**NO. 14-1745**

# IN THE

# United States Court of Appeals

## FOR THE FOURTH CIRCUIT

**JANICE FAYE TRUMP,**
**o/b/o and Widow of JESSE WILLARD TRUMP,**

***Petitioner,***

**V.**

**EASTERN ASSOCIATED COAL COMPANY,**

***Respondent,***

**AND**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION,**
**UNITED STATES DEPARTMENT OF LABOR,**

***Party-in-Interest.***

## Opening Brief of Petitioner, Janice Faye Trump

**PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD**

**Timothy C. MacDonnell, Esquire**
**David T. Long, Jr., Student Caseworker**
**Black Lung Legal Clinic, Room 106**
**Washington and Lee University**
**School of Law, Lewis Hall**
**Lexington, VA 24450**
**(540) 458-8562**
***Counsel for Respondent***

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1745 Caption: Janice Faye Trump, o/b/o and Widow of Jesse Willard Trump v. Eastern Associated Coal Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Black Lung Legal Clinic
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? [ ] YES [X] NO

2. Does party/amicus have any parent corporations? [ ] YES [X] NO If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? [ ]YES [X] NO If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b)) [ ]YES [X] NO If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) [ ]YES [X] NO If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? [ ]YES [X] NO
If yes, identify any trustee and the members of any creditors' committee:

**********

CERTIFICATE OF SERVICE

I certify that on 12/29/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

/s/ Timothy C. MacDonnell 12/29/14

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Regulations

## I. STATEMENT OF JURISDICTION

This appeal arises from a final order of the United States Department of Labor Benefits Review Board ("BRB") in a claim under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945. This court has jurisdiction over an appeal from a final order of the BRB under § 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). The BRB affirmed Administrative Law Judge ("ALJ") Thomas M. Burke's July 30, 2013 Decision and Order on remand denying black lung benefits to Jesse Trump.

The jurisdictional time limit for filing an appeal from a final order of the Board is 60 days. *See* 33 U.S.C. § 921(c); 20 C.F.R. § 725.482(a) (2012). The Board issued its final order denying Mr. Trump benefits on May 29, 2014. Janice Trump, on behalf of Mr. Trump, filed an appeal with this Court on July 24, 2014. The injury alleged, within the meaning of § 422(a) of the Black Lung Benefits Act, occurred in West Virginia. This court has jurisdiction to review the BRB's decision.

## II. STATEMENT OF ISSUES

The following issues are present on petition:

1) Whether ALJ Burke's finding that the blood gas studies performed during the miner's hospitalization for non-pulmonary conditions were entitled to less weight was improper.
2) Whether ALJ Burke's decision to discredit Dr. Houser's opinion regarding the miner's total disability was irrational and inconsistent with prevailing law.
3) Whether ALJ Burke failed in his duty of explanation under the Administrative Procedure Act to adequately explain his credibility determination of the experts.

## III. STATEMENT OF THE CASE

### A. Procedural History

Jesse Trump was denied his September 24, 1974 claim for Federal Black Lung Benefits on September 18, 1980, pursuant to an Administrative Law Judge Decision and Order issued on August 18, 1980.[1] JA 516-18.[2] Mr. Trump's subsequent appeal to the Benefits Review Board ("the Board" or "BRB") was dismissed. He filed a subsequent claim on May 29, 1986, which the Administrative Law Judge denied on June 27, 1987 because the evidence did not show a material change in condition.[3] Mr. Trump filed the claim now before the court on October 23, 2001. JA 610-13. The hearing was continued multiple times until Mr. Trump died on October 22, 2006. Administrative Law Judge Thomas A. Burke presided over the hearing on October 21, 2010.

On August 31, 2011, Judge Burke issued a Decision and Order awarding Mrs. Trump benefits. He determined that the newly submitted evidence supported

---

[1] Mr. Trump had established pneumoconiosis but not total disability.

[2] Exhibits are identified as follows: Joint Appendix "JA"; Miner's claim "M"; Survivor's claim "S"; Director's Exhibits "DX"; Claimants' Exhibits "CX"; and Employer's Exhibits "EX." The hearing transcript is identified as "Tr." Judge Burke's August 31, 2011 Decision and Order Granting Benefits is identified as "2011 D&O"; his July 30, 2013 Decision and Order Denying Benefits is identified as "2013 D&O." The 2012 Benefits Review Board Decision and Order is identified as "BRB D&O." The 2014 Benefits Review Board Decision and Order is identified as "2014 BRB D&O."

[3] Mr. Trump again established pneumoconiosis but not total disability.

a finding that Mr. Trump had been totally disabled from a pulmonary impairment, thus establishing a change in condition of entitlement that Mr. Trump had not previously shown. JA 1022. Judge Burke determined that the evidence supported a finding of both clinical and legal pneumoconiosis. *Id.* at 1025. He credited Mr. Trump with forty years of coal mine employment, which entitled him to the presumption under 20 C.F.R. § 718.203(b) that his pneumoconiosis arose out of his coal mine employment. *Id.* at 1024-25. Employer failed to rebut this presumption. *Id*. Finally, Judge Burke determined that a preponderance of the evidence established that Mr. Trump's total pulmonary disability arose out of his coal mine employment. *Id.* at 1026. Accordingly, he awarded benefits on Mr. Trump's claim. *Id.*

Employer appealed this decision and, on November 7, 2012, the Board issued an unpublished Decision and Order affirming in part and vacating in part the Award, and remanding both claims for further consideration. JA at 1029–41. The Board left Judge Burke's finding of forty years of underground coal mine employment and the presence of clinical pneumoconiosis undisturbed. The Board vacated the finding of a totally disabling respiratory impairment, determining that Judge Burke did not "adequately explain his rationale for crediting Dr. Houser's opinion and for discounting the opinions of Drs. Zaldivar and Naeye," and that he failed to give a reason for not crediting Dr. Rosenberg's opinion. *Id.* at 1037. The

Board rejected Employer's argument that Judge Burke mischaracterized Dr. Zaldivar's opinion, but expressed concern that Judge Burke had potentially assumed that any notation of hypoxemia supports a finding of disability and substituted his own opinion for that of a physician in evaluating the treatment records. *Id*.

The Board further vacated the findings of legal pneumoconiosis and disability causation as they "may" have been affected by Judge Burke's weighing of the evidence on the issue of disability. *Id.* at 1038. The Board rejected Employer's arguments that Dr. Houser's opinion was insufficient to support a finding of legal pneumoconiosis and that Judge Burke erred in finding Dr. Zaldivar's opinion inconsistent with the pathology evidence of record. *Id*. However, the Board found that Judge Burke mischaracterized Dr. Rosenberg's opinion regarding the absence of legal pneumoconiosis. JA at 1039. Finally, the Board vacated the award of Mrs. Trump's claim, as it was based on the award of Mr. Trump's claim. *Id.* at 1040. The Board instructed Judge Burke "to reassess the conflicting medical opinions in light of the physician's explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and fully explain the reasons for his credibility determinations." *Id.* at 1038.

On July 30, 2013, Judge Burke issued a Decision and Order denying benefits. He reversed his earlier decision and found that Dr. Houser's opinion that Mr. Trump suffered from a totally disabling pulmonary impairment was not well-reasoned and not well-supported by the medical evidence of record. He reasoned that because Dr. Houser opined that the arterial blood gas tests showed "persistent . . . moderately severe to severe hypoxemia," JA at 1058-59, and because this finding was "only supported by one ABG," *id.*, Dr. Houser's opinion was poorly reasoned. Notwithstanding the fact that the record contained ten ABGs—nine of which evinced hypoxemia (the exception being the one performed by Dr. Zaldivar), and five of which yielded qualifying results under the regulations—Judge Burke determined that "five studies all occurred during hospitalizations for acute non-pulmonary conditions that could have caused hypoxemia," *id.*, and therefore did not support a finding of total disability.

**B. Relevant Facts**

Mr. Trump worked underground in coal mines for forty years as a shot fireman and hand-loader until 1977, when he quit due to breathing difficulties. *See M-DX-1*; JA 949, 968. He was diagnosed with clinical pneumoconiosis in 1968[4] and emphysema in 1974.[5] *See M-DX-1*. He never smoked. *See M-DX-1*; JA 978. In

[4] See 04/23/68 X-ray interpretation by William M. Clopton, M.D.
[5] See 08/29/74 X-ray interpretation by C. Richard Daniel, M.D.

1998, Mr. Trump suffered a cerebrovascular accident, which impaired his motor skills and speech, requiring him to undergo physical and speech therapy treatments. JA 365-71. Later Mr. Trump was diagnosed with dementia, which exacerbated the effects of his previous stroke. In addition to Mr. Trump's cerebral impairments, Mr. Trump's medical history included coal workers' pneumoconiosis, dyspnea, chronic obstructive pulmonary disease ("COPD"), transient ischemic attacks, coronary artery disease, and severe hearing loss. *CX 10-20*. Mr. Trump also suffered from gastrointestinal impairments. In 2004, due to his COPD and chronic hypoxemia, Mr. Trump was placed on continuous home oxygen, which he used until his death on October 22, 2006. JA 160-66; JA 205-10.

Dr. Imbing performed an autopsy on October 23, 2006 and found Mr. Trump died of an acute myocardial infarction secondary to simple coal workers' pneumoconiosis. JA 78. He concluded that "the presence of coal worker's pneumoconiosis in both lungs contributed to his death." *Id.* Dr. Oesterling, Employer's pathologist, found Mr. Trump had moderate coal workers' neumoconiosis and focal emphysema surrounding the micro-nodules.[6] JA 1137-38.

[6] Claimant objected to Dr. Oesterling's report dated May 25, 2010, and moved to exclude it on the ground that it constituted a third reasoned medical opinion because Dr. Oesterling had relied on records outside the scope necessary to prepare an autopsy report. JA at 951–54, 961, 996. Judge Burke denied Claimant's motion, holding that Dr. Oesterling's report would be considered an autopsy report, but only with respect to those portions that properly considered autopsy evidence, and permitted Employer to submit a rehabilitative report. JA 958-62, 996. Employer

Dr. Naeye, Employer's rebuttal pathologist, submitted a report finding that up to twenty percent of Mr. Trump's lungs were afflicted with coal workers' pneumoconiosis lesions, and the remaining 80 to 85 percent of the lung tissue had mild to moderately severe centrilobular pulmonary emphysema. JA 782.

Dr. Houser submitted a report finding that Mr. Trump had both clinical pneumoconiosis and legal pneumoconiosis which caused moderate to severe chronic hypoxemia, as evinced by his arterial blood gas studies ("ABGs"). JA 22. Dr. Houser concluded that Mr. Trump's coal mine employment caused his chronic, moderate to severe hypoxemia, which rendered him totally disabled. *Id.*

Dr. Zaldivar submitted a report finding Mr. Trump had clinical pneumoconiosis and no evidence of legal pneumoconiosis. *See* JA 772. Dr. Zaldivar opined that his clinical pneumoconiosis did not cause a pulmonary impairment as evinced by Mr. Trump's normal pulmonary function test ("PFT"), and that his disability was due to his cardiac issues and was unrelated to his lungs. *Id.*

Dr. Rosenberg submitted a report finding Mr. Trump had clinical pneumoconiosis without definite legal pneumoconiosis. JA at 753. Dr. Rosenberg

---

submitted Dr. Oesterling's supplemental report dated December 8, 2010, and Claimant moved to exclude it on the same ground. Judge Burke granted in part and denied in part Claimant's motion, holding that the portions of Dr. Oesterling's opinion that were "based on the pathological evidence could be separated from his opinion based on pathology plus the clinical evidence." JA 1004 .

concluded that Mr. Trump's clinical pneumoconiosis did not contribute to his death or cause any pulmonary impairment based on his normal PFTs and the two ABGs conducted by Dr. Zaldivar. *Id.*

On February 28, 2006, Mr. Trump entered the Appalachian Regional Hospital ("ARH") emergency room complaining of a decreased level of consciousness. JA 201-07*;* JA 1015. Mr. Trump was admitted to ARH and remained hospitalized until March 3, 2006, at which time his discharge diagnosis was "altered mental status likely secondary to dementia." *Id*. During the normal course of treatment, Mr. Trump produced an ABG on February 28, 2006, with a $PO_2$ at 55 and $PCO_2$ at 45, evincing severe hypoxemia and an increased A-a gradient. JA 247. Dr. Rosenberg testified that these figures would satisfy the disability guidelines and that Mr. Trump was suffering from severe hypoxemia. JA 1107-10. Dr. Zaldivar also testified that these results were abnormal and would satisfy the disability guidelines. JA 905-07. Dr. Houser agreed with Drs. Zaldivar and Rosenberg that these values satisfied the disability guidelines and evinced severe hypoxemia. JA 19-21.

During this hospitalization, Mr. Trump received oxygen and Albuterol (a drug administered to patients with COPD), which were part of his normal outpatient medications. JA 201-02*;* JA 333-50; JA at 975–76; JA at 1022; *2011 D&O* at 21. The Emergency Nursing Record stated under "Additional Findings"

that "Pt $O_2$ dependent." JA 210. The emergency room's Physician Order Sheet stated under "Subsequent Nursing Orders" that Mr. Trump was to receive "(2) $O_2$ at 40° Ventimask." *Id.* Mr. Trump received $O_2$ and Albuterol throughout this hospitalization, and on the final respiratory therapy note, the therapist reported Mr. Trump was given "O2 day. DC home." JA 206.

Mr. Trump also had two chest X-rays taken during this admission to the hospital. Dr. Manu Patel[7] interpreted the February 28, 2006 X-ray as showing "no obvious consolidation or congestive heart failure . . . normal cardiovascular structures[,] chronic obstructive pulmonary disease[, and] classifiable pneumoconiosis." JA 250. Dr. Bharat Patel interpreted the March 6, 2006 X-ray as showing "no infiltrate[,] no congestive heart failure[, and] changes of chronic obstructive pulmonary disease and chronic parenchymal lung changes due to pneumoconiosis." JA 248.

On September 28, 2006, Mr. Trump again presented to the ARH emergency room complaining of a decreased level of consciousness and shortness of breath. JA 130; JA 1015. He was admitted to ARH and remained hospitalized until October 4, 2006. Upon his discharge, Mr. Trump was diagnosed with a decreased level of consciousness secondary to a transient ischemic attack—i.e., a mini-stroke.

[7] Dr. Manu Patel is a board-certified radiologist and B-Reader.

JA 1016. During his admission, Mr. Trump performed two ABGs on September 29, 2006—at 00:34 and at 06:26 hours. *See* JA 130 (*CX-10*).

At 00:34 hours, his $PO_2$ was 51 and $PCO_2$ was 50, evincing severe hypoxemia and an increased A-a gradient. JA 194. Dr. Rosenberg testified that these levels were abnormal, would qualify as totally disabled, and showed severe hypoxemia. JA 1110-11. Dr. Zaldivar also testified that these results were abnormal and would satisfy the disability guidelines. JA 820 (*EX-15)*. At 06:26 hours, Mr. Trump's $PO_2$ was 50 and $PCO_2$ was 53, evincing moderate chronic respiratory acidosis, severe hypoxemia, and an increased A-a gradient. JA 130-150 (*CX-10)*.

During his 2004 hospitalization, Mr. Trump received oxygen and Albuterol, which were part of his normal outpatient medications. *Id.*; JA 976-77; JA 1022. Again, Dr. Rosenberg testified that these levels were abnormal, qualified as totally disabled, and showed severe hypoxemia. JA 1106-14 (*EX-17)*. Dr. Zaldivar testified that these results were very abnormal. JA 908 (*EX-15)*. Dr. Houser reported that both studies showed severe hypoxemia and satisfied the disability guidelines. JA 18 (*CX-7)*.

On October 19, 2006, Mr. Trump presented to the ARH emergency room complaining of increased confusion. JA 87-89*;* JA 1014-17. He was admitted to ARH and suffered an acute myocardial infarction on October 20, 2006. *Id*. Mr.

Trump subsequently died on October 22, 2006. *Id*. During the normal course of treatment, Mr. Trump performed an ABG on October 20, 2006 with a $PO_2$ at 55 and $PCO_2$ at 24, evincing severe chronic respiratory alkalosis, severe hypoxemia, and an increased A-a gradient. Dr. Rosenberg testified that these levels were outside the normal range, and Mr. Trump had severe hypoxemia. JA 1112-13. Dr. Zaldivar testified that these results are very abnormal. JA 908-09 Dr. Houser reported these results showed severe hypoxemia and satisfied the disability guidelines. JA 18-22.

In the 2011 Decision and Order, Judge Burke excluded these qualifying ABGs under 20 C.F.R. § 718.204(b)(2)(ii) on the ground that the studies "administered in 2006 were administered during treatment for an acute or cardiac condition and thus, under the requirements of Appendix C to Part 718, cannot be considered." JA 1017–18. As a result, Judge Burke determined that a preponderance of the ABG evidence was non-qualifying and did not establish a totally disabling pulmonary impairment. JA 1018. Nevertheless, a preponderance of evidence supported Dr. Houser's conclusion that Mr. Trump had hypoxemia, thus establishing total pulmonary disability. JA at 1020, 1022.

## IV. SUMMARY OF ARGUMENT

The Benefits Review Board decision to uphold ALJ Burke's Decision and Order should be reversed and remanded. Judge Burke made a reversible error in

excluding arterial blood gas studies simply because they were conducted during periods of hospitalization. According to Appendix C to Part 718 of the regulations, the evidentiary weight of ABGs may be discounted if the tests are taken during or soon after an acute respiratory or cardiac illness. This was not the case for any of the ABGs taken by Mr. Trump during 2002, July 2004, May 2004, and February 2006 to October 19, 2006. The treatment records corresponding to the dates of hospitalization at Appalachian Regional Hospital, where the ABGs were administered, indicate that Mr. Trump's hospitalization was due to a decreased level of consciousness associated with Mr. Trump's dementia and a transient ischemic attack, and not due to any acute event of a respiratory or cardiac nature. Neither the BRB nor ALJ Burke considered this in making a determination that the ABGs of record were unreliable. Of the four excluded ABGs, only one—the final ABG, administered on October 20, 2006—can be said to have occurred in relation to an acute cardiac condition. For the remaining excluded ABGs, Employer claims that because the tests were administered during hospitalization they cannot be relied upon in a determination of total disability. However, such a conclusion is not supported by the Department of Labor Regulation.

Additionally, the ALJ incorrectly dismissed Dr. Houser's opinion of consistent hypoxemia. Dr. Houser's reasoning was based upon multiple evidentiary factors in the record. Dr. Houser relied on more than one type of evidence in

determining that Mr. Trump was totally disabled and could not return to his previous employment as a coal miner. The record reflects that Dr. Houser relied upon pathology reports, autopsy reports, ABGs, and hospital records in reaching his reasoned medical opinion. Judge Burke's failure to consider all of the evidence used by Dr. Houser in his report is a reversible error.

Ultimately, Judge Burke failed to carry his burden of explanation in supporting his findings that neither the arterial blood gas studies nor Dr. Houser's reasoned medical opinion established Mr. Trump's total disability. In Judge Burke's subsequent Decision and Order, Judge Burke dismisses evidence previously accepted in the initial Decision and Order without an explanation. In the few places within the subsequent Decision and Order wherein Judge Burke attempts to explain his findings for accepting certain pieces of evidence, his reasoning is mired by vague assertions and incorrect interpretations of the law. Judge Burke's failure to sufficiently explain the reasoning underlying his findings is, standing alone, a reversible error. Judge Burke's errors in this case is sufficient enough to mandate a remand of this case to the ALJ, directing Judge Burke to consider all evidence in the record before making a determination in the case.

## V. ARGUMENT

### A. Standard of Review

In reviewing claims for benefits under the Black Lung Benefits Act, this Court must determine whether substantial evidence supports the findings of fact issued by the ALJ. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193 (4th Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998). In determining whether substantial evidence supports the ALJ's factual determinations, the Court should address whether all relevant evidence has been analyzed and whether the ALJ has sufficiently explained the rationale used in crediting certain pieces of evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997).

The ALJ's and Board's conclusions of law are reviewed *de novo* to determine if they are rational and consistent with the law. *See Ballard*, 65 F.3d at 1193; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000).

## B. Discussion of Issues

### 1. ALJ BURKE'S FINDING THAT THE BLOOD GAS STUDIES PERFORMED DURING THE MINER'S HOSPITALIZATION FOR NON-PULMONARY CONDITIONS WERE ENTITLED TO LESS WEIGHT WAS IMPROPER.

Judge Burke improperly discounted the arterial blood gas studies conducted during Mr. Trump's hospitalizations. Judge Burke, in an attempt to abide by the regulations, afforded several blood gas studies less weight when reaching a conclusion on total disability. The regulations state that "[arterial blood gas] tests shall not be performed during or after an acute respiratory or cardiac illness." 20 C.F.R. § 718, App'x C. Yet Judge Burke's application of the regulation to the ABGs at issue is inapposite. The regulations limit the admissibility of ABGs taken *during* or *after* a respiratory or cardiac illness. First, three of the discounted ABGs were not performed during or after an acute cardiac or respiratory illness. The discounted ABGs were taken during a hospital visit related to Mr. Trump's pre-existing dementia. Second, under *Jeffries v. Director, OWCP*, 6 B.L.R. 1-1013 (1984), the Employer has a duty to present qualified medical testimony proving the unreliability of the otherwise qualifying tests. Failure to accept the qualifying tests absent contest by the Employer is reversible error.

Mr. Trump's arterial blood gas tests taken during the final years of his life evince a steady decrease in the oxygenation of his blood.[8] Judge Burke asserts that the results of the ABGs taken during the last year of Mr. Trump's life were due to acute illnesses, ignoring evidence in the record that correlates the ABGs with the prolonged pulmonary issues Mr. Trump suffered during his life. Judge Burke's assumption that the severe ABG results were due to acute illnesses and independent of the pre-existing conditions is unsupported by the record.

The purpose of the requirement in Appendix C is to remove from evidence those studies that represent only isolated instances of low oxygen levels due to an acute respiratory or cardiac illness. In proposing this regulation, the Department of Labor believed that studies conducted during or shortly after a respiratory illness were "likely to produce spurious values which are not indicative of the miner's true condition." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3,346 (Jan. 22, 1997) (to be codified at 20

[8] The outlying exception is the May 5, 2004 test performed by Dr. Zaldivar. The only testimony and evidence about this outlying study show that it was skewed by Mr. Trump's use of supplemental oxygen immediately prior to taking the test. Mrs. Trump testified that Mr. Trump was on supplemental oxygen immediately prior to taking the May 5, 2004 study, and that Mr. Trump had begun regularly using supplemental oxygen that same year. *See* JA 976. Mrs. Trump then stated that Mr. Trump was using oxygen up until he was brought in for the May 5, 2004 study's administration. *See* JA 976. The study itself shows that the attending physicians who administered the test were uncertain about Mr. Trump's oxygen use status at the time. They wrote: "PATIENT'S 02 STATUS?R/AIR." JA 743. The question mark shows that the physician conducting the test had doubts about the lingering effects of the supplemental oxygen Mr. Trump had just been using.

C.F.R. § 718, App'x C). The regulation was not intended to be used as a tool to dismiss probative arterial blood gas studies taken during hospitalizations for changes in mental condition or general symptoms of chronic pulmonary conditions.

Both the Benefits Review Board and the ALJ mischaracterize 20 C.F.R § 718, App'x. C. Appendix C states that a test shall not be performed during or soon after an *acute* respiratory or cardiac illness. The BRB incorrectly determined that the ALJ's decision to exclude ABGs taken by Trump during hospitalization was correct. The ALJ determined that all of the 2006 ABGs should be excluded because they were taken during hospitalization for "acute non-pulmonary conditions that could have caused hypoxemia" is inapposite to the regulations. The regulations only exclude ABGs taken during acute pulmonary and cardiac issues. The ALJ failed to look at the hospital treatment records that show that except for the ABG taken in October 20, 2006 and August 5, 2004, Mr. Trump was not hospitalized for acute pulmonary or cardiac illnesses. Because the regulation actually allows for the introduction into evidence of ABGs taken during *non-pulmonary* or *non-cardiac* acute illnesses, the exclusion of the remaining ABGs taken during hospitalization is contrary to the regulation and is a reversible error.

According to Dr. Richard Naeye, one of the Employer's own pathology experts, fifteen to twenty percent of Mr. Trump's lungs were occupied by coal

workers' pneumoconiosis, and the remaining tissue had "mild to moderately severe centrilobular emphysema."[9] JA 782. Dr. Fausto Imbing also listed simple coal workers' pneumoconiosis in his autopsy report and opined that its presence in both lungs contributed to Mr. Trump's death. *See* JA 78-83.

In confirmation of the pathology evidence, Drs. Houser, Rosenberg, and Zaldivar all agreed that Mr. Trump suffered from emphysema. JA 1049-50. Mr. Trump's emphysema was in fact so severe that it was plainly visible on chest x-rays. *See* JA 201. As Mr. Trump was a life-time non-smoker, the only reasonable source of this emphysema was his coal mine employment. In Mr. Trump's treatment records, no fewer than five doctors diagnose Mr. Trump with chronic obstructive pulmonary disease.[10] Mr. Trump was placed on supplemental oxygen for the last two years of his life.[11]

Mr. Trump's reliance on supplemental oxygen for the last two years of his life further bolsters the relevance of the ABGs administered during the last year of

[9] Dr. Naeye first stated that the lesions "occupy [less than] 15% of the lung tissues." JA 782. He then went to say that "[t]he 80-85% lung tissues not occupied by coal worker's pneumoconiosis" are afflicted by emphysema. *Id*. This indicates that 15–20% of the lungs are occupied by pneumoconiosis.

[10] Dr. Siddiqi on September 11, 2004, JA 291-92; Dr. M. Patel on February 24, 2005 and March 1, 2006, JA 281, JA 250; Dr. Williams on February 28, 2006, JA 211-13; Dr. Rahim on March 1, 2006, JA 204 ; and Dr. B. Patel on March 2, 2006, JA 248.

[11] Mr. Trump's physicians decided to put him on supplemental oxygen in 2004 because of his declining pulmonary health. He was to use supplemental oxygen "all the time." JA 940.

his life. Reliance on supplemental oxygen evinces pulmonary impairments, including ineffective blood oxygenation. Additionally, findings of fibrosis and emphysema in Mr. Trump's lungs are known to have a detrimental effect on the alveoli in the lungs, which affect blood oxygenation. Dr. Houser specifically notes this in his reasoned medical opinion. *See* JA 20.

The evidence contains ten arterial blood gas studies that together establish a pattern of low arterial blood oxygen and demonstrate a disabling and chronic respiratory condition. Three of Mr. Trump's arterial blood gas studies were performed in relation to Mr. Trump's benefits claim, while the remaining seven were administered at Appalachian Regional Hospital ("ARH") during the course of Mr. Trump's treatment. *See* JA 15 *(CX-5);* JA 16 *(CX-6);* JA 130 *(CX-10)*; JA 201 *(CX-12)*; JA 310 *(CX-16);* JA 318 *(CX-17)*; JA 333 *(CX-18)* (showing results of studies performed at ARH). Of the remaining seven ABGs, Judge Burke improperly excluded three: CX 6; CX 10; and CX 12.

The studies from ARH show consistently low oxygen values. To be excluded by Appendix C, each of these studies would have to have been conducted in conjunction with an acute respiratory or cardiac illness. The medical records establish that during each of the relevant hospital visits, with the exception of the fatal heart attack during his final visit and the August 2004 visit, Mr. Trump's

physicians ruled out the presence of any acute respiratory or cardiac illness through the use of blood tests and chest x-rays:

| **Date of ABG** | **Exhibit number** | **Relevant medical findings (with page number)** |
|---|---|---|
| 03/21/2002 | CX 18 | Blood test negative for acute myocardial infarction (7) |
| 07/30/2004 | CX 17 | "No acute chest pathology" (2)<br>Blood test negative for acute myocardial infarction (6) |
| 08/05/2004 | CX 16 | "Clinical Impression: Dyspnea, COPD – acute exacerbation" (4)<br>"Normal cardiovascular structures . . . No acute cardiopulmonary disease. . . Chronic interstitial lung changes suggesting pneumoconiosis" (16) |
| 02/28/2006 | CX 12 | "Cardiac enzymes have been negative" (1)<br>"Changes of chronic obstructive pulmonary disease and chronic parenchymal lung changes due to pneumoconiosis" (48) |
| 09/29/2006 (at 00:34)<br>09/29/2006 (at 06:26) | CX 10 | Blood test negative for acute myocardial infarction (21)<br>"Discharge summary . . . He did have evidence of congestive heart failure on the x-ray report read by the radiologist, but the BNP was normal" (43) |
| 10/20/2006 | CX 5 | "There is no infarct seen. No congestive heart failure. . . . No acute cardiopulmonary disease." (10/19/2006) (44)<br>Blood tests positive for acute myocardial infarction. (10/20/2006) (28–30) |

Additionally, in the reports for each of these seven studies, the treating physicians noted that Mr. Trump was suffering from severe or moderate hypoxemia based on his gas levels. *See* CX 5; CX 6; CX 10; CX 12; CX 16; CX 17; CX 18. Each physician also saw that the A-a gradient was increased, indicative of a difference between the concentration of oxygen in the bloodstream and the

concentration of oxygen in the alveoli. A high A-a gradient shows that there is "a problem with gas exchange." JA 1100:1–16. The results of the arterial blood gas studies from ARH reflect Mr. Trump's chronic lung conditions.

Even though the final blood gas study was taken after Mr. Trump's heart attack, the fact that his oxygen levels had already been measured at severely low levels over a five-year span reveals that Mr. Trump's breathing disability was not the result of his cardiac and vascular issues. The records show that there were no acute cardiac or pulmonary events concurrent with the administration of these arterial blood gas studies. The only possible explanation for five years of low blood oxygen levels is Mr. Trump's long-standing pulmonary problems: pneumoconiosis and emphysema. It is fully acknowledged that Mr. Trump suffered from vascular congestion and resulting complications. However, the evidence establishes a pattern of consistently low and dropping oxygen levels, without any acute cardiac or pulmonary events. Consistent with this pattern and with the absence of any concurrent acute cardiac or pulmonary events, Mr. Trump's chronic lung impairments were preventing the oxygenation of his blood. Given the progressive nature of pneumoconiosis, the waning oxygen levels measured by these blood gas studies establish that Mr. Trump was totally disabled from a respiratory standpoint. Claimant is not seeking to introduce the ABGs from Mr. Trump's final hospital visit as evidence of chronic hypoxemia, as that final hospital

visit was linked to a cardiac impairment. All other ABGs taken prior to Mr. Trumps final hospital visit are not excluded as evidence under the regulations and should have been considered by the ALJ when making a determination on total disability.

Although the Employer has argued that Mr. Trump visited the hospital because of acute respiratory or cardiac events, thus discrediting the results of the studies from ARH, the evidence shows otherwise. 20 C.F.R. § 718, App'x C does not exclude from evidence the excluded studies, because Mr. Trump's hospital visits were not due to "acute respiratory or cardiac illnesses." Although each study by itself reflects Mr. Trump's arterial oxygen levels at a single point in time, taken together, the studies illustrate Mr. Trump's inability to take in oxygen due to his chronic pulmonary conditions of CWP and coal dust induced emphysema. The regulation calls for dismissing studies that were taken during an acute cardiac or pulmonary *illness*—a singular isolated incident. Mr. Trump suffered from a chronic lung *condition*, a consistent ailment. Mr. Trump's hospital visits occurred because his chronic pulmonary conditions had worsened an affliction that cannot be classified as an acute respiratory illness.

### 2. ALJ BURKE'S DECISION TO DISCREDIT DR. HOUSER'S OPINION REGARDING THE MINER'S TOTAL DISABILITY WAS IRRATIONAL AND INCONSISTENT WITH PREVAILING LAW.

Judge Burke's reversal of his original finding of total disability yields the flawed conflation of two separate medical criteria found in 20 C.F.R. § 718.204(b)(2)—arterial blood gas tests and reasoned medical opinions—both of which establish Mr. Trump's total disability. Judge Burke's decision and actions were irrational and inconsistent with the existing regulations and prevailing law.

The regulations provide four separate criteria which may be relied upon in establishing total disability: (1) pulmonary function tests, (2) arterial blood gas tests, (3) existence of cor pulmonale with right-sided congestive heart failure, or (4) the reasoned medical conclusion of a physician. 20 C.F.R. § 718.204(b)(2). Mr. Trump has established total disability by meeting the regulatory requirements for total disability based upon arterial blood gas studies and the reasoned medical opinion of a physician, Dr. Houser. Given the disjunctive requirements in the regulation, Congress intended for there to be a different standard between section 718.204(b)(2)(ii) and 718.204(b)(2)(iv).

Based on the ABGs that Judge Burke relied on, Dr. Houser was correct in concluding that Mr. Trump suffered from a totally disabling pulmonary condition. The ABGs that Judge Burke gave full credit to were: JA at 666 (MDX 14); JA 324;

JA 326; JA 333; and the 2002 ABG in JA 742. All the other ABGs Judge Burke discredited for one reason or another. All five ABGs that were fully credited demonstrate hypoxemia. Regarding JA 742, Dr. Zaldivar noted in his 2002 medical opinion that the normal range for Mr. Trump's $PO_2$ should have been 80-100, and Mr. Trump's $PO_2$ was 68. Dr. Zaldivar stated in his report this demonstrated mild hypoxemia and admitted at his deposition that Mr. Trump's ABG was abnormal. MDX 14 also contained a $PO_2$ of 68 but had a reduced $PCO_2$. Based on Mr. Trump's $PO_2$ to $PCO_2$ values, he was 4 mm from qualifying as presumptively totally disabled based on the standards at Appendix C of the Department of Labor Regulation. JA 310 (*CX-16)* and JA 318 (*CX-16)* were 3 mm and 5 mm respectively from qualifying as presumptively totally disabled based on the standards at Appendix C of the Department of Labor Regulation. Finally, the $PO_2$ and $PCO_2$ values of JA 333 (*CX-18)* are qualifying under Appendix C of the Department of Labor Regulation to establish a totally disabling lung disease. These are the ABGs that Judge Burke fully credited in his opinions. Judge Burke also noted that Trump's treating physicians stated in the treatment records that the ABGs taken during July 2004 and August 2004 evinced moderate hypoxemia. *See* JA 1016; *See* JA 1047. Based on these ABGs alone, Dr. Houser was correct in concluding that Mr. Trump was total disability.

In Judge Burke's 2011 Decision and Order, Judge Burke found Mr. Trump to be totally disabled based upon the reasoned medical opinion of Dr. Houser that Mr. Trump was totally disabled. *See* JA 1020. While Dr. Houser's reasoning relied in part on the ABGs that Judge Burke excluded, there was other fully credited evidence Dr. Houser relied upon in finding Mr. Trump totally disabled.

Dr. Houser's reasoned medical opinion is aptly summarized by Judge Burke in his 2011 Decision and Order:

> Dr. Houser concluded that the miner had a total pulmonary disability evidenced by hypoxemia due to his fibrosis and emphysema as a consequence of his prior coal mine employment. . . . [H]e considered that the arterial blood gas test results revealed hypoxemia and a disabling pulmonary impairment. He reasoned that the autopsy findings include fibrosis which causes hypoxemia by altering the diffusion of oxygen from the alveolus to the pulmonary capillary, and centrilobular emphysema which causes hypoxemia as a result of ventilation mismatch and fibrosis. He offered the opinion that individuals such as the miner who has persistent findings of moderately severe to severe hypoxemia would be expected to have respiratory symptoms resulting in impairment in function and respiratory capability. He also considered that hypoxemia has an adverse effect on cardiac function, and when associated with co-existing coronary artery disease can contribute to precipitating an acute myocardial infarct.

JA 1018 *(2011 D&O* at 17) (internal quotation marks omitted).

In Judge Burke's original 2011 decision, he found Dr. Houser's opinion was supported by the medical evidence because, "[o]f the six tests administered before his 2006 hospitalizations only one, the May 5, 2004 test, resulted in values not evidencing hypoxemia." JA 1020. Judge Burke, recognizing the abnormal result in

the May 5, 2004 test, accepted the prior ABGs as evincing totally disabling hypoxemia. Judge Burke's initial analysis of Dr. Houser's reasoned medical opinion was correct. Although Dr. Houser considered the ABGs taken during 2006, his medical opinion of total disability was independent of the October 20, 2006 ABG.

When the case was appealed, the BRB found Judge Burke's short explanation of his rationale for crediting Dr. Houser's opinion inadequate, and charged him on remand to "reassess the conflicting medical opinions in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and fully explain the reasons for his credibility determinations." JA 1037-38.

In response to the remand order, Judge Burke disregarded the sophisticated reasoning and documentation that he had previously relied upon in assessing Dr. Houser's opinion. *See* JA 18-25 (*CX-7*). Judge Burke reasoned that because Dr. Houser "relied on" the results of the ABGs to reach his conclusion, Dr. Houser's conclusion was "poorly reasoned." JA 1047-48. Judge Burke's analysis is contrary to the directives of the BRB and is precisely the sort of reasoning that was rejected by the Fourth Circuit in *Hobert Mining, Inc. v. Terry*, 219 Fed. App'x 310 (4th Cir. 2007).

In *Terry*, the Court of Appeals affirmed the ALJ's finding of total disability even where the ALJ had relied upon PFT and ABG evidence that did not meet the regulations' qualifying standards. The Judge determined that "these tests although not qualifying for a finding of total disability standing alone, do demonstrate some impairment and therefore can form a basis, along with other evidence . . . to support a reasoned medical decision establishing total respiratory disability. . . ." Brief of Respondent, No. 06-1218, 2006 WL 1911667 at *11 (June 20, 2006) (quoting the Decision and Order of Judge Sutton). The Fourth Circuit held that:

> The regulations do not require any particular objective values. All that is required is that pneumoconiosis have a material adverse effect on the miner's condition. Any argument that Terry should not be found to be totally disabled because his respiratory studies were outside the values set for total regulatory disability from the studies is contrary to law and confuses two independent sections of the regulations.

Hobet, 219 Fed. App'x at 314 (emphasis added).

Judge Burke determined that "Dr. Houser's opinion regarding total pulmonary disability depends upon his finding that the miner's ABGs showed *totally disabling* hypoxemia that was pulmonary in origin." JA 1046 (emphasis added). That determination by Judge Burke is incorrect. Further, such a rigid application of the regulatory standards is contrary to *Terry*. Dr. Houser opined that "[s]olely from a respiratory stand point, I believe that the hypoxemia resulted in total disability." JA 22. In reaching his conclusion of total disability, Dr. Houser relied on multiple ABGs, including JA 333 (*CX-18)* which he specifically

described as including $PO_2$ and $PCO_2$ values that "meet the standard for disability as outlined by the Department of Labor." JA 21. Additionally Dr. Houser relied on the x-ray evidence showing pneumoconiosis with 2/2 in all lung zones.[12] Dr. Houser's assessment of the x-ray evidence is supported by a pathology report indicating the presence of clinical pneumoconiosis in twenty percent of Mr. Trump's lungs. The same report shows mild to moderately severe centrilobular emphysema affecting the remaining 80 percent of Mr. Trump's lungs. Dr. Houser explained in detail how these pathologic and radiographic findings were perfectly consistent with Mr. Trump's ABG findings. Dr. Houser's reasonable medical opinion took all of this evidence into consideration in arriving at his conclusion of total disability, not merely the ABG evidence.

Finally, in Judge Burke's second D&O he concluded that Dr. Houser's opinion was poorly reasoned. ALJ Burke based his conclusion on what he believed to be a lack of support for Dr. Houser's opinion. Specifically, Judge Burke stated Dr. Houser's opinion that "the miner's ABGs showed "persistent . . . moderately severe to severe hypoxemia" . . . is only supported by one ABG" D&O 5, 6. This statement reveals at least two errors. First, Judge Burke's finding takes

[12] Dr. Gaziano read a 1986 x-ray showing a 1/1 profusion of opacities in all zones. JA 2. Fifteen years later, in 2001, Dr. Patel saw a profusion of opacities that measured 2/2 in all zones. JA 640. Finally, Dr. Zaldivar read a 2004 x-ray as again showing a 2/2 profusion of opacities, finding them in the upper and middle zones. JA 1.

Dr. Houser's opinion out of context. Second, Judge Burke in effect holds Mr. Trump to a standard of proving moderately severe to severe hypoxemia rather than a totally disabling pulmonary condition.

Dr. Houser's conclusion that Mr. Trump suffered from moderately severe to severe hypoxemia was well supported by the three ABGs Judge Burke incorrectly excluded from consideration. Although Dr. Houser might not have characterized Mr. Trump's hypoxemia as severe without the excluded ABGs, he certainly would have described it as disabling. In fact Dr. Houser did describe Mr. Trump's ABG results in (JA at 333) CX-18 as totally disabling in his reasoned medical opinion.

Dr. Houser also described the ABGs in JA 310 (CX-16) and JA 318 (CX 17) as demonstrating hypoxemia and Dr. Zaldivar described his 2002 ABG at JA 742 (EX-7) as demonstrating hypoxemia. A miner need not demonstrate that all his ABGs are totally disabling, under the right circumstances, one is enough. In the context of: multiple abnormal ABGs that demonstrate hypoxemia; coupled with radiographic evidence demonstrating a 2/2 profusion in all lung zones; pathologic evidence that demonstrates fifteen to twenty percent of the lung involved with CWP and the other 80 percent having emphysema in a non-smoking miner; a miner who was $O_2$ dependent the last two years of his life; one qualifying ABG is enough.

Further, there is no requirement that Mr. Trump's hypoxemia be moderately severe or severe, only that he be totally disabled from a pulmonary standpoint. As *Terry* held, establishing a total pulmonary disability does not require a PFT or ABG that qualifies under the Department of Labor Regulation. Dr. Houser made clear in his opinion that Mr. Trump's ABGs demonstrated hypoxemia. Particularly, the March 2002 ABG demonstrated totally disabling hypoxemia. Dr. Houser further explained that the cause of this totally disabling hypoxemia was the coal dust induced fibrosis and emphysema repeatedly demonstrated radiographically and pathologically.

Judge Burke's dismissal of Dr. Houser's opinion was irrational and inconsistent with established law. The ABGs Judge Burke credited in his opinions support Dr. Houser's conclusion that Mr. Trump suffered from a totally disabling pulmonary disorder. Further, Judge Burke's failure to consider Dr. Houser's reasoned medical opinion as an independent basis for establishing total disability was improper an conflation of regulatory alternatives. Judge Burke's ruling should be reversed.

### 3. ALJ BURKE FAILED IN HIS DUTY OF EXPLANATION UNDER THE ADMINISTRATIVE PROCEDURE ACT TO ADEQUATELY EXPLAIN HIS CREDIBILITY DETERMINATION OF THE EXPERTS.

In his second Decision and Order, Judge Burke failed to address the other medical evidence and failed to fully explain his reasoning in electing to rely on the underlying medical judgments, and failed to offer any reasoning with respect to his credibility determinations for each expert as mandated by case law. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Furthermore, Judge Burke failed to set forth a rationale that comports with the APA in determining whether each opinion is well-reasoned and sufficient to meet the claimant's burden in establishing total respiratory disability. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

When an ALJ finds that there is contrary evidence in the case that may lead to an alternative conclusion, the ALJ must assign the contrary evidence appropriate weight and determine whether it outweighs the evidence that supports a finding of total disability. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998); *Lane v. Union Carbide Corp.,* 105 F.3d 166, 171 (4th Cir.1997). Judge Burke failed to do this. Judge Burke gave disproportionate weight to Employer's experts

in deciding whether Mr. Trump was totally disabled. Judge Burke relied on Employer's experts in finding that the ABGs taken during Mr. Trump's hospitalization should not be considered because Mr. Trump was hospitalized due to cardiac-related illnesses, failing to explain why he credited those experts regarding the ABGs. The hospital records show that Mr. Trump only suffered from a cardiac-related illness during his last hospitalization. Judge Burke's credence of Employer's experts was inapposite to the evidentiary record; Employer's experts were given inappropriate weight in being accepted as contradictory of Dr. Houser's findings of consistent moderate to moderately severe hypoxemia. Furthermore, the record reflects that all of the treating doctors in Mr. Trump's treatment records indicated that from 2004 through 2006, Mr. Trump's ABGs evinced moderate to moderately severe hypoxemia, further supporting Dr. Houser's medical opinion. Judge Burke also noted that one of the Employers experts did not consider medical evidence in the record. *See* JA 1019. Additionally, Judge Burke noted that the Employer's experts argued that certain medical evidence was unreliable to establish hypoxemia based on medical problems not listed in the treatment records. *See* JA 1047.

Prior to making a determination on the reasonableness of the medical evidence, the ALJ must set out and discuss all of the medical evidence presented. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). In *Rowe*, the court

determined that the ALJ committed a reversible error for failing to set out in its decision all of the medical evidence and the reasons for affording each piece of evidence its respective weight.

When discrediting Dr. Houser's opinion, Judge Burke did not adequately address the favorable autopsy and pathology findings discussed in Dr. Houser's report in support of his diagnosis of hypoxemia. Dr. Houser noted in his reasoned medical opinion the pathology report's finding of emphysema. Emphysema, as Dr. Houser explained, causes a ventilation perfusion mismatch, which itself causes hypoxemia. Judge Burke failed to adequately explain why the combination autopsy/pathology evidence and the ABG evidence he admitted were unpersuasive on the issue of total disability.

The pathology report finding of emphysema supports Dr. Houser's determination that Mr. Trump suffered from totally disabling hypoxemia. The pathology report stated that Mr. Trump suffered from both fibrotic pneumoconiosis and emphysema, both of which negatively affected Mr. Trump's lungs' ability to oxygenate his blood. Hypoxemia is caused by the inability of the lungs to perform its functions of blood oxygenation and diffusion.

Given Judge Burke's acceptance of Dr. Houser's opinion asserting that the March 2002 ABG evinces disabling hypoxemia, any evidence that supports that study should have been considered. The pathology report bolsters Dr. Houser's

finding that the subsequent ABGs are not the result of an isolated illness, but rather are due to an ongoing condition Mr. Trump suffered from as a result of his coal mine work—a condition that caused Mr. Trump's lungs to be unable to oxygenate his blood, rendering him totally disabled from a pulmonary standpoint.

## VI. CONCLUSION

Judge Burke's Decision and Order Denying Benefits should be reversed and remanded. Dr. Houser's opinion was straightforward, well-reasoned, and well-documented. The opinions of Employer's experts consist of vague generalizations not even specific to this miner, and were shot through with inconsistencies and mistakes of fact. Judge Burke's Decision and Order proposes to deny black lung benefits to a non-smoking miner with 40 years of underground coal mining employment—a man who spent the last two years of his life dependent on supplemental oxygen, and who has presented uncontested evidence of clinical CWP by way of pathology reports and x-rays, five qualifying ABGs, and a medical history of COPD. The absurd conclusion that Mr. Trump is not entitled to benefits was accepted by Judge Burke on the basis of an overly mechanical discrediting of the well-reasoned and well-supported medical opinion of Dr. Houser. Judge Burke's decision can only be the result of his misapplication of the regulations and was rendered in an attempt by the ALJ to appease the BRB remand decision. The ALJ's decision on remand does not comport with his prior decision and order.

Judge Burke's failure to explain all of the relevant evidence that he considered in his subsequent decision fails to comport with judicial precedent and is thus a reversible error.

Respectfully submitted,

/s/ Timothy C. MacDonnell

Timothy C. MacDonnell, Esquire
Counsel for Janice Faye Trump

/s/ David T. Long

David T. Long, Jr.
Student Caseworker

Black Lung Legal Clinic, Room 106
Washington and Lee University
School of Law, Lewis Hall
Lexington, VA 24450
(540) 458-8562

# CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

**No.** 14-1745 **Caption:** Janice Faye Trump, o/b/o and Widow of Jesse Willard Trump v. Eastern Associated Coal Company

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

*[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines: Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]*

[**X**] this brief contains 8,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains _____ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

*[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]*

[**X**] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 [*state name and version of word processing program*] in 14 point, Times New Roman [*state font size and name of the type style*]; *or*

[ ] this brief has been prepared in a monospaced typeface using _____ [*state name and version of word processing program*] with _____ [*state number of characters per inch and name of type style*].

/s/ Timothy C. MacDonnell

Attorney for Janice Faye Trump

Dated: December 29, 2014

## CERTIFICATE OF SERVICE

I, Timothy C. MacDonnell, do hereby certify that I served the foregoing JOINT APPENDIX and BRIEF OF PETITIONER, JANICE FAYE TRUMP, upon the following by mailing a copy to each by electronic mail, United Parcel Service Ground Track Delivery, or by United States Postal Service this the 29th day of December, 2014:

***Electronic Mail and United Parcel Service Ground Track Delivery:***

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
United States Courthouse Annex, 5th Floor
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

***Electronic Mail:***

Laura Metcoff-Klaus, Esquire
klausl@gtlaw.com
Mark E. Solomons, Esquire
solomonsm@gtlaw.com

Michelle S. Gerdano, Esquire
gerdano-seyman-miche@dol.gov
Gary Stearman, Esquire
stearman.gary@dol.gov

***By U.S. Mail*:**

Janice Faye Trump
P.O. Box 164
Glen Rogers, WV 25848

/s/ Timothy C. MacDonnell
Timothy C. MacDonnell, Esquire
Counsel for Claimant