U.S. Department of Labor

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

BRB Nos. 18-0151 BLA
18-0151 BLA-A
and 18-0377 BLA

TEMMY WOLFORD (o/b/o and Widow of MARK A. WOLFORD) Claimant-Respondent Cross-Petitioner v. KWV OPERATIONS, LLC and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2019 DECISION and ORDER

Appeals and Cross-Appeal of the Decisions and Orders of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer/carrier (employer) appeals, and claimant[1] cross-appeals, the Decision and Order (2014-BLA-05431) of Administrative Law Judge Larry Temin awarding benefits on a miner's claim filed on February 26, 2013 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Employer also appeals the Decision and Order (2017-BLA-05295) of the administrative law judge awarding benefits on a survivor's claim filed on September 21, 2016 pursuant to the Act.[2]

In the miner's claim, the administrative law judge initially designated employer the responsible operator. Because the administrative law judge credited the miner with only 8.93 years of coal mine employment,[3] he found that the miner did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). Turning to whether the miner could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence

[1] Claimant is the surviving spouse of the miner, who died on August 24, 2016. Claimant's Exhibit 9.

[2] Employer's appeal in the miner's claim was assigned BRB No. 18-0151 BLA, claimant's cross-appeal in the miner's claim was assigned BRB No. 18-0151 BLA-A, and employer's appeal in the survivor's claim was assigned BRB No. 18-0377 BLA. By Order dated October 16, 2018, the Board consolidated these appeals for purposes of decision only.

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 19. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

established the existence of both clinical pneumoconiosis[5] and legal pneumoconiosis,[6] in the form of emphysema due to coal mine dust exposure and cigarette smoking. 20 C.F.R. §718.202(a). Finally, the administrative law judge found that the miner was totally disabled due to legal pneumoconiosis, 20 C.F.R. §718.204(b), (c), and awarded benefits. In a separate Decision and Order, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits under Section 422(*l*) of the Act,[7] 30 U.S.C. §932(*l*) (2012), and awarded benefits in the survivor's claim.

On appeal, employer contends the administrative law judge erred in finding that it is the responsible operator. Employer also argues the administrative law judge erred in finding legal pneumoconiosis and total disability due to legal pneumoconiosis established. Claimant responds in support of the award of benefits. In her cross-appeal, claimant argues the administrative law judge erred in crediting the miner with less than fifteen years of coal mine employment, and therefore erred in finding that he did not invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's designation of employer as the responsible operator. In a reply brief, employer reiterates its previous contentions.[8]

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[5] "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).

[6] "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).

[7] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[8] Two and one-half months after filing its brief in support of the petition for review in the miner's claim, employer moved to permit supplemental briefing addressing the impact of *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), which held that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. By Order dated October 16, 2018, the Board denied

In its appeal of the survivor's claim, employer contends that, because the administrative law judge was not properly appointed when he adjudicated the miner's claim, his award of survivor's benefits is based on a "void" award of miner's benefits, and must be vacated. Claimant and the Director respond that employer waived its Appointments Clause challenge in the miner's claim. In a reply brief, employer reiterates its previous contentions.

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

RESPONSIBLE OPERATOR

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1).[9] The administrative law judge found

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employer's motion, agreeing with the Director, Office of Workers' Compensation Programs (the Director), that employer forfeited the Appointments Clause issue by failing to raise it in its opening brief. *Wolford v. KWV Operations, LLC*, BRB Nos. 18-0151 BLA, 18-0151 BLA-A (Oct. 16, 2018) (Order) (unpub.). On February 4, 2019, employer filed a Motion to Remand the miner's claim to the Office of Administrative Law Judges for a new hearing before a different administrative law judge based upon the Supreme Court's ruling in *Lucia.* Employer's motion is a request that the Board reconsider its October 16, 2018 Order. Because employer's motion was filed more than ten days after the Board's Order was filed, it is untimely. 20 C.F.R. §802.219(i). Moreover, even if employer's motion had been timely filed, we would continue to hold that employer waived the Appointments Clause issue by not raising it in its opening brief. *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"); *see also Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief).

[9] In addition, the evidence must establish that the miner's disability or death arose out of employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

that employer was the potentially liable operator that most recently employed the miner for a cumulative year. Decision and Order at 9-10.

On appeal, employer contends it should be released from liability because it did not employ the miner for one year. Employer's Brief at 6-9. We disagree. The administrative law judge accurately noted employer stipulated at the hearing that it employed the miner for at least one year. Decision and Order at 6, 9; Hearing Transcript at 18. Stipulations of fact fairly entered into are binding on the parties. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013). Employer is therefore bound by its stipulation it employed the miner for a year.[10] *Id.*; *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996). We thus reject employer's allegation of error,[11] and affirm the administrative law judge's designation of employer as the responsible operator.

The Miner's Claim

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to his disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer argues the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. In order to establish that the miner had legal

[10] Employer does not argue that it requested permission from the administrative law judge to withdraw its stipulation.

[11] In calculating the length of the miner's coal mine employment, the administrative law judge used the formula at 20 C.F.R. §725.101(a)(32) and found 0.84 year of coal mine employment for the period 2010 to 2011 (the period when the miner worked for employer). Decision and Order at 8. Employer argues this finding establishes that it did not employ the miner for a cumulative year. However, because employer stipulated to having employed the miner for one year, we agree with the Director that the administrative law judge's recalculation of the miner's coal mine employment for 2010 to 2011 was an "oversight." Director's Brief at 4. Moreover, the administrative law judge's determination the miner worked for employer for 127.63 days in 2010 is sufficient to establish a full year of coal mine employment with employer. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019) (to be credited with a full year of employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship); Decision and Order at 8.

pneumoconiosis, claimant must prove that he had a "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).

In addressing this issue, the administrative law judge considered the opinions of Drs. Forehand, Zaldivar, and Basheda. Dr. Forehand diagnosed legal pneumoconiosis in the form of emphysema due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 8; Claimant's Exhibit 10 at 32. Drs. Zaldivar and Basheda opined that the miner did not have legal pneumoconiosis, but instead had emphysema due to cigarette smoking and asthma. Director's Exhibit 10; Employer's Exhibits 12, 14. The administrative law judge credited Dr. Forehand's opinion over those of Drs. Zaldivar and Basheda because he found Dr. Forehand's opinion better reasoned and more consistent with the regulations. Decision and Order at 30-35. The administrative law judge, therefore, found that the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Employer argues the administrative law judge erred in finding Dr. Forehand's opinion sufficiently reasoned to establish legal pneumoconiosis. Employer's Brief at 11-20. We disagree. The administrative law judge noted that Dr. Forehand based his opinion that the miner's emphysema was due to the parallel effects of both coal mine dust exposure and cigarette smoking on his review of the pathology reports and the miner's work history. Decision and Order at 30-31. Dr. Forehand noted that Dr. Minami, in his pathology report,[12] described scattered parenchymal coal dust macules, nodules, and emphysematous changes throughout the parenchyma of the miner's right lung. Claimant's Exhibit 10 at 6. He explained these findings made it "very clear" that the miner's coal mine dust exposure "triggered sufficient reaction to cause not only macules but nodules and centriacinar emphysema." Claimant's Exhibit 10 at 12. Dr. Forehand further explained the miner's coal mine dust exposure was a substantial contributing cause of his disabling obstructive impairment based on "where [the miner] worked and the jobs he did in the mines."[13] Decision and Order at 31; Claimant's Exhibit 10 at 24.

The determination of whether a medical opinion is adequately reasoned is committed to the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge specifically found that Dr. Forehand set forth the

[12] Dr. Minami, a Board-certified pathologist, performed a post-mortem right lung pulmonectomy on September 22, 2016. Claimant's Exhibit 7.

[13] Dr. Forehand noted that the miner's coal mine work was "right at the face." Claimant's Exhibit 10 at 23-24.

rationale for his opinion, based on his interpretation of the medical evidence of record, and explained why he concluded that the miner's coal mine dust exposure was a substantially contributing cause of his emphysema. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255. We therefore affirm the administrative law judge's finding that Dr. Forehand's opinion is sufficient to establish legal pneumoconiosis.[14] 20 C.F.R. §718.202(a)(4); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *Rowe*, 710 F.2d at 255.

Employer contends that the administrative law judge erred in declining to accord less weight to Dr. Forehand's opinion because the doctor relied upon an inflated coal mine employment history. Employer's Brief at 22-24. We disagree. The administrative law judge noted that he credited the miner with 8.93 years of coal mine employment, while Dr. Forehand relied upon a coal mine employment history of 14 years. Decision and Order at 32; Director's Exhibit 38. The administrative law judge, however, found it reasonable to infer that Dr. Forehand's opinion regarding the cause of the miner's emphysema would not change if he considered a lesser coal mine dust exposure of 8.93 years. As the administrative law judge noted, Dr. Forehand specifically explained that he based his opinion not only on the length of the miner's coal mine employment, but also on the nature and location of the miner's coal mine work.[15] Decision and Order at 32; Claimant's Exhibit 10 at 11-12, 27. It is the administrative law judge's function to weigh the evidence, draw

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[14] We reject employer's contention that the administrative law judge applied an incorrect standard in finding that Dr. Forehand's opinion supports a finding of legal pneumoconiosis. The administrative law judge accurately noted that the Sixth Circuit has held a claimant seeking to establish legal pneumoconiosis could prove his pulmonary impairment was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), by showing that the impairment was caused "in part" by dust exposure in coal mine employment. *Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

[15] Dr. Forehand noted that the miner's coal mine work took place where the coal was being cut:

> [The miner] was a roof bolt operator which put him at the face. He was a shuttle car operator which put him right there behind the continuous miner. He was a coal driller and a coal shooter. He was a scoop operator. He worked in seams as low as 31 to 32 inches. Those are the types of exposures that cause coal mine[-]related lung disease; right at the face, right where they're cutting the coal.

Claimant's Exhibit 10 at 23-24.

appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382, 387 (6th Cir. 1999). Because the administrative law judge's inference is reasonable, we affirm his decision that Dr. Forehand's opinion was not called into question by his reliance upon a 14-year history of coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (explaining that if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) ("If a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation is satisfied.").

Moreover, because the administrative law judge underestimated the length of the miner's coal mine employment, Dr. Forehand did not rely upon an inaccurate coal mine employment history. In calculating the length of the miner's coal mine employment, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[16] and determined the number of the miner's working days between 1983 and 2011.[17] Decision

[16] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[17] Using the formula at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge calculated the number of the miner's working days for each year:

1983	6.70
1985	1.70
1986	24.79
1987	73.54
1988	117.68
1989	132.64
1991	4.19
1992	52.59
1995	145.84
1996	49.65
1997	238.96
1999	163.87
2000	0.90

and Order at 8. Using a 250-day work year as a divisor, the administrative law judge found that the miner had 6.39 years of coal mine employment for these years. *Id.*

By dividing by 250, however, the administrative law judge undercounted the miner's years of employment. In *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit held that a miner need not establish a full calendar year relationship under the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii). Rather, to be credited with a full year of employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship. *Id.* at 401-02. Thus, if the miner had 125 or more working days during a calendar year, he is entitled to credit for a full year of coal mine employment; if he had less than 125 working days, he is entitled to a fraction of the year "based on the ratio of the actual number of days worked to 125." *Id.* at 402. Using these guidelines, the administrative law judge should have credited the miner with 11.3 years of coal mine employment during this time frame. Additionally, the administrative law judge credited the miner with a total of 1.96 years of coal mine employment for the years 1984, 1990 and 1998, and with 0.50 of a year in 2012, for an additional 2.46 years of coal mine employment. Decision and Order at 7. Thus, using the administrative law judge's calculations, the miner was entitled to credit for at least 13.76 years of coal mine employment, approximately the same length of coal mine employment relied upon by Dr. Forehand. Therefore, any error by the administrative law judge in crediting Dr. Forehand's opinion despite his reliance on an inaccurate coal mine employment history was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Employer also argues the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 24-31. We disagree. The administrative law judge accurately noted Drs. Zaldivar and Basheda excluded coal mine dust exposure as a cause of the miner's emphysema based in part on the partial reversibility of the miner's impairment after the administration of a bronchodilator. Decision and Order at 33-34. The administrative law judge permissibly found that Drs. Zaldivar and Basheda

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2001	79.25
2004	3.91
2006	67.49
2007	109.90
2008	102.78
2009	9.38
2010	127.63
2011	82.67

Decision and Order at 8.

failed to adequately explain why the irreversible portion of the miner's pulmonary impairment, which remained totally disabling after bronchodilation, was not due in part to coal mine dust exposure, or why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the miner's emphysema.[18] *See Banks*, 690 F.3d at 489; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

Moreover, noting that the preamble to the revised regulations acknowledges the studies found credible by the Department that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Basheda that the miner's emphysema was due solely to cigarette smoking and asthma because neither physician adequately explained how he eliminated the miner's coal mine dust exposure as a source of his emphysema.[19] *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017); *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); Decision and Order at 34-35. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Zaldivar and Basheda.[20] *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

[18] The administrative law judge accurately noted that the miner's pulmonary function studies conducted on June 20, 2013, September 18, 2013, and May 29, 2015 produced qualifying results even after the administration of a bronchodilator. Decision and Order at 14; Director's Exhibits 8, 10; Employer's Exhibit 5. A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[19] The administrative law judge found that neither Dr. Zaldivar nor Dr. Basheda accounted for the miner's coal mine dust exposure in addressing the cause of his emphysema. Decision and Order at 34.

[20] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

Employer next argues the administrative law judge erred in finding that the evidence established that the miner was totally disabled due to legal pneumoconiosis.[21] 20 C.F.R. §718.204(c). We disagree. The administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 36. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611 (6th Cir. 2001).

The administrative law judge explained that Dr. Forehand's opinion establishes that "the [m]iner's legal pneumoconiosis, in the form of emphysema, had a material adverse effect on his respiratory condition and that the [m]iner's disability was substantially contributed to by his pneumoconiosis." Decision and Order at 36-37. Further, he concluded that Dr. Forehand's opinion "establishes that the [m]iner's pneumoconiosis was a substantial contributing factor in his total disability." *Id.* at 37.

The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Basheda because they did not diagnose legal pneumoconiosis. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 37. Moreover, as the administrative law judge rationally relied on Dr. Forehand's well-reasoned opinion to find that the miner had legal pneumoconiosis, he permissibly found that his opinion establishes that the miner's legal pneumoconiosis substantially contributed to his totally disabling respiratory or pulmonary impairment.[22]

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[21] Because it is unchallenged on appeal, we affirm the administrative law judge's finding of total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[22] Drs. Zaldivar and Basheda agree that the miner's disabling pulmonary impairment was caused by his emphysema. Director's Exhibit 10; Employer's Exhibit 5.

See Groves, 761 F.3d at 599. Consequently, we affirm the administrative law judge's finding at 20 C.F.R. 718.204(c). We therefore affirm the administrative law judge's award of benefits in the miner's claim.[23]

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish her entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 3-4.

Although employer concedes that the administrative law judge was validly appointed at the time he issued his decision in the survivor's claim, it contends that he was not validly appointed when he issued his award of benefits in the miner's claim. Employer's Brief at 5-8. Employer therefore contends that the administrative law judge's award of survivor's benefits is based on a "void" award of miner's benefits, and must be vacated. We disagree. As discussed *supra*, employer's February 4, 2019 motion to reconsider the Board's October 16, 2018 Order, holding that employer forfeited its Appointments Clause argument in the miner's claim, was untimely. *See* n.8. Employer is therefore precluded from attacking the administrative law judge's award of benefits in the miner's claim on Appointments Clause grounds, and cannot rely on that basis to vacate the award of benefits in the survivor's claim.

Because none of the administrative law judge's findings in the survivor's claim are otherwise challenged on appeal, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[23] In view of our affirmance of the award of benefits, we need not address the arguments raised in claimant's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decisions and Orders awarding benefits in the miner's claim and the survivor's claim are affirmed.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I write separately to note my disagreement with the majority's conclusion that the administrative law judge reasonably inferred that Dr. Forehand's opinion regarding the cause of the miner's emphysema would not have changed if he considered a lesser coal mine dust exposure of 8.93 years. The administrative law judge's explanation was, "Given all the medical evidence Dr. Forehand reviewed and his examination of the Miner, I find it reasonable to infer that his opinions regarding the cause of the Miner's condition would not change if he considered a coal mine employment of less duration." Decision and Order at 32. The administrative law judge did not further explain his conclusion. His explanation does not provide the reviewing adjudicator a sufficient basis to ascertain whether his inference was reasonable and fails to meet the requirements of the Administrative Procedure Act. *See* 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). This is particularly the case because Dr. Forehand highlighted the miner's years of coal mine exposure in making his determination as to the cause of the miner's obstructive lung

disease. *See* Director's Exhibit 8 at 23; Claimant's Exhibit 10 at 27, 32.[24] In the absence of a reasoned explanation, the administrative law judge's finding amounts to improper speculation. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

However, as the majority notes, applying *Shepherd*, the miner's length of coal mine employment closely approximates the 14 years relied upon by Dr. Forehand. Therefore, the issue as to whether the administrative law judge properly concluded that Dr. Forehand would have rendered the same opinion (if he considered a lesser coal mine employment history) is, in effect, moot, and any error as to making an inference concerning Dr. Forehand's opinion harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[24] I thus also disagree with the majority's contention that the reasoning of the administrative law judge is apparent.