U.S. Department of Labor

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

BRB No. 18-0276 BLA

CHARLENE FULLER (Widow of JOSEPH FULLER) Claimant-Respondent v. EXCEL MINING, LLC c/o EAST COAST RISK MANAGEMENT Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/14/2020 DECISION and ORDER

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

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and Denise Hall Scarberry, (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

BEFORE: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05827) of Administrative Law Judge Steven D. Bell on a claim filed pursuant

to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on October 21, 2014.[1]

The administrative law judge found the miner had twenty-eight years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption and awarded benefits under Section 411(c)(4). Alternatively, he found claimant also established entitlement under Part 718, as she established the miner had clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), and the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b).

On appeal, employer argues the administrative law judge erred in finding the miner was totally disabled at the time of his death and, thus, erred in concluding claimant invoked the Section 411(c)(4) presumption. Employer alternatively asserts the administrative law judge erred in finding the evidence sufficient to establish the miner's death was due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[3]

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[1] Claimant is the widow of the miner, who died on November 19, 2013. Director's Exhibit 8. 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 his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012). The record is devoid of evidence that the miner filed for benefits during his lifetime. Because the miner was not determined eligible to receive benefits during his lifetime, claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

[2] 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 coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of underground coal mine employment and the existence of clinical and legal pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202(a)(1), (2); 718.203; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[4] 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).

Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish the miner worked at least fifteen years in qualifying coal mine employment and "*had at the time of his death* a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §725.305(b)(1)(iii) (emphasis added). 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge initially found there are no pulmonary function studies in the record to be considered at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9. Because the only blood gas studies were not performed to assess the extent of the miner's disability, but instead were performed during treatment for acute respiratory illnesses, the administrative law judge declined to consider whether the reported values establish disability at 20 C.F.R. §718.204(b)(2)(ii).[5] Decision and Order at 9.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 14.

[5] Because the blood gas studies were obtained in conjunction with the miner's treatment, they are not subject to the specific quality standards set forth at 20 C.F.R. §718.105 and Appendix C. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); *see* 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Error, if any, in finding the blood gas studies do not "meet the quality standards" is harmless, as the administrative law judge's concern that they were performed for purposes of treatment, not diagnosing the extent of disability, reflects a consideration of whether the results are nonetheless sufficiently reliable. *Stowers*, 24 BLR at 1-92; 65 Fed. Reg. at 79,920; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 9, *quoting*

The administrative law judge next considered the medical opinions of Drs. Jarboe, Caffrey, and Perper, together with the miner's treatment records from Pikeville Medical Center, and statements from claimant, the miner's wife of 34 years, describing his condition prior to death.[6] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 5, 6, 10; Director's Exhibit 9; Claimant's Exhibits 1, 2. Drs. Jarboe and Caffrey did not offer an opinion as to whether the miner was disabled at the time of his death and were given no weight. Decision and Order at 6. The administrative law judge determined Dr. Perper's diagnosis of total disability was well-reasoned and based on an extensive review of the miner's medical records. *Id*. at 6, 10. Finding Dr. Perper's opinion supported by claimant's credible description of the miner's condition prior to and at the time of his death, as well as the Pikeville Medical Center treatment records showing a "steep decline" in the miner's respiratory condition in the two years leading to his death, the administrative law judge found claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 10. For the following reasons, we affirm the administrative law judge's findings and the award of survivor's benefits.

As the administrative law judge found, evidence that the miner suffered a "steep decline in [his] respiratory condition over time" and was "disabled by a respiratory impairment at the time of his death" is compelling and supported by the record. Decision and Order at 10. The administrative law judge gave "significant weight to [c]laimant's observations of her husband of 34 years" and found she provided "useful evidence" that he "had a disabling respiratory condition in the years leading up to his death." *Id*. at 5, 10. Claimant stated in her hearing testimony and Affidavit of Deceased Miner's Condition (DOL Form CM-1093) that her husband began having breathing problems several years before his death. Hearing Transcript at 18; Director's Exhibit 9. He "would struggle" when exerting himself, "just couldn't breathe" when "walking [a] great distance," would "smother and wheeze," and "had trouble breathing when he would lay down." Hearing Transcript at 18; Director's Exhibit 9. The miner's breathing problems worsened over time "during the latter stages of his life." Hearing Transcript at 18. He was "diagnosed with pneumonia a lot," was prescribed nebulizers and inhalers "probably during the last three years" of his life, and was placed on oxygen for "a couple of years before he died." Hearing

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Appendix C to 20 C.F.R. Part 718 (blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness").

[6] Because there is no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Transcript at 19; *see* Director's Exhibit 9. His oxygen use "was every day and then every night and then it was 24/7 at the end." Hearing Transcript at 19.

The administrative law judge found claimant's statements and the treatment records reflect a "progress[ion] of the respiratory conditions which eventually caused the [miner's] death." Decision and Order at 6. The records from Pikeville Medical Center, in particular, "provide some of the most important information about [the miner's] medical condition at the end of his life" and "detail a prolonged decline in [his] respiratory condition." [7] *Id*. at

[7] The medical records from Pikeville Medical Center detail the miner's respiratory problems in the two-year period prior to his death on November 19, 2013. Claimant's Exhibit 1. Between December 2011 and January 2013, he was admitted to the emergency room five times with a cough and/or shortness of breath, and diagnosed with pneumonia on each occasion. *Id*. On December 17, 2011, the miner was admitted to the emergency room with a cough and decreased breath sounds, diagnosed with pneumonia, "continue[d] [on] o2," and given a "poor prognosis." Claimant's Exhibit 1 at 63-70. On February 19, 2012, he was admitted to the emergency room with a cough and diagnosed with "a complicated course of pneumonias." *Id*. at 71-87. He had "decreased breath sounds bilaterally," "expiratory wheezing," and had been prescribed nebulizers and other medications. *Id*. On September 17, 2012, he again was admitted to the emergency room with a cough and diagnosed with pneumonia; he had been experiencing "some increased cough and congestion over the past severa1 months;" and he was "kept on oxygen and receive[d] [nebulizers] every 4 hours." *Id*. at 95-102. On December 5, 2012, he was admitted to the emergency room and diagnosed with pneumonia; he started experiencing "shortness of breath along with yellowish greenish cough," was "on nasal cannula, oxygenating without difficulty," and was given nebulizers "to help with secretions and phlegm." *Id*. at 1-15. On January 23, 2013, he was diagnosed with pneumonia after being admitted with a "cough for the last three weeks intermittently" and shortness of breath; he was given "nebulizer treatments as well as oxygen." *Id*. at 16-24.

The miner was admitted to the emergency room two additional times prior to his death. On September 22, 2013, he was admitted "with dry cough associated with some shortness of breath." *Id*. at 25-44. Among the impressions was "hypoxic respiratory failure"; he was placed on "oxygen by nasal cannula to titrate the saturation above 92%." *Id*. The miner's final admission occurred on October 30, 2013 after he was "found at home to be cyanotic with hypoxia." *Id*. at 45-61. His "oxygen saturation [was] in the 70s on 6 liters of oxygen with no improvement." *Id*. He was treated for pneumonia "but did not improve much on the antibiotics." *Id*. He "continued to remain hypoxic [and] was found to have p1eura1 effusion of his 1ungs and the goal of care was changed to comfort measures only." *Id*.

8. The administrative law judge found they show that the miner "began having significant pulmonary issues in [December 2011],[8] and these illnesses progressed in seriousness until his death." *Id*. at 7. He noted that the miner's final hospitalization in October 2013, after being found "cyanotic with hypoxia" which did not improve after 6 liters of oxygen, is "obviously a serious state of respiratory failure, and there was not a great deal of improvement before [his] death a few weeks later." *Id*. at 8. The administrative law judge concluded, "[t]his is evidence of a disabling respiratory condition immediately before [the miner's] death." *Id*.

As for the medical opinions, employer's experts, Drs. Jarboe and Caffrey, limited their opinions to the cause of the miner's death and did not specifically address the separate question of whether he had a totally disabling respiratory impairment at the time of his death. Director's Exhibits 12, 13. The administrative law judge thus did not give them any weight on the issue of total disability.[9] Decision and Order at 9-10.

The miner died on November 19, 2013. His "Final Diagnoses . . . at the Time of Death" included "hypoxic respiratory failure" and pneumonia. *Id*. Dr. Limbu completed the death certificate, identifying "aspiration pneumonia," due to "hypoxic respiratory failure," due to "advanced early stage dementia" as the causes of death. Director's Exhibit 8. Dr. Nichols performed an autopsy, which revealed "mucoid material . . . within the major bronchi," "subpleural anthracosis," "acute and organized bronchopneumonia," "multiple areas of 1-2 millimeter localized collections of black pigment throughout all lobes," and "densely anthracotic" perihilar lymph nodes. Director's Exhibit 10. Pathology slides identified, among other things, "fixed anthracotic pigment entrapped in linear and nodular fibrous tissue," interstitial fibrosis, acute bronchopneumonia, coal dust macules, "acute and organizing pneumonia," pulmonary emphysema, and "marked pulmonary fibrosis." *Id*. The physician's "Final Diagnoses" included "chronic lung disease, consistent with coal workers' pneumoconiosis" and "pan-lobar pneumonia." *Id*. He concluded, "Death in this case is due to respiratory failure." *Id*.

[8] The administrative law judge stated in this passage that the miner's pulmonary issues began in "January 2012." Decision and Order at 7. He accurately cited, however, the miner's first hospitalization for pneumonia at Pikeville Medical Center one month earlier in December 2011. *Id*. at n.58.

[9] In considering the evidence on the cause of the miner's death, the administrative law judge found Drs. Jarboe and Caffrey did not review the miner's treatment records from Pikeville Medical Center and "provided no explanation" for failing to do so. Decision and Order at 8. Because they were "unaware of the progress of the respiratory conditions" that

Claimant's expert, Dr. Perper, on the other hand, did render a diagnosis of total respiratory disability after "review[ing] all of the materials reviewed by Drs. Jarboe and Caffrey [including the death certificate and autopsy report], plus the Pikeville Medical Center records, the reports of Drs. Jarboe and Caffrey as well as other medical records." Decision and Order at 6. He also "examined the autopsy slides . . . [and] had a complete understanding of [the miner's] work history." *Id*. Based on his review of the autopsy slides, Dr. Perper diagnosed the following lung conditions:

> 1. Coal workers' pneumoconiosis, interstitial fibrosis type with macules and sparse micronodules, mild to moderate, mainly mild. 2. Centrilobular emphysema, mild to moderate. 3. Acute aspiration bronchopneumonia, severe, extensive with multiple foreign body granulomas and giant cells. 4. Acute and chronic bronchiolitis. 5. Foci of organizing pneumonia. 6. Sclerosis of intrapulmonary blood vessels consistent with pulmonary hypertension. 7. Severe congestion and edema.

Claimant's Exhibit 2 at 39. After setting forth a detailed review of the miner's medical records as well as his examination of the lung sections, Dr. Perper concluded "within a reasonable degree of medical certainty:"

> The medical records indicate that prior to his death [the miner] was disabled from a respiratory standpoint, as evidenced by severe shortness of breath, with abnormal breathing sounds, abnormal arterial blood gases (hypoxemia and reduced oxygen saturation) and abnormal diffusion of respiratory gases, requiring treatment with bronchodilators, antibiotics, steroids and supplemental oxygen, because of his acute and chronic pulmonary conditions.

Id. at 42. He also concluded based on his review of the miner's treatment records and claimant's affidavit:

> [The miner] suffered of chronic shortness of breath on minimal exertion, and eventually even at rest and cough. [He] needed eventually supplemental oxygen, first [as needed] during the day and eventually at night as well and finally, continuously. . . . Furthermore, the respiratory condition was aggravated by impaired swallowing ability and choking of food leading to aspiration of food and recurrent pulmonary infections and pneumonia, often

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preceded the miner's death, he found their opinions on the cause of death have "almost no probative value" and are entitled to "almost no weight." *Id*. at 7-8, 10.

> requiring hospitalization and treatment with antibiotic, steroids, bronchodilators and supplemental oxygen.

Id. at 40.

The administrative law judge found Dr. Perper "exercise[d] . . . reasoned medical judgment [in] opin[ing] that [the miner] was disabled from a respiratory standpoint at the time of his death." Decision and Order at 10. Taking into consideration the contents of the Pikeville Medical Center treatment records, claimant's statements about her husband's condition, and "the reasoned opinion of Dr. Perper," the administrative law judge found the miner "was disabled by a respiratory condition at the time of his death," thus entitling claimant to the Section 411(c)(4) presumption that his death was due to pneumoconiosis. *Id*.

We reject employer's assertion that claimant's affidavit contradicts her hearing testimony and, therefore, does not constitute credible evidence of the miner's disability. Employer's Brief at 10. Employer contends claimant stated in her affidavit that the miner needed oxygen in 2009, but testified at the hearing that he did not require oxygen until 2011. *Id*. Contrary to employer's contention, the record does not reflect a wide discrepancy in claimant's statements. Her affidavit states that the miner started using supplemental oxygen "around" 2009, while her hearing testimony reflects that he started using oxygen "a couple of years before he died," "I'm thinking in, I'm thinking '10, '11." Director's Exhibit 9; Hearing Transcript at 19. Employer does not, and indeed cannot, credibly contend that claimant misstated the miner was on supplemental oxygen in the final years of his life. Six of his seven hospitalizations for pneumonia in the two years before his death specifically reference treatment with oxygen. Claimant's Exhibit 1. Dr. Perper's assessment is similar to claimant's testimony that the miner was on oxygen "every day and then every night and then it was 24/7 at the end." Hearing Transcript at 19; Claimant's Exhibit 2 at 18, 40. And, Dr. Jarboe acknowledged the miner eventually "required oxygen and near the end of his life, he required continuous oxygen." Director's Exhibit 12.

Further, the administrative law judge did not accord claimant's affidavit determinative weight, but specifically stated his "decision about whether [the miner] was disabled [was] based primarily on the medical records in the file and the opinions of the physicians who have issued reports in this case." Decision and Order at 10 n.74. As it is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence, we affirm the administrative law judge's rational determination that claimant's affidavit "provides useful evidence" of the miner's

respiratory condition in the years leading to his death.[10] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 10.

We also reject employer's contention the administrative law judge erred in crediting Dr. Perper's opinion on total disability because he relied on blood gas studies contained in the Pikeville Medical Center records that the administrative law judge declined to consider at 20 C.F.R. §718.204(b)(2)(ii).[11] Employer's Brief at 10-11. Contrary to employer's argument, the administrative law judge's finding that these studies do not meet the quality standards at subparagraph (ii) does not render them unavailable for any diagnostic purpose or require the rejection at subparagraph (iv) of any medical opinion that references them. Dr. Perper did not base his diagnosis of total disability on a mistaken belief that the treatment record blood gas studies were valid and qualifying; rather, he stated the blood gas studies are "abnormal" and reflect "hypoxemia and oxygen saturation."[12] Claimant's Exhibit 2 at 42.

On this point there is little dispute. The two most recent blood gas studies Dr. Perper referenced in his summary of the treatment records were conducted within two months of

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[10] Employer also asserts claimant's affidavit is "clearly biased" because she is the miner's widow. Employer's Brief at 10. In the case of deceased miners, however, the regulations specifically provide for consideration of lay testimony, including that of surviving spouses and close family members, in determining whether a miner was totally disabled. *See* 20 C.F.R. §718.305(b)(4). A determination of total disability must not be based *solely* on the testimony or affidavit of any person who would be eligible for benefits if the claim were approved. 20 C.F.R. §718.305(b)(4) (emphasis added). That is not the case here, as the administrative law judge explicitly relied primarily on medical evidence. Decision and Order at 10 n.74. Aside from its assertion of inherent bias, employer does not credibly contest the truthfulness of claimant's affidavit and testimony, or the consistency of her statements with the other record evidence.

[11] As we have affirmed the administrative law judge's finding that claimant's testimony is credible evidence supporting total disability, we reject employer's additional contention that Dr. Perper's reference to it also undermined his opinion. Employer's Brief at 10.

[12] Dr. Perper also acknowledged that the blood gas studies and oxygen saturations contained in the Pikeville Medical Center records were usually done during periods of acute pulmonary infection and pneumonia and, therefore, did not reflect "in-between respiratory conditions." Claimant's Exhibit 2 at 40.

the miner's death. The first was conducted on September 22, 2013, at the time of the miner's admission to the emergency room. *Id*. at 16. As Dr. Perper summarized, the miner's admission diagnoses that day included "hypoxic respiratory failure;" it was further noted that "[b]y October 3, 2013 . . . the hypoxemia and oxygen saturation [were] brought to normal levels with supplemental oxygen." *Id*. The second was conducted on October 30, 2013, the day of the miner's admission for his terminal hospitalization. *Id*. at 19. Dr. Perper again accurately characterized the medical records. The miner was admitted "with hypoxemia, after being found cyanotic at home, and persistent [*sic*] being so with an oxygen saturation of 70%, even after being placed on 6 liters/min of supplemental oxygen. . . . In the ER he received . . . supplemental oxygen." *Id*. at 18. Further, "hypoxic respiratory failure" was listed as one of the miner's "Diagnoses at the time of death;" it was among the causes of death identified by Dr. Limbu on the death certificate; and it was the cause of death identified on autopsy by Dr. Nichols.[13] *Id*. at 19-22.

Moreover, Dr. Perper's accurate diagnosis of hypoxemia and reduced oxygen saturation as reflected in the treatment records was but one of several specific factors he relied upon in diagnosing total disability. He opined the miner's total respiratory disability at the time of death was also evidenced by his "severe shortness of breath, with abnormal breathing sounds," "abnormal diffusion of respiratory gases," and the need for "treatment with bronchodilators, antibiotics, steroids and supplemental oxygen." Claimant's Exhibit 2 at 42. He elaborated that claimant's shortness of breath was "chronic" and eventually required continuous oxygen. *Id*. at 40. He stated this respiratory condition was aggravated by the miner's inability to swallow food, leading to "recurrent pulmonary infections and pneumonia" and often requiring hospitalization and treatment with bronchodilators and supplemental oxygen. *Id*.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-7 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). The Board is not authorized to reweigh the evidence or substitute its

[13] Although Dr. Jarboe limited his opinion to the cause of the miner's death, he made statements that are in accord with Dr. Perper's assessment that the miner was hypoxemic at the time of his death. Director's Exhibits 12. In attributing the underlying cause of death to dementia, he stated dementia caused recurrent aspiration, which "in turn caused the recurrent pneumonia and hypoxemic respiratory failure." Director's Exhibit 12. He described the recurrent pneumonia as a "process [that] went on almost continually. Eventually, [the miner] required oxygen and near the end of his life, he required continuous oxygen." *Id*.

inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge fully considered and accurately characterized the relevant evidence, his decision comports with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A) (requiring a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented"); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, his findings are based on more than the required substantial evidence. We thus affirm his determination that Dr. Perper's opinion, as supported by the Pikeville Medical Center records and claimant's affidavit and testimony, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *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.). As employer raises no other arguments with respect to the administrative law judge's weighing of the evidence, we affirm his finding that claimant established that the miner was totally disabled at the time of his death.[14] 20 C.F.R. §§725.305(b)(1)(iii), 718.204(b)(2).

[14] Our dissenting colleague faults the administrative law judge for finding total disability without "address[ing] the extent to which Dr. Perper opined claimant is disabled by his acute, rather than his chronic, respiratory conditions." *See infra* at 13. Contrary to this assessment, nothing in the Act or regulations requires a showing that the miner's total disability was chronic in order to invoke the Section 411(c)(4) presumption. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In *Tanner*, the Board squarely addressed this issue, holding that, "Under the plain language of Section 411(c)(4) of the Act and the implementing regulation . . . claimant is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic." *Tanner*, 10 BLR at 1-86. Thus, the relevant inquiry for invocation of the Section 411(c)(4) presumption is whether the deceased miner had a totally disabling respiratory impairment "at the time of his death," not whether the disability preceded death by some undefined time period such that it can be considered "chronic." 20 C.F.R. §718.305(b)(1)(iii); *see generally Price v. Califano*, 468 F.Supp. 428 (N.D. W.Va. 1979) (inquiry under Section 411(c)(4) is whether the miner was totally disabled "at the time of death," not some point in time "prior to death").

Further, the administrative law judge did not base his finding of total disability on a fleeting or temporary impairment. As noted, he fully reviewed relevant treatment records, medical opinions, and lay testimony to find that the miner suffered a "prolonged decline in [his] respiratory condition," beginning in December 2011 with his first of many diagnoses of pneumonia and "progress[ing] in seriousness until his death" two years later from "hypoxic respiratory failure." Decision and Order at 6-8. This finding is supported by ample evidence in the record.

In light of our affirmance of the administrative law judge's findings that the miner had twenty-eight years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

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, 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. As employer raises no specific challenge to this determination, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see* Employer's Brief at 10-11; Decision and Order at 10.

First, Dr. Perper conducted an extensive review of the miner's medical history and autopsy slides, and diagnosed numerous lung conditions and diseases. Claimant's Exhibit 2 at 42. While he stated the miner's disabling impairment is due to both "acute and chronic pulmonary conditions," he elaborated that the miner "suffered of *chronic* shortness of breath on minimal exertion, and eventually even at rest," ultimately requiring supplemental oxygen "continuously." *Id.* at 40 (emphasis added). This chronic condition, in turn, "was aggravated by recurrent pulmonary infections and pneumonia," often requiring hospitalization and supplemental oxygen. *Id.* Second, all but one of the miner's seven hospitalizations for lung infections/pneumonia in the two years before his death reference treatment with oxygen, including the final two hospitalizations which also report diagnoses of "hypoxic respiratory failure" during the two month period before his death. Claimant's Exhibit 1. Third, claimant, the miner's spouse of 34 years, confirmed his worsening shortness of breath over time, his repeated lung infections and hospitalizations, and his increasing dependence on supplemental oxygen. Director's Exhibit 9; Hearing Transcript at 18-20. Finally, although not explicitly relied upon by the administrative law judge, employer's medical expert, Dr. Jarboe, agreed the miner began having "recurrent aspiration [which] caused recurrent pneumonia" as early as December 2011. Director's Exhibit 12. He stated the process "went on almost continuously" until the miner's death in November 2013, eventually requiring oxygen and then "continuous oxygen" near the end of his life, and resulting in respiratory failure and death. *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[15]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits. I do so because, as employer argues, the administrative law judge failed to adequately address the credibility of Dr. Perper's opinions. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Dr. Perper opined that "prior to his death [the miner] was disabled from a respiratory standpoint, as evidenced by severe shortness of breath, with abnormal breathing sounds, abnormal arterial blood gas studies (hypoxemia and reduced oxygen saturation), abnormal diffusion of respiratory gases, requiring treatment with bronchodilators, antibiotics, steroids and supplemental oxygen, because of his acute and chronic pulmonary conditions." Claimant's Exhibit 2 at 42. The administrative law judge found Dr. Perper's opinion reasoned, and relied on it in finding the miner was totally disabled. Decision and Order at 10. As employer correctly asserts, however, the administrative law judge

[15] We, therefore need not address employer's challenges to the administrative law judge's additional finding that claimant also established entitlement pursuant to Part 718 by establishing the miner's death was due to pneumoconiosis without the benefit of the Section 411(c)(4) presumption.

discredited the abnormal blood gas studies on which Dr. Perper in part relied and the administrative law judge did not address whether this undermined his opinion. Employer's Brief at 10-11. The administrative law judge also failed to address the extent to which Dr. Perper opined claimant is disabled by his acute, rather than his chronic, respiratory conditions. Because the administrative law judge failed to explain his determination to credit Dr. Perper's opinion in light of these factors, I would vacate the administrative law judge's finding that Dr. Perper's opinion supports total disability. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984).

Consequently, I would vacate the administrative law judge's findings that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2) and invocation of the Section 411 (c)(4) presumption.

I also would vacate the administrative law judge's alternative finding that Dr. Perper's opinion establishes pneumoconiosis hastened the miner's death at 20 C.F.R. §718.205(b). Dr. Perper diagnosed both clinical and legal pneumoconiosis and opined that both were a significant and substantial contributory cause of death. Claimant's Exhibit 2. In crediting Dr. Perper, the administrative law judge correctly noted the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has explained that pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010).

The administrative law judge initially found *Williams* and *Conley* only apply to cases where the miner's *legal* pneumoconiosis hastened his death. Decision and Order at 8. Because Dr. Perper specifically opined the miner's *clinical* pneumoconiosis also substantially contributed to and hastened his death (and because the administrative law judge also found Dr. Perper entitled to "great weight" as the only physician to review all the medical evidence, including the Pikeville Medical Center records), the administrative law judge found his opinion sufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); Decision and Order at 8; Claimant's Exhibit 2. Alternatively, the administrative law judge found if *Williams* and *Conley* apply even when clinical pneumoconiosis is identified as hastening death, Dr. Perper's opinion still meets the standards set forth therein. Decision and Order at 8-9.

The administrative law judge erred in finding *Williams* and *Conley* only apply to cases in which the miner's *legal* pneumoconiosis hastened his death; nothing in either case

limits its application to one type of pneumoconiosis. *See Williams*, 338 F.3d at 518; *Conley*, 595 F.3d at 303-04.

Further, as employer asserts, the administrative law judge failed to explain how Dr. Perper's opinion meets claimant's burden to provide a reasoned opinion that sets forth the "specifically defined process" through which pneumoconiosis hastened the miner's death. Employer's Brief at 7-8. The administrative law judge inferred from Dr. Perper's statement "clinical and legal pneumoconiosis contributed to and hastened the death of [the miner] by terminal aspiration pneumonia,"[16] (Claimant's Exhibit 2 at 42) that "the mechanism is that [the miner's] pneumo rendered him susceptible to the aspiration pneumonia which was the immediate cause of his death." Decision and Order at 8. It is unclear how the administrative law judge divined this meaning from what Dr. Perper actually said. Moreover even what the administrative law judge has written does not explain how pneumoconiosis rendered the miner susceptible to aspiration pneumonia. Employer's Brief at 7. Nor has the administrative law judge explained how the Pikeville Medical Center records support Dr. Perper's opinion that the miner's pneumoconiosis hastened the miner's death, as they do not reference the miner's pneumoconiosis and state that dementia caused the miner's terminal aspiration pneumonia. *Id*. at 7-8. The Administrative Procedure Act requires an explanation for the administrative law judge's findings. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). That requirement has not been met here. More critically, the administrative law judge has not properly applied the Sixth Circuit standard for determining whether pneumoconiosis hastened the miner's death. Under Sixth Circuit law, pneumoconiosis "only 'hastens a death if it does so through a specifically defined process that reduces the miner's life by an estimable time.'" *Conley*, 595 F.3d at 303, *quoting Williams*, 338 F.3d at 518. A claim that "if pneumoconiosis makes someone weaker, it makes them less resistant to some other trauma . . ." does not satisfy this standard. *Conley*, 595 F.3d at 303. Thus, even if the administrative law judge had properly set forth his basis for finding that Dr. Perper opined that pneumoconiosis rendered the miner more susceptible to aspiration pneumonia, standing alone this would not meet the Circuit

[16] In addition to the above quoted language, Dr. Perper stated only: "[t]he cause of death was respiratory failure secondary to acute and chronic pulmonary conditions due primarily to aspiration pneumonia, and contributory coal workers' clinical and legal pneumoconiosis." *Id*. at 43. This also does not explain *how* pneumoconiosis contributed to death.

standard. "A medical opinion that pneumoconiosis expedited death through a 'specifically defined process' must explain why that is so . . ." *Id*.

Consequently, I would instruct the administrative law judge on remand to consider all of the relevant evidence, resolve the conflicts in the evidence, and properly explain his findings and determinations on the issues of total disability and death causation, properly applying the Sixth Circuit standard. *See* 20 C.F.R. §§718.204(b); 718.205(b); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also* 5 U.S.C. §557(c)(3)(A), as incorporated into the Actby 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; *Conley*, 595 F.3d at 303-04; *Williams*, 338 F.3d at 518.

In all other respects, I agree with the majority's conclusions.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge