U.S. Department of Labor

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

BRB No. 19-0256 BLA

PATTY L. LOUDY (Widow of WOODROW E. LOUDY) Claimant-Respondent v. CONSOLIDATION COAL COMPANY c/o HEALTHSMART CCS Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2018-BLA-05009) of Administrative Law Judge Dana Rosen on a survivor's claim filed on May 19, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge accepted the parties' stipulation the miner had 34.58 years of underground coal mine employment. She determined the miner was totally disabled at the time of his death and thus found claimant[1] invoked the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2). The administrative law judge further determined that employer did not rebut the presumption and awarded benefits.

Employer argues the administrative law judge lacked the authority to preside over the case because she was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[3] and challenges the constitutionality of the Section 411(c)(4) presumption. On the merits, employer argues the administrative law judge erred in finding claimant established total disability necessary to

[1] Claimant is the widow of the miner, who died on July 11, 2010. Director's Exhibit 12.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption the miner's death was due to pneumoconiosis if he had 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) (2012); 20 C.F.R. §718.305.

[3] 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.

invoke the Section 411(c)(4) presumption.[4] Employer further argues she erred in finding the presumption unrebutted. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing the administrative law judge had authority to decide the case and that the Section 411(c) presumption is constitutionally valid.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 8-11. Employer asserts the Secretary of Labor's (the Secretary) December 21, 2017 ratification of the administrative law judge's appointment was insufficient to cure any constitutional deficiencies in the initial appointment.[7] *Id.* at 9. The

[4] We affirm, as unchallenged, the administrative law judge's finding that the miner had 34.58 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 13; Hearing Transcript at 7.

[6] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v.* SEC, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[7] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017 stating:

Director responds that the Secretary's ratification was proper under the Appointments Clause. Director's Brief at 4-5. We agree with the Director.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). In cases involving the Appointments Clause, ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. The Secretary thus had, at the time of his ratification of the administrative law judge's appointment, the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. In evaluating these factors, we note the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather,

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> 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 Administrative Law Judge Dana Rosen.

he specifically identified Administrative Law Judge Rosen and indicated he gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Rosen. The Secretary further stated that he was acting in his "capacity as head of the Department of Labor" when ratifying her appointment "as an Administrative Law Judge." *Id*. Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgment" when he ratified the administrative law judge's appointment, and therefore employer does not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a proper ratification of the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" earlier actions was proper). Thus, we deny employer's request to remand this case to a different constitutionally appointed administrative law judge for a new hearing.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the entire Affordable Care Act (ACA), Pub. L. No. 111-148 (2010), including its provisions reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 7-8. We disagree. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the requirement for individuals to maintain health insurance) unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from the insurance requirement. *Texas v. United States*, 945 F.3d. 355 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are "fully operative as a law." *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), as amended (Dec. 21, 2011). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal*

Co., 24 BLR 1-193, 1-201 (2010). We thus reject employer's contention that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.[8] *See* Employer's Brief at 8.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish, in addition to fifteen years of qualifying coal mine employment, the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 pulmonary function studies, arterial blood gas studies, 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 administrative law judge must consider all relevant evidence and weigh the evidence supporting a finding of total disability against the 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).

The administrative law judge noted that the parties did not "designate" any pulmonary function studies or arterial blood gas studies[9] and no evidence suggests the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 30; 20 C.F.R. §718.204(b)(2)(i)-(iii). She found Drs. Fino's and Rosenberg's opinions that the miner was not totally disabled unpersuasive. Decision and Order at 35. She concluded that claimant established total disability based on the miner's treatment records indicating he had severe emphysema and chronic obstructive pulmonary disease (COPD), and required continuous oxygen prior to his death. *Id.* at 34. She further found the treatment records supported by lay testimony. *Id.* at 34-35.

Employer argues the administrative law judge erred in relying on the miner's treatment records because they do not include a reasoned and documented physician's

[8] Furthermore, we decline employer's request to hold this case in abeyance pending resolution of legal challenges to the Affordable Care Act. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010); Employer's Brief at 7.

[9] The administrative law judge considered a pulmonary function study and arterial blood gas study contained in the miner's treatment records in weighing the evidence at 20 C.F.R. §718.204(b)(2)(iv).

opinion concluding the miner was totally disabled. Employer's Brief at 12. Employer asserts the administrative law judge improperly acted as a medical expert in rejecting the contrary opinions of Drs. Fino and Rosenberg that the miner was not totally disabled. *Id*. Employer's arguments are without merit.

A physician need not phrase his or her opinion specifically in terms of "total disability" to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *Black Diamond Coal Co. v. Benefits Review Board*, 758 F.2d 1532, 1534 (11th Cir. 1985). Treatment records may support a finding of total disability if they provide sufficient information from which the administrative law judge can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole*, 897 F.2d at 894.

The administrative law judge considered the miner's treatment records from Novant Health Forsyth Medical Center (Forsyth Medical Center), dating from 1985 until his death

on July 11, 2010,[10] and Wake Forest Medical Center in June, 2010.[11] Decision and Order at 30-33; Director's Exhibits 13, 14, 15, 17;[12] Employer's Exhibits 5-7. She found the physicians' opinions therein "well-reasoned, well-documented," and "persuasive" and thus constitute "evidence by [the] Miner's treating physicians of [his] pulmonary decline and his total disability." Decision and Order at 33. In support, she accurately noted the treatment records from Forsyth Medical Center include x-rays, computed tomography (CT) scans, and physicians' opinions evidencing the miner's pulmonary decline due to COPD,

[10] On May 23, 2006, Dr. Igbinigie ordered an x-ray that showed "severe [chronic obstructive pulmonary disease (COPD)]." Director's Exhibit 17 at 132. From November 22 to November 26, 2006, the miner was admitted to Forsyth Medical Center for COPD exacerbation and chronic bronchitis. *Id*. at 100. Dr. Igbinigie noted the miner's oxygen saturations were 91 to 92 percent on room air at rest but went down to 88 percent with exertion. He recommended home oxygen which the miner refused. *Id*. On August 10, 2009, the miner was treated for COPD and was directed to continue inhaler therapy and oxygen. Director's Exhibit 13. A renal computed tomography (CT) scan was also performed that showed "bullous lung disease." *Id*. at 137. From June 7 to June 10, 2010, the miner was hospitalized and treated by Dr. Phillips for "severe emphysema with exacerbation, [COPD] with negative tobacco exposure on chronic oxygen, history of coal mine exposure but without classic findings of coal miner's lung on CT, chronic anemia, steroid-induced hyperglycemia, and chronic respiratory failure." Director's Exhibit 17. Dr. Phillips noted the following: the miner had severe emphysema despite the fact that he never smoked in the past; he had an extensive history of coal mine dust exposure; had been on oxygen up to four liters daily and re-presented to the emergency room with difficulty breathing; the miner was admitted to the intensive care unit in respiratory distress and was given intravenous Decadron, in addition to scheduled breathing treatments and antibiotics; his condition improved and he was sent home on "4 liters of oxygen, which is his baseline," and prescribed a rescue inhaler; and a CT scan showed "severe emphysema" and "minimal lung tissue." *Id*. On July 7, 2010, the miner was admitted to Forsyth Medical Center and Drs. Phillips and Bathory treated him for COPD and acute renal failure. *Id*. He received palliative care until his death on July 11, 2010. *Id*.

[11] On April 30, 2010, Dr. Newsome treated the miner at Wake Forest University Baptist Medical Center for COPD, anorexia, hyperlipidemia, coronary artery disease, and hypertension. Director's Exhibit 14. On June 17, 2010, he saw the miner for COPD and chronic respiratory failure. *Id*. He also noted the miner was on four liters of continuous oxygen. *Id*.

[12] The administrative law judge incorrectly refers to Director's Exhibit 17 as Employer's Exhibit 17. Decision and Order at 30-33.

severe emphysema, and colitis. *Id*. She also accurately found the miner was on continuous oxygen, rescue inhalers, and was hospitalized twice in respiratory failure in the months leading up to his death. *Id*. Further, Dr. Phillips, who treated the miner at Forsyth Medical Center during the last months of his life, listed COPD as a significant contributing factor in his death. *Id.*; Director's Exhibit 12.

The administrative law judge also considered the medical reports Drs. Fino and Rosenberg prepared after reviewing the miner's treatment records. Decision and Order at 8-10. She gave their opinions no weight because Dr. Rosenberg based his opinion on a twenty-two-year-old pulmonary function test and neither physician persuasively explained whether the miner was able to perform his usual coal mine work in light of his treatment records documenting severe emphysema and his need for continuous oxygen. *Id*. at 35. She noted Dr. Fino acknowledged that the miner had severe COPD, but opined there are no pulmonary function tests from which to conclude the miner was totally disabled. *Id*. at 33; Employer's Exhibit 1 at 3. She also noted that Dr. Rosenberg acknowledged the miner's severe emphysema but still opined the miner was not totally disabled based on a pulmonary function test administered in 1988. Decision and Order at 34; Employer's Exhibit 2 at 3.

Finally, the administrative law judge found the miner's daughter, Ms. Trish Loudy Gray, credibly testified regarding the miner's respiratory condition. Decision and Order at 35. She testified that her father was on continuous oxygen for the last two to three years of his life and that during the last year of his life he slept in a hospital bed at a raised angle because "he just couldn't breathe." Hearing Transcript at 15. The administrative law judge found Ms. Gray's testimony corroborated the miner's treatment records regarding his respiratory condition at the time of his death and "supports a finding that [the] Miner suffered a totally disabling respiratory or pulmonary impairment." Decision and Order at 34.

Contrary to employer's contention, we see no error in the administrative law judge's finding that claimant established total disability by a preponderance of the evidence. Decision and Order at 35. She specifically noted that the physicians' opinions in the treatment records were based on "physical examination[s] of [the] Miner as well as x-rays and CT scans" showing he had COPD and severe emphysema. Decision and Order at 33. She permissibly found those opinions "well-reasoned, well-documented, and are persuasive" regarding the severity of the miner's lung disease. *Id; see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Further, the administrative law judge permissibly found the miner totally disabled at the time of his death because he was on continuous oxygen and rescue inhalers. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017). We also see no error in her discrediting of Dr. Rosenberg's reliance on pulmonary function

testing performed more than two decades before the miner's death or her finding Drs. Fino's and Rosenberg's opinions unpersuasive in light of the medical records documenting the miner's severe COPD and need for continuous oxygen. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

The administrative law judge has discretion to weigh the medical evidence and draw her own inferences therefrom. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). The Board is not empowered to reweigh the evidence or substitute its judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge drew reasonable inferences from the miner's treatment records, we affirm her finding the miner was totally disabled at the time of his death, as supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Grizzle*, 994 F.2d at 1096. We further affirm the administrative law judge's overall finding that claimant established total disability and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2); 718.305.

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[13] 20 C.F.R. §718.305(d)(2)(i), or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b),

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

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions Drs. Fino and Rosenberg who attribute the miner's COPD and severe emphysema entirely to smoking. Employer's Exhibits 1, 2. The administrative law judge found their opinions unreasoned because she determined the miner did not smoke cigarettes. Decision and Order at 6. Employer contends the administrative law judge erred in finding the miner was a non-smoker and in discrediting Drs. Fino's and Rosenberg's opinions. *Id*. at 26. We disagree.

The administrative law judge correctly found that the record contains conflicting evidence regarding whether the miner smoked cigarettes. Decision and Order at 5. She noted various physicians at Forsyth Medical Center treated the miner, some of whom reported a significant smoking history while others reported the miner never smoked.[14] *Id*.; Director's Exhibit 17. She also noted the miner's daughter, Ms. Gray, testified at the hearing that she never saw her father smoke during the forty-seven years she knew him.[15] Decision and Order at 6; Hearing Transcript at 15. The administrative law judge observed that "[i]f the [m]iner had a 50-year smoking history as [certain] treatment records suggest, it would be difficult for [the miner] to hide his smoking habit from family members like his daughter." Decision and Order at 6. She thus found the non-smoking histories in the treatment records "more persuasive" and corroborated by Ms. Gray's testimony. *Id*.; *see* Director's Exhibits 13, 15, 17.

Employer contends the administrative law judge erred in crediting Ms. Gray's testimony since the hearing was conducted telephonically and she did not have the opportunity to observe the witness. Employer's Brief at 22. Employer alleges "obviously,

[14] On May 22, 2006, Dr. Igbinigie treated the miner for COPD and noted he was an ex-smoker who smoked for fifty years. Director's Exhibit 17. On January 30, 2007, Dr. Sayers treated the miner for wheezing and noted he was a previous smoker but quit smoking years earlier. *Id*. On August 10, 2009, Dr. Jones treated the miner for back pain and noted he did not smoke. Director's Exhibit 13. On June 7, 2010, Dr. Wolff treated the miner for chest discomfort and noted he never smoked. Director's Exhibit 17. On June, 10, 2010, Dr. Phillips treated the miner for severe emphysema exacerbation and noted he never smoked. Director's Exhibit 17. On July 7, 2010, Dr. Bathory treated the miner for stomach pain and noted he never smoked. Director's Exhibit 15.

[15] Ms. Gray testified she was unaware her father allegedly smoked until she read Dr. Rosenberg's report alleging a fifty-year smoking history. Hearing Transcript at 15. She stated this was "absolutely not true." *Id*.

the miner was not truthful at some point in time," and maintains the administrative law judge's finding the miner was a non-smoker is not explained in accordance with the Administrative Procedure Act.[16] *Id.* We disagree.

The length and extent of the miner's smoking history is a factual determination within the administrative law judge's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Further, the administrative law judge has discretion in determining witness credibility and the weight to be accorded the hearing testimony. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). No distinction exists between weighing telephonic and in-person testimony. The administrative law judge permissibly credited Ms. Gray's sworn testimony that the miner did not smoke and found several notations in the treatment records corroborated that the miner was a non-smoker. *See Clark*, 12 BLR at 1-151; Decision and Order at 6. Because substantial evidence supports the administrative law judge's determination the miner did not have a smoking history, we affirm it. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Maypray*, 7 BLR at 1-686 (1985).

Having affirmed the finding the miner did not smoke, we also affirm the determination Drs. Fino's and Rosenberg's opinions are not credible because they relied on an inaccurate smoking history in concluding the miner did not have legal pneumoconiosis. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (the administrative law judge may reject medical opinions that rely on an inaccurate smoking history); Decision and Order at 26. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Rosenberg,[17] we affirm her determination that employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Employer's failure

[16] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[17] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg on legal pneumoconiosis, we need not address employer's contention she erred in also finding their opinions inconsistent with the preamble to the 2001 revised regulations. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)

Death Causation

The administrative law judge also considered whether employer established that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). She rationally found that the same reasons for which she discredited Drs. Fino's and Rosenberg's opinions on legal pneumoconiosis also undercut their opinions that no part of the miner's death was caused by legal pneumoconiosis.[18] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015); 20 C.F.R. §718.305(d)(2)(ii)*Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 35. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. We thus affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[18] Employer does not allege any specific error on disability causation other than the same arguments it raised on legal pneumoconiosis, which we have rejected.