U.S. Department of Labor

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

BRB No. 19-0327 BLA

VADA HIGGINS (Widow of HOWARD D. HIGGINS) Claimant-Respondent v. HIGGINS COAL COMPANY and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Edward Waldman (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

GRESH, Administrative Appeals Judge:

Employer and its Carrier (employer) appeal Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits (2014-BLA-05138) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on August 19, 2011.[1]

The administrative law judge accepted the parties' stipulation to thirty-two years of qualifying coal mine employment[2] and found the evidence established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant[3] invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

[1] This case involves Claimant's second request for modification of a district director's denial of benefits. Director's Exhibits 27, 32, 38. In cases involving a request for modification of a district director's decision, the administrative law judge proceeds de novo and "the modification finding is subsumed in the administrative law judge'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] The Benefits Review Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner's last coal mine employment occurred in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[3] Claimant is the widow of the Miner, who died on April 8, 2011. Director's Exhibit 8.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, Employer contends the administrative law judge erred in finding total disability and therefore erred in finding that Claimant invoked the Section 411(c)(4) presumption. Finally, employer argues he erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Worker's Compensation Programs (the Director), has filed a limited response, asserting employer waived its Appointment's Clause challenge. The Director also urges the Benefits Review Board (Board) to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 9-11. Employer acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id*. In response, the Director asserts employer waived its Appointments Clause challenge. Director's Response Brief at 2. We agree with the Director's position.

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his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012). Because the Miner's two lifetime claims for benefits were denied and those decisions are final, Claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

[5] *Lucia* involved an Appointments Clause challenge to the selection of a Securities and Exchange Commission (SEC) administrative law judge. 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)).

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *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).

Employer filed a January 12, 2018 motion requesting the administrative law judge hold this case in abeyance pending a decision in *Lucia.* After the administrative law judge denied its request, the United States Supreme Court decided *Lucia* on June 21, 2018. Thereafter, the administrative law judge issued a September 11, 2018 Notice and Order directing the parties to file a statement within forty days indicating whether they sought to have the case reassigned. The administrative law judge indicated that if no party filed a response, the remedy of reassignment and a new hearing would "be deemed waived and the case will proceed before the undersigned." *Id.* Neither party responded to the Notice and Order. Decision and Order at 2 n.2.

Had employer responded to the Notice and Order and requested reassignment, the administrative law judge could have referred the case for reassignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Service Employees Intnl, Inc.*, 53 BRBS 13 (2019); *Kiyuna v. Matson Terminal Inc.*, 53 BRBS 9 (2019). Based on these facts, we conclude employer waived its Appointments Clause challenge.[6] *Id.* We therefore deny the requested relief.

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F.Supp.3d 579, decision stayed pending appeal, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional and the award of benefits should be vacated and the case remanded for consideration of entitlement absent the presumption. Employer's Brief at 7-

[6] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)). Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid because it had the opportunity to also raise this issue in response to the administrative law judge's Notice and Order, but failed to do so.

9. Alternatively, employer asks the Board to hold this appeal in abeyance pending resolution of the issue. *Id.* Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the 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.[7] *See 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 therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

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

A miner is 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). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies, qualifying 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 weigh the relevant 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 found the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 6-7, 23.

[7] Further, the United States Court of Appeals for the Fourth Circuit 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), *cert. denied*, 568 U.S. 816 (2012).

The administrative law judge next considered Dr. Perper's medical opinion, as well as the Miner's treatment records.[8] 20 C.F.R. §718.204(b)(2)(iv). After reviewing the Miner's medical records and autopsy slides, Dr. Perper opined that the Miner suffered from a totally disabling respiratory impairment prior to his death. Claimant's Exhibit 3. Although the administrative law judge noted the Miner's treatment records do not contain a specific opinion of total disability, he found that as Dr. Perper noted, the Miner's treatment records reflect multiple serious conditions including diagnoses of chronic obstructive pulmonary disease (COPD) and the use of supplemental oxygen. Decision and Order at 14-20, 25; Director's Exhibits 11-20; Claimant's Exhibits 1, 2, 4. Based upon the objective and clinical findings of COPD and the Miner's need for supplemental oxygen, the administrative law judge found it reasonable to conclude the Miner was totally disabled from performing his previous coal mine job. *Id*. at 25.

The administrative law judge did not adequately explain, however, how the Miner's treatment records support the conclusion that the Miner was totally disabled. Employer's Brief at 12-15. A physician need not phrase his or her opinion in terms of "total disability" in order 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, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired. . . ."). Medical opinion evidence can support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer a Miner is or was unable to do his last coal mine job. *See Freeman*, 897 F.2d at 894, 13 BLR at 2-356. However, the administrative law judge must still adequately explain his determination that such evidence establishes the Miner is totally disabled.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165

[8] The administrative law judge also considered the medical opinions of Drs. Fino and Basheda, but found that neither physician offered an opinion as to whether the Miner was totally disabled and determined neither opinion provided "any useful information" regarding total disability. Decision and Order at 24. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The record also contains a medical opinion from Dr. Enjeit and autopsy reports from Drs. Head, Caffrey and Oesterling. Director's Exhibits 10, 20; Employer's Exhibits 1, 3. As the administrative law judge noted, none of these physicians offered an opinion as to whether the Miner was totally disabled from a pulmonary standpoint prior to his death. Decision and Order at 7-8.

[9] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all

(1989). In this case, the administrative law judge only summarily concluded the diagnoses of COPD and the Miner's use of supplemental oxygen during his hospitalizations supported a finding of total disability. Decision and Order at 25. Moreover, in finding the Miner's COPD and supplemental oxygen would have rendered him unable to perform his usual coal mine employment, the administrative law judge did not address the nature of the Miner's usual coal mine employment and the exertional requirements of that job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996).

Consequently, the administrative law judge's determination that the medical opinions establish total disability is vacated. 20 C.F.R. §718.204(b)(2)(iv). Therefore his determination that the evidence as a whole establishes total disability and that Claimant invoked the Section 411(c)(4) presumption are also vacated. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we address Employer's challenge to the administrative law judge's determination that it did not rebut the Section 411(c)(4) presumption. If Claimant invokes the Section 411(c)(4) presumption, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[10] 20 C.F.R. §718.305(d)(2)(i), or "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 Employer failed to establish rebuttal by either method.

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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).

[10] "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).

To disprove legal pneumoconiosis,[11] Employer must establish 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [the Miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the Miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The administrative law judge considered the opinions of Drs. Fino and Basheda. He found neither doctor adequately explained why the Miner's coal mine dust exposure was not a factor in causing his totally disabling respiratory impairment. Decision and Order at 31; Employer's Exhibits 4-5, 8-9. Because employer does not challenge these findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's only contention of error is the administrative law judge erred in crediting Dr. Perper's diagnosis of legal pneumoconiosis.[12] Employer's Brief at 16-20. However, as the administrative law judge noted, employer has the burden to rebut the Section 411(c)(4) presumption of legal pneumoconiosis with affirmative evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Dr. Perper's opinion does not assist Employer in satisfying that burden. We therefore affirm the administrative law judge's finding that employer failed to rebut the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A). Because it is unchallenged on appeal, we also affirm the administrative law judge's finding that Employer did not establish the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR 1-710, 1-711 (1983). We therefore also affirm the administrative law judge's determination that Employer did not rebut the Section 411(c)(4) presumption.

[11] The administrative law judge found employer established the Miner did not have clinical pneumoconiosis. Decision and Order at 28.

[12] Dr. Perper diagnosed legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 3.

On remand, the administrative law judge should first determine the Miner's usual coal mine employment[13] and the exertional requirements of that job. *Cornett*, 227 F.3d at 578 (6th Cir. 2000); *Ward*, 93 F.3d. at 218-19. He must then consider the Miner's treatment records and Dr. Perper's medical opinion[14] in light of those requirements. *Id.* In weighing this evidence, he must set forth his findings, including the underlying rationale, in compliance with the Administrative Procedure Act (APA). *Wojtowicz*, 12 BLR at 1-165. If the administrative law judge finds total disability established by the medical opinions and treatment records, considered in isolation, he must determine whether the Miner was totally disabled taking into account the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If Claimant establishes the Miner was totally disabled, she will have invoked the Section 411(c)(4) presumption. In the light of our affirmance of the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption, claimant would be entitled to benefits.

If the administrative law judge finds the evidence does not establish total disability, he must consider whether the evidence establishes that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817 (6th Cir. 1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). In cases where the statutory presumptions cannot be invoked, the Miner's death will be considered due to pneumoconiosis if it caused his death or was a substantially contributing cause that hastened his death. 20 C.F.R. §718.205(b).

[13] The Miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[14] We note the administrative law judge did not indicate what, if any, weight he accorded to Dr. Perper's opinion that the Miner was totally disabled. Decision and Order at 25. On remand, the administrative law judge must explain his findings in accordance with the APA. *Wojtowicz v. Duquesne Light, Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's decision to affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. I respectfully dissent, however, from its decision to vacate the administrative law judge's finding of total disability. 20 C.F.R. §718.204(b).

Having affirmed the administrative law judge's determination the other medical opinions and autopsy records do not contain any relevant information regarding whether the Miner was totally disabled at the time of his death, the Board's remand instructions direct the administrative law judge to make a finding regarding the exertional requirements of the Miner's usual coal mine employment and more fully consider the Miner's remaining treatment records and Dr. Perper's opinion, which the administrative law judge already found establish disability. I do not believe remand is warranted, however, because the conclusion of any further inquiry is forgone.

While it is true the administrative law judge did not make a finding of the exertional requirements of the Miner's usual coal mine employment, the only evidence in the record establishes he worked as a mine supervisor/operator. In addition to ensuring the safe operation of the mine, he maintained coal production by acting "hands on" to assist other workers with their jobs. Miner's Closed 1992 Claim (Director's Exhibit 5). This included

periodically having to crawl 2000 to 3000 feet for up to eight hours a day, regularly spending four or five hours each day directing work at the face of the mine, and routinely operating mining equipment and tools. *Id.*; *see also* Administrative Law Judge Thomas M. Burke's December 28, 1994 Decision and Order at 2. The record contains no other evidence regarding the Miner's job requirements.[15]

And, as the administrative law judge already found, the Miner's treatment records and Dr. Perper's opinion -- the only remaining evidence on disability -- compel the conclusion the Miner could not perform those duties from a respiratory standpoint. In finding the Miner totally disabled, Dr. Perper extensively documented the Miner's treatment records and autopsy reports in a comprehensive report, concluding the "pulmonary findings were a significant component [of the miner's total disability] with diagnoses of COPD and severe COPD with exacerbations and pulmonary hypertension." Claimant's Exhibit 3 at 58. In addition, he noted that in the Miner's terminal hospitalization, "he was treated for sepsis of a pulmonary source with acute respiratory failure" and that he was in pulmonary acidosis." *Id.*

In the disability section of his analysis, the administrative law judge summarized Dr. Perper's opinion:

> Dr. Perper noted that Mr. Higgins's records included diagnoses of COPD, severe COPD with exacerbation, and pulmonary hypertension. His autopsy findings showed evidence of significant centrilobular emphysema, which is the pathological counterpart of COPD. Dr. Perper concluded that Mr. Higgins had a totally disabling respiratory impairment. Mr. Higgins had a number of significant medically disabling conditions, including arteriosclerotic heart disease, aortic stenosis, and diabetes with nephropathy and renal failure. But he also had a significant component of pulmonary findings, with diagnoses of COPD and severe COPD with exacerbation and pulmonary hypertension.

Decision and Order at 24. Finding Dr. Perper's opinion COPD disabled the Miner from a pulmonary standpoint -- as bolstered by his documented need for supplemental oxygen in

[15] Notably, Employer has not identified the Miner's usual coal mine employment nor attempted to indicate how the Miner could perform it from a respiratory standpoint in its brief.

his treatment records -- outweighed the relative lack of counter evidence, the administrative law judge concluded the Miner had a disabling respiratory impairment:

> Considering all of this evidence as a whole, I find that it supports the conclusion that shortly before his death, Mr. Higgins had a totally disabling respiratory impairment, as reflected by his need for supplemental oxygen, and the clinical findings of COPD. Given these objective and clinical findings, and especially Mr. Higgins's need for supplemental oxygen, I find that it is reasonable to conclude that Mr. Higgins did not have the respiratory capacity to return to his previous coal mine job.

Id. at 25. Later in his decision, in crediting Dr. Perper's conclusion the disabling COPD was legal pneumoconiosis, the administrative law judge reiterated he found Dr. Perper's extensive report documented and reasoned:

> I find that the opinions of Dr. Perper are well-reasoned and supported by the objective medical evidence. He considered Mr. Higgins's clinical and test findings, as well as his history of smoking and coal mine dust exposure, and cited to medical literature supporting his conclusions. His opinions are also consistent with the Act, which recognizes that coal mine dust exposure can result in obstructive impairment even in the absence of x-ray findings of pneumoconiosis, and that its effects can be additive with those of smoking. I accord significant weight to his conclusion that Mr. Higgins's respiratory impairment was caused at least in part by his history of exposure to coal mine dust, that is, that he had legal pneumoconiosis. *See Arch on the Green, Inc.* v. *Groves*, 761 F.3d 594 (6th Cir. 2014); *see also, Tennessee Consol. Coal Co.* v. *Kirk*, 264 F.3d 602 (6th Cir. 2001).

Id. at 30.

These determinations contain no error of law and are well within the administrative law judge's wide discretion as fact-finder. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Because I can see no way a reasonable person could reconcile these findings with a simultaneous finding the Miner retained the respiratory capacity to perform his usual mine employment, I would affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis and affirm the

award of benefits. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.); *see also Groves*, 277 F.3d at 833.

JONATHAN ROLFE
Administrative Appeals Judge