**U.S. Department of Labor**

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

BRB No. 22-0322 BLA

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| LARRY A. LESTER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| DOMINION COAL CORPORATION | ) | |
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| and | ) | |
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| SUNCOKE ENERGY INCORPORATED | ) | DATE ISSUED: 11/07/2023 |
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| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-In-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

David Casserly (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, BOGGS and JONES, Administrative Appeals Judges.

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

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration (2016-BLA-05857) rendered on a subsequent claim[1] filed on April 7, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Employer is the properly designated responsible operator. On the merits, the ALJ found that Claimant established 26.11 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Thus, she determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and

[1] This is Claimant's second claim for benefits. On November 28, 2007, the district director denied his initial claim, filed on March 8, 2007, because although he established pneumoconiosis arising out of coal mine employment, he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibits 1, 38.

[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); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's prior claim was denied for failure to establish total disability, Claimant had to establish this element to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibits 1, 38.

awarded benefits. Employer subsequently filed a timely motion for reconsideration, which the ALJ denied.

On appeal, Employer argues ALJ Bland (the ALJ) and ALJ Paul R. Almanza[4] lacked the authority to hear and decide the case because they were not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also asserts the removal provisions applicable to ALJs rendered their appointments unconstitutional. Further, it contends the ALJ erred in finding it is the liable operator. On the merits, Employer argues the ALJ erred in finding Claimant established at least fifteen

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[4] The case was initially assigned to ALJ Almanza, who conducted the hearing, admitted exhibits into evidence, and received the parties' closing arguments. After *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018) was issued, ALJ Almanza issued an order notifying the parties he would refer the case for reassignment to a new ALJ upon any party's request and the new judge would "determine the manner in which prior decisions, hearings, or other significant actions will be considered[.]" ALJ Almanza's May 15, 2020 Order at 2 & n.1. Employer requested reassignment but did not specifically request a new hearing or otherwise comment on how the case should proceed. Employer's May 21, 2020 Letter to ALJ Almanza. The case was reassigned to ALJ Bland who informed the parties that because "all evidence has been submitted and closing briefs have been filed . . . a decision and order will issue in due course." August 20, 2020 Notice of Re-Assignment at 1. Employer responded by filing "Special Objections and Motion to Hold in Abeyance," challenging the constitutionality of the Affordable Care Act, stating it "objects to resolution of this case by any [ALJ] because ALJs lack jurisdiction," and requesting "that this case be adjudicated by an [ALJ] in accordance with [*Lucia*][,] . . . Executive Order 13843 (July 10, 2018) and Secretary of Labor's Order 07-2018 (August 30, 2018) . . . ." Employer's August 26, 2020 Special Objections and Motion to Hold in Abeyance at 1-2. The ALJ denied Employer's motion and objections. Decision and Order at 2.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

years of qualifying coal mine employment and thereby invoked the Section 411(c)(4) presumption.[6] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's challenges to the constitutionality of the ALJs' appointments and to affirm the ALJ's findings that Claimant established over fifteen years of qualifying coal mine employment and that Employer is the properly designated responsible operator. Employer filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

**Appointments Clause/Removal Protections**

Employer urges the Board to vacate the ALJ's Decision and Order and her Order Denying Employer's Motion for Reconsideration and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 6-14; Employer's Reply Brief at 4-13. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL)

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21-24.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as Claimant performed his coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 29; Director's Exhibits 3, 11.

[8] *Lucia* involved the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

ALJs on December 21, 2017,[9] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJs' prior appointments.[10] Employer's Brief at 9; Employer's Reply Brief at 5. In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 6-14; Employer's Reply Brief at 8-12. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in and the Solicitor General's argument in *Lucia*. Employer's Brief at 11-12. Moreover, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*. at 11-14; Employer's Reply Brief

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[9] The Secretary issued letters to ALJ Almanza and ALJ Bland on December 21, 2017. The letter to ALJ Almanza stated:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as Associate Chief Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Almanza. The letter to ALJ Bland stated:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Bland.

[10] Employer states the Secretary's ratification of ALJ Almanza "did not occur until after he held a hearing and ruled on evidence in this claim" and the Secretary's ratification of the ALJ "does not and cannot establish that she is properly appointed." Employer's Brief at 9.

at 8-12. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.[11]

**Responsible Operator**

The responsible operator is the potentially liable operator that most recently employed the miner.[12] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator is financially capable of assuming liability and more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

In her Decision and Order, the ALJ found that while Employer contested its status as the responsible operator, it failed to offer any evidence or argument to dispute its designation. Decision and Order at 10. The ALJ also noted that Claimant's most recent

[11] To the extent Employer's arguments are not covered by *Johnson* and *Howard* (i.e., its assertion that the ALJ failed to give it an opportunity to request a new hearing once the case was reassigned), we agree with the Director's contention that Employer had the opportunity to request a new hearing, but failed to do so, and therefore forfeited its ability to raise this issue for the first time before the Board. Director's Brief at 2-5; *see Edd Potter Coal Co., Inc. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 206 (4th Cir. 2022) ("Forfeiture results when a party fails to raise an issue at the appropriate time."); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

[12] 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 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).

coal mine employer, Miners Oil Company, Inc. (Miners Oil), was not covered by insurance or authorized to be self-insured at the time of Claimant's employment, had filed for bankruptcy, and was no longer in business, and therefore could not be liable for the claim. *Id*. at 7. She also found that Employer met all the regulatory requirements to be designated as the responsible operator. *Id*. at 10-11; *see* 20 C.F.R §725.494(c). Thus, she determined Employer is the properly designated responsible operator. Decision and Order at 11. In her Order Denying Employer's Motion for Reconsideration, the ALJ noted that, as discussed in more detail below, Employer initially argued only that Miners Oil did not operate a coal mine and therefore Claimant's work there did not constitute coal mine employment. Motion for Reconsideration at 3. She also declined to address, as untimely, Employer's contention, raised for the first time in its Motion for Reconsideration, that the Black Lung Disability Trust Fund (Trust Fund) should be liable because the district director did not notify two Virginia state insurance guarantors as parties to the claim. *Id*. at 3 n.1.

Employer argues the ALJ erred in refusing to address its argument concerning notification of two Virginia state insurance guarantors as parties to the claim and in not transferring liability to the Trust Fund. Employer's Brief 22-23. Specifically, Employer asserts the "DOL *must* determine whether an insolvent carrier's obligations 'are not otherwise guaranteed' either by a guaranty fund or reinsurance, surety coverage, excess insurance, or any other resources or third-party payers." *Id*. at 22 (quoting 20 C.F.R. §725.494(e)(1)) (emphasis in original). Employer further argues DOL failed to follow its own procedures by not providing notice to any guaranty fund prior to issuing the Proposed Decision and Order naming Employer as responsible operator. Employer's Brief at 23. The Director contends Employer waived its challenge to its responsible operator designation by failing to timely raise the issue; he submits Employer's Motion for Reconsideration raised new arguments not previously raised before the ALJ. Director's Brief at 12. In addition, the Director notes Employer did not dispute the determination that Miners Oil was incapable of paying benefits before the district director. *Id*.

We agree with the Director's position that Employer did not timely challenge its designation as responsible operator. *See* Director's Brief at 12-15. In the Proposed Decision and Order, the district director indicated Employer did not timely submit evidence to contest its designation as the potentially liable operator or request an extension of time to submit such evidence. Director's Exhibit 46 at 12. Once the case was transferred to the Office of Administrative Law Judges, Employer did not contest its designation as the responsible operator in its brief. *See* Operator's Brief at 9-12. Rather, Employer waited to raise this issue in its Motion for Reconsideration, asserting Miners Oil should have been designated as the responsible operator and the district director erred in not notifying two Virginia state guaranty funds, and therefore liability should fall to the Trust Fund. *See* Employer's Motion for Reconsideration at 1-6; Employer's Reply Brief at 4.

Employer has not provided any basis to excuse its failure to raise the issue until after the ALJ issued an adverse decision.[13] *See* Employer's Brief at 22-23; Motion for Reconsideration at 1-2. Employer's failure to raise these arguments prior to filing its Motion for Reconsideration contravenes regulatory issue exhaustion requirements. 20 C.F.R. §§725.451 (after district director issues decision, a party may request ALJ hearing "on any contested issue of fact or law"), 725.463 (hearing before an ALJ "shall be confined" to issues raised before the district director or new issues "not reasonably ascertainable" before the district director), 802.301 (Board cannot engage in de novo proceeding; it may only "review the findings of fact and conclusions of law on which the decision or order appealed from was based"); *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board."); *see Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning 5 U.S.C. §7521 removal provisions are subject to Department of Agriculture statutory issue exhaustion requirements); *see also* 20 C.F.R. §§725.408(b), 725.414(c), 725.456(b)(1) (designated responsible operator must submit documentary evidence relevant to liability before the district director and must notify district director of any potential witnesses whose testimony pertains to liability; failure to do so renders such evidence and testimony inadmissible before the ALJ unless "extraordinary circumstances" exist to excuse untimely submission). Thus, we affirm the ALJ's finding that Employer is the responsible operator.[14]

**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 in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

Employer contends the ALJ erred in finding Claimant worked as a miner for Miners Oil and therefore erred in relying on Claimant's employment with that company to find Claimant established fifteen years of coal mine employment sufficient to invoke the

[13] In response to the ALJ's determination that Employer waived its ability to challenge its responsible operator designation, Employer asserted that the ALJ erred by "refusing to address [its] argument" but did not specifically address its failure to raise the issue prior to filing its Motion for Reconsideration. Employer's Brief at 22-23.

[14] Because we find Employer forfeited its ability to challenge its designation as the responsible operator, we need not specifically address its arguments regarding notification of the state guaranty funds. Employer's Brief at 14.

Section 411(c)(4) presumption. Employer's Brief at 14-18; Employer's Reply Brief at 2-3. Alternatively, Employer challenges the ALJ's method of calculating the length of Claimant's employment with Miners Oil and in finding it was comparable to employment in underground coal mines. *Id*. We reject Employer's contentions.

**Definition of a Miner**

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." 30 U.S.C. §902(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held work duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 41-42. The implementing regulation provides "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 ALJ considered Claimant's testimony that he worked as a tank installer, pump repairman, and supervisor for Miners Oil, traveling to mine sites four days per week[15] and spending an average of four hours per day at mine sites. Decision and Order at 8 (citing Director's Exhibit 40[16] at 11-12). The ALJ observed that "almost all of [Claimant's] work was done at deep mining operations" where he delivered oil to storage sheds at the mine

[15] Employer argues that in her findings of fact the ALJ did not reference that Claimant only occasionally went to mine sites to deliver oil during the last few years of his employment with Miners Oil. Employer's Brief at 17. We reject this argument because even if, arguendo, Claimant worked fewer hours during his last few years of coal mine employment, Claimant would still have enough years of qualifying coal mine employment to invoke the rebuttable presumption. 20 C.F.R. §718.305(b)(1)(i); *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[16] The ALJ cited to Director's Exhibit 39, which is a letter rescheduling the deposition. *See* Decision and Order at 8; Director's Exhibit 39. Claimant's deposition transcript, dated December 4, 2015, is actually located at Director's Exhibit 40.

sites, maintained the tanks and equipment, and worked at the loadout and stockpile where the fuel tanks were located. Decision and Order at 9 (citing Hearing Transcript at 29-30); *see also* Hearing Transcript at 36. Claimant testified that after setting the tanks, he would deliver oil but also bring tools and remain on site to "check on those pumps, keep them running," which "was a non-stop thing . . . going around, keeping check on everything, making sure they worked right."[17] Hearing Transcript at 30-32.

Contrary to Employer's and our dissenting colleague's contention, the ALJ permissibly found Claimant's work met the function prong, explaining:

> It is difficult to imagine how the delivery of fuel oil to a mine site, and the maintenance of the tanks and equipment that held the fuel, was merely incidental or convenient to the process of extracting, preparing, or transporting coal. Without the delivery of the fuel to power the equipment, the mine could not operate. Clearly the Claimant's job, which was to deliver the fuel that ran the mine equipment, and to service the tanks, was critical and essential to this process.

Decision and Order at 9; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Krushansky*, 923 F.2d at 41-42; Employer's Brief at 22; *see also Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 645-46 (6th Cir. 2014) (those "who perform tasks necessary to keep the mine operational and in repair" are generally classified as miners); *Etzweiler v. Cleveland Bros. Equip. Co.*, 16 BLR 1-38, 1-41 (1992) (en banc) ("The repair of mining equipment . . . contributes to the extraction of coal and is integral to the coal production process."); *Pinkham v. Director, OWCP*, 7 BLR 1-55, 1-57 (1984) (employment by subsidiary of the operator loading, recharging, and delivering carbon dioxide cylinders on mine premises is integral to the extraction of coal). The ALJ also permissibly found Claimant's work satisfied the situs prong because he worked at underground coal mine

[17] Thus, the current case is distinguishable from *Rose v. Director, OWCP*, 10 BLR 1-63 (1987), upon which our dissenting colleague relies, as the individual in that case merely delivered oil products to mines and preparation plants, unloaded them, and continued his delivery route. *Rose*, 10 BLR at 1-65. Here, Claimant was not "merely" delivering fuel and then leaving the mine site, but performed additional maintenance duties that kept him at the mine site an average of four hours per day. Further, in accordance with our standard of review, the ALJ rationally noted that mining operations cannot proceed without service of mining equipment such as tanks, so such service is "necessary to keep the mine operational." *See Navistar, Inc. v. Forester*, 767 F.3d at 641, 645-46.

sites for a substantial portion of his period of employment.[18] Decision and Order at 6, 8; *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Employer's arguments amount to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that Claimant worked as a miner for Miners Oil.

**Length of Employment**

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*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 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); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f 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 . . . ." 20 C.F.R. §725.101(a)(32)(iii).

In calculating the length of Claimant's coal mine employment, the ALJ considered Claimant's testimony, his Description of Coal Mine Work and Other Employment, a 2007

[18] Employer contends Claimant's aboveground work for Miners Oil is not comparable to underground coal mine employment. However, we affirm, as unchallenged, the ALJ's finding that Claimant's work delivering coal and working at the loadout and stockpile was on the surface of underground mines. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9. Thus, contrary to Employer's assertion, Claimant is not required to prove the dust conditions on the surface were identical or comparable to those underground. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011) (it is the type of mine (underground or surface), rather than the location of the particular worker that determines whether a miner is required to show comparability of conditions); Employer's Brief at 19-20. Further, we reject Employer's argument that surface miners do not contract black lung disease no matter the length of their employment as directly contradictory to the regulations. 20 C.F.R. §718.305(b)(1)(i), (b)(2); Employer's Brief at 20.

letter from a claims examiner, and his Social Security Administration (SSA) earnings record. Decision and Order at 7-10; *see* Hearing Transcript; Director's Exhibits 4, 5, 9, 10, 11, 40. The ALJ noted that information from Employer establishes that Claimant worked for it from July 11, 1974 to February 9, 1988, with a break from June 11, 1975 to June 22, 1975, for a total of 13.58 years of coal mine employment. Decision and Order at 7; Director's Exhibit 9. Employer does not challenge this finding and we therefore affirm it. *Skrack*, 6 BLR at 1-711. For the years 1990 to 2005,[19] the ALJ noted the beginning and ending dates of Claimant's employment with Miners Oil was not ascertainable and that in certain years he had non-coal mine employment wages. Decision and Order at 9. Thus, she applied the method at 20 C.F.R. §725.101(a)(32)(iii) to calculate Claimant's number of years of coal mine employment with Miners Oil. *Id*. at 9-10. Specifically, she compared Claimant's SSA-reported annual earnings for Miners Oil with the coal mine industry's daily average as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* to estimate the number of days Claimant worked each year from 1990 to 2005 in coal mine employment.[20] *Id.* at 9-10; *see* 20 C.F.R. §725.101(a)(32)(iii). For the years in which Claimant worked at least 125 days, the ALJ credited him with a full year of coal mine employment and for those years where he worked less than 125 days, she credited him with a fractional year of coal mine employment by dividing the number of days he worked by 125. Decision and Order at 10. Based on the foregoing method, the ALJ found Claimant established 12.53 years of coal mine employment with Miners Oil, and an overall total of 26.11 years of coal mine employment. *Id*.

Employer asserts the ALJ erred in using "the 125-day rule" to calculate Claimant's length of coal mine employment as the Board has held that this rule applies exclusively to the identification of the responsible operator. Employer's Brief at 20-21 (citing *Fletcher v. Director, OWCP*, 2 BLR 1-911, 1-914 (1980)).[21] We disagree.

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[19] The ALJ noted Claimant's SSA earnings record reflects he worked for only Miners Oil in 1990, for Miners Oil, Prosperity Trucking, and Progress Trucking in 1991 and 1994, only Miners Oil in 1995, and for Miners Oil and Progress Trucking from 1996 through 2005. Decision and Order at 9; Director's Exhibits 10, 11.

[20] 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).

[21] We note that *Fletcher* was issued under a prior version of the regulations.

The current regulations specifically provide that "if the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added). Thus, contrary to Employer's argument, the regulatory definition of working in coal mine employment is the same for purposes of identifying the responsible operator and determining the applicable presumptions under the Act. *See* 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability").

To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position 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 Mitchell*, 479 F.3d a 334-35 (a one-year employment relationship must be established, during which the miner had 125 working days); *Martin*, 277 F.3d at 474-75 (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280.

Because the record clearly shows Claimant had a cumulative employment relationship with Miners Oil that spanned at least two calendar year periods of 365 days each,[22] during which he worked at least 125 days, we affirm the ALJ's finding that Claimant established at least fifteen years of coal mine employment (adding two years of coal mine employment with Miners Oil to 13.58 years with Employer). 20 C.F.R. §725.101(a)(32)(ii), (iii); *see Muncy*, 25 BLR at 1-27; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993).

Having established total disability and at least fifteen years of qualifying coal mine employment, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b). Moreover, because Employer does not challenge the

[22] The regulation at 20 C.F.R. §725.101(a)(32)(ii) provides that, "[i]f the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *See* 20 C.F.R. §725.101(a)(32)(ii).

ALJ's finding that it failed to rebut the presumption, we affirm it. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's conclusion that Claimant is entitled to benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues with respect to Employer's challenges to the ALJ's authority to hear and decide this case and with the decision to affirm the ALJ's determination that Employer is the properly designated responsible operator. However, I respectfully dissent from the majority's affirmance of Claimant's status as a miner and thus the award of benefits.

The relevant inquiry in determining whether Claimant's work with Miners Oil is coal mine employment is whether the delivery of oil products, including diesel oil, and the maintenance of surface fuel tanks are *integral*[23] to the process of extracting coal and preparing it for market. Jobs that are merely "convenient" or "helpful" to the extraction and preparation of coal do not meet the function test if they are not vital or essential to the production or extraction of coal. *See Director, OWCP v. Consolidation Coal Co.*

[23] Integral is defined as "essential to completeness; constituent, as a part; pert. to or serving to form, an integer, integrant. 2. Composed of constituent parts making a whole; composite; integrated (see WHOLE). 3. Lacking nothing of completeness; complete; entire. 4. *Math.* (omitted)." Webster's New International Dictionary, Second Edition, Unabridged, G.C. Merriam Company Publishers, Springfield, Massachusetts, 1935, p. 1290.

[*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991); *Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 922-23 (6th Cir. 1989).

It is well-settled that Claimant's work *delivering* oil and grease does not qualify as coal mine employment. In *Rose v. Director, OWCP*, 10 BLR 1-63 (1987), *published on recon.*, 10 BLR 1-71 (1987), the Benefits Review Board considered whether a truck driver for two oil companies who made regular deliveries to coal mines qualified as a coal miner under the Act. The Board found that, while the Claimant's delivery work in *Rose* took place in or around a coal mine or preparation facility, the function of his work, delivering oil products, was not integral to coal production and thus he was not a coal miner. *Rose*, 10 BLR at 1-65; *see also Hagy v. Director, OWCP*, 11 BLR 1-142, 1-143 (1988) (delivery of limestone used in extraction and preparation of coal does not meet the function requirement required to establish coal mine employment), aff'd No. 88-3809 (4th Cir. Aug. 16, 1988) (unpub.). Consequently, Claimant's *delivery* of oil products to coal mine sites here does not meet the functional requirement necessary to qualify him as a coal miner.

Claimant testified that he performed maintenance on surface tanks, which provided fuel for trucks and end-loaders. Director's Exhibit 40 at 12. Claimant, also, on occasion, "set" tanks onsite. Director's Exhibits 5, 40 at 11-12. While having the ability to fuel trucks and end-loaders on site is certainly convenient, it has not been shown that it rises to the level of being *integral* as is required to be considered coal mine employment. *See Krushansky*, 923 F.2d at 41-42; *Clemons*, 873 F.2d at 922-23. There is no evidence that it is essential that refueling take place at the mine; a truck or end-loader could refuel off-site.[24] Furthermore, contrary to the majority's opinion, Claimant has not shown his work maintaining surface tanks at the mine site was more than merely incidental to his delivery of products, i.e., more than an associated subordinate activity conducted in conjunction with his work as a deliveryman.[25]

Because Claimant's time spent delivering products for Miners Oil is not coal mine employment and because he has not established that he met the function and situs

[24] There is no evidence that surface oil tanks are typically considered mining equipment.

[25] Claimant's accounts of his activities in this regard varied. In a 2007 letter from William A. Spence, Senior Claims Examiner, Mr. Spence documented that Claimant described his job with Miners Oil as delivering various types of oil such as hydraulic oil, motor oil and diesel fuel; he delivered and unloaded the hydraulic oil and motor oil by hand; typically the oil was in five gallon containers and would be placed in a storage shed or supply area designated at the mine site. Director's Exhibit 5. "On occasion," he would set up a tank for diesel fuel; the set up process would take two or three hours. *Id.* During

requirements with regard to any work he did checking and maintaining oil tanks, I would reverse the ALJ's finding that Claimant's work at Miners Oil constituted coal mine employment. I therefore would vacate the ALJ's finding that Claimant established 26.11 years of qualifying coal mine employment and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act and remand the case for further consideration.

JUDITH S. BOGGS
Administrative Appeals Judge

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the first six or seven years of his employment with Miners Oil, he delivered oil to mines on most days of the week, and in a typical day might spend two to three hours at the mine site delivering oil. *Id*. Claimant told Mr. Spence he went to mine sites only occasionally during the last few years of his employment with Miners Oil, believing the last time he was at a mine site to be in 2004. *Id*. Claimant did not describe any maintenance activities to Mr. Spence.

In his 2015 Deposition Claimant initially described his job with Miners Oil as "tank installer, pump repairman . . . ." Director's Exhibit 40 at 11-12. However, when asked about how much time he spent at the mine site, he replied about four hours, four days a week, and talked about delivering oil and supplies. *Id*. at 12-14. He acknowledged, " . . . with Miners, I mean—it's iffy, iffy you know, how much time you would actually spend at the mines and how much time I didn't." *Id*. at 16.

At the 2017 hearing, he described Miners Oil as a "fuel business and oil supplier," not located near any coal mine site, acknowledged that he drove a truck for Miners Oil, and said he "did maintenance and delivered buckets of oil and grease and stuff. I wasn't a truck driver, I was maintenance." Hearing Transcript at 30. He described the maintenance as setting fuel tanks and maintaining them, "[s]o just about every day, I would be at the mines, either—if I delivered oil, I would take tools with me and I got in and I'd have to check on those pumps, keep them running." *Id*.