

No. 12-4357

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IDA CARBON CORPORATION,

Petitioner

v.

AVERY MURPHY

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,**

Respondents

**On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH

Solicitor of Labor

RAE ELLEN FRANK JAMES

Associate Solicitor

SEAN G. BAJKOWSKI

Counsel for Appellate Litigation

RITA A. ROPPOLO

Attorney

U. S. Department of Labor

Office of the Solicitor

Suite N2117, 200 Constitution Ave. NW

Washington, D.C. 20210

(202) 693-5664

Attorneys for the Director, OWCP

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STATEMENT REGARDING ORAL ARGUMENT

The Director agrees with Ida Carbon that oral argument is unnecessary in this case.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION

This case involves a claim filed by Avery Murphy for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944. On February 22, 2011, Administrative Law Judge Pamela J. Lakes (the ALJ) awarded benefits to Murphy and ordered Ida Carbon Corporation (Ida Carbon or the company), Murphy's

former coal mine employer, to pay them. Appendix, p. (A.) 18. Ida Carbon appealed this decision to the Benefits Review Board on March 16, 2011. The Board had jurisdiction over this appeal because section 21(a) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party thirty days to appeal an ALJ's decision to the Board.

The Board affirmed the ALJ's decision on March 12, 2012, A.7, and Ida Carbon sought reconsideration of that decision on April 9, 2012, within the thirty-day period prescribed by 20 C.F.R. § 802.407(a). The Board denied reconsideration on September 24, 2012. A.4. Ida Carbon then petitioned this Court for review on November 15, 2012, within the sixty-day period prescribed by 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). A.1; *see also* 20 C.F.R. § 802.406 (timely motion for reconsideration tolls the sixty-day appeal period). The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The relevant injury – the miner's occupational exposure to coal mine dust – occurred in Kentucky.

STATEMENT OF THE ISSUE

A coal mine operator designated as liable for a disabled miner's BLBA benefits can escape liability by proving that it is not the operator that most recently employed the miner for at least one year. After working for Ida Carbon, Murphy was employed by two road-construction companies, each for more than one year. During his work with those companies, he occasionally mined coal from seams encountered during the road-construction process. The ALJ and Board found that Ida Carbon had failed to prove that Murphy spent at least a year mining coal with either subsequent employer.

The question presented is whether the ALJ and Board correctly found that Ida Carbon is liable for Murphy's BLBA benefits.

STATEMENT OF THE CASE

Murphy filed this claim for BLBA benefits in April 2008. Director's Exhibit No. (DX) 2. The ALJ found that he was entitled to benefits, payable by Ida Carbon. A.18-49. Ida Carbon appealed to the Benefits Review Board, which affirmed the award and denied the company's subsequent request for reconsideration. A.7-17.

STATEMENT OF THE FACTS

A. Legal Background

The Black Lung Benefits Act provides disability and medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as “black lung disease.” *See* 30 U.S.C. § 901(a). Ida Carbon no longer disputes the ALJ’s finding that Murphy suffers from “complicated” pneumoconiosis – a particularly severe form of the disease – and is therefore entitled to benefits. *See* 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-25 (1976). The only dispute is whether it is liable to pay those benefits.

Under the BLBA, coal mine operators are responsible for the payment of benefits to miners who worked after December 31, 1969. 30 U.S.C. § 932(c).¹ An employer is a “potentially liable operator” if, *inter alia*, “the miner was employed by the operator . . . for a cumulative period of not less than one year[.]” 20 C.F.R. § 725.494(c).² A “year” is defined as “a period of one calendar year (365 days, or

¹ Claims by miners who worked only before that date are generally paid by the federally-administered Black Lung Disability Trust Fund. *See* 26 U.S.C. § 9501(d)(2).

² The other conditions necessary to trigger an employer’s potential BLBA liability – that the miner’s disability arose out at least in part out of employment with it; that it operated a coal mine after June 30, 1973; that it employed the miner after December 31, 1969; and that it is financially capable of assuming liability for the claim – are not relevant to this case. *See* 20 C.F.R. § 725.494.

366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days.” 20 C.F.R. § 725.101(a)(32). Where more than one employer qualifies as a potentially liable operator, the one that most recently employed the miner is responsible for paying benefits. 20 C.F.R. § 725.495(a)(1).

Claims for federal black lung benefits begin with proceedings before a district director, a Department of Labor official who is “authorized to develop and adjudicate claims.” 20 C.F.R. § 725.101(a)(16); *see also* 20 C.F.R. § 725.401. After developing and evaluating the evidence, the district director issues a “proposed decision and order.” 20 C.F.R. §§ 725.404-.418. In addition to expressing the district director’s view on whether the claimant is entitled to BLBA benefits, “[t]he proposed decision and order shall reflect the district director’s final designation of the responsible operator liable for the payment of benefits.” 20 C.F.R. § 725.418(d).

Any party dissatisfied with a district director’s proposed decision may request a *de novo* hearing before an administrative law judge. 20 C.F.R. §§ 725.419(a), 725.455(a). At the hearing, the Director bears the burden of proving that the operator designated by the district director as liable for the claim is a “potentially liable operator” as defined by 20 C.F.R. § 725.494. 20 C.F.R. § 725.495(b). If the designated operator seeks to escape liability by proving that the

miner was subsequently employed by another potentially liable operator, that burden of proof is reversed. 20 C.F.R. § 725.495(c) (“The designated responsible operator shall bear the burden of proving . . . [t]hat it is not the potentially liable operator that most recently employed the miner.”).

Once the claim is referred to an ALJ, no operator other than the designated operator may be ultimately held liable for benefits. If the designated operator successfully proves that the miner was subsequently employed by another potentially liable operator for at least one year, no new responsible operator may be named and benefits (if any) are paid by the federally-administered Black Lung Disability Trust Fund. 20 C.F.R. § 725.418(d).

B. Factual Background

Murphy worked for petitioner Ida Carbon, a strip-mining operation, from 1982-1986. A.11, 38; Hearing Transcript (HT) 27-28; DX 3 at 1; DX 7 at 2. Thereafter he worked as a bulldozer operator for two road-construction companies, Bizzack Construction Company (from 1988-2000) and Elmo Greer & Sons (from 2001-2002). A.22; HT 29-31, 34; DX 3 at 1; DX 7 at 3-5.³

Murphy testified that, while working for the road-construction companies, he occasionally would hit a coal seam. DX 19 at 10-11, 33; HT at 13, 29-30, 34.

³ Murphy also performed some mine-construction and strip-mining work before his employment with Ida Carbon. *See* A.4-5 (ALJ’s summary of Murphy’s previous employment).

He explained that this coal was sometimes extracted for sale and at other times merely removed along with other overburden and dumped as waste.⁴ DX.19 at 10-11; HT. at 29-30, 49. He was unable to state how often coal was extracted for sale, or what percentage of his time with the road-construction companies involved the extraction of coal, either generally or for sale. DX 19 at 11; HT. at 30.

C. Proceedings Below

1. *Proceedings before the district director*

After Murphy filed a claim for BLBA benefits in 2008, the district director notified Ida Carbon and Elmo Greer of their potential liability. DX 2, 22, 23. After reviewing the available evidence, the district director designated Ida Carbon as the operator responsible for those benefits. A.51, 56. In considering the liability issue, the district director acknowledged Murphy's subsequent employment with Bizzack and Elmo Greer, but concluded that Murphy's work for those road-construction companies was not coal mine employment.⁵ A.56. The

⁴ An operation that removes and discards coal for a purpose unrelated to coal extraction or processing is not a "coal mine" for purposes of the BLBA. *See Wisor v. Director, OWCP*, 748 F.2d 176, 179 (3d Cir. 1984) (holding that clay mine is not a "coal mine" for purposes of the BLBA; while workers were required to remove coal in order to extract clay, the coal was discarded as a by-product). Bizzack and Elmo Greer's road-construction projects were "coal mines" for BLBA purposes to the extent that they extracted coal for sale.

⁵ This conclusion was incorrect. As the Director acknowledged before the ALJ and the Board, and as both tribunals held, Murphy was engaged in coal-mine employment with Bizzack and Elmo Greer on those occasions when he extracted

district director also concluded that Murphy suffered from complicated pneumoconiosis and was therefore entitled to benefits. A.54-56.

2. *The ALJ's Decision and Order Granting Benefits (February 22, 2011)*

Contesting the district director's determination that it was the liable operator, Ida Carbon requested a formal hearing, which was held before the ALJ in July 2009.⁶ The ALJ found that Murphy "worked irregularly as a coal miner for both Bizzack and Elmo Greer, which occasionally engaged in the extraction of coal for sale." A.36. But she found that Murphy's testimony was too vague to establish "one year of qualifying coal mine employment" with either company. *Id.* Consequently, the ALJ determined that Ida Carbon was the responsible operator because no later employer had employed Murphy as a coal miner for the requisite year. A.36.

The ALJ also found that Murphy suffered from complicated pneumoconiosis, A.38-47, and had timely filed his claim, A.48. She accordingly awarded benefits, payable by Ida Carbon. A.31.

coal for sale. A.14, 32. This error was harmless in light of the ALJ's finding that Ida Carbon failed to prove that Murphy engaged in coal mine employment for at least one year with either company. A.36-37.

⁶ Murphy died in December of that year. *See* Pet. br. 1 n.1.

3. *The Board's Decision and Order affirming the award (March 12, 2012)*

Ida Carbon appealed the ALJ's decision to the Board, which affirmed. A.7-17. Before the Board, Ida Carbon "[did] not contest its designation as a 'potential responsible operator[]'" as defined by 20 C.F.R. § 725.494. A.11. Instead, it argued "that it was not the potential responsible operator that 'most recently employed the miner'" for at least one year, and that either Bizzack or Elmo Greer should have been found liable. A.11. The Board explained that, as the designated responsible operator, Ida Carbon bore the burden of proof on the issue. A.13 (citing 20 C.F.R. § 725.495(c)(2)).

The Board held that Ida Carbon had not satisfied this burden merely by proving that (1) Murphy worked for Bizzack and Elmo Greer for more than one calendar year and (2) during his employment with those road-construction companies, he occasionally extracted or prepared coal. A.13-14. Agreeing with the Director, the Board explained that Murphy "was working as a miner only during the time when he was engaged in the extraction or preparation of coal with Bizzack and Elmo Greer." A.14 (citing 20 C.F.R. § 725.101(a)(19) (defining "miner")). Because the ALJ reasonably found that the evidence did not establish that Murphy "was engaged in one year of coal mine employment with either Bizzack or Elmo Greer[,]" the Board agreed that Ida Carbon had failed to bear its burden of proof on the issue. *Id.*

Ida Carbon also argued that it had been injured by the district director's failure to notify Bizzack of the claim, as allegedly required by 20 C.F.R. § 725.407(b), and that liability should therefore be shifted to the Black Lung Disability Trust Fund. A.12-13. The Board declined to address the issue because Ida Carbon had not raised it before the ALJ. A.13. The Board noted, however, that Ida Carbon was aware of Murphy's work with Bizzack while the case was before the district director; that the district director did not prevent Ida Carbon from developing evidence on the issue; that Ida Carbon had asked Murphy questions about his work with Bizzack during a deposition while the case was before the district director; and that Ida Carbon never asked the district director to notify Bizzack or otherwise indicated to the district director that Bizzack should be held liable for the claim. A.13 n.6.

The Board also affirmed the ALJ's findings that the claim was timely and that Murphy suffered from complicated pneumoconiosis. A.9-10, 14-16. It therefore affirmed the award. A.16. Ida Carbon requested reconsideration, which the Board denied. A.3. This appeal followed. A.1.

SUMMARY OF THE ARGUMENT

Ida Carbon failed to prove that Murphy was employed as a coal miner by either Bizzack or Elmo Greer for at least one year. Contrary to Ida Carbon's suggestion, only Murphy's intermittent periods of work as a coal miner for those

road-construction companies count toward 20 C.F.R. § 725.494(c)'s one-year requirement. Petitioner does not challenge the ALJ's finding that the evidence of record fails to establish that Murphy's discrete periods of coal-mining work with either subsequent employer total a year or more. The decisions below should therefore be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

Ida Carbon challenges the legal sufficiency of the decisions below. This Court's review of the Board's legal conclusions is plenary. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998) (citation omitted). The Director's interpretation of the BLBA and its implementing regulations is, however, entitled to deference. This Court will "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 485 (6th Cir. 2012) (quoting *Chase Bank U.S.A., N.A. v. McCoy*, -- U.S. --, 131 S.Ct. 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

ARGUMENT

Ida Carbon does not deny that it is a "potentially liable operator." A.11. It is therefore liable for Murphy's BLBA benefits unless it proves that either Bizzack or Elmo Greer is a "potentially liable operator" that employed Murphy for at least

one year. 20 C.F.R. §§ 725.494(c), .495(c). There is no dispute that Ida Carbon failed to establish that Murphy's discrete periods of coal-mining work for Bizzack and Elmo Greer add up to a year or more. Ida Carbon argues that this fact is irrelevant. In Ida Carbon's view, all it needed to prove was that Murphy's coal mine work, *together with* his road-construction work for those later employers, resulted in more than a year of employment with each company. Pet br.18-21. This is incorrect. As the Board held, Ida Carbon must prove that Murphy worked as a coal miner for at least one year to escape liability for this claim.

For either road-construction employer to be a potentially liable operator, it must satisfy Section 725.494(c)'s requirement that “[*t*]he miner was employed by the operator . . . for a cumulative period of not less than one year (§725.101(a)(32)).” 20 C.F.R. § 725.494(c) (emphasis added). While the regulation does not specify that the employment must be coal-mine-related, that requirement is embedded in the regulatory definition of “miner”:

Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19).

Bizzack and Elmo Greer only employed Murphy as a “miner” during those times when they employed him to extract coal for sale. During the remainder of his employment, he was a road-construction worker. In the absence of proof that Murphy’s employment *as a miner* lasted one year, Ida Carbon has failed to prove that either subsequent employer is a potentially liable operator.

Ida Carbon’s argument that the regulatory definition of a “year” supports its view has only superficial appeal. A “year” is defined as “a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days.” 20 C.F.R. § 725.101(a)(32). The definition thus has two prongs: (1) a calendar year (or 365 days) of employment and (2) 125 working days in or around a coal mine.⁷ Ida Carbon reasons that, since a miner only has to work “in or around a coal mine” for 125 working days to satisfy the second prong of this definition, the first prong cannot require a calendar year (or 365 total days) of employment as a coal miner. Pet br. 16-21. But this conclusion simply does not follow.

The purpose of the “125 working days in or around a coal mine” prong of the regulatory definition of a “year” is not to distinguish coal-mine employment

⁷ If the first prong is established, the second is rebuttably presumed. 20 C.F.R. § 725.101(a)(32)(ii). While Ida Carbon makes much of this presumption, *see* Pet. br. 21-23, it plays no role in this case because the company has failed to establish the first prong.

from other employment. It is to determine whether a claimant *who is employed as a miner* but was not actively working at a mine for much of a given year should be credited with a year of coal-mining work.⁸ This is clear from the regulatory text, which defines “working day” to include “any day or part of a day for which a miner received pay *for work as a miner*, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave.” 20 C.F.R. § 725.101(a)(32) (emphasis added). The 125-day requirement does not render the basic “one year of employment *as a miner*” requirement redundant, it merely qualifies that basic rule.⁹

The Director’s understanding that Section 725.101(a)(32)’s calendar-year-of-employment requirement is limited to coal mine employment is reinforced by the preamble to that regulation. *See* 65 Fed.Reg. 79959 (Dec, 20, 2000) (“The Director initially proposed a uniform definition of ‘year’ (§ 725.101(a)(32)) for computing the length of *coal mine employment*.”) (emphasis added), (“The

⁸ The definition of a “year” is not only relevant to which operator is liable for benefits, but also to whether a claimant qualifies for certain statutory presumptions based on years of employment as a coal miner. *See, e.g.*, 30 U.S.C. § 921(c)(1).

⁹ Before the current regulation was adopted in 2000, the question of whether vacation time, disability leave, and work missed due to labor disputes counted towards a year of coal-mining employment resulted in substantial litigation. *See, e.g. Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 562 (6th Cir. 2002); *Armco, Inc. v. Martin*, 277 F.3d 468, 475 (4th Cir. 2002). The revised definition of “year” in the current regulation was intended to clarify these issues, not to change the long-understood requirement of one year of employment as a coal miner.

Department proposed that, to the extent the evidence permitted, the beginning and ending dates of all periods of *coal mine employment* be ascertained.”) (emphasis added); *id.* at 79960 (“The Department believes the partial periods must be aggregated until they amount to one year of *coal mine employment* comprising a 365-day period.”) (emphasis added).¹⁰

The Director’s reading is further supported by section 725.101(a)(32)’s subsections providing instructions for determining if the one-year requirement is met in various circumstances, which specifically refer to “coal mine employment.” *See* 20 C.F.R. § 725.101(a)(32) (ii) (“To the extent the evidence permits, the beginning and ending dates of all periods of *coal mine employment* shall be ascertained[.]” (emphasis added); 20 C.F.R. § 725.102(a)(32)(iii) (“If the evidence is insufficient to establish the beginning and ending dates of the miner’s *coal mine employment*, or the miner’s employment lasted less than a calendar year, then the

¹⁰ *Ida Carbon* argues that *Armco, Inc.; Director, OWCP v. Gardner*, 882 F.2d 67 (3d Cir. 1989); and *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996), support its view that *any* employer-employee relationship of the requisite duration satisfies the “calendar year of employment” prong of the “year of employment” test. Pet. br. 18. But all of these cases involved employment as a coal miner with traditional coal-mine operators. *Armco*, 277 F.3d at 471-72; *Gardner*, 882 F.2d at 68-69; *Northern Coal*, 100 F.3d at 872. They therefore provide no support for *Ida Carbon*’s position here.

adjudication officer may use the following formula [which considers] the miner's yearly income from *work as a miner*[.]” (emphasis added).

In sum, the Director's construction of Section 725.101(a)(32) is consistent with the text, preamble, and history of that regulation. At the very least, it is a reasonable interpretation of the regulation, falling well within the bounds of *Auer* deference. *See Cumberland River Coal Co.*, 690 F.3d at 485. This Court should join the ALJ and Board in adopting it. To establish that either Bizzack or Elmo Greer was a potentially responsible operator, Ida Carbon was required to show that one of those companies employed Murphy as a coal miner for periods totaling a calendar year. Ida Carbon's failure to do so means that it is liable for this claim.

Ida Carbon also argues, as it did before the Board, that liability should transfer to the Black Lung Disability Trust Fund because the district director did not notify Bizzack of this claim. Pet br. 15-16. As the Board properly held, Ida Carbon waived this argument by not raising it before the ALJ. A.12-13. This Court should do the same. *See Sigmon Fuel Co. v. Tennessee Valley Authority*, 754 F.2d 162, 164-65 (6th Cir. 1985). In any event, as the Board also pointed out, Ida Carbon suffered no prejudice as a result of the district director's failure to notify Bizzack. *See supra* at 9-10. The argument is simply meritless.

CONCLUSION

Ida Carbon's petition for review should be denied.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
Frances Perkins Building
200 Constitution Ave., N.W.
Washington, D.C. 20210
Telephone: (202) 693-5664
Facsimile: (202) 693-5687
E-mail: blls-sol@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 3,932 words, as counted by Microsoft Office Word 2010.

/s/Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2013, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

Ronald E. Gilbertson, Esq.
Husch Blackwell LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006
ronald.gilbertson@huschblackwell.com

Ryan Christopher Gilligan, Esq.
Wolfe Williams Rutherford && Reynolds
470 Park Avenue
P.O. Box 625
Norton, VA 24273
rgilligan@wwrlawfirm.com

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor