U.S. Department of Labor

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

BRB No. 22-0506 BLA

HARVEY D. DOBBINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 12/26/2023
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, 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, BUZZARD and JONES, Administrative Appeals Judges.

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

Claimant appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits on Modification (2021-BLA-05427) rendered on a request for

modification of a denied claim[1] filed on June 28, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 13.58 years of coal mine employment and thus found he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. She further found he did not establish a totally disabling pulmonary or respiratory impairment, an essential element of entitlement under 20 C.F.R. Part 718, and denied benefits.

On appeal, Claimant argues the ALJ erred in calculating the length of his coal mine employment and in finding he is not totally disabled, and thus erred in finding he did not invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director),[3] concedes remand is necessary with respect to those issues.

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[1] This case involves a request for modification of a district director's denial of benefits. Director's Exhibits 25, 28, 30, 32, 35. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[2] 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).

[3] The district director explained in the Schedule for the Submission of Additional Evidence his determination that the Federal Black Lung Disability Trust Fund (the Trust Fund) is liable for this claim. Director's Exhibit 23 at 8-9. The district director determined that Claimant worked for Burgess Mining & Construction Co. (Burgess Mining) from 1964 to 1969 and from 1971 to 1977, and that the Department of Labor's records indicate Burgess Mining was insured through First Southern Insurance Company (First Southern) in 1981. *Id.* Further, as First Southern filed for bankruptcy in 1992, the district director notified the Kentucky Insurance Guaranty Association (KIGA) of its potential liability. *Id.* at 9. However, KIGA informed the district director that the deadline for claims against First Southern was May 31, 1993. Director's Exhibits 20, 23 at 9. Thus the district director concluded that, because the claim was not timely filed with KIGA, liability rests with the Trust Fund. Director's Exhibit 23 at 9.

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.[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 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of 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). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See 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. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ evaluated Claimant's employment with Burgess Mining and Tuscaloosa County. Decision and Order at 6-11.

Burgess Mining

Although Claimant listed having worked for Burgess Mining on his CM-911(a) employment history form, the ALJ found he did not provide sufficient information to determine the beginning and ending days of that employment. Decision and Order at 8. She also acknowledged his hearing testimony that a co-worker told him he worked for seventeen years for Burgess Mining, but she found this testimony constitutes hearsay and thus is not credible. *Id*.

The ALJ then credited Claimant's Social Security Administration (SSA) earnings records with respect to Burgess Mining. Decision and Order at 8. She found the SSA records "demonstrate largely uninterrupted coal mine employment from 1964 through 1977," and thus found Claimant established a calendar year relationship with Burgess Mining for those years. *Id*. at 8-10. She then applied the formula at 20 C.F.R.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

§725.101(a)(32)(iii) to calculate the number of working days in each year by dividing Claimant's yearly earnings as reported in his SSA records 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*. *Id*. If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id*. If Claimant had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id*. Based on this method, the ALJ concluded Claimant has 13.58 years of coal mine employment with Burgess Mining. *Id.* at 9-10.

Claimant first argues the ALJ should have applied the holding of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-03 (6th Cir. 2019) when calculating his coal mine employment with Burgess Mining. Claimant's Brief at 4-8. The Director asserts the Board should decline to apply *Shepherd* in cases outside the Sixth Circuit. Director's Brief at 3-4. We agree with the Director's argument.

As this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, we decline to hold the ALJ should have applied the regulatory interpretation set forth in *Shepherd*, as it is not binding precedent. In cases arising out of the Eleventh Circuit, the regulation defining a year requires the ALJ to first determine whether Claimant engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32); *see Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003) (pre-2000 regulation required ALJ to determine whether the miner worked for an operator for one calendar year and then determine whether the miner worked for 125 days during the one-year period); *Mims v. Drummond Co., Inc*., BRB No. 21-0314 BLA, slip op. at 3-6 (Sept. 24, 2023) (unpub.) (ALJ erred in applying regulatory interpretation of *Shepherd* in case arising out of Eleventh Circuit); *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA, slip op. at 5-7 (May 20, 2021) (unpub.) (same). If the threshold one-calendar year period is met, the ALJ must then determine whether Claimant worked for at least 125 working days within that period in order to be credited with a year of coal mine employment.[5] *Id*.

[5] Although our colleague would apply *Shepherd's* rationale in all circuits, this case arises in the Eleventh 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 cases arising outside of the Sixth Circuit, the Board has interpreted applicable case law as supporting the position that 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*

Nevertheless, we note the ALJ found Claimant established a calendar year relationship with Burgess for each year from 1964 to 1977. Decision and Order at 8-10. Thus Claimant met the threshold requirement to establish he engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year, and the ALJ then properly evaluated whether Claimant worked for at least 125 working days within a year in order to be credited with a year of coal mine employment. *Id*.; *see Clark*, 22 BLR at 1-280. Thus Claimant has not set forth how the error he alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Next, Claimant contends, and the Director concedes, that the ALJ erred in calculating Claimant's coal mine employment from 1969 to 1971. Claimant's Brief at 7; Director's Reply at 4. We agree.

Based on the yearly earnings listed in Claimant's SSA records, the ALJ credited Claimant with 0.85 years of coal mine employment in 1969, no coal mine employment in 1970, and 0.2 years of coal mine employment in 1971. Decision and Order at 9-10. But in rendering her calculations, she failed to account for the wages Claimant earned with Clyde O. Mitchell Construction Co. (Clyde O. Mitchell) in those years. Director's Exhibit 8. As the Director notes, this employment should have been considered because Claimant listed it as coal mine employment on his employment history forms, and his SSA records indicate a relationship between Clyde O. Mitchell and Burgess Mining. Director's Reply Brief at 4; Director's Exhibits 4, 8 at 2. Further, the Director asserts the additional employment may be material to bringing the total length of Claimant's coal mine employment to the fifteen years needed to invoke the Section 411(c)(4) presumption. Director's Reply at 4. As the ALJ failed to consider relevant evidence, we vacate her length of coal mine employment calculation[6] with respect to Burgess Mining and remand the case

Daniels Co. v. Mitchell, 479 F.3d 321, 334-36 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *see also Mims v. Drummond Co., Inc.*, BRB No. 21-0314 BLA, slip op. at 3-6 (Sept. 24, 2023); *Salaz v. Powderhorn Coal Co.*, BRB Nos. 21-0406 BLA and 21-0406 BLA-A (Oct. 31, 2022) (unpub.); *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA (May 20, 2021) (unpub.); *Lusk v. Jude Energy, Inc.*, BRB No. 19-0505 BLA (Oct. 21, 2020) (unpub.).

[6] We affirm the ALJ's finding that all of Claimant's coal mine employment from 1964 to 1977 is qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

for reconsideration.[7] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Tuscaloosa County

With respect to Claimant's employment with Tuscaloosa County, the ALJ considered his employment history forms and hearing testimony to determine whether it constitutes qualifying coal mine employment. Decision and Order at 8. She found his testimony that he worked as a miner for Tuscaloosa County is not credible because it contradicts the statements made on his employment history forms, and thus she did not consider it as coal mine employment. *Id.*

Claimant argues the ALJ erred in finding he did not work as a miner for Tuscaloosa County. Claimant's Brief at 9-12. There is merit to this argument.

At the hearing, Claimant testified that he worked for eight years at the Jim Walter mine for Tuscaloosa County after he finished working for Burgess Mining. Hearing Tr. at 15-16. He stated this work took place on the surface of an underground coal mine, where he would go two to three days a week for seven hours a day. *Id*. With respect to the nature of his duties, he testified as follows:

> I was loading the rock, black rock that was coming out of the washer at Jim Walter [mine] and I was loading it on the dump trucks right there. And the big pans that was hauling the rock out of the mine was coming up there,

[7] On remand, the ALJ should apply a consistent method of rounding fractional years of coal mine employment. She appears to round her calculation to the nearest one-hundredth. Decision and Order at 8-10. However, for the year 1965, she failed to perform this rounding function. Specifically, the ALJ credited Claimant with 0.36 years of coal mine employment, but Claimant's earnings of $1,177.05 divided by the coal mine industry average of $3,222.50 for 125 working days equals 0.365, and thus the ALJ should have rounded to 0.37 years. *Id.*

Additionally, the ALJ may choose to credit Claimant with a quarter-year of employment for each quarter in which his SSA records indicate he earned at least $50.00 from coal mine operators prior to 1978. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984).

> running right up there dumping it out. And when they'd dump it, I'd scoop it up and load it on the trucks.

Id. at 16-17. He further testified that he was exposed to coal and rock dust when working at the mine, and that the job he performed was part of the regular mining operations. *Id.* at 17.

The ALJ noted Claimant testified that this work was coal mine employment and he worked there for seven years[8] after working at Burgess Mining. Decision and Order at 8. However, she found this testimony contradictory and not credible because, when Claimant first filed his claim, he had listed Burgess Mining as coal mine employment and Tuscaloosa County as non-coal mine employment. *Id.* Although Claimant's SSA records reflect he earned wages with Tuscaloosa County, she found this evidence did not indicate if he worked as a miner and thus found he failed to establish this work constitutes coal mine employment. *Id.* at 8 n.6. We must vacate this credibility finding as it is not supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Jones*, 386 F.3d at 992.

The record reflects that Claimant repeatedly identified Tuscaloosa County as coal mine employment in the initial stages of this claim. On his initial claim for benefits form Claimant stated he stopped working around coal mines in 2008 when he retired from the county and wrote in the margin of the form that he "also worked several years with county around coal mine (sic)." Director's Exhibit 2. On his employment history form, Claimant stated that he started working for Clyde O. Mitchell in January 1965. Director's Exhibits 3, 4. Thereafter, he listed Tuscaloosa County last on the list of his coal mine employers after Burgess Mining and WW Coal Company.[9] *Id.*

Nor do Claimant's statements on his form CM-913, description of coal mine work and other employment (Form CM-913), contradict his hearing testimony, as the ALJ found. Decision and Order at 8. Although he listed his work for Tuscaloosa County from 1984 to 2008 as non-coal mine employment, he nonetheless stated that in this job "they used black

[8] The ALJ repeatedly stated Claimant testified to having worked seven years in coal mine employment with Tuscaloosa County, Decision and Order at 8, but the record reflects he testified he worked for the county at the Jim Walters mine for eight years. Hearing Tr. at 16.

[9] Thus we reject the Director's contention that Claimant did not identify his work for Tuscaloosa County as coal mine employment when he applied for benefits. Director's Reply at 4.

rock out of [the] mine to put on roads from Jim Walter Mines (2004-2008)," he "ran a dozer and was around black rock," and he "worked in [a] coal mine and also for [the] county and was around coal dust." Director's Exhibit 5. Moreover, Claimant acknowledged at the hearing that part of his work with the county constituted non-coal mine employment, and that he only worked for Tuscaloosa County at the Jim Walters mine for four or eight of those twenty-four years. Director's Exhibit 5; Hearing Tr. at 16. Thus, the majority of his employment with Tuscaloosa County was non-coal mine employment, and he logically listed it as such on his Form CM-913 while simultaneously identifying it as coal mine employment in other instances. Director's Exhibits 2-6.

Moreover, the ALJ is tasked with making a finding of fact regarding whether Claimant's duties satisfy the situs and function requirements to meet the definition of a "miner" under the Act,[10] and the question of whether Claimant understands his employment meets those requirements is not part of that analysis.[11] *See Fox v. Director, OWCP*, 889 F.2d 1037, 1041 (11th Cir. 1989); *Baker v. United States Steel Corp.*, 867 F.2d 1297, 1298 (11th Cir. 1989); *Foreman v. Director, OWCP*, 794 F.2d 569, 570 (11th Cir. 1986); 20 C.F.R. §725.202(a).

Thus we vacate the ALJ's finding that Claimant's testimony that he worked as a miner for Tuscaloosa County is not credible and instruct her on remand to address whether

[10] A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine maintenance or construction, or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). There is "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The definition of "miner" comprises a "situs" requirement (i.e., the work must take place in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., the work must be integral or necessary to the extraction or preparation of coal). *See Fox v. Director, OWCP*, 889 F.2d 1037, 1041 (11th Cir. 1989); *Baker v. United States Steel Corp.*, 867 F.2d 1297, 1298 (11th Cir. 1989); *Foreman v. Director, OWCP*, 794 F.2d 569, 570 (11th Cir. 1986).

[11] We note that Claimant was not represented when he first filed his claim for benefits and completed his employment history forms, but he retained counsel before submitting his second request for modification. Director's Exhibit 32.

the evidence establishes Claimant's work for Tuscaloosa County constitutes coal mine employment.[12] Director's Exhibits 2-6; Hearing Tr. at 16-17.

Because we vacate the ALJ's findings regarding the length of Claimant's coal mine employment, and because we reverse the ALJ's total disability finding as discussed below, we also vacate her finding Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[13] 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 evidence supporting total disability against all relevant contrary evidence. *See 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found the pulmonary function studies and medical opinions do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure.[14] 20 C.F.R. §718.204(b)(2)(i), (iii), (iv); Decision and Order at 14. While she found the arterial blood gas studies support total disability at 20 C.F.R. §718.204(b)(2)(ii),

[12] We decline the Director's invitation to hold Claimant's work for Tuscaloosa County does not constitute coal mine employment as a matter of law. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Circ. 1983); Director's Reply at 3-4.

[13] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[14] We affirm, as unchallenged on appeal, the ALJ's finding the pulmonary function study evidence does not establish total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 14.

she found the overall weight of the evidence does not establish total disability. Decision and Order at 14, 17.

Claimant and the Director contend the ALJ erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 13-14; Director's Reply at 4-5. Specifically, they agree the ALJ erred in discrediting Dr. Lipscomb's opinion that Claimant is totally disabled based on the ALJ's finding that the doctor did not set forth the exertional requirements of Claimant's usual coal mine employment. *Id.*; *see* Decision and Order at 17. We agree with the parties that the ALJ erred in weighing this opinion as the record reflects that Dr. Lipscomb was aware of the exertional requirements of Claimant's usual coal mine employment. Claimant's Exhibit 1.

Despite the ALJ's error, it is not necessary to remand this case for further consideration of the issue of total disability. While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing denial, with directions to award benefits without further administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same).

The ALJ has rendered the necessary findings in this case. Her finding that the blood gas study evidence supports total disability is unchallenged. Decision and Order at 14. Thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(ii).

The only medical opinions of record are from Drs. Lipscomb and Goldstein.[15] Dr. Lipscomb opined Claimant is totally disabled due to the level of his dyspnea on exertion and need for oxygen, especially with exertion. Claimant's Exhibit 1. As discussed above, the ALJ erroneously discredited this opinion. Dr. Lipscomb's opinion, however, does not undermine the arterial blood gas testing results. Dr. Goldstein opined that Claimant has hypoxia and dyspnea on exertion, and the ALJ discredited this opinion because the doctor did not render a conclusion on whether Claimant is totally disabled by this impairment.

[15] The non-qualifying pulmonary function studies do not constitute contrary probative evidence because, as the ALJ correctly notes, pulmonary function studies and blood gas studies measure different types of impairment; thus non-qualifying pulmonary function studies do not necessarily call into question valid and qualifying blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 17.

Decision and Order at 16-17; Director's Exhibit 12. Thus, the medical opinions do not undermine the blood gas study evidence, and the ALJ erred in finding they outweigh the qualifying blood gas studies. *Addison*, 831 F.3d at 256-57; 20 C.F.R. §718.204(b)(2). Because the blood gas study evidence supports total disability and there is no contrary probative evidence, we reverse the ALJ's finding Claimant did not establish total disability. *See Scott*, 289 F.3d at 269-70; *Adams*, 886 F.2d at 826.

Remand Instructions

On remand, the ALJ must determine if Claimant established at least fifteen years of coal mine employment by considering his employment with Clyde O. Mitchell from 1969 to 1971 and reconsidering whether he worked as a miner for Tuscaloosa County.[16] In doing so, she must explain her method of calculating Claimant's length of coal mine employment, using any reasonable method of calculation. *Muncy*, 25 BLR at 1-27. Regardless of the method used, the ALJ should set forth her calculations, findings, and conclusions in accordance with the Administrative Procedure Act. 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.[17]

If Claimant establishes fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. The ALJ must then consider whether the Director rebutted the presumption. 20 C.F.R. §718.305(d)(1). If Claimant does not establish fifteen years of qualifying coal mine employment, the ALJ must consider if he has established the other elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence, taking into account that Claimant has established he is totally disabled. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[16] Should the ALJ find Claimant worked as a miner for Tuscaloosa County, that employment will be qualifying to invoke the Section 411(c)(4) presumption as it took place at an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1057-59 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

[17] The Administrative Procedure Act requires the ALJ to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the ALJ's Decision and Order Denying Benefits on Modification is affirmed in part, reversed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion with the exception of its holding that the Sixth Circuit's interpretation of the regulatory definition of "year" in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) cannot, as a matter of law, be applied to claims arising outside the Sixth Circuit. *See* 20 C.F.R. §725.101(a)(32)(i)-(iv) (definition of "year"). As an initial matter, the majority concedes that resolving this issue has no bearing on the outcome of this claim. Thus, its holding is dictum. *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (dictum, by definition, is "unnecessary to the decision" and "is, therefore, not controlling"). Notably, the majority's overly definitive statement about the state of the law "in cases arising out of the Eleventh Circuit" is itself based on nothing more than non-binding dicta and unpublished decisions issued by the Board.[18]

To the extent the majority presses the issue, the question is not whether the Sixth Circuit's decision in *Shepherd* is binding in this Eleventh Circuit claim – it obviously isn't.

[18] As in this case, panel majorities at the Board have typically relied on dicta in *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003) to hold that, regardless of the number of days a miner works in a given year, he cannot be credited with a full year of coal mine employment unless he also proves he had a 365-day employment relationship with his employer. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir 2007) (confirming that the regulatory definition of "year" discussed by the Board in *Clark* was not yet effective and thus inapplicable to Clark's claim). The Sixth Circuit in *Shepherd*, however, concluded that the "plain" and "unambiguous" language of the regulation provides four distinct methods to establish one year of coal mine employment and "permits

The question is whether the Sixth Circuit's accurate interpretation of the "plain" and "unambiguous" language of the regulation should be applied by the Board consistently to all claims under the Act. For the reasons I set forth in *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (DOL Ben. Rev. Bd. July 14, 2023) (Buzzard, J., concurring and dissenting), I believe it should.

GREG J. BUZZARD
Administrative Appeals Judge

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a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement." 915 F.3d at 402; *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" for invoking statutory presumptions at 20 C.F.R. §718.201(b) (2000)).