U.S. Department of Labor

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

BRB No. 25-0121 BLA

ROBERT P. FULLER Claimant-Respondent v. CLAS COAL COMPANY, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/30/2026 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Order on Employer's Request for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer.

Kevin A. Shanahan (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for

Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, JONES and ULMER, Administrative Appeals Judges.
PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits and Order on Employer's Request for Reconsideration (2021-BLA-05526) rendered on a claim filed on November 7, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act).

The ALJ found Employer is the properly designated responsible operator[1] and accepted the parties' stipulation that Claimant has twenty-nine years of underground coal mine employment. He determined Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer challenges the ALJ's finding that it is the responsible operator. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the ALJ correctly found Employer is the

[1] In his Decision and Order, the ALJ divided Claimant's reported earnings from Employer in 2019, based on his W2 forms, by the average daily wage in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to determine the number of days he worked for Employer in 2019. Decision and Order at 11. The ALJ found this number exceeds 125 working days; thus, he credited Claimant with a full year of employment with Employer and found Employer is the responsible operator. *Id.* Employer requested the ALJ reconsider Claimant's testimony, arguing the evidence establishes the beginning and end dates of Claimant's employment and the number of days he worked for Employer and therefore the ALJ erred in applying Exhibit 610. Employer's Request for Reconsideration at 1-4. However, the ALJ rejected Employer's contentions and found the application of Exhibit 610 is appropriate based on the United States Court of Appeals for the Sixth Circuit's decision in *Shepherd v. Incoal Inc.*, 915 F.3d 392 (6th Cir. 2019). Order on Reconsideration at 3, 5. Thus, the ALJ denied Employer's request for reconsideration and again determined Employer is the properly designated responsible operator. *Id.* at 6.

responsible operator. Employer replies, urging that the Director's interpretation of the applicable regulations be rejected.[2]

The Benefits Review 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.[3] 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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[4] 20 C.F.R. §§725.494(c), 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 responsible 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 potentially liable operator that is financially capable of

[2] We affirm, as unchallenged on appeal, that Claimant established at least twenty-nine years of qualifying coal mine employment and the existence of complicated pneumoconiosis arising out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.203(b), 718.304; Decision and Order at 3, 9-10.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 42-43.

[4] 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).

assuming liability more recently employed Claimant for at least one year. 20 C.F.R. §725.495(c).

Employer asserts it is not the responsible operator because it did not employ Claimant for at least one year.[5] Employer's Brief at 4-9. Specifically, it contends the ALJ erred in applying Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*[6] without first analyzing evidence concerning the "readily ascertainable" beginning and ending dates of Claimant's work with Employer.[7] Employer's Brief at 5-7. It also argues the ALJ erred in finding 125 days establishes one year of employment, as that portion 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), is non-binding dicta. Employer's Reply Brief at 1-2. Further, it contends *Shepherd* is contrary to the Department of Labor (DOL)'s interpretation of its own regulation and to the equal protection clause.[8] *Id.* at 2-4.

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[5] Employer does not contend it is financially incapable of assuming liability. 20 C.F.R. §725.495(c)(1).

[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[7] As the Director notes, Employer's reliance on *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016), for the proposition that the Board has a "preference for the use of direct evidence to compute the length of coal mine employment," is misplaced. Director's Brief at 2-3; Employer's Brief at 4. As explained below, the ALJ found he could not rely on the direct evidence to determine the length of Claimant's coal mine employment and instead used the formula provided at 20 C.F.R. §725.101(a)(32)(iii) to make the calculation. Order on Reconsideration at 4-5. In addition, the preference for direct evidence is not applicable to the length of coal mine employment calculation at 20 C.F.R. §725.101(a)(32)(iii) and therefore does not circumvent the regulation's authorization to use this method when a miner is employed by a mining company for less than a calendar year. *See Shepherd*, 915 F.3d at 402.

[8] In making its equal protection assertion, Employer cites to cases dealing with the Equal Protection Clause of the Fourteenth Amendment, which applies to the states and not the federal government. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); *see* Employer's Reply Brief at 3. However, the United States Supreme Court has held the federal

The Director argues that *Shepherd* is controlling law in this case and the Board should affirm the ALJ's determination that Claimant's employment with Employer encompasses more than 125 working days thereby establishes one year of coal mine employment. Director's Response at 2-3. We agree with the Director's argument.

Contrary to Employer's contention, in determining the length of Claimant's coal mine employment with Employer, the ALJ considered all relevant evidence, including his application for benefits, pay stubs, W-2 forms, affidavits, and deposition and hearing testimony. Decision and Order at 11; Order on Reconsideration at 2-5; Director's Exhibits 4, 10, 11, 14, 15, 74, 75. On his Employment History Form CM-911a, Claimant indicated he worked for Employer from April 2019 to September 2019. Director's Exhibit 3. In his October 5, 2020 affidavit, Claimant testified that he worked for Employer, "[t]o the best of [his] knowledge," for more than 125 days and that he "believe[d]" he started working for Employer "around" March 15, 2019, and worked through September 7, 2019. Director's Exhibit 15. Additionally, his pay stubs cover pay periods from March 2019 through September 2019, and he testified he worked for Employer for more than 125 days, from the middle of March 2019 through September 7, 2019. Director's Exhibits 11 at 1-5; 74 at 8-9; 75 at 16, 21-22; Hearing Tr. at 25-34.

Relying on this evidence, the ALJ permissibly determined that although Claimant's end date with Employer is "credibly known," because he was injured on September 7, 2019, and could no longer work after that date, the evidence does not clearly show his beginning date with Employer.[9] *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Order on Reconsideration at 5. Moreover, as the ALJ accurately states, the Sixth Circuit's decision in *Shepherd* explains that the formula at 20 C.F.R. §725.101(a)(32)(iii) can be applied "if the beginning and ending dates of the miner's

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government to the same standard under the Due Process Clause of the Fifth Amendment. *See S.F. Arts & Athletics*, 483 U.S. at 542 n.21; *Bolling*, 347 U.S. at 498-99.

[9] Employer contends that the record shows that Claimant began working for it at the earliest on March 16, 2019, the beginning date of the pay period for his first check, or that the beginning date for Claimant's employment can be narrowed down to a one-week period. Employer's Brief at 5. The ALJ observed that Claimant's pay stub for the March 16-31, 2019 pay period shows forty-eight hours of regular work and thirteen hours of overtime. Order on Reconsideration at 5; *see* Director's Exhibit 11 at 2. He noted that this is approximately half the number of hours worked in subsequent pay periods. Order on Reconsideration at 5. Given Claimant's testimony that he often worked more than eight-hour days, the ALJ determined "it is clearly not a full two-week period" but found no evidence shows "a clear beginning date." *Id.*; *see* Hearing Tr. at 36.

employment cannot be determined *or – even if such dates are ascertainable* – if the miner was employed by the mining company for 'less than a calendar year.'" Order on Reconsideration at 5 (quoting *Shepherd*, 915 F.3d at 402) (emphasis added). Thus, regardless of whether the beginning date of Claimant's employment with Employer is ascertainable, the ALJ permissibly relied on Exhibit 610 to determine Claimant's length of coal mine employment with Employer by dividing his yearly income in 2019[10] by the average daily earnings of an employee in the coal mining industry. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 11; Order on Reconsideration at 5. As that calculation is greater than 125 working days, the ALJ permissibly credited Claimant with a year of coal mine employment with Employer. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 11; Order on Reconsideration at 5; *see Shepherd*, 915 F.3d at 402; *see also Baldwin v. Director, OWCP*, F.4th , No. 23-1947, 2026 WL 772356, at *12 (4th Cir. Mar. 19, 2026); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Further, contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, that 125 days may constitute a year of coal mine employment even if the miner did not establish a full calendar year employment relationship, is not dicta. Employer's Reply Brief at 1-4. The court expressly instructed the ALJ in *Shepherd* to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating a miner's length of coal mine employment. 915 F.3d at 407. Thus, regardless of Employer's disagreement with the court's interpretation of the regulation, the ALJ was bound by the Sixth Circuit's holding.[11]

[10] Employer states that Claimant testified that he earned a significant amount of overtime when working for Employer, "which means the amount of his total earnings compared to Exhibit 610 would inflate the number of working days." Employer's Brief at 6. However, Employer does not specifically argue that the ALJ erred in using $38,717.50 as Claimant's total earnings with it when applying the formula at 20 C.F.R. §725.101(a)(32)(iii) to find Claimant had 144.60 working days with Employer. Decision and Order at 11; Order on Reconsideration at 4. Thus, we affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[11] As we have affirmed that the ALJ's determination concerning Claimant's length of coal mine employment with Employer is in compliance with the Sixth Circuit's holding, we also reject Employer's contentions that *Shepherd* is contrary to the DOL's interpretation of its own regulation and the guarantee of equal protection under the Due Process Clause of the Fifth Amendment. *See* Employer's Reply Brief at 1-4. In addition, we reject Employer's assertion that the Director implicitly conceded the ALJ's application of Exhibit 610 is inappropriate and should not be permitted to take a different position on appeal. Employer's Brief at 6-7. Employer does not explain why the Director's statement before

We therefore affirm the ALJ's finding that Employer is the responsible operator, as it most recently employed Claimant for one year. Decision and Order at 11; Order on Reconsideration at 5-6.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge

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the ALJ that the beginning and end dates are ascertainable forecloses him from arguing on appeal that the ALJ permissibly applied an alternative methodology for calculating the length of Claimant's coal mine employment. *See* Director's Brief at 3; Director's Response in Opposition to Request for Reconsideration. Further, because we have affirmed the ALJ's application of the formula in 20 C.F.R. §725.101(a)(32)(iii), Employer has not explained how the ALJ's interpretation of a "working day" when discussing Claimant's work shifts could alter his finding that Claimant worked for Employer for at least 125 working days. Employer's Brief at 7-9; *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"); Order on Reconsideration at 4.