability for benefits); Director's Response at 13-14. Further, while the regulation contemplates that the DOL "may collect from a state guaranty association where state law *requires* such an association to assume the [insolvent] insurer's liabilities," 62 Fed. Reg. 3,338, 3,369 (Jan. 22, 1997) (emphasis added), nothing in the regulation obligates the district director to pursue a state guaranty

Mullins, 842 F.3d at 283 (district director has no duty to notify a state guaranty fund of a claim for which it cannot be liable as a matter of law); Employer's Brief at 13-21; *see* 20 C.F.R. §725.494. Therefore, any error by the ALJ in not more specifically addressing Employer's liability arguments is harmless and we affirm her finding that Employer is the properly named responsible operator. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing a denial without further proceedings when no further factual development was necessary); Decision and Order at 6-7; 20 C.F.R. §725.495(c), (d).

Evidentiary Issue- DOL Pilot Program

Employer next contends the ALJ erred by considering Dr. Forehand's supplemental opinions that the district director obtained as part of the DOL pilot program and by failing to address its arguments on the issue.[9] Employer's Brief at 21. Specifically, Employer asserts that the DOL has no legal authority to request supplemental opinions under the pilot program, that the pilot program deprives it of due process, and that the implementation of the pilot program violates the notice and comment rulemaking procedures under the APA. *Id.* at 22-26. For the reasons set forth in *Smith v. Kelly's Creek Resources*, 26 BLR 1-15, 1-20-24 (2023), we reject Employer's arguments.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

Length of Coal Mine Employment

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 Board will uphold an ALJ's determination on the length of coal mine employment based on a reasonable method of calculation that

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fund where, as here, state law neither requires nor allows the fund to assume liability for a federal black lung claim.

[9] In 2014, the DOL established a pilot program allowing the district director, in certain claims, to request a supplemental opinion from the physician who performed the DOL-sponsored complete pulmonary evaluation. *See* BLBA Bulletin No. 14-05 (Feb. 24, 2014). The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019).

is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

When determining the length of a miner's coal mine employment, the ALJ should first determine, if possible, the beginning and ending dates of the miner's period or periods of coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 n.1 (1988). The dates and length of the miner's coal mine employment "may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." 20 C.F.R. §725.101(a)(32)(ii). To credit a miner with a year of coal mine employment, the ALJ must first determine whether that 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)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *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. 20 C.F.R. §725.101(a)(32). Where a miner establishes he was engaged in coal mine employment for a period of one calendar year or partial periods totaling one year, "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).

In calculating the length of Claimant's coal mine employment, the ALJ considered his hearing testimony, Social Security Earnings Statement (SSES), and CM-911(a) employment history form. Decision and Order 8; Hearing Transcript at 7-8. The ALJ found that this evidence demonstrated periods of employment from 1973 to 1990. Decision and Order at 9. But the ALJ found the evidence insufficient to establish the beginning and ending dates of Claimant's coal mine employment. *Id.* Thus, she used two different methods for calculating the length of Claimant's coal mine employment. First, for the years prior to 1978, the ALJ credited Claimant with a quarter-year of employment for each quarter in which he earned at least $50.00 from coal mine operators. *Id.*; *Tackett v. Director, OWCP,* 6 BLR 1-839, 1-841 n.2 (1984). Using this method, the ALJ credited Claimant with four years (sixteen quarters) of coal mine employment from 1973 through 1977. Decision and Order at 10.

For the years 1978 onward, she attempted to apply the method of computation provided at 20 C.F.R. §725.101(a)(32)(iii)[10] to ascertain the number of days Claimant

[10] Section 725.101(a)(32)(iii) provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry,

worked, dividing his yearly earnings reported in his SSES by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. Decision and Order at 9-11. If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited Claimant with one year of coal mine employment. *Id.* at 10-11. If Claimant worked less than 125 days, she credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* Based on this method, she found Claimant had 11.60 years of coal mine employment from 1978 to 1990. *Id.* at 11. Thus, she concluded Claimant established a total of 15.60 years of coal mine employment. *Id.*

Employer maintains that the ALJ erred in finding the evidence establishes at least fifteen years of coal mine employment. Specifically, it challenges the ALJ's use of the "quarter method" for the years prior to 1978. Employer's Brief at 27-28. It also contends she erred in crediting Claimant with a full calendar year for each year in which he worked 125 days and further failed to consider evidence that would establish Claimant's last date of coal mine employment. Employer's Brief at 27-28, 30. Employer's arguments are persuasive, in part.

Initially, contrary to Employer's argument, under applicable precedent, crediting a miner with a quarter year of employment for each quarter in which he earned $50.00 or more is a reasonable standard to compute pre-1978 coal mine employment. *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"); *Tackett*, 6 BLR at 1-841 n.2. Thus, we affirm the ALJ's finding that Claimant established four years of coal mine employment for the years 1973 through 1977.

However, we agree with Employer that the ALJ erred in failing to consider whether Claimant established calendar years of coal mine employment prior to applying the regulatory formula to determine the remaining years of his coal mine employment. In attempting to address the threshold inquiry of whether Claimant was engaged in coal mine employment for a period of one calendar year of coal mine employment, the ALJ indicated only that Claimant established "periods of employment" from 1973 to 1990 before summarily finding the periods encompassed "full calendar years." Decision and Order at 9. She then proceeded to credit Claimant with a year of coal mine employment for those

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as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Earnings of Employees in Coal Mining."

years in which he worked for 125 days for the years 1978 through 1990. Decision and Order at 10-11. She failed to explain how the evidence established these "periods of employment" all encompassed full calendar years.

The Board has long interpreted Fourth Circuit case law as supporting the position that the threshold question is 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. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35; *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*, 22 BLR at 1-280.[11] 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. Moreover, we agree that the ALJ failed to consider evidence potentially addressing Claimant's ending date of coal mine employment in 1990, including paystubs and his application. 20 C.F.R. §725.101(a)(32)(ii); *Dawson*, 11 BLR at 1-60 n.1; *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to consider relevant evidence requires remand); Employer's Brief at 27-28; Director's Exhibits 2, 4-8.

As the ALJ failed to explain her findings regarding the threshold finding of calendar years of coal mine employment, we vacate her finding that Claimant established 11.60 years of coal mine employment from 1978 to 1990 and remand for further consideration. Decision and Order at 9-11. Consequently, we also vacate the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *Id.* at 22.

[11] Although our dissenting colleague would apply the rationale of the United States Court of Appeals for the Sixth Circuit's decision in *Shepherd v. Incoal, Inc*., 915 F.3d 392 (6th Cir. 2019) in all circuits, this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position 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. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35; *Martin*, 277 F.3d at 474-75 (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*, 22 BLR at 1-280.

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must also establish he worked at least fifteen years in "underground coal mines" or in surface mines in conditions "substantially similar to conditions in an underground mine." 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ considered Claimant's testimony that most of his coal mine work was underground in "dusty" conditions. Decision and Order at 12. She also noted he worked aboveground at a strip mine from 1974 to 1977, where he was an auger helper and equipment operator. *Id.* She stated Employer offered "no evidence" to suggest that Claimant's surface employment was not "similarly situated to his underground work" and therefore found all Claimant's employment qualifying for purposes of invoking the Section 411(c)(4) presumption. *Id.*

Employer argues that Claimant bears the burden of proof on invocation and the ALJ erroneously required Employer to disprove substantial similarity by citing to and relying on inapplicable regulations. Employer's Brief at 29. Employer's argument has merit.[12]

While the ALJ initially correctly stated it is Claimant's burden to demonstrate qualifying coal mine employment, it appears that, as Employer argues, she then incorrectly placed the burden of proof on Employer to disprove that Claimant's surface dust conditions were not substantially similar to those in underground mines, stating, "I find no evidence proffered by Employer that suggests that this aboveground period was not similarly situated to his underground work." Decision and Order at 11-12 (citing 20 C.F.R. §725.491(d), which provides a rebuttable presumption that an employee was exposed to coal mine dust "[f]or the purposes of determining whether a person is or was an operator that may be found liable for the payment of benefits"). However, it is Claimant's burden to establish he was regularly exposed to coal mine dust in his surface employment, as it did

[12] Employer also generally contends the ALJ failed to consider whether Claimant's trucking job from 1973 to 1974 (Turner Trucking) qualified as coal mine employment under the situs and function tests. Employer's Brief at 28; *see* Employer's Closing Brief at 18. However, Employer has offered no argument to support this assertion; thus, we decline to address the contention as inadequately briefed. *See* 20 C.F.R. §802.211(b); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

not take place at an underground mine. *See Muncy*, 25 BLR at 1-29-1-30; 20 C.F.R. §718.305(b)(1)(i).

Further, even assuming the ALJ applied the correct burden, it is unclear what evidence she relied upon to make her findings. While stating she relied on Claimant's testimony to find his employment qualifying, her reference to Claimant's hearing testimony of "dusty" conditions concerned his work with Liberty Mining and Heritage Mining, both of which were underground mines. Decision and Order at 12 (citing Hearing Transcript at 11, 22); *see* Hearing Transcript at 21. As she noted, Claimant also testified that he worked aboveground at a strip mine at Big C Coal Company from approximately 1974 until 1977, but nowhere did he testify at the hearing about his dust exposure during that employment or any other aboveground employment.[13] Hearing Transcript at 22.

Because the ALJ misapplied the burden of proof and failed to consider relevant evidence, and as we cannot discern what evidence she relied upon, if any, to find Claimant was regularly exposed to coal mine dust in his aboveground employment, we must vacate her finding that all his coal mine employment was qualifying under 20 C.F.R. §718.305. Decision and Order at 12. Thus, if the ALJ again finds Claimant established fifteen or more years of coal mine employment, she must also reconsider whether he has established his surface coal mine employment conditions were substantially similar to those in underground mines prior to invoking the Section 411(c)(4) presumption.[14]

[13] Claimant also provided deposition testimony while this case was pending before the district director in which he was asked about his employment history and dust exposure during certain employment. Director's Exhibit 32. Further, while the ALJ notes only Big C Coal Company as aboveground coal mine employment, Claimant also identified – on his CM-911a employment history form – two other employers for which he worked on the surface or as a coal truck driver. Director's Exhibit 4. The ALJ did not address this evidence to determine Claimant's dust exposure in his surface employment.

[14] Our dissenting colleague asserts the ALJ "reasonably inferred" that Claimant's work at a surface coal mine exposed him to coal dust given his job duties as an auger operator and an equipment operator and Claimant's assertion on his Employment History Form that he was exposed to "dust, gases, or fumes" in his surface coal mine work. *See* Director's Exhibit 4, 32. But after noting Claimant worked as an auger helper and equipment operator at a surface coal mine, the ALJ merely stated she found "no evidence proffered by Employer that suggests that this above ground period was not similarly situated to his underground work" or "provide evidence that indicates that Miner's aboveground work did not result in significant coal dust exposure." Decision and Order at 11-12. Again, the ALJ misapplied the burden of proof. She made no reference to

Invocation of the Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work or comparable gainful work.[15] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11 (4th Cir. 2000); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found the pulmonary function study evidence and the medical opinion evidence support a finding of total disability.[16] 20 C.F.R. §718.204(b)(2)(i), (iv).

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated October 29, 2018, March 4, 2019, December 11, 2019, and March 18, 2021. Decision and Order at 16; Director's Exhibits 17, 20, 23; Employer's Exhibit 6. The ALJ found the October 29, 2018

Claimant's Employment History Form as specifically indicating that he was exposed to "dust, gases, or fumes" in his surface coal mine work (moreover, regular exposure to dust is required in qualifying for the presumption, not exposure to gases or fumes.). It is the ALJ's responsibility in the first instance to weigh all relevant evidence, applying the proper burden of proof, *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989), and to draw her own inferences therefrom, *see Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1096 (4th Cir. 1993), but the Board may not substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999).

[15] We affirm the ALJ's finding that Claimant's usual coal mine employment required heavy exertion as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[16] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 22.

study qualifying,[17] the March 4, 2019 study qualifying both before and after the administration of bronchodilators, and the December 11, 2019 study to be non-qualifying pre-bronchodilator, but qualifying post-bronchodilator. Decision and Order at 16. Thus, she found those three studies supported a finding of total disability. *Id.* at 18. The March 18, 2021 study was non-qualifying both before and after the administration of bronchodilators. *Id.* at 16, 19. The ALJ gave diminished weight to the March 18, 2021 study because the physician who obtained the testing found it "suboptimal." *Id.* at 18. Thus, the ALJ concluded that because three of the four pulmonary function studies were qualifying, the evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* at 19.

Employer does not dispute that three of the pulmonary function studies provide qualifying values. However, it asserts the ALJ failed to address evidence that each qualifying study was invalid and thus asserts they cannot be relied upon to support a finding of total disability. Employer's Brief at 31. It further contends the ALJ erred in discounting the most recent non-qualifying study. *Id.* at 34. While Employer concedes its experts deemed Claimant's effort insufficient on that study, it argues such a determination means he could have achieved higher results had he put forth maximal effort. *Id.*

Initially, contrary to Employer's argument, the ALJ permissibly accorded the March 18, 2021 study diminished weight given Dr. Dahhan's explanation that it was "suboptimal."[18] Decision and Order at 18; Employer's Exhibit 6. The regulations state that "no results of a pulmonary function study shall constitute evidence of the *presence or absence* of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with" the regulatory quality standards. 20 C.F.R. §718.103(c) (emphasis added); 20 C.F.R. Part 718, Appendix B. Thus, substantial evidence supports the ALJ's determination to accord the March 18, 2021 study diminished weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); 20 C.F.R. §718.103(c); Decision and Order at 18.

Regarding the qualifying studies, the ALJ first noted that the October 29, 2018 and March 4, 2019 studies were administered by Dr. Forehand, who did not provide any indication the studies were invalid and the ALJ noted neither study's "printout" stated that

[17] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[18] Dr. Fino also indicated Claimant "could have given a better effort" during the March 18, 2021 study. Employer's Exhibit 10 at 15; Employer's Brief at 34.

the study was inadequately performed. Decision and Order at 17-18. Therefore, she found "no evidence" that the October 29, 2018 and March 4, 2019 studies should be given less weight due to "invalidity or unreliability." *Id.* As Employer asserts, the ALJ failed to address Dr. Dahhan's opinion that the October 29, 2018 study was invalid because Claimant did not inhale maximally or blow out rapidly, or Dr. Fino's similar opinion. Employer's Brief at 31 n.7; Employer's Exhibits 10 at 18; 11. Similarly, the ALJ failed to address Dr. Fino's opinion that the March 4, 2019 study is invalid because Claimant did not blow all the air out of his lungs. Employer's Brief at 31 n.7; Employer's Exhibit 10 at 17.

Finally, when considering the December 11, 2019 study, the ALJ indicated that Dr. Fino, the administering physician, "gave no indication" that the study was invalid. Decision and Order at 18. As Employer argues, Dr. Fino in fact invalidated the December 11, 2019 study. Employer's Brief at 31; Director's Exhibit 23; Employer's Exhibit 10 at 15-16. Specifically, he stated there was premature termination to exhalation, lack of reproducibility, and lack of abrupt onset to exhalation. Director's Exhibit 23 at 6.

Because the ALJ failed to consider relevant evidence regarding the validity of the October 29, 2018, March 4, 2019, and December 11, 2019 qualifying pulmonary function studies, we must vacate her determination that they are sufficiently reliable to support a finding of total disability. *McCune*, 6 BLR at 1-998; Decision and Order at 17-18. Thus, we must also vacate her finding that the pulmonary function studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

Medical Opinions

Next, the ALJ considered Dr. Forehand's medical opinion that Claimant is totally disabled, and the contrary opinions of Drs. Fino and Dahhan that Claimant is not totally disabled. Director's Exhibits 17, 23, 25, 28; Employer's Exhibit 6, 10-12, 14. The ALJ accorded Dr. Forehand's opinion greater weight as consistent with the weight of the objective medical findings and because he understood the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 21. She accorded the contrary opinions little weight as inconsistent with her findings. *Id.* at 22. Thus, she found the medical opinion evidence supported a finding of total disability. *Id.*

Employer asserts the ALJ's failure to consider the evidence regarding the validity of the pulmonary function studies undermines her weighing of the medical opinion evidence. Employer's Brief at 32-33. Because we have vacated the ALJ's crediting of the qualifying pulmonary function studies, and because her crediting of Dr. Forehand's opinion

was based in part[19] on her finding that his opinion is consistent with the objective testing, we must also vacate her crediting of his opinion. Decision and Order at 21. Similarly, because the ALJ found Drs. Fino's and Dahhan's opinions undermined as they "are not consistent with my findings above," presumably that the pulmonary function studies support a finding of total disability, we also vacate her decision to accord their opinions less weight. *Id.* at 22.

Employer also argues the ALJ erred in discrediting Dr. Dahhan's opinion because she found he did not specifically address whether Claimant could return to his last coal mine employment. Employer's Brief at 30-31, 33 n.8; Decision and Order at 21. We agree. Noting a mild obstruction, Dr. Dahhan specifically stated that Claimant nonetheless "retains the respiratory capacity to return to his previous coal mining work or job of comparable physical demand."[20] Employer's Exhibit 14 at 2; *see also* Employer's Exhibit 6 at 5. Thus, we vacate the ALJ's weighing of the medical opinion evidence regarding total disability and remand for further consideration.

Because we have vacated the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's contentions of errors regarding rebuttal of the presumption.

[19] The ALJ also accorded Dr. Forehand's opinion greater weight as it reflects an understanding of the exertional requirements of Claimant's "prior job." Decision and Order at 21. Employer contends that this finding is erroneous, as Dr. Forehand failed to identify Claimant's job demands. Employer's Brief at 33. While we find no reference to specific job requirements in Dr. Forehand's opinions, "very heavy" exertion is circled in the employment section on the CM-988 form. *See* Director's Exhibit 17 at 1. On remand, the ALJ should determine if this notation is consistent with her determination that Claimant's usual coal mine employment required heavy labor. Further, she must set forth whether Dr. Forehand correctly understood the exertion Claimant's usual coal mine employment required and, if so, the basis upon which he did so. *See* 20 C.F.R. §718.204(b)(2)(iv).

[20] As the ALJ indicates, Dr. Dahhan noted the physical requirements of Claimant's underground work, including carrying fifty pounds five to ten times per day; however, she made no finding regarding whether his understanding was consistent with the exertional requirements of Claimant's usual coal mine employment, taking into account all the information he reviewed. Decision and Order at 21; Employer's Exhibit 6 at 1. On remand, the ALJ should make the requisite finding in this regard. *See* 20 C.F.R. §718.204(b)(2)(iv).

Remand Instructions

On remand, the ALJ must reconsider the length and nature of Claimant's coal mine employment. She must first determine whether beginning and ending dates of Claimant's coal mine employment can be determined for any period from 1978 until 1990 and make the threshold determination of whether Claimant established a full calendar year of coal mine employment or partial periods totaling one year. For each calendar year of coal mine employment established, the ALJ must also determine whether Claimant worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32); *see Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. In doing so, she must consider all relevant evidence and utilize a reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *McCune*, 6 BLR at 1-998.

If the ALJ again finds fifteen or more years of coal mine employment established, she must determine whether the evidence is sufficient to establish that Claimant was regularly exposed to coal mine dust during his surface employment to determine if it is qualifying under Section 411(c)(4). 20 C.F.R. §718.305(b)(2).

Whether or not fifteen years of qualifying coal mine employment is established, the ALJ must also reconsider whether Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). She must consider all relevant evidence related to the validity of the pulmonary function studies and reassess whether the pulmonary function studies can support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Then she must reconsider the medical opinion evidence considering these findings, as well as the experts' understanding of the exertional requirements of Claimant's usual coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991). In rendering her credibility findings, the ALJ must consider the physicians' qualifications, the explanations for their diagnoses, the documentation underlying his medical judgments, and the sophistication of, and bases for, his diagnoses. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42 (4th Cir. 1997).

If Claimant establishes total disability considering the evidence in isolation at 20 C.F.R. §718.204(b)(2)(i) or (iv), the ALJ must also reweigh the evidence as a whole and determine whether Claimant has established total disability. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If the ALJ again finds Claimant established fifteen years of qualifying coal mine employment as well as total disability and thus that he invoked the presumption, she must determine if Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d). In doing

so, she must first determine if Employer has disproved both clinical and legal pneumoconiosis. If the ALJ finds Employer has disproved the existence of both clinical and legal pneumoconiosis, it has rebutted the presumption at 20 C.F.R. §718.305(d)(1)(i). However, if she again finds Employer failed to rebut the presence of pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i), she must then consider whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

On the other hand, if the ALJ finds less than fifteen years of qualifying coal mine employment established, she must determine if Claimant has established entitlement to benefits without the presumption under 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of the elements of entitlement under Part 718 precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations, findings of fact, and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion, except its holding that remand is required for the ALJ to reconsider the length and dust conditions of Claimant's coal mine employment. The majority's conclusion is based on its belief that Fourth Circuit law prohibits an ALJ from crediting a miner with a full year of coal mine employment unless he establishes a 365-day employment relationship with his employer. However, as I explained in *Baldwin*

v. Island Creek Kentucky Mining, a miner is entitled to credit for a full year of coal mine employment "for all purposes under the Act" if he establishes 125 working days in a given year. *Baldwin*, BRB No. 21-0547 BLA, slip op. at 8-13, 2023 WL 5348588, at *5-8 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting).

That conclusion is consistent with the Sixth Circuit's holding that the "plain" and "unambiguous" language of the regulatory definition of "year" "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *see also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) (125 working days equals "one year of work" under the prior definition of "year"). Contrary to my colleagues' analysis, neither the Fourth Circuit nor the Board has issued binding precedent that would preclude application of *Shepherd's* rationale to this claim. *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, slip op. at 12, 2023 WL 5348588, at *8 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting) (explaining why the Board's decision in *Clark* and the Fourth Circuit's decisions in *Mitchell* and *Armco*, all of which predate the effective date of the current regulation, do not foreclose the Sixth Circuit's *Shepherd* rationale).[21]

Relatedly, I disagree with my colleagues' assessment that the ALJ erred in finding Claimant's surface coal mining work qualifies for purposes of invoking the Section 411(c)(4) presumption. To qualify for the presumption, a miner's surface coal mine employment must have occurred in conditions "substantially similar to those in an underground mine," meaning the miner was "regularly exposed to coal mine dust while working there." 20 C.F.R. §718.305(d)(2).

The ALJ reasonably inferred that Claimant's work at an active strip mine exposed him to coal dust, given his job duties as an auger operator and an equipment operator, and his assertion on his Employment History Form that he was exposed to "dust, gases, or fumes" in all his surface coal mine work. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (a reviewing court has no license to set aside an inference "merely because it finds the opposite conclusion more reasonable") (internal citations excluded); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (the Board is not empowered to reweigh the evidence); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d

[21] The majority's interpretation of Fourth Circuit precedent also differs from the Director's understanding of the law. Although the Director has expressed his disagreement with the Sixth Circuit's holding in *Shepherd*, he nevertheless conceded in *Baldwin* that there is no binding in-circuit precedent that would preclude the Board from adopting *Shepherd's* rationale in cases arising in the Fourth Circuit.

703, 713 (6th Cir. 2002) (because some jobs have a "precise meaning in the context of coal mining" an ALJ can rely on a miner's job title to render findings regarding the demands of the job); Director's Exhibit 4. While the majority faults the ALJ for not discussing Claimant's deposition testimony about his surface coal mine employment, that evidence simply bolsters the ALJ's findings. *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"). Claimant testified that in his surface coal mine employment with Big C Coal Corporation (Big C Coal), he operated an auger, highwall drill, and dozers, and was exposed to "a lot" of dust.[22] Director's Exhibit 32 at 11. He also testified that he subsequently had the "same type of job" with Dixie Energy,[23] which he said was "the same company" as Big C Coal. *Id*. at 11-12.

Thus, I would affirm the ALJ's finding that Claimant established greater than fifteen years of qualifying coal mine employment. Otherwise, I concur in the majority's decision.

GREG J. BUZZARD
Administrative Appeals Judge

[22] He also described being exposed to coal dust while working as a truck driver for Turner Trucking, transporting coal between a strip mine and a dock. Director's Exhibit 32.

[23] This appears to be a scrivener error in transposing Claimant's testimony, as Claimant's subsequent employment was with Big C Energy Corporation. *See* Director's Exhibits 4, 13.