BRB Nos. 24-0005 BLA
and 24-0005 BLA-A

LEE A. FINLEY, SR. Claimant-Petitioner Cross-Respondent v. RECLAIMING LLC c/o CORINTHIAN CAPITAL GROUP, LLC and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND c/o WEST VIRGINIA INSURANCE COMMISSION Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/26/2025 DECISION and ORDER

Appeal and Cross-Appeal of Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Lee A. Finley, Sr., Sophia, West Virginia.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,[1] and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2022-BLA-05540) rendered on a claim filed on February 10, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 11.75 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ determined Claimant did not establish the existence of clinical or legal pneumoconiosis.[3] 20 C.F.R. §718.202(a). Consequently, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. On cross-appeal, Employer asserts the ALJ erred in calculating the length of Claimant's coal mine employment as well as in evaluating the medical opinion evidence and treatment records on the issue of the existence of pneumoconiosis. The Acting Director, Office of Workers' Compensation Programs, has not filed a response.

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[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review Administrative Law Judge (ALJ) Scott R. Morris's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) 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.

[3] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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, 361-62 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish that he worked at least fifteen years in underground coal mines or "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 Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's testimony, his Employment History Form CM-911a (Form CM911a), his Social Security Administration (SSA) earnings records, and a letter from his former employer, U.S. Steel. Decision and Order at 7. The ALJ found the uncontradicted letter from U.S. Steel established Claimant worked in coal mine employment for 2.74 years from 1969 to 1972. *Id.*; Director's Exhibit 6. For the remaining employment, the ALJ noted Claimant admitted to poor recollection regarding his coal mine employment and testified that his SSA earnings records are more reliable than his testimony or Form CM-911a. The ALJ thus permissibly determined Claimant's SSA earnings records are the "most accurate evidence regarding his employment history." *See Westmoreland Coal Co. v. Stallard*, 876 F.2d 663, 670 (4th Cir. 2017); *Hall v. Director*, 2 BLR 1-998 (1980); Hearing Transcript at 27-29; Decision and Order at 7.

Except for U.S. Steel, the ALJ found he could not determine the beginning and end dates of Claimant's coal mine employment. Decision and Order at 7. He thus applied the method of computation provided at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days the Claimant worked, dividing his yearly earnings as reported in his SSA earnings records by the coal mine industry's average daily earnings, as reported in Exhibit 610 of

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director*, *OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11.

the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id.* at 7-8. For years in which Claimant's earnings reflected 125 or more working days, the ALJ credited him with one year of coal mine employment. *Id*. For years when Claimant worked fewer than 125 days, the ALJ divided his working days by 125 to credit him with a fraction of a year. *Id*. Based on this method, the ALJ credited Claimant with 9.01 years of coal mine employment from 1963 to 1968 and from 1973 to 2005. *Id.* at 8. Adding Claimant's years of coal mine employment with U.S. Steel, the ALJ found Claimant established a total of 11.75 years of coal mine employment. *Id.* at 9.

The ALJ erred in failing to consider whether Claimant established a calendar year of coal mine employment prior to applying the regulatory formula at 20 C.F.R. §725.101(a)(32)(iii). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held 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. *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (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 revisions 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); 20 C.F.R. §725.101(a)(32)(i). 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). Proof that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not in itself establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

Nonetheless, the ALJ's error is harmless, and remand is not required on this basis; his method of calculation resulted in crediting Claimant with as many, or more, years of coal mine employment as if he had done the proper initial threshold analysis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 7-9. Consequently, we affirm the ALJ's finding that Claimant did not establish at least fifteen years of coal mine employment and, therefore, is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i).

Entitlement under 20 C.F.R. Part 718

Without the Section 411(c)(4) presumption, to establish entitlement to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the

disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements 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, 1-2 (1986) (en banc). The ALJ found Claimant did not establish the existence of clinical or legal pneumoconiosis. Decision and Order at 17, 21.

Clinical Pneumoconiosis

The ALJ considered eight readings of three x-rays dated March 5, 2021, October 27, 2021, and February 22, 2022. Decision and Order at 11-13. He observed that all the interpreting physicians are dually-qualified as B readers and Board-certified radiologists and found their interpretations entitled to equal weight on the basis of their qualifications. *Id.* at 12.

Drs. DePonte and Seaman read the March 5, 2021 x-ray as negative for clinical pneumoconiosis, while Dr. Crum read it as positive for the disease. Director's Exhibits 12, 17; Claimant's Exhibit 3. Drs. Meyer and Seaman read the October 27, 2021 x-ray as negative for clinical pneumoconiosis, while Dr. Ramakrishnan read it as positive for the disease. Employer's Exhibits 2, 4; Claimant's Exhibit 2. Because a greater number of equally qualified doctors interpreted each x-ray as negative for clinical pneumoconiosis, the ALJ found the March 5, 2021 and October 27, 2021 x-rays readings are negative for clinical pneumoconiosis. Decision and Order at 12-13.

Dr. Meyer read the February 22, 2022 x-ray as negative for clinical pneumoconiosis while Dr. Ramakrishnan read it as positive for the disease. Claimant's Exhibit 1; Employer's Exhibit 11. Because an equal number of equally qualified physicians read this x-ray as negative and positive for clinical pneumoconiosis, the ALJ found it in equipoise and thus neither positive nor negative. Decision and Order at 13.

Considering all the x-ray evidence together, the ALJ found two x-rays weigh against a finding of clinical pneumoconiosis, whereas one x-ray is in equipoise. *Id.* He thus permissibly found the preponderance of the x-ray evidence does not support a finding of clinical pneumoconiosis.[5] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2015) (ALJ performs a qualitative and quantitative assessment of the x-ray evidence

[5] As there is no biopsy evidence in the record, Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). In addition, Claimant cannot invoke the presumptions under 20 C.F.R. §§718.304 and 718.305 and therefore cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3).

when he takes into account the radiological qualifications of each reader and the number of readings by the readers); Decision and Order at 12-13.

The ALJ also considered the medical opinions of Drs. Ajjarapu, Zaldivar, and Spagnolo. Decision and Order at 14-17. He accurately observed that none of the physicians diagnosed clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 17; Director's Exhibits 12, 18, 20; Employer's Exhibits 9, 12, 13. Because there is no other evidence supportive of Claimant's burden of proof, we affirm, as supported by substantial evidence, the ALJ's finding that Claimant did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 17.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The Fourth Circuit has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 319, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

Prior to considering the medical opinion evidence, the ALJ resolved the conflicting evidence regarding Claimant's smoking history. Decision and Order at 4. As the ALJ observed, Claimant testified he smoked roughly one half of a pack of cigarettes per day from 1956 to 1978 or 1979. *Id.* (citing Hearing Transcript at 20). In response to Employer's interrogatories, he stated he smoked one pack per day for forty-eight years. Employer's Exhibit 1 at 5. He also reported to Drs. Ajjarapu and Zaldivar that he smoked one half of a pack per day for fifteen years and one pack per day for forty-six years beginning at the age of eighteen, respectively. Director's Exhibit 12 at 7; Director's Exhibit 18 at 5. Treatment records from November 10, 2017 indicate he smoked one pack per day from the age of fifteen until he quit in 2005. Employer's Exhibit 6 at 1.

The ALJ found Claimant's testimony and statements to Dr. Ajjarapu were undermined by his responses to Employer's interrogatories as well as his statements to Dr. Zaldivar and in his treatment records. Decision and Order at 4. The ALJ thus permissibly found Claimant smoked for at least forty-six pack years. *Id.*; *see Looney*, 678 F.3d at 316-17 (it is the duty of the ALJ to make findings of fact and resolve conflicts in the evidence); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985) (ALJ is responsible for

making a factual determination as to the length and extent of a miner's smoking history). Consequently, we affirm his finding. Decision and Order at 4.

The ALJ next considered the medical opinions. Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and smoking. Conversely, Dr. Zaldivar diagnosed asthma unrelated to coal mine dust exposure and Dr. Spagnolo diagnosed asthma and bronchitis unrelated to coal mine dust exposure. Decision and Order at 18-21; Director's Exhibits 12 at 7-8; 18 at 5-6; 20 at 1; Employer's Exhibits 12 at 29-32; 13 at 13-17. The ALJ gave each opinion little weight and, therefore, found the medical opinion evidence is insufficient to establish that Claimant has a respiratory impairment that was caused or aggravated, in part, by his history of coal mine dust exposure. Decision and Order at 20. The ALJ's finding is supported by substantial evidence.

Dr. Ajjarapu performed the Department of Labor-sponsored complete pulmonary evaluation on March 5, 2021 and diagnosed chronic bronchitis based on Claimant's symptoms. Director's Exhibits 12 at 7-8; 20 at 1. In her initial report, she stated Claimant has a smoking history of "7.5 pack years" and fifteen years of coal mine dust exposure. Director's Exhibit 12 at 8. In a supplemental report, she again stated Claimant has a smoking history of "7.5 pack years" but now indicated he had only 8.68 years of coal mine employment. Director's Exhibit 20 at 1. She stated Claimant's coal mine employment history is longer than his smoking history and noted he has no history of coronary artery disease or congestive heart failure. She thus reaffirmed her diagnosis of legal pneumoconiosis, opining coal mine dust exposure is the "predominant etiology" for Claimant's pulmonary impairment and that "smoking played a secondary role." *Id.*

The ALJ permissibly discredited Dr. Ajjarapu's opinion because she considered a smoking history of only 7.5 pack years, whereas the ALJ found Claimant has a significantly longer smoking history of at least forty-six years.[6] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ may reject medical opinions that rely on an inaccurate smoking history). Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by

[6] Because we affirm the ALJ's discrediting of Dr. Ajjarapu's opinion, the only opinion supportive of Claimant's burden to establish legal pneumoconiosis, we need not address his consideration of Drs. Spagnolo's and Zaldivar's opinions. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

substantial evidence, we affirm the ALJ's finding that Claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Akers*, 131 F.3d at 441; Decision and Order at 20-21. Because Claimant did not establish pneumoconiosis, an essential element of entitlement, we affirm the ALJ's denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[7] Because we affirm the ALJ's finding that Claimant failed to prove legal pneumoconiosis, we need not address Employer's arguments on cross-appeal that the ALJ erred in evaluating its experts' opinions. Employer's Response Brief at 18-40.

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

For the reasons I set forth in *Baldwin v. Island Creek Kentucky Mining*, I concur in the majority decision except its conclusion that an ALJ cannot credit a coal miner with a full year of employment unless he establishes employment relationships with each of his employers lasting at least 365 days. *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) (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). However, as the majority holds, the ALJ's error in this case was harmless. I thus concur in the remainder of the decision.

GREG J. BUZZARD
Administrative Appeals Judge