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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-9539
(Benefits No. 15-0342 BLA)
(Benefits Review Board)

[Filed December 20, 2017]

CONSOLIDATION COAL COMPANY,	)
	)
Petitioner,	)
	)
v.	)
	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; ROBERT THOMPSON,	)
	)
Respondents.	)

ORDER AND JUDGMENT*

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **HARTZ**, **McKAY**, and **MATHESON**, Circuit Judges.

Consolidation Coal Company seeks review of the award to Robert Thompson by the Department of Labor (DOL) of miner's benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944. Consolidation's principal legal arguments on appeal were recently resolved against its position in *Consolidation Coal Co. v. Director, OWCP (Noyes)*, 864 F.3d 1142, 1144 (10th Cir. 2017) (statutory presumption of 30 U.S.C. § 921(c)(4) applies to both clinical and legal pneumoconiosis; rebuttal standard of 20 C.F.R. § 718.305(d)(2)(ii), which requires employer to "rule out" any causal connection between pneumoconiosis and death, comports with Administrative Procedure Act; and rule-out standard is consistent with congressional intent of BLBA).[1]

Consolidation's remaining arguments all concern how the administrative law judge (ALJ) viewed the evidence in making his findings. But those findings are quite difficult to set aside. We do not reweigh the evidence; we merely ask whether the ALJ's decision is supported by substantial evidence, that is, whether there is "evidence in the record that a reasonable mind might accept as adequate to support [the ALJ's] conclusion." *Energy W. Mining Co. v. Oliver*, 555 F.3d

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[1] *Noyes* involved rebuttal of a claim for survivor's benefits under 20 C.F.R. § 718.305(d)(2)(ii), but essentially the same rule-out standard applies to the regulatory subsection concerning rebuttal of claims for disability benefits under 20 C.F.R. § 718.305(d)(1)(ii).

1211, 1217 (10th Cir. 2009) (internal quotation marks omitted). By that standard, we must affirm. Another factfinder may have disagreed with the ALJ, but we cannot say that the decision here was unsupported by substantial evidence. It is unnecessary for us to recite all the evidence or explain how the ALJ could reasonably reject each argument made by Consolidation on appeal. We do, however, address what appear to be its chief arguments.

Consolidation challenges the use of DOL standards in evaluating four arterial blood-gas (ABG) studies. *See* 20 C.F.R. Pt. 718, App. C (DOL tables of arterial blood-gas levels that may establish total disability). Under these standards, three of Mr. Thompson's ABG studies, including the most recent two, supported the ALJ's finding of disability. Consolidation asserts that the DOL standards are not adequately adjusted for the altitude of the test site and are not adjusted at all for the age of the miner. But this challenge fails because DOL regulations require use of the standards. *See* 20 C.F.R. § 718.204(b)(2)(ii) (absent contrary probative evidence, evidence that meets the standards for ABG studies listed in appendix C "shall establish a miner's total disability"). Consolidation argues that a better standard is a "Predicted Normal Range" handwritten on one document in the record, without any explanation of where the numbers came from. The ALJ properly refused to consider that standard.

Consolidation also argues that the ALJ's determination that Mr. Thompson was totally disabled was improperly based on medical opinions by several physicians and was refuted by the opinion of Dr. Lawrence Repsher, who concluded that Mr. Thompson

did not have pneumoconiosis. But the ALJ had significant reasons for doubting Dr. Repsher.

First, Dr. Repsher incorrectly interpreted the ABG studies, inexplicably concluding that they were nonqualifying, despite evidence indicating that three of the four studies qualified Mr. Thompson as totally disabled. He also dismissed as an "outlier" an abnormal oxygen value from one ABG study, stating it "was probably the result of laboratory error." Admin. R., Vol. 2, Emp'r Ex. 11 at 2. But as the ALJ observed, he merely speculated that this abnormal result was an outlier, without providing any explanation why, other than simply suggesting that it resulted from lab error.

Second, Dr. Repsher stated that Mr. Thompson did not give his full effort and cooperation when taking his pulmonary function tests. But the ALJ observed that Dr. Repsher "provide[d] no support for speculating [that Mr. Thompson] did not cooperate with the tests[,] and each of the [pulmonary function tests] specifically indicates that [Mr. Thompson] showed good effort." *Id.*, Vol. 1 at 152. Although one doctor indicated a test was "not optimally performed" and "the effort during the exhalation was poor," *id.*, Vol. 2, Emp'r Ex. 13 at 2, three other doctors indicated that Mr. Thompson gave "fair effort" and "good effort," *see id.*, Emp'r Ex. 12 at 2-3; *id.*, Claimant's Ex. 1 at 2; *id.*, Dir. Ex. 10 at 3-4.

Third, Dr. Repsher concluded that Mr. Thompson was "fully fit to perform his usual coal mine work or work of a similarly arduous nature," *id.*, Emp'r Ex. 4 at 4, but the ALJ noted that Dr. Repsher did not describe the exertional requirements of Mr. Thompson's work.

Fourth, Dr. Repsher attributed Mr. Thompson's low oxygen levels to cardiovascular disease, citing two abnormalities diagnosed by an October 2009 echocardiogram. The ALJ noted, however, that Dr. Repsher provided no explanation of how these abnormalities affected Mr. Thompson's ABG studies or otherwise caused his condition. Consolidation responds that the echocardiogram showed additional abnormalities while other evidence supports Dr. Repsher's finding, but as the ALJ indicated, Dr. Repsher did not cite any of this evidence, nor did he explain how any of the abnormalities caused his pulmonary condition. Moreover, the ALJ observed that Mr. Thompson underwent multiple cardiac tests between 2004 and 2011, none of which required further treatment.

Fifth, Dr. Repsher indicated that he reviewed Mr. Thompson's medical records, including those of his primary care physician, and found no evidence of coal workers pneumoconiosis. But the ALJ observed that the primary care physician's records reflected "progressively worsening complaints of breathing difficulty," *id.*, Vol. 1 at 145, and "frequent references [to] respiratory and pulmonary conditions that [the primary care doctor] believed to be related to [Mr. Thompson's] coal mine employment," *id.* at 152. Consolidation asserts that the ALJ provided no supporting citations to medical records and that the primary care doctor recorded only two findings of cough attributable to sinusitis and rhinitis. The record belies this argument, however; the ALJ cited the primary care doctor's notes indicating that Mr. Thompson had "cough and congestion of several years' duration," had "been exposed to coal dust for over 30 years," and "in

the past several months the cough and symptoms ha[d] worsened," *id.* at 123 (internal quotation marks omitted). Although these notes were based on Mr. Thompson's self-reporting, rather than observations by the physician, they constitute substantial evidence to justify discounting Dr. Repsher's opinion.

Notwithstanding these reasons for discounting Dr. Repsher's opinion, Consolidation contends that the ALJ improperly dismissed Dr. Repsher's opinion that "the alveolar-arterial oxygen gradient (A-a gradient)" was a "far more scientifically valid" way of measuring alveolar function, and that Mr. Thompson's A-a gradient was normal. *Id.*, Emp'r Ex. 6 at 1. But the ALJ acknowledged there was support for using the A-a gradient. The reason the ALJ found this component of Dr. Repsher's opinion unhelpful was that he failed to explain how he determined that Mr. Thompson's A-a gradient was normal and he did not calculate Mr. Thompson's A-a gradient associated with ABG studies performed by other physicians.

Additionally, Consolidation asserts that Dr. Repsher's opinion was consistent with evidence that in 2011, Mr. Thompson was "working on top of a mountain summit on a daily basis and it was necessary [for him] to travel from high to low altitude on a daily basis." Pet'r Br. at 32. Consolidation suggests this evidence refutes Mr. Thompson's testimony that he could no longer climb stairs or mountains. But the ALJ properly rejected this argument as a mischaracterization of Mr. Thompson's testimony, which indicated that when he was younger, he did a lot of walking and hiking, but now he could no longer hike;

he did not testify that his method of traveling up the mountain every day was by walking.

Finally, Consolidation contends that the ALJ erred in giving "much probative weight" to Dr. David James's opinion that Mr. Thompson was totally disabled. Admin. R., Vol. 1 at 146. It suggests Dr. James admitted that the pulmonary function tests revealed only mild abnormalities. That is correct. And the ALJ gave Dr. James credit for recognizing this fact. But he credited Dr. James's ultimate conclusion that Mr. Thompson was suffering from a totally disabling respiratory or pulmonary condition because it was based on "an extensive review of the exertional requirements of" Mr. Thompson's job, recognition of the qualifying ABG studies, and consideration of Mr. Thompson's treatment records. *Id.*

In sum, a careful review of the administrative record requires affirmance of the decision below.

The petition for review is denied.

Entered for the Court

Harris L Hartz
Circuit Judge

APPENDIX B

NOT-PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
P.O. BOX 37601
WASHINGTON, DC 20013-7601

BRB No. 15-0342 BLA

[Issued June 30, 2016]

ROBERT C. THOMPSON	)
	)
Claimant-Respondent	)
	)
v.	)
	)
CONSOLIDATION COAL COMPANY	)
	)
and	)
	)
WELLS FARGO DISABILITY MANAGEMENT/SELF-INSURED THROUGH CONSOL ENERGY	)
	)
Employer/Carrier-Petitioners	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
)
Party-in-Interest)
)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Second Remand of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia S. Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Second Remand (2009-BLA-05197) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed on February 14, 2008, pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time. In its most recent Decision and Order, the Board vacated the award of benefits issued by Administrative Law Judge Richard K. Malamphy on March 23, 2013, and remanded the case for reconsideration of total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Thompson v. Consolidation Coal Co., BRB No. 13-0321 BLA, slip op. at 5 (Apr. 23, 2014) (unpub.). The Board also instructed Judge Malamphy to reconsider his rebuttal findings relevant to legal pneumoconiosis and total disability causation if claimant invoked the Section 411(c)(4) presumption on remand.

Due to Judge Malamphy's retirement, the case was reassigned to Judge Bergstrom (the administrative law judge). The administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

Employer argues that the administrative law judge erred by applying the rebuttal provisions at 20 C.F.R.

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[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or 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.

§718.305(d)(1), because the regulation is not valid and employer was not given the opportunity to develop evidence relevant to the standard for rebutting the presumed fact of total disability causation. Employer also contends that the administrative law judge erred by finding that claimant established total disability, thereby invoking the Section 411(c)(4) presumption, and by finding that employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to summarily reject employer's arguments with regard to the application of Section 411(c)(4) and its implementing regulation at 20 C.F.R. §718.305. Employer has filed briefs in reply to claimant's and Director's responses, reiterating its contentions.[2]

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

[2] We agree with the Director, Office of Workers' Compensation Programs, regarding the summary rejection of employer's challenge to the application of the rebuttal provisions of Section 411(c)(4) and 20 C.F.R. §718.305. We determined in our most recent prior Decision and Order that these arguments are without merit, and those holdings now constitute the law of the case. Thompson v. Consolidation Coal Co., BRB No. 13-0321 BLA, slip op. at 3 (Apr. 23, 2014) (unpub.); see Coleman v. Ramey Coal Co., 18 BLR 1-9, 1-15 (1993); Brinkley v. Peabody Coal Co., 14 BLR 1-147, 1-150-51 (1990). Because employer has not advanced any persuasive reasons for recognizing an exception to that doctrine, we decline to revisit our prior holdings.

law.[3] 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).

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

Employer contends that the administrative law judge did not properly weigh the evidence on the issue of total disability, specifically challenging the administrative law judge's findings that the arterial blood-gas tests and medical opinion evidence are sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(b)(2).

A. Arterial Blood-Gas Tests

Prior to weighing the arterial blood-gas tests at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered Dr. Repsher's opinion that the qualifying pO2 and pCO2 values,[4] designated in Appendix C to 20 C.F.R. Part 718, are not accurate indicators of total disability. Decision and Order at 29; Employer's Exhibits 8, 11. Dr. Repsher obtained a resting arterial blood-gas test on November 13, 2008 at Crestview Hospital. Employer's Exhibit 8. This test produced qualifying values under the table at Appendix C to 20 C.F.R. Part 718. Id. Dr. Repsher noted, however, that

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as claimant's coal mine employment was in Utah. See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

the test results were "normal" according to the values used by Dr. Gagon in his laboratory, which is located at Crestview Hospital in Price, Utah. Id. Dr. Repsher characterized these values as more accurate than those in Appendix C because they more precisely account for the age of the test subject and the altitude where the test was performed. Id. The administrative law judge discredited Dr. Repsher's opinion, finding it "poorly reasoned." Decision and Order at 29.

Employer alleges that, contrary to the administrative law judge's determination, Dr. Repsher's opinion is well-reasoned because it is supported by Crestview Hospital's predicted normal values. This contention is without merit. Assessing the probative value of the evidence is a task committed to the discretion of the administrative law judge in his role as fact-finder, and his findings will not be disturbed unless they are plainly irrational. See Poole v. Freeman United Coal Mining Co., 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). Because the disability standards in Appendix C are already adjusted for age and altitude and, by extension, for barometric pressure, the administrative law judge acted within his discretion in finding Dr. Repsher's opinion poorly reasoned in light of his failure "to provide or explain the adjustments he made to determine that the values he obtained were 'non-qualifying.'"[5] Decision and Order at 30; see Big Horn v.

[5] The regulation at 20 C.F.R. §718.204(b)(2)(ii) provides, "[i]n the absence of contrary probative evidence," arterial blood-gas values that are equal to or less than those set forth in Appendix C "shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2)(ii). Regarding comments received before the final version of Appendix C was promulgated, the Department of Labor (DOL) acknowledged

Director, OWCP [Alley], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990). The administrative law judge also rationally found that, although Dr. Repsher asserted that the blood-gas test results were affected by claimant's "likely" cardiovascular disease, he did not explain how this detracted from the reliability of claimant's pO2 and pCO2 values as a measure of total respiratory or pulmonary disability. Employer's Exhibit 11 at 2; see Energy West Mining Co. v. Oliver , 555 F.3d 1211, 1217, 24 BLR 2-155, 2-164 (10th Cir. 2009); Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 30. Similarly, the administrative law judge acted within his discretion in discrediting Dr. Repsher's statement that the May 7, 2008 qualifying exercise blood-gas test was "probably the result of laboratory error," because it was speculative. Decision and Order at 29, quoting Employer's Exhibit 11 at 2; see Campbell v. Director, OWCP, 11 BLR 1-16, 1-19 (1987); Justice v. Island Creek Coal Co., 11 BLR 1-91, 1-94 (1988).

The administrative law judge then considered whether the results of the blood-gas tests administered on May 7, 2008, November 13, 2008, and September 17,

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that altitude affects arterial blood-gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). Consequently, the DOL adopted a sliding scale that designated three levels of altitude. Id. The DOL also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. Id. Therefore, the values set forth in Appendix C were determined by the DOL after consideration of elevation and the advanced age of many miners filing claims for benefits.

2009, were sufficient to establish total disability under 20 C.F.R. 718.204(b)(2)(ii). Decision and Order at 31; Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibit 8. The May 7, 2008 arterial blood-gas test, administered by Dr. Gagon during the examination sponsored by the Department of Labor, produced qualifying values at exercise, but not at rest. Director's Exhibit 10. As previously indicated, Dr. Repsher's November 13, 2008 test, performed only at rest, was also qualifying. Employer's Exhibit 8. Dr. James obtained the September 17, 2009 resting test, which produced qualifying values. Claimant's Exhibit 3.

The administrative law judge concluded that the arterial blood-gas evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), because the preponderance of the more recent tests was qualifying, and the qualifying post-exercise results from the May 7, 2008 test more accurately reflected claimant's ability to perform heavy labor. Decision and Order at 31. We affirm the administrative law judge's findings, as they are rational and supported by substantial evidence. See Director, OWCP v. Greenwich Collieries [Ondecko], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989); Worley v. Blue Diamond Coal Co., 12 BLR 1-20, 1-23 (1988).

B. Medical Opinions

Before weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the exertional requirements of claimant's usual coal mine employment. On a signed form, dated January 26, 2009, and entitled Requirements of Last Coal Mine Job, claimant reported:

> As a pre-plant operator, I would load trucks from [the] tipple or with [a] front-end loader. I would have to shovel by hand coal spills from [the] belt or trucks. I would also load materials, belt rollers, rock dust, grease buckets and timbers with [a] fork-lift and by hand to go underground. I would have to grease belt rollers, clean [the] large magnet which removed all metal which came out of the miner, such as roof bolt[s] and put in [the] dumpster at pre-plant and maintain all equipment outside. When there were no trucks to load, I was sent underground to help move belts, belt structure, set timbers, etc., whatever needed to be done.

Employer's Exhibit 14 at 52. Claimant further indicated that his duties required him to: walk approximately two miles per shift; climb forty-five steps, two to three times per shift or as needed; lift from fifteen to one-hundred pounds, including belt rollers weighing one-hundred pounds, rock dust bags weighing fifty pounds, and timbers weighing one-hundred pounds; and carry grease cans, five gallon buckets, respiratory gear, a mine belt, and a mine light. Id.; Claimant's Exhibit 6. Based on his review of this evidence, the administrative law judge concluded that claimant's usual coal mine employment required "heavy labor." Decision and Order at 31. We affirm this finding because it is unchallenged by employer on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. James and Zaldivar that claimant has

a totally disabling pulmonary impairment and the contrary opinion of Dr. Repsher.[6] Decision and Order at 32-34; Claimant's Exhibits 1, 10, 11; Employer's Exhibits 4, 6, 11, 13. The administrative law judge acknowledged the "excellent credentials" possessed by Drs. James, Zaldivar, and Repsher, and noted that each is "thoroughly published, though many of Dr. Zaldivar's publications relate to sleep medicine rather than pulmonology." Decision and Order at 32. The administrative law judge accorded Dr. James's opinion "much probative weight" because his diagnosis of a totally disabling pulmonary impairment was supported by the underlying objective studies and the exertional requirements of claimant's usual coal mine work. Id. at 34; Claimant's Exhibits 1, 10, 11. In contrast, the administrative law judge determined that Dr. Zaldivar's opinion was entitled to "little probative

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[6] The administrative law judge noted that the Board affirmed Judge Malamphy's finding that Drs. Cohen and Gagon did not address whether claimant is totally disabled. Decision and Order at 32. The Board only observed, however, "that no party challenged this aspect of [Judge Malamphy's] decision." Thompson, BRB No. 13-0321 BLA, slip op. at 5, n.8. Dr. Cohen reviewed the three arterial blood gas-tests of record and diagnosed "mild gas exchange abnormalities." Employer's Exhibit 12 at 3. Dr. Gagon performed resting and exercise arterial blood-gas tests on April 7, 2008, diagnosed an impairment of "moderate severity," and attributed the impairment to shortness of breath and hypoxia on exertion. Director's Exhibit 10. Because neither Dr. Cohen, nor Dr. Gagon, offered an opinion as to the extent, if any, these impairments prevented claimant from performing his usual coal mine work, the administrative law judge permissibly determined that he was not required to weigh their opinions under 20 C.F.R. §718.204(b)(2)(iv). See Onderko v. Director, OWCP, 14 BLR 1-2, 1-4 (1989); Budash v Bethlehem Mines Corp., 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc).

weight," as it "seem[ed] to pertain only" to claimant's ability to carry objects up and down steps.[7] Decision and Order at 33-34; Employer's Exhibit 13. The administrative law judge further found that Dr. Zaldivar mischaracterized Dr. Morgan's treatment records "in noting that [c]laimant rarely complained of respiratory symptoms[.]" Decision and Order at 32. The administrative law judge determined that Dr. Repsher's opinion was also entitled to "little probative weight," because he relied on discredited conclusions regarding the arterial blood-gas test evidence, failed to describe the exertional requirements of claimant's coal mine work, and was incorrect in stating that Dr. Morgan's treatment records contained no relevant information. Id. at 33; Employer's Exhibits 4, 6. Based on his decision to accord greatest weight to Dr. James's opinion diagnosing a totally disabling pulmonary impairment, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 34. The administrative law judge further determined that, when considered as a whole, the evidence of record was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(b)(2). Id.

Employer argues that the administrative law judge erred in finding that Dr. James's medical opinion was

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[7] Dr. Zaldivar initially opined, "from a pulmonary standpoint[,] judging by the blood-gas abnormality, [claimant] has an impairment that would not allow him to do very heavy manual labor." Employer's Exhibit 13 at 7. When specifically describing claimant's ability to perform his usual coal mine job, Dr. Zaldivar stated, "[f]rom the blood-gas standpoint, [claimant] would not be able to his usual coal mining work as he described it regarding carrying objects up and down steps." Id.

sufficient to establish total disability without considering that the pulmonary function study Dr. James performed produced nonqualifying[8] results and that he characterized the study as showing only a "mild" impairment. See Claimant's Exhibit 1. Employer further alleges that the administrative law judge erred in stating that Dr. James's opinion is supported by Dr. Morgan's treatment records.

We hold that employer has not identified error requiring us to vacate the administrative law judge's decision to accord "much probative weight" to Dr. James's opinion. Contrary to employer's contention, the fact that the pulmonary function study Dr. James obtained is nonqualifying under 20 C.F.R. 718.204(b)(2)(i) did not preclude the administrative law judge from crediting his diagnosis of a totally disabling pulmonary impairment.[9] Decision and Order at 34; see

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[8] A "nonqualifying" pulmonary function study exceeds the values set out in the table at Appendix B to 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(i).

[9] We also reject employer's argument, erroneously raised at rebuttal, that the administrative law judge erred in discounting Dr. Repsher's invalidation of the pulmonary function study performed by Dr. James. The administrative law judge reasonably determined that Dr. Repsher's opinion is not supported by the record, in light of notations on the test results that claimant showed good effort and that the testing satisfied the American Thoracic Society's criteria. See Big Horn Coal Co. v. Director, OWCP [Alley], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990); Hutchens v. Director, OWCP, 8 BLR 1-16 (1985); Decision and Order at 40; Claimant's Exhibit 1. In addition, we decline to consider employer's contention that Dr. Repsher "testified that his opinion was based upon review of the flow volume curves." Employer's Brief at 16, citing Employer's Exhibit 5 at 14. When Judge Malamphy reopened the record after the Board's initial

McMath v. Director, OWCP, 12 BLR 1-6 (1988); Marsiglio v. Director, OWCP, 8 BLR 1-190 (1985). Rather, the administrative law judge rationally found that Dr. James's opinion was documented by the arterial blood-gas test evidence, in addition to the pulmonary function study showing a mild obstructive impairment, particularly in light of the fact that claimant's usual coal mine job required heavy manual labor. See Northern Coal Co. v. Director, OWCP [Pickup], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); Hansen v. Director, OWCP, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); Clark, 12 BLR at 1-155. In addition, although Dr. James recorded the symptoms of "morning cough and phlegm production over the past 4 to 5 years" in the "History" section of the report of his examination of claimant, and indicated that he reviewed only one office note from Dr. Morgan, employer does not explain how the administrative judge's identification of Dr. Morgan's treatment records as the source of this information detracts from the credibility of Dr. James's opinion. See Shinseki v. Sanders, 556 U.S. 396, 413 (2009); Larioni v. Director, OWCP, 6 BLR 1-1276, 1-278 (1984). We affirm, therefore, the administrative law judge's weighing of Dr. James's opinion.

Despite the fact that Dr. Zaldivar rendered a diagnosis of a totally disabling pulmonary impairment

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Decision and Order remanding the case to him, he allowed the parties to develop evidence relevant to invocation and rebuttal of the Section 411(c)(4) presumption. The parties conferred as to their submissions and agreed that employer would submit two supplemental reports from Dr. Repsher, but withdraw his deposition. Judge Malamphy's March 28, 2013 Decision and Order on Remand at 2.

that assists claimant in satisfying his burden, employer argues that the administrative law judge erred in discrediting Dr. Zaldivar's opinion, based on Dr. Zaldivar's erroneous understanding that claimant's treatment records contained only rare mentions of respiratory or pulmonary complaints. We hold that error, if any, in the administrative law judge's finding is harmless, as he provided a valid alternative rationale for his discrediting of Dr. Zaldivar's opinion. See Searls v. Southern Ohio Coal Co., 11 BLR 1-161, 1-164 n.5 (1988); Kozele v. Rochester and Pittsburgh Coal Co., 6 BLR 1-378, 1-383 n.4 (1983). The administrative law judge acted within his discretion in giving little weight to Dr. Zaldivar's opinion because Dr. Zaldivar limited his assessment of claimant's ability to perform his usual coal mine work to the requirement that he carry items up and down steps. See Poole, 897 F.2d at 893-94, 13 BLR at 2-355-56. We affirm, therefore, the administrative law judge's decision to accord little weight to Dr. Zaldivar's diagnosis of a totally disabling pulmonary impairment.

Employer next argues that the administrative law judge erred in "disregard[ing]" Dr. Repsher's opinion because he relied on his belief that the blood gas-tests were not qualifying, and reiterates that Dr. Repsher was correct, based on Castleview Hospital's "predicted normal values." Brief in Support of Petition for Review at 11. Employer also contends that the administrative law judge mistakenly determined that Dr. Repsher failed to consider Dr. Morgan's notes indicating claimant's "progressively worsening complaints of breathing difficulties." Id. at 12. Employer further alleges that, although the administrative law judge "dismissed" Dr. Repsher's opinion because he did not

explain how he calculated the A-a gradient value, there was no indication that either Dr. Zaldivar or Dr. James characterized Dr. Repsher's calculation as erroneous. Id. at 14. In addition, employer asserts that the administrative law judge's finding that Dr. Repsher erroneously observed that claimant's hearing testimony and a note in Dr. Morgan's treatment records established that claimant walked to the summit of a hill to get to his job is unsupported by the record.

We reject employer's contentions. The administrative law judge rationally discredited Dr. Repsher's view that the A-a gradient is the most accurate measure of blood-gas exchange impairments because he failed to explain how he selected the predicted or reported A-a gradient, and he did not identify the adjustments he made for altitude to determine that claimant's A-a gradient is "well within the normal range."[10] Employer's Exhibit 6; see Pickup, 100 F.3d at 873, 20 BLR at 2-338-39. Regarding Dr.

[10] The administrative law judge also reasonably concluded that Dr. Zaldivar's characterization of the A-a gradient as a "tool with which to standardize the blood gases at any altitude," was entitled to little weight because he did not address whether claimant's reported A-a gradient values were consistent with the diagnosis of a blood-gas exchange impairment. Employer's Exhibit 13 at 6; see Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989); Decision and Order at 34. Similarly, the administrative law judge acted within his discretion in finding that Dr. James's comment that claimant's A-a gradient was consistent with "oxygen transfer/gas exchange problems" did not prove or disprove the presence of a totally disabling impairment, as Dr. James did not compare the A-a gradient he calculated to the values obtained on the other arterial blood-gas tests in the record. Decision and Order at 34, quoting Claimant's Exhibit 10 at 4; see Clark, 12 BLR at 1-155.

Morgan's comment on claimant's ability to walk up hills,[11] the administrative law judge correctly stated, "[c]laimant's testimony that he avoided hills[12] related to his ability to walk up hills, as hiking was a hobby of his, whereas he did not report to Dr. Morgan that he walks up the mountain to get to work every day." Decision and Order at 33 (emphasis added); Hearing Transcript at 48; Employer's Exhibit 14. Finally, the administrative law judge acted within his discretion in determining that Dr. Repsher's opinion was undermined by his conclusion, contrary to the administrative law judge's finding, that none of the arterial blood-gas tests produced qualifying values. See Hansen v. 984 F.2d at 370, 17 BLR at 2-59; Clark, 12 BLR at 1-155. We affirm, therefore, the administrative law judge's decision to accord "little probative weight" to Dr. Repsher's opinion and we decline to address employer's additional allegations of error regarding the

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[11] Dr. Morgan reported that claimant had "to travel," not walk, "from high to low altitude on a daily basis." Employer's Exhibit 14 at 13, 15.

[12] At the September 17, 2009 hearing in this case, when asked if he had "any difficulties going up hills or stairways," claimant responded:

A: Oh, Yes . . .

A: I can't generally go up on them. I have to stop, if I walk them at all. I try to go around them, you know . . . I just don't go up and down, climb the mountains anymore.

I used to do a lot of walking and hiking when I was younger. And I just, I can't do that anymore . . .

I don't have the breath. I don't have enough air.

Hearing Transcript at 48-49.

administrative law judge's weighing of Dr. Repsher's opinion. Decision and Order at 33; see Searls, 11 BLR at 1-164 n.5; Kozele, 6 BLR at 1-383 n.4.

Because employer has not raised any meritorious allegation of error regarding the administrative judge's weighing of the medical opinions of Drs. James, Zaldivar, and Repsher under 20 C.F.R. 718.204(b)(2)(iv), we affirm his finding that Dr. James's diagnosis of a totally disabling pulmonary impairment is entitled to the greatest weight. We further affirm his finding that when all relevant evidence is considered together, Dr. James's medical opinion, as supported by the arterial blood-gas test evidence, is sufficient to establish that claimant has a totally disabling pulmonary impairment pursuant to 20 C.F.R. 718.204(b)(2). See Bosco v. Twin Pines Coal Co., 892 F.2d 1473, 1479, 13 BLR 2-196, 2-208 (10th Cir. 1989); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and a totally disabling pulmonary impairment at 20 C.F.R. §718.204(b)(2), we also affirm his determination that claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1335, 25 BLR 2-549, 2-554 (10th Cir. 2014)

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

In order to rebut the Section 411(c)(4) presumption, employer must establish that claimant has neither

legal[13] nor clinical pneumoconiosis,[14] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); see Goodin, 743 F.3d at 1336-7, 25 BLR at 2-556; Minich v. Keystone Coal Mining Corp., 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R §718.305(d)(1)(i)(B), but failed to affirmatively establish that claimant does not have legal pneumoconiosis, or that no part of claimant's pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Decision and Order at 40-41, 43. Employer challenges the administrative law judge's finding that it failed to disprove legal pneumoconiosis, and failed to prove that claimant's total disability was not caused by pneumoconiosis.

A. Legal Pneumoconiosis

The administrative law judge initially observed that the Board affirmed Judge Malamphy's findings that

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[13] Legal pneumoconiosis is defined as "any chronic lung disease or impairment, and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[14] "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).

the medical opinions of Drs. Cohen and Zaldivar do not assist employer in satisfying its burden of proving that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 40, citing Thompson, BRB No. 13-321 BLA, slip op. at 10-11 n.18; Employer's Exhibits 12, 13. The administrative law judge then determined that Drs. James and Gagon opined that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, while Dr. Repsher determined that claimant does not have a respiratory or pulmonary impairment related to dust exposure in coal mine employment. Decision and Order at 40; Director's Exhibit 10; Claimant's Exhibits 1, 10, 11; Employer's Exhibits 4, 6, 11. The administrative law judge reiterated his prior finding that Drs. James and Repsher possess "excellent credentials," and characterized Dr. Gagon as "well-credentialed," although he practices, and is Board-certified in, family medicine. Decision and Order at 40. The administrative law judge then found that, although each medical opinion is generally well-documented, Dr. Repsher's opinion is "less well-documented" because he relied on his diagnosis of a cardiovascular defect, "without significant support in the record for his theory." Id. The administrative law judge concluded, therefore, that employer failed to establish by a preponderance of the evidence that claimant does not suffer from legal pneumoconiosis. Id. at 40-41.

Employer contends that in discounting Dr. Repsher's opinion, the administrative law judge failed to acknowledge the echocardiogram (ECG) performed at Castleview Hospital on October 13, 2009, that

supports Dr. Repsher's view that a heart condition caused claimant's impairment. Similarly, employer asserts that the administrative law judge did not address Dr. Gagon's notation on the May 7, 2008 arterial blood-gas test that he observed frequent premature ventricular contractions and multifocal premature ventricular contractions. Employer's arguments lack merit.

The administrative law judge correctly found that Dr. Repsher's opinion that claimant's gas exchange impairment is due solely to a cardiovascular defect was based on his review of Dr. James's medical reports. Decision and Order at 40; Employer's Exhibit 8 at 4. The administrative law judge also observed correctly that Dr. James ordered the October 13, 2009 ECG, and he stated only that it showed left ventricular hypertrophy and mild diastolic dysfunction. Decision and Order at 21; Claimant's Exhibit 1 at 3. The administrative law judge further found, and employer does not dispute, that although Dr. Morgan's records indicate that claimant has undergone multiple cardiac tests between 2004 and 2011, none of the test reports include a physician's recommendation that claimant receive further treatment. Decision and Order at 40. Accordingly, the administrative law judge rationally found that Dr. Repsher's opinion is entitled to little weight because he "points to no medical evidence arising from his own examination of [c]laimant or any additional evidence in the [c]laimant's medical records to support his finding that a heart abnormality caused [c]laimant's impairment." See Hansen v. 984 F.2d at 370, 17 BLR at 2-59; Clark, 12 BLR at 1-155; Decision and Order at 40. We affirm, therefore, the administrative law judge's determination that Dr.

Repsher's opinion is insufficient to satisfy employer's burden to affirmatively prove that claimant does not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[15]

B. Total Disability Causation

The administrative law judge considered the opinions of Drs. Repsher, Cohen, and Zaldivar in determining whether employer rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 42-43; Employer's Exhibits 4, 6, 11-13. The administrative law judge discredited Dr. Repsher's opinion, that any impairment suffered by claimant is due to cardiac disease, for the reasons he provided under 20 C.F.R. §§718.204(b)(2) and 718.305(d)(1)(i)(A). Id. at 42. He gave "little probative weight" to Dr. Cohen's opinion because he did not identify the source of claimant's abnormal blood-gas exchange results. Id. The administrative law judge accorded Dr. Zaldivar's opinion, that claimant's disability was caused by idiopathic pulmonary fibrosis that is unrelated to legal pneumoconiosis, "decreased probative weight," as Dr. Zaldivar based his conclusion on the diagnosis of a disease of unknown origin. Id. at 42-43. He also discredited Dr. Zaldivar's opinion because he failed to diagnose legal pneumoconiosis,

[15] Based on our affirmance of the administrative law judge's discrediting of Dr. Repsher's opinion, the only evidence that supports employer's burden to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A), we need not address employer's allegations of error regarding the administrative law judge's crediting of the opinions in which Drs. James and Gagon diagnosed legal pneumoconiosis.

contrary to the administrative law judge's weighing of the evidence under 20 C.F.R. §718.305(d)(1)(i)(A). Id.

Employer asserts that the administrative law judge erred in giving little weight to Dr. Repsher's disability causation opinion, reiterating the allegations of error relevant to the issue of legal pneumoconiosis. Employer also maintains that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Cohen and Zaldivar. Employer asserts that Dr. Zaldivar's opinion is supported by the findings of Drs. Wiot and James, who agreed that the fibrosis in claimant's lower lung zones was not caused by exposure to coal dust.[16]

Employer's allegations of error do not have merit. The administrative law judge rationally discounted the opinions of Drs. Repsher, Cohen, and Zaldivar that claimant's disability was not due to pneumoconiosis because these physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. See Goodin, 743 F.3d 134, 25 BLR at 2-570; Hobet Mining, LLC v. Epling, 783 F.3d 498, 504-05 (4th Cir. 2015); Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). We affirm, therefore, the

[16] Employer also argues that the "no part," or "rule out," standard that the administrative law judge applied to determine whether employer rebutted the presumed fact of total disability causation is not valid. We reject employer's contention for the reasons identified by the Tenth Circuit in Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1342, 25 BLR 2-549, 2-556 (10th Cir. 2014) (The rebuttal provisions set forth in 20 C.F.R. §718.305(d)(1) "do not change existing law and are substantially consistent with prior regulations and agency practices.").

administrative law judge's conclusion that these opinions are insufficient to establish that "no part of [claimant's] pulmonary impairment was caused by pneumoconiosis," as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii). Based on our affirmance of the administrative law judge's findings under 20 C.F.R. §718.305(d)(1)(A) and (ii), we further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

/s/Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/Ryan Gilligan
RYAN GILLIGAN
Administrative Appeals Judge

/s/Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX C

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
11870 MERCHANTS WALK - SUITE 204
NEWPORT NEWS, VA 23606
(757) 591-5140
(757) 591-5150 (FAX)

BRB no.: 13-0321 BLA
Case No.: 2009-BLA-05197

[Issued May 28, 2015]

In the Matter of:

ROBERT C. THOMPSON,
Claimant,

v.

CONSOLIDATION COAL COMPANY,
WELLS FARGO DISABILITY
MANAGEMENT, SELF-INSURED
THROUGH CONSOL ENERGY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS,)
Party-in-interest.)
_____)

APPEARANCES: Jonathan Wilderman
Attorney for the Claimant

Cheryl L. Intravaia
Attorney for the Employer

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS ON SECOND REMAND

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. §§ 901-950 (the "Act" or the "BLBA"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2014). A hearing was held in Price, Utah, on November 17, 2009. A Decision and Order awarding benefits was issued on January 14, 2011. Employer appealed and, on January 20, 2012, the Benefits Review Board ("Board") remanded for reconsideration. On March 23, 2013, the ALJ issued a Decision and Order on Remand awarding benefits. Employer appealed and, on April 23, 2014, the Board remanded for reconsideration.

PROCEDURAL HISTORY

The current claim was filed on February 14, 2008, (DX 2) and was referred by the Director of the Office of Workers' Compensation Programs (OWCP) to the Office of Administrative Law Judges (OALJ) on

December 15, 2008, for a formal hearing in accordance with the Act and the regulations issued thereunder. A hearing was held by Administrative Law Judge (ALJ) Richard K. Malamphy[1] on November 17, 2009, in Price, Utah. ALJ Malamphy issued a Decision and Order Awarding Benefits on January 14, 2011. (ALJ1)[2] The Employer appealed the decision to the Board.

The Board issued its first Decision and Order on January 20, 2012. (BRB1) The Board found ALJ Malamphy erred in classifying Dr. Repsher's report as two separate reports and therefore further erred in refusing to admit Employer's Exhibit 12, Dr. Cohen's report as an excess report. (BRB1 at 4). The Board vacated ALJ Malamphy's award of benefits and remanded the case for ALJ Malamphy, "to reconsider whether employer was provided with the opportunity to submit its permissible allotment of evidence under Section 725.414." (BRB1 at 4). The Board also remanded the case to "allow the parties the opportunity to address whether the claimant had at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those of underground coal mine employment." (BRB1 at 6). The Board also vacated ALJ Malamphy's finding the Employer failed to rebut the Section 411(c)(4)

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[1] The undersigned judge issues this order in light of Judge Malamphy's retirement in 2013.

[2] The following notation applies in this Decision and Order: TR: hearing transcript; EX: Employer's Exhibit; CX: Claimant's Exhibit; DX: Director's Exhibit; ALJ1: ALJ Malamphy's first Decision and Order; ALJ2: ALJ Malamphy's Decision and Order on Remand; BRB1: the Board's first Decision and Order remanding the case to ALJ Malamphy; BRB2: the Board's second Decision and Order remanding the case to the undersigned Judge.

presumption and remanded the case so that ALJ Malamphy could provide the Employer the opportunity to submit additional evidence on this matter. On March 23, 2013, ALJ Malamphy issued a Decision and Order on Remand Awarding Benefits. The Employer again appealed the decision to the Board.

The Board issued its second Decision and Order on April 23, 2014, remanding the claim to the ALJ. In its second Decision and Order, the Board found that Employer's argument that ALJ Malamphy "did not weigh the non-qualifying resting values of the May 7, 2008 blood gas study. Therefore, the Board is unable to determine whether substantial evidence supports his determination that the blood gas study established" total disability. (BRB2 at 5). The Board remanded the case to determine if the arterial blood gas studies established total disability. (BRB2 at 5). Because the Board vacated the finding the blood gas studies established total disability, and because ALJ Malamphy relied on the blood gas studies when weighing the medical opinions, the Board also vacated ALJ Malamphy's finding that the medical opinion evidence supported a finding of total disability. (BRB2 at 7). The Board also directed that, if the presumption were to be invoked on remand, the ALJ should address the CT scan evidence and whether it assisted the Employer in disproving the existence of pneumoconiosis. (BRB2 at 9). The Board also instructed the ALJ to make a finding on whether the medical opinion evidence disproves the existence of clinical pneumoconiosis. (BRB2 at 9). The Board also instructed the ALJ to address, if the issue were reached, whether the Employer proved the Claimant's

impairment did not arise out of, or in connection with, coal mine employment. (BRB2 at 12).

ISSUES PRESENTED ON REMAND

The Board has remanded for further consideration of the following issues based on the evidentiary record as it stands on remand:

1. Whether the evidence establishes a totally disabling respiratory condition invoking the 411(c)(4) presumption.

2. If so, whether Employer has rebutted the presumption.

Specifically, the Board directed that on remand the following issues be addressed:

1. Whether the arterial blood gas studies show total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). (BRB2 at 5).

2. Whether the medical opinion evidence shows total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). (BRB2 at 6-7).

3. Whether the 15-year presumption is properly invoked. (BRB2 at 7).

4. Whether the CT scan evidence assisted the Employer in disproving the existence of clinical pneumoconiosis. (BRB2 at 9).

5. Whether the medical opinion evidence assisted the Employer in disproving the existence of clinical pneumoconiosis. (BRB2 at 9).

6. Whether Dr. Repsher's opinion disproves the existence of legal pneumoconiosis. (BRB2 at 11).

7. Whether the Employer has affirmatively proven the Claimant's impairment did not arise of his coal mine employment. (BRB2 at 12).

The following issues addressed by ALJ Malamphy in this claim were not appealed or were not disturbed by the Board and will not be re-addressed:

1. The Parties stipulated that the Claimant had over fifteen years of underground coal mine employment. (BRB2 at 3).

2. ALJ Malamphy found that the pulmonary function study evidence failed to establish total disability. (BRB2 at 4, n. 6).

3. ALJ Malamphy found that there was no evidence of record that the Claimant suffers from cor pulmonale with right-sided congestive heart failure. (BRB2 at 4, n. 6).

4. The opinions of Drs. Cohen and Gagon did not address whether the Claimant is totally disabled. (BRB2 at 5, n. 8).

5. Substantial evidence supports ALJ Malamphy's characterization of Dr. Zaldivar's opinion that the blood gas study evidence shows total disability. (BRB2 at 6).

6. ALJ Malamphy found that the x-ray evidence of record was negative for pneumoconiosis. (BRB2 at 9).

7. Dr. Cohen's report does not support the Employer's rebuttal burden of affirmatively showing that the Claimant does not suffer from pneumoconiosis or that his disabling respiratory disease is unrelated to coal mine work. (BRB2 at 10-11, n.18).

8. ALJ Malamphy permissibly discounted Dr. Zaldivar's opinion that Claimant did not have legal pneumoconiosis for failure to explain the basis for his opinion. (BRB2 at 11).

APPLICABLE STANDARDS

Because Claimant filed his claim for benefits after January 19, 2001, the current regulations at 20 C.F.R. Parts 718 and 725 apply. Under 20 C.F.R. § 725.202(d), a claimant must establish the following conditions of entitlement in order to receive benefits on a claim filed as a living miner under the BLBA:

1. The claimant is or was a "miner" as defined by the BLBA;
2. The miner has pneumoconiosis as defined by the BLBA;
3. The pneumoconiosis arose out of coal mine employment;
4. The miner is totally disabled, as defined by the BLBA, due to a respiratory or pulmonary impairment;
5. The totally disabling respiratory or pulmonary impairment was caused, at least in part, by pneumoconiosis; and
6. The claim for benefits was filed in accordance with applicable federal regulations.

The record indicates that Claimant's coal mine employment was in Utah. (DX 3). Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

PARTIES' POSITIONS

Claimant's Position

The Claimant argues that he has established total respiratory disability based on the qualifying arterial blood gas (ABG) study evidence noting that Drs. Gagon, Repsher, and James all reported values that qualify as totally disabling per the DOL standards, with Dr. Gagon also reporting non-qualifying resting values. Claimant notes that Dr. Repsher admitted that the PO_2 value reported at his November 13, 2008, exam was qualifying, but also noted Dr. Repsher's statement that the calculation of the alveolar oxygen gradient was more "scientifically valid" and which he interpreted as normal. (Claimant's Brief at 3). Claimant argues that even if this method is more scientifically valid, Dr. James' report interpreting Claimant's alveolar oxygen gradient is better documented and better explains why the gradient is actually abnormally elevated. Claimant also argues that he has established total disability by medical opinion evidence arguing Dr. James' opinion that Claimant is totally disabled is better reasoned and better comports with the objective medical data, Claimant's testimony, and Claimant's hospital and treatment records. Claimant therefore argues that he is entitled to the fifteen year presumption.

Citing United States Court of Appeals for the Tenth Circuit decisions, Claimant argues that Employer has failed to rebut the fifteen year presumption. *Antelope Coal Co. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014); *Bosco v. Twin Pines Coal Company*, 892 F.2d 1473 (10th Cir. 1989). Claimant argues that Employer has neither affirmatively disproven legal nor clinical pneumoconiosis. Claimant argues that Employer has also failed to rebut the presumption by affirmatively showing no part of the Claimant's totally disabling pulmonary or respiratory condition was caused by pneumoconiosis. Citing *Goodin*, Claimant argues that the "rule out" standard is the appropriate rebuttal standard and that it is applicable to this claim. Claimant argues that the Employer has failed to "rule out" a connection between his disability and pneumoconiosis because Drs. James, Morgan, and Gagon opined that Claimant's obstructive airway disease was due to his coal mine dust exposure and Drs. Repsher and Zaldivar failed to show coal dust had not aggravated or materially worsened Claimant's condition. Claimant argues Drs. Repsher and Zaldivar failed to adequately explain why Claimant's coal dust exposure could not have contributed to his lung disease.

Employer's Position

The Employer argues that the Claimant failed to establish a totally disabling respiratory or pulmonary impairment based on the ABG study evidence. The Employer notes that the first two ABG studies, performed by Drs. Gagon and Repsher, were taken at Castleview Hospital in Price, Utah, which has an elevation of 5,627 feet. Employer noted that if the

6,000-foot elevation values in the Part 718, Appendix C, tables were used, the values reported by Dr. Repsher were no longer qualifying, leaving only Dr. Gagon's testing as "qualifying." Employer also noted that the Claimant's ABG values were within the predicted range of normal as defined by Castleview Hospital, where the tests were performed. Therefore, Employer argued, the undersigned ALJ should find that neither Dr. Gagon nor Dr. Repsher's ABG studies establish total disability, and that these two studies outweigh the ABG study by Dr. James showing total disability.

The Employer also argued that the medical opinion evidence does not support a finding of total disability. Employer argued that neither Dr. Gagon's nor Dr. Morgan's medical opinions address total disability explicitly, and that therefore the opinions are not probative on the issue. Of the remaining three doctors who commented on whether Claimant was totally disabled, Employer argues that Dr. Repsher's opinion that Claimant was not totally disabled is entitled to the most probative weight. Employer argues only Dr. Repsher's opinion comports with reports in the medical records, which "revealed, contrary to Claimant's testimony that he could no longer go up in the mountains and avoided hills (TR at 48) that Claimant was 'working on top of mountain summit on a daily basis' on October 24, 2011 and again on December 12, 2011. (EX14 at 13 and 15)." (Employer's Brief at 16).

Employer also argues that because Claimant has not established total disability by either arterial blood gas study or medical opinion evidence, he cannot invoke the fifteen year presumption. However, Employer argued that if the undersigned Judge finds

the Claimant properly invoked the fifteen-year presumption, the Employer has successfully rebutted it by affirmatively showing the Claimant did not suffer from either clinical or legal pneumoconiosis as shown by the negative x-ray evidence, the CT evidence, medical records, and medical opinions. Specifically, Employer argues that the opinions of Dr. Gagon and Dr. Morgan are discredited because they do not possess pulmonary qualifications and because their reports "were either rebutted by objective evidence, internally inconsistent or both." (Employer's Brief at 27). Employer noted that of the remaining four opinions, only Dr. James diagnosed legal pneumoconiosis. However, Employer also noted the Board's affirmation of ALJ Malamphy's discounting of the opinions of Drs. Cohen and Zaldivar. (BRB2 at 11). Employer argues that Dr. Repsher's opinion that Claimant does not suffer legal pneumoconiosis is entitled to more weight than Dr. James's opinion because Dr. Repsher provided a more specific and documented evaluation of the Claimant's condition and was better supported by the medical records showing the Claimant suffered cardiac issues.

Lastly, Employer argues that it also rebutted the presumption, if invoked, by affirmatively showing that Claimant's totally disabling pulmonary or respiratory impairment did not arise out of or in connection with his coal mine employment. The Employer continues to object to the rebuttal standard set forth by the Board. Employer argues that such a standard is in "conflict with the statutory directive that required a showing that the 'respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.'" Employer further argues that the "rule out

" standard is "in conflict with [§]718.201(b) that defines 'arising out of' as 'a respiratory or pulmonary impairment significantly related to, or substantially aggravated by dust exposure in coal mine employment.'" Employer argues that the "rule out" standard is in conflict with these provisions because they imply an employer need only establish that a miner's impairment was not significantly related to or substantially aggravated by coal mine employment. Employer further argues that because the statute and regulatory interpretation are in conflict, §718.305, revised on September 25, 2013, and effective October 25, 2013, should not be retroactively applied to a claim that was filed on February 14, 2008, and proceeded to hearing on November 17, 2009, "because Employer was never allowed an opportunity to develop evidence based on this new standard, which is a change in the law." (Employer's Brief at 28).

RELEVANT EVIDENCE

Entitlement Evidence

CM-911 (DX 2)

Claimant's claim was filed February 14, 2008. Claimant's responses indicate he last worked in or around coal mines or a coal preparation facility on September 2, 2013. Claimant reported that he is currently married and lives with wife, Shelly. Claimant reported they married on February 28, 2003. Claimant reported he was previously married, but did not report the year. Claimant reported he and his previous wife divorced in 1986. Claimant reported that he has one unmarried, disabled son born September 26, 1962.

Marriage License

Claimant's marriage license indicates the Claimant married his wife, Shelly, on February 28, 2002.

Claimant's Testimony

The Claimant testified that he is currently married to his wife, Shelly, that they married on February 28, 2002, and have lived together since approximately 1987. Claimant did not testify regarding his son.

Medical Evidence

X-ray Evidence

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[3] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal*

[3] A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified radiologist" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. A "Board-eligible radiologist" (BER) denotes a physician who has successfully completed a formally accredited residency program in radiology or diagnostic roentgenology.

Co., 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The following chest roentgenogram evidence is in the record:

Exhibit No.	Submitting Party; Purpose	Physician; Qualifications	Date of Reading (X-Ray date)	Reading	Film Quality
DX 10	OWCP-Sponsored Exam	Dr. Hammond[4]; BCR	5/7/2008 (5/7/2008)	- No parenchymal or pleural abnormalities consistent with pneumoconiosis. Other abnormalities noted as "left basilar scar or atelectasis." -Film Quality read as "2" because "[illegible] low lung volumes."	2
DX 12	Quality only	Dr. Navani; B/BCR	5/15/2008 (5/7/2008)	- Film Quality read as "2." Reason for rating illegible.	2

Exhibit No.	Submitting Party; Purpose	Physician; Qualifications	Date of Reading (X-Ray date)	Reading	Film Quality
EX 1/ DX 29	Employer; Case in Chief	Dr. Wiot[5]; B/BCR	7/28/2008 (5/7/2008)	- No evidence of CWP. Other abnormalities include changes indicative of plate atelectasis at both bases. "This is not a manifestation of coal dust exposure."	1
EX 2[6]	Employer; Case in Chief	Dr. Wiot; B/BCR	11/29/2008 (11/13/2008)	- No CWP. Other abnormalities include changes indicative of plate atelectasis at both bases. -Film Quality read as "2" because the films were taken in improper position.	2

[4] *Summary of curriculum vitae(DX 10):* Dr. Hammond earned his M.D. at the University of California, San Francisco in 1995. Since that time he has completed a residency in diagnostic radiology, a fellowship in body imaging, and is currently a diagnostic radiologist at Utah Valley Radiology Associates, Inc., in Provo, Utah. Dr. Hammond is Board-Certified in Radiology. Dr. Hammond's publications and presentations are not relevant to this claim.

[5] *Summary of curriculum vitae (DX 30):* Dr. Wiot earned his M.D. at the University of Cincinnati in 1953. Since that time he has completed residencies in Radiology, a fellowship at the National Cancer Institute, periods of private practice, and multiple professorships including Professor Emeritus of Radiology at the University of Cincinnati 1998-present. Dr. Wiot has served in several leadership positions on the American Board of Radiology, the American College of Radiology, the American Roentgen Ray Society, and various other radiological committees. Dr. Wiot has authored or co-authored "approximately 50 papers dealing with various aspects of Diagnostic Radiology" and chapters in four text books on radiology. Dr. Wiot is a B-reader and was certified as a "Diplomat" by the American Board of Radiology in 1959.

[6] Also contained in EX 8 at 19.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air measured, the more severe the lung impairment. The tests most often relied upon to establish disability in black lung claims measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1), and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the submitted pulmonary function studies available with the current claim. Pulmonary function studies submitted by the parties in connection with the current claim are in accordance with the limitations contained in 20 C.F.R. § 725.414 (2014). "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.204(b)(2)(i).

Exhibit No.	Submitting Party; Purpose	Physician	Date of Study	Age/ Height[7]	Pre (Post) FEV1 (liters)	Pre (Post) FVC (liters)	Pre (Post) $\frac{\text{FEV1}}{\text{FVC}}$	Pre (Post) MVV (liters /min.)	Qualifying
DX 10	OWCP-Sponsored Exam	Gagon[8]	5/7/ 2008	67/70	2.94/ --	4.06/ --	72%/ --	109/ --	No
CX 3	Claimant; Case in Chief	James[9]	9/17/ 2009	69/ 68.5	2.81/ 2.86	4.46/ 4.28	63%/ 67%	--	No
EX 8	Employer; Case in Chief	Repsher[10]	11/13/ 2008	68/ 70	2.86/ 3.09	4.04/ 4.27	71%/ 72%	102/ 116	No

[7] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. The fact-finder can resolve the conflicting heights by taking the average. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983). Taking the average of the reported heights, the undersigned Judge finds the Miner's height to be 69.5".

[8] *Summary of curriculum vitae* (DX 10): Dr. Gagon earned his M.D. from University of Utah School of Medicine in 1997. Since that time he completed a residency in family practice. Dr. Gagon is currently in private practice providing a full range of family practice services. Dr. Gagon has served as the Chairman of the Department of Medicine at Castleview Hospital and has held various research positions related to pathology and family and preventative medicine. Dr. Gagon is board certified in family practice.

[9] *Summary of curriculum vitae* (CX 3): Dr. James earned his M.D. from University of Colorado School of Medicine. Since that time Dr. James has completed a residency in internal medicine at the University of New Mexico Hospital and a fellowship in pulmonary and critical care. Dr. James is a certified B-Reader and is certified in internal medicine, pulmonary diseases, and critical care medicine, all by the American Board of Internal Medicine. Dr. James is currently in private practice at the Western Colorado Lung Center and has held multiple medical professorships. Dr. James has published extensively including articles and abstracts regarding pulmonary diseases in miners.

[10] *Summary of curriculum vitae* (EX 4): Dr. Repsher earned his M.D. from Rochester School of Medicine & Dentistry in 1965. Since that time he completed a residency and a Fellowship in Pulmonary and Critical Care Medicine at the University of Colorado Medical Center. Dr. Repsher is currently the Medical Director of the Occupational & Environmental Lung Disease Program at Lutheran Medical Center. Dr. Repsher is certified as a B-Reader and is Board Certified in Internal Medicine with subspecialty certifications in pulmonary disease and critical care. Dr. Repsher is extensively published in the field of pulmonary and respiratory diseases.

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO_2) and the percentage of carbon dioxide (pCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli, which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in this case. Arterial blood gas studies submitted by the parties are in accordance with the limitations contained in 20 C.F.R. § 725.414. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Exhibit No.	Submitting Party; Purpose	Physician	Date of Study	Altitude (ft. above sea level)	Resting (Exercise) pH	Resting (Exercise) pCO_2 mmHg	Resting (Exercise) pO_2 mmHg	Resting (Exercise) Qualifying
DX 10	OWCP-Sponsored Exam	Gagon	5/7/2008	3000-5999	7.41 (7.34)	45 (46)	56 (50)	No (Yes)
EX 8	Employer; Case in Chief	Repsher	11/13/2008	3000-5999	7.45	36	56	Yes
CX 4	Claimant; Case in Chief	James	9/17/2009	3000-5999	7.43	35.8	59	Yes

Hospitalization & Treatment Records

Notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). In this case, the Parties have submitted treatment and hospitalization records, the relevant portions of which are summarized below.

Hospitalization and Treatment Records from Dr. Morgan[11] *and Castleview Hospital*

Both the Claimant and Employer submitted treatment records by Claimant's primary care physician, Dr. Morgan. (CX 8; CX 9; EX 14). The relevant portions of these exhibits are summarized below in chronological order.

5/20/2004	On review of symptoms, Claimant denied shortness of breath. (EX 14 at 90).
6/10/2004	Physical examination revealed lungs clear to auscultation bilaterally (EX 14 at 88)
12/16/2004	Claimant denied dyspnea on exertion or at rest, paroxysmal nocturnal dyspnea, and cough. Claimant also reported "left anterior pectoral chest pain that was

[11] *Summary of curriculum vitae* (EX 14 at 61): Dr. Morgan earned his M.D. from University of Utah Medical School in 1971. He is certified by the American Academy of Family Practice and has multiple subspecialties including adult medicine, geriatric medicine, limited general surgery, and non-invasive vascular testing.

	somewhat relieved by "maneuver or position." (EX 14 at 86).
12/16/2004	ECG report indicates "borderline abnormal exercise yes- caution." (EX 14 at 84).
6/20/2005	Appointment note indicates Claimant was seen for runny nose, nasal congestion, sore throat, and cough. Review of systems indicates lungs clear to auscultation bilaterally, with no wheezes, rhonchi, or rales. Note indicates assessment of upper respiratory infection. (EX 14 at 82).
9/8/2005	Appointment note indicates Claimant was seen for dermatological issues. Review of systems indicates lungs clear to auscultation bilaterally with no wheezing, fine or course crackles. (EX 14 at 79).
10/4/2005	Appointment note indicates Claimant was seen for evaluation regarding knee pain. Review of systems indicates lungs clear to auscultation bilaterally with no wheezes or rhonchi. (EX 14 at 79).
11/20/2007	Claimant was seen for abdominal pain. At that time Claimant denied chest pain, palpitations, orthopnea, paroxysmal nocturnal dyspnea, edema, cyanosis, cough, pleurisy, and wheezing. Physical examination revealed symmetrical respiratory excursion bilaterally and lungs clear to percussion and auscultation. (EX 14 at 73).
11/28/2007	The CT report indicates the reason for the exam was abdominal pain and pelvic tenderness. The reported findings include "significant linear scarring and/or

	atelectasis involving the right lung base, and less so, the left lung base. The reported impression indicates "[s]ignificant linear scarring and or atelectasis involving the right lung base. A followup chest CT in 6 months is recommended to assure stability." (EX 14 at 67-68, EX 8 at 34-35; CX 9).
12/4/2007	Dr. Morgan saw Claimant for follow-up after the 11/28/2007 radiology appointment. Dr. Morgan noted "linear scarring and atelectasis of the right lung base. There is some also present in the left lung base." (EX 14 at 65). Dr. Morgan stated his plan including, "in light of possible black lung disease [the Claimant] will need to get black lung x-rays." (CX 8; EX 14 at 66).
7/21/2008	Appointment note indicates that the Claimant complained of "cough and congestion of several years duration. Intermittent in nature. Sometimes cough is productive of a gray-white sputum worse in the am upon rising." (EX 14 at 63). Dr. Morgan noted that Claimant's cough and wheezing were chronic, and that he had never smoked. The note indicates Claimant had "scattered wheezes, decreased breath sounds," and had an "increased AP diameter of the chest." He found that Claimant's heart had no evidence of murmur, gallop, or rub, and was not enlarged. He also did not find any evidence of clubbing, cyanosis, or edema in the extremities. The

	note indicates an assessment of "Chronic Obstructive Pulmonary Disease" and "Pneumoconiosis." (CX 8; EX 14 at 63).
7/21/2008	X-ray report states indication as productive cough, wheezing, and dyspnea. Report notes Claimant's history of working in a coal mine. The comparison is made with the 11/28/2007 CT. The report notes findings of "mild heterogeneous opacity in the left lung base, suspicious for an infiltrate in the setting of productive cough." The pleural space is noted as clear. The report indicates an impression of "mild left lung base airspace disease, suspicious for infiltrate/pneumonia in the setting of productive cough." (EX 14 at 62, EX8 at 30; CX 9).
7/23/2008	Dr. Morgan's letter commented on the findings of the examination and x-ray performed on July 21, 2008. Dr. Morgan noted Claimant's cough and congestion of several years' duration. Dr. Morgan commented that "in the past several months the cough and symptoms have worsened." Dr. Morgan noted Claimant had been exposed to coal dust for "over 30 years." Dr. Morgan noted assessment of "pneumoconiosis, fibrous changes on CT scan with scarring in lung bases, chronic obstructive pulmonary disease, clinical pneumoconiosis." Dr. Morgan's impression was that Claimant has coal workers' pneumoconiosis, and that it "does interfere with his daily living and

	even impairs his ability to perform his usual hobbies." (CX 8; EX 13 at 59).
8/11/2008	The x-ray report indicates the reason for exam as "cough, congestion." The interpreting physician compared this film with the 7/21/2008 x-ray. Linear densities at the left base with lesser changes in the right base are noted. Pulmonary vasculature is described as normal. Aorta is described as mildly ectatic. The conclusion states, "Linear increased density at the lung bases, more notably on the left, likely representing atelectasis though infiltrate cannot be excluded." (EX 14 at 58, EX 8 at 25; CX 9).
11/13/2008	The x-ray report indicates the reason for exam as "black lung determination." The interpreting physician compared this film with the 8/11/2008 x-ray. The findings include "linear opacities at the lung bases have decreased slightly. They likely represent atelectasis or potentially mild fibrosis. No focal consolidation." The impression is stated as "mild basilar linear opacities, atelectasis versus mild scarring. Slight decrease compared to the prior study."(EX 14 at 55, EX 8 at 19).
1/15/2009	Claimant's chief complaint is sinus congestion. Dr. Morgan noted Claimant's "cough and congestion of several years duration. Intermittent in nature. Some times cough is productive of a gray-white sputum worse in the am upon rising. Has had wheezing and cough chronically." Claimant reported cough had worsened in

	the past several months. Dr. Morgan reviewed Claimant's x-rays, which "reveal pulmonary fibrosis and probably pneumoconiosis. He complains of nasal stuffiness every night. He denies dyspnea only with severe exertion but not to [sic] often." He noted that there was no change in Claimant's medical history since his last visit on July 21, 2008. He observed that Claimant had decreased breath sounds and scattered wheezes. Claimant's heart also had not changed- there was no murmur, gallop or rub, and was not enlarged. Dr. Morgan assessed Claimant with chronic obstructive pulmonary disease and pneumoconiosis. He also stated that home oxygen may be needed. (CX 8; EX 13 at 53).
1/26/2009	This description of Requirements of Last Coal Mine Job, signed by the Claimant, and possibly an attachment to the 10/27/2009 report by Dr. James, indicates that as a pre-plant operator, Claimant would load trucks from the tipple or with a front-end loader. Claimant would have to shovel coal spills from belt or trucks by hand. Claimant would also load materials, belt rollers, rock dust, grease buckets, and timbers with a fork-lift and by hand to go underground. Claimant also greased belt rollers and cleaned the large magnet that removed metal that came out of the mine such as roof bolts. When there were no trucks to load, Claimant was sent underground to "help move belts, belt

	structure, set timbers, etc. whatever needed to be done." Claimant reported that heavy lifting from 15 to 100 pounds was required; for example, lifting a belt roller weighing 100 pounds, rock dust bags weighing 50 pounds, timbers weighing 100 pounds, etc. Claimant reported he would walk approximately two miles per shift. Claimant indicated he had to climb approximately 30 steps to reach the first landing of the tipple and 15 more steps to reach the second landing, which he had to do about 2-3 times per shift. Claimant reported he regularly had to carry 5-gallon grease cans, his mine belt, mine light, and "respiratory." (EX 14 at 52, CX 6).
10/13/2009	The cardiac echo report, ordered by Dr. James, indicates "admission clinical data: COPD dyspnea on exertion." The report indicates diagnoses of "1. Borderline aortic root enlargement; 2. Borderline left ventricular hypertrophy; 3. Aortic regurgitation, trace; 4. Grade 1 diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressure." (EX 8 at 4; CX 7).
10/27/2009	The results of the pulmonary function test and arterial blood gas study, summarized above, and the examination, record review, and accompanying report by Dr. James, summarized below, are in Dr. Morgan's records here. (EX 14 at 38-52).
10/29/2009	The appointment note indicates the Claimant was seen for a physical. Dr.

	Morgan noted a history of chronic obstructive pulmonary disease, coal dust exposure, and probable pneumoconiosis. Claimant complained of early morning cough productive of grey-white sputum, wheezing, and dyspnea both at rest and with exertion. Claimant denied pleurisy, hemoptysis, chest pain, recurrent respiratory infection or tuberculosis exposure. The second page of this note is omitted from the record. (EX 14 at 35).
6/4/2010	The appointment note indicates the Claimant was seen complaining of cough and congestion of 4 days duration. Claimant reported "breathing distress with the inability to move air through the nostrils." Lungs were noted as clear to percussion and auscultation.
3/10/2011	The appointment note indicates the Claimant was seen for a physical. Dr. Morgan noted Claimant's history of chronic obstructive pulmonary disease, coal dust exposure, and probable pneumoconiosis. Claimant reported an incident of vomiting including hematemesis. Claimant reported that he was worried the blood was coming from his lungs. Claimant complained of early morning cough with productive grey white sputum and wheezing as well as dyspnea both at rest and on exertion. Claimant denies pleurisy, hemoptysis, chest pain, recurrent respiratory infection or tuberculosis exposure. (EX 14 at 28).

5/4/2011	The appointment note indicates the Claimant was seen for follow-up of intermittent chest pain of several months duration. Claimant reported no pain at the time of the exam but that the pain was sometimes precipitated by physical exercise such as daily chores. Claimant denied history of coronary artery disease. Claimant underwent a cardiac stress test, which Dr. Morgan characterized as within normal limits showing normal perfusion. Dr. Morgan noted "however, his ejection fraction was only 53 percent," which the interpreting physician determined as normal. (EX 14 at 18)
5/4/2011	The stress test report indicates a nuclear cardiogram revealed no significant fixed or reversible perfusion defects, but noted an estimated ejection fraction of 53% with relatively decreased motion in the anterior and lateral walls. (EX 14 at 24). In several visits between October 24, 2011, and March 1, 2012, Claimant was seen by Dr. Morgan for tinnitus. In connection with the tinnitus treatment, Claimant informed Dr. Morgan that he worked on top of a mountain and had to travel from high to low altitude on a daily basis. (EX 14 at 1-16).

Other Medical Evidence

High resolution CT scans may be used to diagnose pneumoconiosis and other respiratory diseases. The regulations provide no guidance for the administration

or evaluation of CT scans. Accordingly, they must be weighed with other acceptable medical evidence under 20 C.F.R. § 718.107. The proponent of such evidence "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. § 718.107(b) (see *Webber v Peabody Coal Co*., BRB No. 05-0335 BLA (Jan 27, 2006) (en banc, AAJ Boggs concurring); *Harris v. Old Ben Coal Co*., 23 B.L.R. 1-273 (2007) (en banc on recon.).

11/28/2007 Scan

11/28/2007 The radiology report indicated findings including "significant linear scarring and/or atelectasis involving the right lung base and less, so, the left lung base." (CX 9).

10/19/2009 Dr. Wiot wrote, "as this is a CT scan of the abdomen and pelvis, there are no lung windows provided which makes this CT unreadable for the presence or absence of coal worker's pneumoconiosis. Therefore, this is no interpretation of this CT." (EX 3).

9/17/2009 Scan

9/17/2009 The Claimant submitted a CT scan of the chest, which was ordered by Dr. James and incorporated into his report. The scan was conducted on September 17, 2009. The CT scan report indicates new areas of alveolitis, some minimal bronchial wall thickening, and some septal increased markings at the bases. Dr. Gehl, the

interpreting physician notes that these findings could be indicative of early pulmonary fibrosis. The report indicates there are no nodes and no hilar or mediastinal gross abnormalities. The report indicates there are no gross pulmonary nodules or ground glass patterns. (CX 5).

10/27/2009 Dr. James's medical report, he noted his impression of the CT scan was "no nodular interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1 at 2). He also found in his report that there was no evidence of coal workers pneumoconiosis because "there are no nodular interstitial changes on chest CT." (CX 1 at 3).

1/19/2010 Dr. Wiot wrote (EX 10):

> There is no evidence of coal worker's pneumoconiosis by CT. There is basilar fibrosis with lower lobe traction bronchiectasis consistent with inflammatory change, aspiration, or fibrotic NSIP. This is not a manifestation of coal worker's pneumoconiosis. The CT is otherwise unremarkable.
>
> In summary, there is no evidence of coal worker's pneumoconiosis by CT.
>
> CT is medically acceptable in the medical community for evaluation of pulmonary problems. CT is beneficial in confirming or denying the presence of simple coal

> worker's pneumoconiosis when it is not evident on the routine chest x-rays. This CT scan is of good quality and is acceptable for interpretation for the presence or absence of coal worker's pneumoconiosis.

Medical Opinions

A claimant and employer each may submit two medical reports pursuant to 20 C.F.R. §725.414(a)(1) and (c). A medical report constitutes the testimony or written report of a physician who examined the miner and/or reviewed his medical records. Medical reports are relevant to the issues of whether the miner has/had pneumoconiosis, whether the miner is/was totally disabled, and whether pneumoconiosis caused the miner's disability. *See* 20 C.F.R. §718.202(a)(4); §718.204(b)(2)(iv), (c)(2). The parties have submitted the following medical opinion evidence.

5/18/2008 Report by Dr. Gagon (DX 10)

Dr. Gagon, conducted the DOL-sponsored pulmonary exam on May 7, 2008. Dr. Gagon reviewed the Claimant's CM-911a and noted that Claimant had worked for Consolidated Coal as a plant control operator, roof bolter, and underground coal miner from 1972 to 2003. Dr. Gagon wrote that Claimant has never smoked. The Claimant's medical history was significant for chronic bronchitis. Dr. Gagon also noted Claimant has had surgery on his right knee, has benign prostatic hypertrophy, and gastrointestinal reflux. Dr. Gagon noted that the Claimant's symptoms are daily sputum, dyspnea (shortness of breath) on climbing and hunting, and cough.

A chest x-ray was negative for opacities consistent with pneumoconiosis but showed left basilar atelectasis. A pulmonary function study showed good effort, and no bronchodilator was used due to results being within normal of predicted values. The arterial blood gas study showed hypoxia after exercise.

Dr. Gagon diagnosed Claimant as having "chronic bronchitis as manifested by hypoxia with exercise and chronic productive cough." Dr. Gagon stated that "as patient has no smoking history, etiology is coal dust exposure." Dr. Gagon noted the Claimant's impairment is of moderate severity "due to shortness of breath, hypoxia on exertion." Dr. Gagon attributed the Claimant's impairment "100%" to the chronic bronchitis he diagnosed. Dr. Gagon did not make any conclusions as to whether Claimant is totally disabled, only that his pulmonary impairment was of moderate severity, and patient had no non-respiratory conditions that could be considered disabling.

12/22/2008 Report by Dr. Repsher (EX 4)

Dr. Repsher examined the Claimant on November 13, 2008. Dr. Repsher noted that the Claimant worked "as a coal miner for 20 years, all but 6 years above ground, from April 1975 until September 2003." Dr. Repsher noted that Claimant retired from coal mining in 2003 because the mine was shutting down and that the Claimant had not returned to work. Dr. Repsher noted that Claimant was a never smoker.

Dr. Repsher stated Claimant complained of "progressive dyspnea on exertion for the past 8 years, as well as a cough productive of scant yellow gray phlegm." Claimant denied any chest pain, but "does

complain of coughing up minimal amounts of blood." Dr. Repsher wrote that Claimant denied any history of hypertension, asthma, atopy, TIAs, or TB. Dr. Repsher noted that Claimant denied having ankle edema, but had "two-pillow orthopnea, sleeps in a recliner, and has PND every night." (EX 4 at 1). Dr. Repsher stated that Claimant did have symptoms of gastroesophageal reflux disease and took medication, and had the "symptoms of OSA [obstructive sleep apnea] but has not had a PSNG [polysomnography], nor does he have any daytime somnolence." (EX 4 at 1). Dr. Repsher noted an elevated blood pressure of 150/95. Physical examination revealed "breath sounds are diminished bilaterally. The expiratory phrase is not prolonged. There are no rales, rhonchi, or wheezes, even with forced expiration." (EX 4 at 1). Dr. Repsher found no gallop or murmur in the heart, and no clubbing, phlebitis, or edema in the extremities.

Dr. Repsher reviewed Dr. Wiot's readings of the Claimant's chest x-rays. Dr. Repsher stated that there were no CT scans, but noted that CT scans "are generally accepted diagnostic techniques, capable of showing the presence or absence of CWP[coal workers' pneumoconiosis]. The radiographic tests that were reviewed in this case are of diagnostic quality and are, therefore, reliable for determining the presence or absence of CWP." (EX 4 at 2). Dr. Repsher also noted PFT results that "suggest mild and clinically insignificant COPD, which is overwhelmingly most likely the result of his failure to provide full effort and cooperation with the testing." (EX 4 at 2). Dr. Repsher noted "ABGs show mild hypoxemia, which is non-qualifying." (EX 4 at 2). Dr. Repsher noted a resting electrocardiogram within normal limits. Dr. Repsher

also reviewed Dr. Gagon's 5/7/2008 exam records and Dr. Morgan's 7/23/2008 exam records.

Dr. Repsher's impressions included:

1. No evidence of medical or legal coal workers pneumoconiosis.
2. No evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust.
3. Probable normal pulmonary function.
4. ABGs performed 7 May 2008 suggest primary alveolar hypoventilation. ABGs performed on 13 November 2008 fail to document primary alveolar hypoventilation.
5. Probable OSA, not documented by PSNG.
6. BPH.
7. Peripheral vascular disease, manifested by bilateral lower extremity claudication.
8. Hypertension, of unknown cause, untreated.
9. Symptoms of biventricular congestive heart failure.
10. Hemoptysis, by self-report.

(EX 4 at 3).

Dr. Repsher concluded his first report by stating: "As a result of the above, it is my opinion that [Claimant] is not now and never has suffered from either medical or legal coal workers pneumoconiosis or any other

pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with the Consolidated Coal Co. with the inhalation of coal mine dust. My reasons for these opinions are as follows:

1. He has no radiographic evidence of CWP. His chest x-ray and CT scan show no small rounded opacities primarily in the upper lobes consistent with medical CWP.
2. He has no histologic evidence of CWP. There are no lung biopsy slides for review.
3. He has no PFT evidence of CWP. His PFTs show only mild and non-qualifying COPD.
4. He has no ABG evidence of CWP. His ABGs show only mild and nonqualifying [sic] hypoxemia.
5. Since he has no clinically significant pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry.
6. He is suffering from a number of other serious and potentially serious diseases and conditions. However, none of these could be fairly attributed to his work as a coal miner with exposure to coal mine dust. Rather, these are diseases and conditions of the general population, which are

> primarily related to hereditary and lifestyle factors.

(EX 4 at 3-4).

10/28/2009 Supplemental Report by Dr. Repsher (EX 6)

Dr. Repsher submitted a second report dated October 28, 2009, regarding the clinical significance of the arterial blood gas values obtained from his November 13, 2008, exam of Claimant at Castleview Hospital in Price, Utah. He stated that the DOL Presumption of Impairment:

> [M]akes no correction for age. This is scientifically untenable, since increasing age has a profound and progressive effect on the pO2. This effect is of the same general magnitude, as is the effect of altitude, and is additive to the effect of altitude.
>
> Further, the altitude at Price is at the very high end of Table #2. The relationship between arterial pO2 and altitude is a nonlinear continuous variable, which does not magically change a defined amount, when going from 5999 feet to 6000 feet altitude.

(EX 6 at 1).

Dr. Repsher opined that a more "scientifically valid way to measure alveolar function is by measuring the alveolar-arterial oxygen gradient (A-a gradient), which

measures both the diffusion function of the alveoli and the ventilation/perfusion ratios in the alveoli. (EX 6).

> Using the alveolar air equation, while taking into account the altitude at the Castleview Hospital, one obtains an expected A-a gradient of 22 torr. Calculation of the A-a gradient for [Claimant] reveals a value of 19.5 torr, which is well within the normal range for a man of age 68.

(EX 6 at 1).

11/11/2009 and 11/18/2009 Supplemental Reports of Dr. Repsher (EX 11)

Dr. Repsher also submitted additional supplemental reports on November 11, 2009 and November 18, 2009 after review of Dr. James's report dated October 27, 2009 and the results of a CT scan performed at the direction of Dr. James.

Dr. Repsher stated in his report in response to Dr. James' findings regarding Claimant's "apparent borderline low arterial pO2", that

> Dr. James appears to have ignored and/or did not even inquire during his examination about [Claimant]'s symptoms of left ventricular congestive heart failure, which are most likely due to his underlying hypertensive cardiovascular disease. This is documented by his echocardiogram, which had revealed LVH and diastolic dysfunction.

> Further, his A-a gradient, when adjusted for his age of 68, is clearly within the normal range at 19.5 torr. Finally, these blood gas tests were not fully adjusted for altitude. The relationship between arterial pO2 and altitude is a continuous variable and, therefore, is not stepwise in 3000 feet increments as in the DOL table. Clearly, his arterial pO2 is well within the normal range…

(EX 11 at 2).

He then stated that it was still his opinion that Claimant did not have legal CWP, because Claimant's FEV1 had always been within the normal range and arterial pO_2 had also been within normal limits, with the exception of the May 7, 2008, blood gas test with Dr. Gagon, "suggesting primary alveolar hypoventilation syndrome. It appears that this outlier result was probably the result of laboratory error." (EX 11 at 2).

Dr. Repsher then reviewed the CT scan that was performed on September 17, 2009, at the direction of Dr. James. (EX 11). He stated that the CT scans of the chest showed

> [S]eptal increased markings at the bases, but no nodules or ground glass patterns. This is not consistent with medical coal workers pneumoconiosis (CWP), which demonstrates small rounded opacities primarily in the upper zones. The pre and post bronchodilator spirometry shows mild and clinically insignificant COPD.

> The arterial blood gases (ABGs) show borderline hypoxemia for age and an echocardiogram shows LVH [left ventricular hypertrophy] and diastolic dysfunction.

(EX 11 at 1). Dr. Repsher stated he also reviewed the office notes of Claimant's primary care physician, Dr. Morgan, "which contain nothing relevant to the issue of CWP." (EX 11 at 1).

2/8/2011 Report by Dr. Cohen[12] (DX 12)

Dr. Cohen noted twenty years of coal mine work with fourteen of those years of exposure being above ground. Dr. Cohen also noted the Claimant is a lifelong non-smoker. Dr. Cohen summarized the records he reviewed including Dr. Hammond's reading of the

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[12] *Summary of curriculum vitae (DX 12)*: Dr. Cohen earned his M.D. from Northwestern University Medical School in 1981. Since that time he completed a residency in internal medicine and fellowships in pulmonary and critical care medicine. Dr. Cohen currently serves as the Chairman of Pulmonary and Critical Care Medicine of Cook County Hospitals System, Medical Director Black Lung Clinics Program at Stroger Hospital, Associate Professor of Environmental and Occupational Health and Safety at the University of Illinois School of Public Health, Chief of the Respiratory Studies Branch of the Great Lakes Center for Occupational and Environmental Health at the University of Illinois School of Public Health, and Medical Director of the National Coalition of Black Lung and Respiratory Disease Clinics, among other appointments. Dr. Cohen is a certified B-reader and is board certified in internal medicine, with subspecialty in pulmonary disease. Dr. Cohen is a reviewer for several pulmonary and occupational health related publications and is himself extensively published the bulk of which related to pulmonary and respiratory or occupational health issues.

5/7/2008 x-ray and Dr. Wiot's reading of the 11/13/2008 x-ray, three PFTs, three ABGs, and one echocardiogram of record. Dr. Cohen summarized his interpretation of the ABG studies as "Low normal gas exchange given the altitude at which these studies were performed." (EX 12 at 3).

In response to the question "Does [Claimant] suffer from Coal Workers' Pneumoconiosis?" Dr. Cohen stated there is insufficient evidence provided in the records he reviewed to make a diagnosis of coal workers' pneumoconiosis. Though noting that Claimant had abnormal gas exchange with exercise, Dr. Cohen stated that "it is difficult to attribute this to coal worker's pneumoconiosis with entirely normal resting pulmonary function testing, including diffusion capacity. The etiology of this gas exchange abnormality cannot be determined from the information above." (EX 12 at 3). Dr. Cohen concluded that the Claimant "has normal chest imaging and normal resting pulmonary function tests. He has mild gas exchange abnormalities of undetermined etiology." (EX 12 at 3).

8/25/2011 Report by Dr. Zaldivar[13] (EX 13)

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[13] *Summary of curriculum vitae (EX 13)*: Dr. Zaldivar earned his M.D. at West Virginia University School of Medicine in 1971. Since that time he completed a residency in internal medicine and a fellowship in lung disease. Dr. Zaldivar is board certified in internal medicine, pulmonary diseases and sleep disorder medicine. He is a certified B-reader. Dr. Zaldivar is a clinical professor of medicine at West Virginia University School of Medicine and Director of the Respiratory Therapy at the Charleston Area Medical Center. Dr. Zaldivar has published and spoken extensively including some articles related to pulmonary and respiratory disability, though the bulk of his publications relate to his practice of sleep disorder medicine.

Dr. Zaldivar, summarized the extensive records he reviewed including medical and occupational histories. In his summary of the Claimant's hospitalization and treatment records, Dr. Zaldivar noted that Claimant rarely complained of respiratory symptoms "except for once when he presented to Dr. Morgan with a complaint of wheezing and Dr. Morgan began to hear crackles in Claimant's lungs." (EX 13 at 5).

Dr. Zaldivar explained Dr. Repsher's statements regarding the A-a gradient to account for barometric pressure and age when interpreting arterial blood gas studies. Dr. Zaldivar referenced a 1984 study by the Intermountain Thoracic Society finding average pO_2 levels at results lower than Claimant's in similar barometric pressure and age conditions. Dr. Zaldivar continued by stating that Claimant's blood gas studies were abnormal, noting that while Claimant's diffusion capacity appeared to be normal, the CT scan was not normal. Dr. Zaldivar opined that the CT demonstrated abnormalities in the lower lung consistent with pulmonary fibrosis as well as bronchiectasis. Dr. Zaldivar stated that these conditions "are not due to coal worker's pneumoconiosis. Coal worker's pneumoconiosis has never been shown by plain chest x-ray in [the Claimant's] case and the radiographic abnormality at the lung bases are all compatible with pulmonary fibrosis as noted by Dr. Wiot." (EX 13 at 6). Dr. Zaldivar stated that "[t]here are physiological reasons for the radiographic abnormalities to be in the upper lobes" citing a medical article discussing this topic. (EX 13 at 6).

Dr. Zaldivar stated his opinion that the Claimant's blood gas values "are borderline abnormal." and that

the abnormality is due to pulmonary fibrosis. (EX 13 at 6). Dr. Zaldivar stated that the Claimant's radiographic and physiological changes are consistent with the "constellation" of changes associated with pulmonary fibrosis noted in another medical article. Dr. Zaldivar stated that the differential diagnoses are "idiopathic pulmonary fibrosis, collagen vascular disease, non-specific interstitial pneumonitis, and fibrosing drug reactions." (EX 13 at 7).

Dr. Zaldivar summarized his opinions as follows:

> 1. There is no evidence in this case to justify a diagnosis of clinical coal worker's pneumoconiosis.
> 2. There is no evidence in this case to justify a diagnosis of legal pneumoconiosis. The blood gas abnormalities of [the Claimant] are due to the disease of his lungs in the lower zones which unfortunately have not been investigated, or have been overlooked. The CT scan of the lungs clearly reveals the presence of a pulmonary fibrosis and is not related to coal mining. The blood gas abnormality has been magnified by the altitude and low barometric pressure.
> 3. From the pulmonary standpoint judging by the blood gas abnormality, [the Claimant] has an impairment that would not allow him to do very heavy manual labor.

(EX 13 at 7).

In response to specific questions from the Employer, Dr. Zaldivar stated that the Claimant does not have simple or complicated CWP. Dr. Zaldivar stated that the Claimant's spirometry and diffusion testing "do not reveal any abnormality that would prevent even heavy manual labor." (EX 13 at 7). Dr. Zaldivar reiterated that the blood gas testing do show an abnormality and that based on these data the Claimant would not be able to perform heavy manual labor and would not be able to perform his usual coal mine work "as he described it regarding carrying objects up and down steps." (EX 13 at 7). However, Dr. Zaldivar stated that the blood gas data were "magnified" by the high altitude and low barometric pressure at which they were obtained. Dr. Zaldivar stated that "[l]egal pneumoconiosis refers to an abnormality of both the blood gasses and the ventilatory studies. The ventilatory studies and should become abnormal first followed by a blood gas abnormality." (EX 13 at 7). Dr. Zaldivar stated that the Claimant's condition was best explained by pulmonary fibrosis, "which is clearly affecting the lungs both anatomically as evidenced in the high resolution CT scan, and physiologically in the blood gases. The blood gases are the first abnormalities seen in pulmonary fibrosis before the diffusion and the spirometry becomes abnormal." (EX 13 at 7). Dr. Zaldivar also stated that the pulmonary fibrosis he diagnosed was not related to his occupation because "[c]oal worker's pneumoconiosis does not cause this type of abnormality." (EX 13 at 7).

10/27/2009 Report by Dr. James (CX 1)

Dr. James examined the Claimant on September 17, 2009, and submitted a report on the examination and

follow up testing that occurred October 13, 2009, at Castleview Hospital in Price, Utah. Dr. James noted that Claimant had a self-reported 20-year coal mine employment history, with 14 years above ground. Dr. James wrote that the Claimant was a never smoker. Dr. James stated that Claimant's primary respiratory complaints were "shortness of breath with exertion and morning cough and phlegm production over the past 4 to 5 years." (CX 1 at 1). Claimant reported that his breathlessness upon exertion had been present in Claimant for 5 to 6 years. He wrote that Claimant could "walk 1 mile at his usual pace and home." (CX 1 at 1). Dr. James noted that Claimant had tried a bronchodilator without any significant relief from his symptoms. Claimant reported occasionally yellowish phlegm and an episode in which there was some blood speckling in the phlegm. Dr. James also wrote that Claimant's wife has heard him wheeze. Dr. James noted Claimant's past medical history including gastroesophageal reflux disease.

Dr. James noted that Claimant stopped mining in 2003, that he worked at the preparation plant towards the end of his mining career, and that he did not normally wear a respirator. Dr. James also noted that the Claimant's last coal mining job required Claimant to walk 3 to 4 miles a day, and that he "needed to carry up to 50-pound rock dust bags. He would have to go up approximately 2 flights of stairs 3 to 4 times a day." (CX 1 at 2). Dr. James noted that Claimant also worked as a driller in his coal mine employment. Dr. James noted that Claimant also worked as a mechanic in a power plant for up to seven years. Dr. James stated that Claimant had no chest pain, history of myocardial

infarction or lower extremity edema. Claimant had no witnessed sleep apneas.

Physical examination of the chest revealed "normal respiratory excursions," and that the heart was at a "regular rate, no gallop, no murmurs, regular radial pulse." (CX 1 at 2). Dr. James also noted that there was no cyanosis or clubbing in the extremities and no pitting ankle edema.

Dr. James reviewed Claimant's test results. Dr. James noted his impression of the Claimant's spirometry, which Dr. James noted showed good effort and met American Thoracic Society criteria, showed mild airflow limitation. Dr. James noted that Claimant's exercise oximetry showed "mild decline in oxygen saturation with activity." (CX 1 at 2). Dr. James also reviewed resting arterial blood gas test showed PCO2 at 35.8 and pO_2 at 59, with oxygen saturation 91%. Dr. James also reviewed Claimant's echocardiogram, dated October 13, 2009, and noted "grade 1 diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressures. Estimated ejection fraction 60%." (CX 1 at 2).

A high resolution CT scan was conducted of Claimant's chest. (CX 1, CX 5). Dr. James reviewed the CT scan, the indication for which he listed as "pulmonary fibrosis, black lung disease." (CX 1 at 2). Dr. James stated his impression of "no nodular interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1 at 2). Dr. James also reviewed Dr. Morgan's office note, dated July 23, 2008,

and Dr. Repsher's medical evaluation report dated December 22, 2008.

Following his examination of Claimant and review of the relevant medical evidence, Dr. James noted the following impressions:

1. Chronic obstructive pulmonary disease. [Claimant] has shortness of breath with exertion. He has a regular morning cough and phlegm production for at least 4 to 5 years. There is airflow limitation on lung function testing. This is not chronic bronchitis. There is airflow limitation present and has been observed on previous lung function testing. The airflow limitation would be less likely explained by asthma. There was no significant change with bronchodilators on lung function testing. He has no history of asthma or allergic rhinitis. There was no wheezing on exam.
2. No evidence of coal workers' pneumoconiosis. There are no nodular interstitial changes on chest CT.
3. Mild left ventricular diastolic dysfunction. The ejection fraction was in the normal range of 60%. There is no clinical evidence of heart failure on physical examination.
4. Abnormal sleep history. There is snoring and some morning fatigue. [Claimant] is overweight, increasing his risk of developing obstructive sleep apnea.

(CX 1 at 3).

Dr. James stated in his report that the cause for Claimant's symptoms is chronic obstructive pulmonary disease. Dr. James noted Claimant's status as a never smoker and significant exposure to coal mine dust over approximately 20 years as a coal miner with 14 years above ground, and noted that Claimant worked in some very dusty conditions in the mine, including as a driller. Dr. James stated that "chronic inhalation exposure to coal mine dust is a risk factor for development of chronic obstructive pulmonary disease." (CX 1 at 4). He noted this connection is "outlined in extensive detail in the preamble to the 2000 rules and regulations in the Federal Register Coal Mine Health Safety Act as amended." (CX 1 at 4). He then went on to state:

> With a reasonable degree of medical certainty, [Claimant]'s chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner. He has no other significant respiratory exposure to increase his likelihood of developing chronic obstructive pulmonary disease. There are no other likely causes of his airflow limitation and chronic productive cough other than chronic obstructive pulmonary disease.

(CX 1 at 4). Dr. James reiterated that there was no evidence of coal workers' pneumoconiosis and stated that neither the Claimant's left ventricular diastolic

dysfunction nor his abnormal sleep history are due to his history of coal mining.

Dr. James concluded that Claimant has the following impairment:

> [Claimant] has mild abnormalities on lung function testing with the FEV1 of 84% predicted prebronchodilator and 86% predicted postbronchodilator. He has mild decline of oxygen saturation with activity. His arterial blood gas does meet impairment standards outlined by the US Department of Labor. For an altitude of 4500 feet for a PCO2 of 36 the PO2 needs to be equal to or less than 59. [Claimant]'s PO2 was 59. The PCO2 is within normal limits and there is no evidence of hypoventilation. [Claimant] has mild diastolic dysfunction on the echocardiogram but the ejection fraction was normal. The diastolic dysfunction would not result in the PO2 of 59 mmHg. There was no evidence of pulmonary hypertension on the echocardiogram. More likely than not, [Claimant]'s chronic obstructive pulmonary disease is the cause of the qualifying PO2 of 59.

(CX 1 at 4).

On review of Claimant's reports to him that day and of a report dated 1/26/2009 (CX 6), Dr. James stated that the physical requirements of the Claimant's prior coal mine work were high. (CX 1 a 4). Dr. James concluded "with a reasonable degree of medical

certainty" that Claimant would be unable to perform the usual tasks of his prior position of coal mine employment because of his obstructive pulmonary disease and that, therefore, Claimant is totally disabled from his usual coal mine employment.

3/19/2010 Supplemental Report of Dr. James (CX 10)

Dr. James submitted a supplemental report on March 19, 2010, after reviewing Dr. Repsher's reports dated October 28, 2009, and November 18, 2009. Dr. James stated in his report that Claimant's "arterial blood gas value from his September 17, 2009, visit shows an abnormal A-a gradient….His A-a gradient was calculated at 19.5 mmHg. The age-adjusted A-a gradient was 17.0." (CX 10 at 1). Dr. James also noted

> [Claimant] underwent pulmonary function studies as part of his evaluation that was conducted in Grand Junction by myself on 9/17/2009. The pre and post spirometry meet ATS criteria. The FEV1/FVC percentage pre bronchodilator was 67 with a predicted value of 77%. The normal difference between the predicted and measured FEV1/FVC ratio for males is 8.3% or less. [Claimant]'s FEV1 predicted minus measured pre and post bronchodilators was 14% and 10%, respectively. These values are abnormal and are consistent with air flow limitation. As I stated in my original report, based on the FEV1, these values are consistent with a mild air flow obstructive process.

> These above findings are consistent with and do not significantly change my impression and opinions outlined in my original report from my evaluation of [Claimant] that took place 9/17/2009.

(CX 10 at 1).

The attachment referenced by Dr. James shows that the expected A-a gradient calculation method resulting in an expected A-a gradient of 17.0 mmHg. The actual A-a gradient calculation based on the Claimant's 9/17/2009 spirometry is reported as 19.5 The attachment explains that "[h]igh A-a gradients are associated with oxygen transfer/ gas exchange problems. These are usually associated with alveolar membrane diseases, interstitial diseases or V/Q mismatch. Hypoxemia in the face of a normal A-a gradient implies hypoventilation with displacement of alveolar O2 by CO2 or other substance." (CX 10 at 4).

1/12/2013 Supplemental Report of Dr. James (CX 11)

Dr. James submitted another supplemental report after reviewing the reports of Dr. Zalvidar and Dr. Cohen dated August 25, 2011, and February 8, 2010, respectively. In his review of Dr. Zalvidar's report, Dr. James states that it does not appear Dr. Zalvidar had a chance to review the CT images from the September 17, 2009, study. Dr. James reviewed the findings of the CT scans, which he stated suggested that compression atelectasis "contributes to a significant degree of the radiographic changes seen when the CT scan is performed in the supine position." (CX 11 at 2).

Dr. James notes that Dr. Zalvidar had concluded that the Claimant's primary respiratory disease was

pulmonary fibrosis, for which Dr. James stated there are a number of different causes, and sometimes no cause is identified. Dr. James noted that Dr. Zaldivar identified several potential causes in his report. Dr. James further explained that he disagreed with Dr. Zalvidar's diagnosis for several reasons stating:

> [Claimant] does not have a medical condition that is associated with pulmonary fibrotic disease. [Claimant] was not on any medications at the time of his evaluation that are associated with causing diffuse or fibrotic lung disease. The radiographic changes observed on [Claimant]'s CT scan are not consistent with pulmonary fibrosis that has been associated with chronic exposure to coal mine dust or silica dust. The predominantly localized changes found in the right lung base more consistent with a post-infectious process such as a previous pneumonia and less likely a more diffuse lung injury that occurs from inhalation of dust or from systemic disorders resulting in pulmonary fibrosis or from idiopathic pulmonary fibrosis.

(CX 11 at 2). Dr. James also noted that pulmonary fibrosis can be associated with crackles and clubbing of the fingers, which have not been identified by physicians examining the Claimant. Dr. James noted that Dr. Zaldivar, on page 5 of his report, referred to crackles reported by Dr. Morgan in one of the Claimant's clinic visits, but Dr. James stated he could find no mention of crackles in Dr. Morgan's records.

Moreover, Dr. James stated that such a chronic disease would be associated with consistent abnormal findings, and was unlikely to occur on a single evaluation alone. Dr. James also stated that in clinically significant pulmonary fibrosis the diffusion capacity is frequently decreased, but on the Claimant's previous lung function testing, it was normal.

In his review of Dr. Cohen's 2/8/2010 report, Dr. James noted that the first table on page 3 of Dr. Cohen's report states the FEV1/FVC ratio from the lung function testing Dr. James conducted on September 17, 2009, was abnormal. However, in Dr. Cohen's narrative interpretation, he stated this ratio was normal. Dr. James also notes that from "Dr. Cohen's numerical values, the FEV1/FVC is abnormal and the spirometry is consistent with an obstructive airflow process." (CX 11 at 3). Dr. James concluded by stating that after reviewing both Dr. Zalvidar's and Dr. Cohen's reports that his conclusions remain unchanged. Dr. James reiterated that the Claimant

> developed chronic obstructive pulmonary disease from chronic coal mine dust exposure over his self-reported 20 years of coal mine employment. He has an abnormal spirometry showing airflow obstruction and has arterial blood gas results that qualify for disability based on US Department of Labor black lung program standards.

(CX 11 at 3). Dr. James concluded that the Claimant does not have coal workers' pneumoconiosis or radiographic evidence of disease from chronic inhalation of coal mine dust.

DISCUSSION

The record indicates that Claimant's coal mine employment was in Utah. (DX 3). Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

Pneumoconiosis is defined under the BLBA as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b). This definition includes medical, or "clinical," pneumoconiosis, and statutory, or "legal," pneumoconiosis. 20 C.F.R. § 718.201. Clinical pneumoconiosis includes "those diseases recognized by the medical community as pneumoconiosis, 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," which include conditions such as silicosis and anthracosis. *Id.* § 718.201(a)(1). Legal pneumoconiosis is a broader term that encompasses "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). For example, courts have recognized that respiratory disorders such as chronic obstructive pulmonary disease (COPD), chronic bronchitis, emphysema, and asthma can be caused or aggravated by coal dust exposure. *See, e.g.*, *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-802, 25 B.L.R. 2-203 (6th Cir. 2012); *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, 1-106 n.3 (1998) (en banc); *Heavilin v. Consolidation*

Coal Co., 6 B.L.R. 1-1209, 1-1212 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666, 1-668 (1983); *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.5, 1-798.8 (1981).

"Clinical" or medical pneumoconiosis is often proved by chest x-ray, biopsy, or autopsy evidence. Federal regulations at 20 C.F.R. § 718.201(a)(1) define "clinical" pneumoconiosis as:

> 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.

"Legal" or statutory pneumoconiosis is generally proved by physician-opinion evidence. Federal regulations at 20 C.F.R. § 718. 201(a)(2) define "legal" pneumoconiosis more broadly as a lung disease that:

> includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

This encompasses "a broader class of lung diseases that are not pneumoconiosis as the term is used by the medical community." *Anderson v. Dir., OWCP*, 455 F.3d 1102, 1104 (10th Cir. 2006). The federal black lung regulations also recognize that pneumoconiosis is a latent and progressive disease

which may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. § 718.201(c).

Subsection 718.202(a) sets forth the criteria to establish the existence of clinical and/or legal pneumoconiosis. It includes: (1) chest x-ray evidence; (2) biopsy or autopsy evidence; (3) the application of certain presumptions described in Sections 718.304 or 718.305; or (4) physician-opinion evidence. 20 C.F.R. §718.202(a). The Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at Section 202(a): chest x-ray; or autopsy; certain presumptions; or medical opinion.

I. The Claimant has shown by a preponderance of the evidence that he is entitled to the fifteen year presumption at 20 C.F.R. §718.305(a).

On March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA) was signed into law. Section 1556 revived the 15-year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. §718.305, for a claim that is (1) filed after January 1, 2005, and (2) pending "on or after the date of enactment" of the amendments, which is March 23, 2010. As the Claimant filed his claim on February 14, 2008, (DX 2) he meets these preliminary filing requirements such that the following rebuttable presumption may apply:

> "If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's … claim and it is

> interpreted as negative with respect to the requirements of § 718.304 [for complicated pneumoconiosis], and if other evidence [under §718.204 other than lay evidence] demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis …"

20 C.F.R. §718.305(a).

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304 (2014), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment. 30 U.S.C. § 902(f), 20 C.F.R. § 718.204(b) and (c) (2014). When, as in this case, complicated pneumoconiosis has not been established under 20 C.F.R. §718.304, regulations at 20 C.F.R. §718.204(b) provide that total respiratory disability may be established through one of the following types of evidence[14]:

> a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

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[14] Total disability also may be established through the use of lay testimony alone when no medical evidence is available or through the application of the irrebuttable presumption at 20 C.F.R. § 718.304 when the medical evidence establishes the miner has complicated pneumoconiosis. *See* 20 C.F.R. § 718.204(b)(1), (d). Neither of these situations is applicable in this case.

(i) from performing his or her usual coal mine work; and

(ii) from engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

Under the regulations, total disability for a living miner may be established by (1) pulmonary-function studies, (2) blood-gas studies, (3) evidence of cor pulmonale with right-sided congestive heart failure, and (4) reasoned medical opinion. Thus, in this case, total disability may still be established by the Claimant upon the preponderance of credible evidence involving the following:

1. pulmonary-function tests showing values equal to or less than those set forth in the regulatory table under 20 C.F.R. § 718.204(b)(2)(i);
2. arterial blood-gas tests showing values set forth in regulatory tables under 20 C.F.R. § 718.204(b)(2)(ii);
3. cor pulmonale with right-sided congestive heart failure is established by acceptable medical evidence under 20 C.F.R. § 718.204(b)(2)(iii); or
4. a physician exercising reasonable medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal-mine work or from engaging in gainful employment in the immediate area of his

> residence requiring the skills or abilities comparable to those of any employment in a mine in which he worked with some regularity over a substantial period of time under 20 C.F.R. § 718.204(b)(2)(iv).

In evaluating total disability under the Act, disabling conditions unrelated to pulmonary disease or impairment may not be considered. 20 C.F.R. §718.204(a); *see also* 65 Fed. Reg. 79920, 79947 (Dec. 20, 2000) (final rule implementing amended black lung regulations) (rejecting concept of "whole-person disability").

When evaluating the relevant evidence, if contrary probative evidence exists, all the evidence must be weighed together to reach a determination whether disability has been established. 20 C.F.R. § 718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986). The Claimant as the party proponent bears the burden of proving total disability by a preponderance of the evidence. *Young v. Barnes & Tucker Co.*, 11 B.L.R. 1-147, 1-150 (1988); *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986) (en banc). Thus, if the credible evidence of record is in "equipoise," or is evenly balanced, the Claimant must lose. *See Schaffer v. Weast*, 546 U.S. 49 (2005); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 18 B.L.R. 2A-1 (1994).

A. The Employer has stipulated to at least fifteen years of underground coal mine employment.

ALJ Malamphy reported, and accepted as fact in this case, that the "Employer agreed to stipulate that Claimant had over 15 years of underground coal mine employment." (ALJ2 at 2). The Board noted that this employment history was unchallenged on appeal and thus affirmed it. (BRB2 at 4, n. 5). Accordingly, the Claimant has satisfied the necessary length of underground coal mine employment element required to invoke the presumption.

B. The Claimant has shown by a preponderance of the evidence that he suffers from a totally disabling respiratory or pulmonary impairment.

Complicated Pneumoconiosis

In order to show complicated pneumoconiosis, Claimant must have a chest X-ray interpreted as negative with respect to the requirements of § 718.304 (yielding one or more large opacities greater than 1 centimeter in diameter that would be classified in Category A, B or C). As summarized above, all of the x-rays interpreted in the record are negative with respect to § 718.304. Accordingly, the Claimant has not shown total disability pursuant to §718.304.

Cor Pulmonale with Right-Sided Congestive Heart Failure

As noted above, ALJ Malamphy previously found, and the Board did not disturb, that there was no evidence of record that the Claimant suffers from cor

pulmonale with right-sided congestive heart failure. (BRB2 at 4, n.6).

Pulmonary Function Tests

As noted above, ALJ Malamphy previously found, and the Board did not disturb, that the pulmonary function tests (PFTs) of record failed to establish total disability. (BRB2 at 4, n. 6).

Arterial Blood Gas Studies

In its most recent Decision and Order remanding the instant case to the OALJ, the Board stated that ALJ Malamphy "did not weigh the non-qualifying resting values of the May 7, 2008, blood gas study." (BRB2 at 5). The Board therefore directed the undersigned Judge to consider whether the arterial blood gas studies (ABGs) of record showed total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The regulatory tables for the ABGs are adjusted for altitude, below 3,000 feet; 3,000 feet to 5,999 feet; and 6,000 feet and above, and compare blood oxygen and carbon dioxide levels. 20 C.F.R. § 718.204(b)(2)(ii). A miner who meets the medical specifications set forth in the appropriate altitude table is entitled to a rebuttable presumption of total disability, 20 C.F.R. Part 17, Appendix C.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise, and the ALJ must provide a rationale for according greater probative value to the results of one study over the results of another study. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I Steel Corp.*, 3 B.L.R. 1-63 (1981). More weight

may be accorded to the results of a recent blood gas study over a study that was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). An administrative law judge may also consider the numerical superiority of ABG results. *Id.* (upholding the use of numerical superiority in weighing ABGs).

The following table sets compares the respective test result with the pertinent table values for the arterial blood gas studies the Claimant completed as part of the current claim

Exhibit No.	Submitting Party; Purpose	Physician	Date of Study	Altitude (ft. above sea level)	Resting (Exercise) pH	Resting (Exercise) pCO_2 mmHg	Resting (Exercise) pO_2 mmHg	Resting (Exercise) Qualifying
DX 10	OWCP-Sponsored Exam	Gagon	5/7/2008	3000-5999	7.41 (7.34)	45 (46)	56 (50)	No (Yes)
EX 8	Employer; Case in Chief	Repsher	11/13/2008	3000-5999	7.45	36	56	Yes
CX 4	Claimant; Case in Chief	James	9/17/2009	3000-5999	7.43	35.8	59	Yes

In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable. *See, e.g., Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (in which the miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (in which the miner was intoxicated).

Dr. Repsher stated that while the Claimant's 11/13/2008 ABG values showed mild hypoxemia, they were non-qualifying. (EX 4 at 2). Dr. Repsher argues in his medical opinion report and accompanying supplemental reports that the DOL ABG tables depicting qualifying values make "no correction for age. This is scientifically untenable since increasing age has a profound and progressive effect on the pO2. This effect is of the same general magnitude as is the effect of altitude and is additive to the effect of altitude." (EX 6 at 1). Dr. Repsher further noted that the altitude at which the ABG was performed was at the very high end of the range in Table 2 of the DOL ABG Tables stating that "the relationship between arterial pO2 and altitude is a nonlinear continuous variable, which does not magically change a defined amount when going from 5,999 feet to 6000 feet altitude." (EX 6 at 1). In his first supplemental report Dr. Repsher opined that a more "scientifically valid" measurement of alveolar function is the A-a gradient.[15] (EX 6 at 1). In his second

[15] While the Department specifically declined to adopt this method, it suggested that the measurement might be a useful tool. 45 Fed. Reg. 13683 (Feb. 29, 1980). Accordingly, weighing of the physicians' discussions of the use of A-a gradient as a measure of total disability will be contained in the medical opinion section, below.

supplemental report, Dr. Repsher also described the qualifying result reported by Dr. Gagon as an "outlier" that was "probably the result of laboratory error." (EX 11 at 2).

Dr. Repsher's opinion that the ABGs either do not truly show total disability or are unreliable is poorly reasoned. Dr. Repsher speculated that the qualifying results obtained by Dr. Gagon were "probably the result of laboratory error." (EX 11 at 2). Dr. Repsher failed to explain why the results were likely the result of error, other than implying they were "outliers" because they were qualifying. Dr. Repsher described the results obtained in the ABG study he performed as "non-qualifying," despite the results being qualifying under the Regulations, as summarized above. Dr. Repsher argued that the DOL Tables did not appropriately account for age or altitude at which ABGs are performed. These arguments are not persuasive, are contrary to the BLBA, and undermine Dr. Repsher's opinion because he failed to provide or explain the adjustments he made to determine that the values he obtained were "non-qualifying" and because the Department's disability standards are already adjusted for age and altitude. *See Lawrence v. Itmann Coal Co.*, BRB No. 13-0351 BLA (Apr. 22, 2014) (citing 45 Fed. Reg. 13,712 (Feb 29, 1980)). Lastly, Dr. Repsher's brief and conclusory statements that

> Dr. James appears to have ignored and/or did not even inquire during his examination about [Claimant]'s symptoms of left ventricular congestive heart failure, which are most likely due to his underlying hypertensive

> cardiovascular disease. This is documented by his echocardiogram, which had revealed LVH and diastolic dysfunction.

(EX 11 at 2) and that "the …ABGs show borderline hypoxemia for age and an echocardiogram shows LVH [left ventricular hypertrophy] and diastolic dysfunction" (EX 11 at 1) do not explain how these conditions affect the results of the ABGs and therefore do not constitute evidence that any of the particular ABGs of record are unreliable. Accordingly, Dr. Repsher's opinion that the ABGs do not reliably show total disability is entitled to little probative weight.

Dr. Cohen's opinion on whether the ABGs showed total disability was limited to stating that the Claimant had "abnormal gas exchange with exercise" (presumably referring to the ABG results obtained by Dr. Gagon) and later stating that the Claimant "low normal gas exchange given the altitude at which these studies were performed." (EX 12 at 3). These limited comments do not provide detailed analysis on whether the particular ABGs show total disability or whether circumstances attending the particular ABGs cause the results to be otherwise unreliable. *See, e.g., Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (in which the miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (in which the miner was intoxicated). Rather they, much like Dr. Repsher's comments regarding age and altitude being near the threshold between blood gas tables, attempt to show that *all* of the Department's Tables are unreliable. Accordingly, the undersigned Judge finds these arguments unpersuasive and contrary to the

BLBA. Dr. Cohen's opinion on whether the ABGs reliably show total disability is given little probative weight.

Dr. Zaldivar alternately described the Claimant's ABG results as "abnormal" and "borderline abnormal." However, Dr. Zaldivar stated that the blood gas abnormality was due to pulmonary fibrosis, stating that the Claimant's radiographic and physiological changes are consistent with the "constellation" of changes associated with pulmonary fibrosis. (EX 13 at 6). Dr. Zaldivar stated that based on the blood gas abnormality, the Claimant would not be able to perform his usual coal mine employment; however, calling into question the reliability of these results, Dr. Zaldivar stated that the results of the ABGs are "due to the disease of his lungs in the lower zones [referring to pulmonary fibrosis] which unfortunately have not been investigated, or have been overlooked," and that the data were "magnified by the altitude and low barometric pressure." (EX 13 at 7). Dr. Zaldivar's opinion is poorly reasoned as he confuses etiology of the respiratory or pulmonary condition to which he attributes the abnormal ABG results with evidence that the ABGs are not reliable. For example, in *Vivian*, the record indicated the miner had unrelated blood diseases of leukemia and chronic anemia, and the Board recognized that medical opinion evidence showing how these conditions would affect ABG results could render the results unreliable. 7 B.L.R. 1-360, 1-361 (1984). It would be absurd to discredit qualifying ABG results because they were "affected" by respiratory or pulmonary conditions that may constitute pneumoconiosis. Dr. Zaldivar's comments regarding altitude's effects on ABGs taken at altitudes

near the threshold of the Department's tables echo those of Drs. Cohen and Repsher, and are rejected for the same reasons already discussed above. Accordingly, Dr. Zaldivar's opinion that the ABGs do not reliably show total disability is entitled to little probative weight.

As none of the ABGs have been shown to be unreliable, they all remain probative of the question of total disability. A majority of the ABG values in the instant claim are qualifying as the ABGs performed by Drs. Repsher and James are both qualifying and the ABG performed by Dr. Gagon returned both qualifying (exercise) and non-qualifying values (resting). The qualifying ABGs are also entitled to more probative value as they were taken later and are therefore a better representation of the state of the Claimant's present condition. Lastly, regarding the ABG performed by Dr. Gagon, the exercising value more closely approximates the Claimant's heavy labor required in his usual coal mine employment and is therefore more probative on the issue of total disability than the resting value. Additionally, the regulations at 20 C.F.R. § 718.105(b) require that the miner be offered an exercise blood gas test in the event the results of the blood gas test at rest do not satisfy the requirements of Appendix C. Because exercise requires the body to be able to oxygenate blood more quickly, an insufficiency in gas transfers may be noted after exercise before it is evident at rest. Thus, the fact that the resting values obtained by Dr. Gagon did not qualify does not rebut the fact that the three other blood gas values were qualifying.

In view of all the foregoing, the undersigned Judge finds that the Claimant has established total disability by arterial blood gas studies pursuant to 20 C.F.R. § 718.204(b)(2)(ii).

Medical Opinion Evidence

The regulations provide that where total disability cannot be established by any of the methods described in 20 C.F.R. § 718.204(b)(2)(i)-(iii) or where pulmonary function tests and/or arterial blood gas studies are medically contraindicated, total disability may still be established by medical reports of physicians "exercising reasonable medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in" his prior coal mine employment or similar arduous work. 20 C.F.R. § 718.204(b)(2)(iv). Such medical reports must be documented and reasoned. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health." *Id.* (emphasis in original omitted). Even if a pulmonary-function test is not qualifying, the court may still find that the claimant was totally disabled. *Gomola v. Manor Mining and Contracting Corp.*, 2 B.L.R. 1-130, 1-135 (1979).

In evaluating the medical evidence, an administrative-law judge may not render an independent interpretation of the clinical data or reject a physician's interpretation, replacing it with his or her own. *Sykes v. Itmann Coal Co.*, 7 B.L.R. 1-820, 1-822

(1985) (citation omitted). Also, "[n]on-qualifying pulmonary function and blood-gas studies by themselves do not establish the non-existence of pneumoconiosis or total disability" the total-disability analysis must be based on the totality of the evidence. *Id.* at 1-822. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data on which the physician based the diagnosis. *Fields*, 10 B.L.R. at 1-22. An opinion may be adequately documented if it is based, at minimum, on factors such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Constr. Co.*, 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). An opinion on total disability must also be based on an accurate understanding of the exertional requirements of the miner's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78, 22 B.L.R. 2-107 (6th Cir. 2000). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, 10 B.L.R. at 1-22. Whether a medical report is sufficiently documented and reasoned is for the judge as finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-155 (1989) (en banc).

In weighing the medical opinion evidence, the physicians' qualifications are relevant to assessment of the relative probative value of their opinions. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). The judge may properly discredit the opinion of a physician whose medical assumptions conflict with the spirit and purpose of the Act, to the extent the assumptions affect

the physician's findings. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 B.L.R. 2-199 (6th Cir. 2009); *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982); *see also Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987). The judge is entitled to consider the Preamble to the Act, published at 65 Fed. Reg. 79920 (Dec. 20, 2000), in assessing the physicians' credibility. *A&E Coal Co. v. Adams*, 694 F.3d 798, 25 B.L.R. 2-203 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 B.L.R. 1-117, 1-125 (2009), *aff'd sub nom.*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 B.L.R. 2-369 (3d Cir. 2011).

The Board affirmed ALJ Malamphy's finding that the opinions of Drs. Cohen and Gagon did not address whether the Claimant is totally disabled. (BRB2 at 5, n. 8). Each of the remaining physicians who opined on the issue of total disability possesses excellent credentials, and each is thoroughly published, though many of Dr. Zaldivar's publications relate to sleep medicine rather than pulmonology.

Dr. Repsher stated that Claimant "is not now and never has suffered from either medical or legal coal workers pneumoconiosis or any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with the Consolidated Coal Co. [sic] with the inhalation of coal dust." (EX 4 at 3). Dr. Repsher further explained that, since "he has no clinically significant pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine employment." (EX 4 at 3-4). Dr. Repsher stated that the reasons for this opinion included the Claimant having "no ABG evidence of CWP. His ABGs show only mild and nonqualifying [sic]

hypoxemia." Dr. Repsher explained his belief that using the A-a gradient was a more scientifically valid way to measure alveolar function. Dr. Repsher stated that the Claimant's expected A-a gradient was 22 torr. and that the testing revealed the Claimant had an A-a gradient value of 19.5 torr. (EX 6 at 1). Upon reviewing Dr. James' report, Dr. Repsher reiterated that the Claimant's "A-a gradient, when adjusted for his age of 68, is clearly within the normal range at 19.5 torr." (EX 11 at 6).

The Board found that substantial evidence supported ALJ Malamphy's characterization of Dr. Zaldivar's opinion as stating that the gas study evidence shows total disability. (BRB2 at 6). Dr. Zaldivar related his opinion of the Claimant's totally disabling ABG values to his ability to perform his usual coal mine employment stating that based on the data the Claimant would not be able to perform heavy manual labor and would not be able to perform his usual coal mine work "as he described it regarding carrying objects up and down steps." (EX 13 at 7). However, Dr. Zaldivar also noted that the Claimant's spirometry and diffusion testing "do not reveal any abnormality that would prevent even heavy manual labor." (EX 13 at 7).

Dr. James provided an extensive summary of the exertional requirements of the Claimant's coal mine employment. Dr. James also reviewed Claimant's blood gas values taken the day of his exam, and noted Claimant's non-qualifying but decreased pulmonary function values. Based on his review of the Claimant's written description of his coal mine employment (CX 6) and the Claimant's reports to him that day, Dr. James

concluded that Claimant would be unable to perform the usual tasks of his prior position of coal mine employment because of his chronic obstructive pulmonary disease. Dr. James therefore opined that Claimant was totally disabled from his usual coal mine employment.

Employer argues that Dr. Repsher's opinion is entitled to greater probative weight because his opinion that the Claimant is not totally disabled is the only opinion consistent with the treatment records, which "revealed, contrary to Claimant's testimony that he could no longer go up in the mountains and avoided hills (TR at 48) that Claimant was 'working on top of mountain summit on a daily basis' on October 24, 2011 and again on December 12, 2011. (EX14 at 13 and 15)." Employer has mischaracterized Claimant's testimony or taken it out of context. Claimant's testimony that he avoided hills related to his ability to walk up hills, as hiking had been a hobby of his, whereas he did not report to Dr. Morgan that he walks up the mountain to get to work every day. Accordingly, Dr. Repsher's opinion is not entitled to additional probative weight as Employer argues. Dr. Repsher's opinion regarding total disability is undermined to the extent that he found that none the ABGs showed qualifying totally disabling values, contrary to the finding made above. Dr. Repsher's opinion regarding total disability also suffers from his failure to describe the exertional requirements of Claimant's coal mine employment that he relied on when determining that Claimant was "fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry" despite the hypoxemia and COPD he described as mild and non-qualifying. (EX 4 at 4). Finally, Dr. Repsher stated that

he reviewed the office notes of Dr. Morgan, which he described as containing nothing relevant to the issue of CWP. However, Dr. Morgan's notes indicate progressively worsening complaints of breathing difficulty that relate to the issue of total disability, which indicates Dr. Repsher failed to consider the Claimant's treatment records in reaching his conclusion. Accordingly, Dr. Repsher's opinion regarding total disability is undermined and entitled to little probative weight.

While Dr. Zaldivar's opinion correctly recognizes that the Claimant's ABG values showed he was totally disabled from performing his usual coal mine work "as he described it regarding carrying objects up and down steps," the opinion is qualified and seems to pertain only to that portion of the Claimant's work. (EX 13 at 7). Dr. Zaldivar does not otherwise indicate the exertional requirements of the Claimant's usual coal mine employment. Additionally, Dr. Zaldivar indicated that he considered the Claimant's treatment records noting that Claimant rarely complained of respiratory symptoms "except for once when he presented to Dr. Morgan with a complaint of wheezing and Dr. Morgan began to hear crackles in Claimant's lungs." (EX 13 at 5). Review of the treatment records reveals Claimant's multiple progressively worsening complaints of wheezing and productive cough over the years. Accordingly, Dr. Zaldivar's opinion that the Claimant is totally disabled is undermined and entitled to little probative weight.

Dr. James' opinion that the Claimant is totally disabled is based on an extensive review of the exertional requirements of Claimant's usual coal mine

employment. Dr. James' opinion correctly recognizes the Claimant's qualifying ABG values and also notes the non-qualifying, but reduced spirometry results. Dr. James' opinion considers the Claimant's treatment records showing a history of "regular morning cough and phlegm production for at least 4 to 5 years." (CX 1 at 3). Dr. James' opinion that Claimant suffers a totally disabling respiratory or pulmonary condition is thus well-documented and well-reasoned. Accordingly, Dr. James' opinion is entitled to much probative weight on the issue of total disability.

Dr. Repsher's assertions that using the A-a gradient was a more "scientifically valid" method to determine whether the Claimant suffers a totally disabling respiratory condition are supported by Dr. Zaldivar's opinion and citation to medical literature. However, Dr. Repsher failed to explain how he arrived at either the expected or reported A-a gradient he considered. It appears Dr. Repsher calculated Claimant's A-a gradient only at the time of his own testing and failed to make similar calculations associated with the other ABGs, which were also qualifying under the Department of Labor regulations as summarized above. It is also unclear what adjustments Dr. Repsher made "while taking into account the altitude at the Castleview Hospital" to determine Claimant's value of 19.5 was well within the normal range for his age. (EX 6 at 1). While Dr. Zaldivar's opinion supported the use of the A-a gradient as a "tool with which to standardize the blood gases at any altitude," his opinion does not address whether or not Claimant's A-a gradient indicated total disability. (EX 13 at 6). Dr. James made one calculation for 9/17/2009, showing that the Claimant's A-a gradient was abnormally elevated,

which he explained indicated "oxygen transfer/ gas exchange problems." (CX 10 at 4). However, he too failed to compare A-a gradients associated with the multiple tests, decreasing the value of his opinion regarding use of the A-a gradient. Accordingly, Dr. Repsher's and James' opinions regarding whether the A-a gradient shows a totally disabling respiratory or pulmonary condition do not aid either party in proving or disproving the presence of a totally disabling respiratory or pulmonary condition.

After review of the medical evidence of record and the professional qualifications of the physicians involved, the undersigned Judge finds that the miner has established Claimant is totally disabled through medical opinion evidence under 20 C.F.R. § 718.204(b)(2)(iv).

Though the Claimant may establish a totally disabling respiratory / pulmonary impairment by (1) pulmonary-function studies, (2) blood-gas studies, (3) evidence of cor pulmonale with right-sided congestive heart failure, and (4) reasoned medical opinion, where there is conflicting results of such evaluation, the evidence must be evaluated as a whole. As Claimant failed to show disability by pulmonary function studies or cor pulmonale with right-sided congestive heart failure, conflicting evidence exists such that the evidence must be evaluated as a whole. Also, "[n]on-qualifying pulmonary function and blood-gas studies by themselves do not establish the non-existence of pneumoconiosis or total disability" the total-disability analysis must be based on the totality of the evidence. *Sykes v. Itmann Coal Co.*, 7 B.L.R. 1-820, 1-822 (1985). In response to commenters

disparaging the utility or reliability of arterial blood gas studies, the Department stated its position that ABGs "are extremely helpful in the evaluation of functional impairment, particularly when the ventilatory test results are inconsistent, or the symptoms are out of proportion to the measurable ventilatory defect…[A]rterial blood gas studies sometimes demonstrate significant impairment when ventilatory functions are relatively normal…The two tests measure different components of lung function." 45 Fed. Reg. 13,683 (Feb. 29, 1980). Accordingly, the Claimant's qualifying ABGs and medical opinion evidence showing the Claimant suffers a totally disabling respiratory or pulmonary condition outweigh the non-qualifying pulmonary function tests and lack of evidence of cor pulmonale with right-sided congestive heart failure.

After deliberation on the credible evidence of record, this presiding Judge finds that the Claimant has established that he suffers from a totally disabling respiratory or pulmonary impairment. Therefore, Claimant is entitled to the fifteen year presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305(a).

II. The Employer has failed to rebut the presumption at 20 C.F.R. §718.305 and the Claimant is therefore entitled to benefits under the BLBA.

A. It is proper to apply the amended regulations at 20 C.F.R. §718.305(d)(1)(ii).

When a miner has at least 15 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the miner is entitled to the presumption that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis arising out of coal mine employment unless it is rebutted by the employer. Pursuant to 20 CFR §718.305(d), an employer may rebut the presumption the totally disabling respiratory / pulmonary impairment was due to pneumoconiosis arising out of coal mine employment by –

> "(i) Establishing both that the miner does not, or did not, have:
>
> > (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
> > (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (see §718.203); or,
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201."

Employer objects to the application of the rebuttal standard set forth by the Board regarding the amended regulation at 20 C.F.R. §718.305(d), which makes clear that the party controverting entitlement must establish

that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201". (Employer's Brief at 28). The employer argues that the amended regulation applies a "rule out" standard, which is in conflict both with the statutory language it purports to codify and with the §718.201(b) definition of "arising out of." The U.S. Court of Appeals for the Tenth Circuit has addressed the retroactive application of the amended regulation at 20 C.F.R. §718.305(d)(1) in *Antelope Coal Co./ Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1341-1342 (10th Cir., 2014). In *Goodin*, the Court reiterated the standard that "if a new regulation is substantively consistent with prior regulations or prior agency practices, and has been accepted by all Courts of Appeals to consider the issue, then its application to pending cases is proper." *Id.* at 1342 (citing *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002) (finding that the amended provision "merely clarifies the Department's position and conforms to circuit court cases") (quotations omitted). Accordingly, the undersigned Judge must apply the standard as set forth by the Board.

Under 20 C.F.R. §718.305, the fifteen year presumption can only be rebutted by establishing that the miner did not have pneumoconiosis, or that his impairment did not arise out of coal mine employment. If the Employer can prove either of these, the presumption will be considered rebutted. 20 C.F.R. §718.305. "However in no case shall the presumption be considered rebutted on the existence of a totally disabling obstructive respiratory or pulmonary impairment of unknown origin." *Id*. If the Employer meets the burden of 20 C.F.R. §718.305(d)(1), then the

presumption is rebutted and the Claimant is not entitled to benefits under 20 C.F.R. §718.305 and the evidence must be weighed as a whole. If the Employer fails to meet this burden, then the Claimant is awarded benefits.

B. The Employer succeeded in ruling out clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), but failed to rule out legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). Because this claim was filed after January 19, 2001, the evidentiary limitations as outlined in § 725.414 apply.

Chest x-ray Evidence 20 C.F.R. § 718.202(a)(1)

Chest x-ray evidence can demonstrate the presence or absence of clinical pneumoconiosis under 20 CFR § 718.202(a)(1). The presence of small opacities at a profusion of 1/0 or greater supports a finding of simple clinical pneumoconiosis, while the presence of large opacities (categorized A, B, or C) supports a finding of complicated clinical pneumoconiosis. *Id.* § 718.102(b). Chest x-rays must be conducted and reported in accordance with the regulations and the ILO guidelines for interpretation of chest x-rays. *Id.* § 718.102(e); *See* INT'L LABOUR OFFICE, *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* (Revised ed. 2011). If two or more x-

ray reports conflict, the Administrative Law Judge must consider the radiological qualifications of the interpreting physicians. *Id.* § 718.202(a)(1). Greater weight may be accorded to an x-ray interpretation by a dually qualified (B-reader and Board-certified) physician. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-218, 1-131 (1984). The recency of the x-rays and the length of time between them are also factors to be considered. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). In weighing conflicting x-ray reports, the courts have exhibited disfavor toward the mechanical application of a "head-counting" approach. *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666, 1-668 (1983).

Judge Malamphy found, and the Board affirmed, that the x-ray evidence showed the Claimant did not suffer from clinical pneumoconiosis. (BRB2 at 9).

Autopsy / Biopsy Evidence 20 C.F.R. §718.202(a)(2)

There are no autopsy or biopsy reports of record to consider.

Other Medical Evidence 20 C.F.R. §718.107

The Board agreed with the Employer that, on remand, the Administrative Law Judge should address the CT scan evidence and make a specific finding as to whether it disproves the existence of clinical pneumoconiosis. (BRB2 at 9).

The record contains two CT scans dated November 28, 2007, and September 17, 2009, each with three

interpretations. The first CT scan was of the abdomen pelvis. Dr. Crawford, the interpreting physician in the hospitalization and treatment records found in the 2007 CT scan, "significant linear scarring and/or atelectasis involving the right lung base and, less so, the left lung base" (CX 9). In the follow up appointment to review the scan, Dr. Morgan noted "linear scarring and atelectasis of the right lung base. There is some also present in the left lung base." (EX 14 at 65). Dr. Morgan stated his plan including, "in light of possible black lung disease [the Claimant] will need to get black lung x-rays." (CX 8; EX 14 at 66). Finally, Dr. Wiot reviewed the CT scan on behalf of Employer's counsel and, noting the CT scan was of the abdomen, stated the scan was unreadable for the presence or absence of coal workers' pneumoconiosis and he thus offered no interpretation. (EX 3). The second CT scan was of the Claimant's chest. It was originally examined by Dr. Gehl who stated, "There are new areas of alveolitis. There is some minimal bronchial wall thickening as well as some septal increased markings at the bases. This could be indicative of early pulmonary fibrosis. There are no nodes. No hilar or mediastinal gross abnormalities. No gross pulmonary nodules or groundglass patterns." (CX 5). Dr. David James' reported the Claimant had chronic obstructive pulmonary disease and did not find evidence of coal workers' pneumoconiosis (CX 1). Dr. Wiot also reviewed this CT scan. He stated there was no evidence of coal workers' pneumoconiosis based on that scan (EX 10).

The weight of the CT scan evidence is negative for clinical pneumoconiosis. However, Dr. Crawford, Dr. Morgan, Dr. Gehl, and Dr. James all identified various lung diseases or impairments including linear scarring,

atelectasis, alveolitis, early pulmonary fibrosis, and chronic obstructive pulmonary disease indicating the existence of conditions that, if tied to coal dust exposure, could constitute legal pneumoconiosis. The CT scan evidence therefore assists the Employer in rebutting the existence of clinical pneumoconiosis but fails to rebut the existence of legal pneumoconiosis.

Medical Opinion Evidence 20 C.F.R. §718.202(a)(4)

The final method by which the Employer may rebut the existence of pneumoconiosis is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields*, 10 B.L.R. 1-19. Whether a medical report is sufficiently documented and reasoned is for the ALJ as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports that support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). If a physician concludes that the miner suffers from COPD arising out of coal mine

employment, then his/her opinion supports a finding of "legal" coal workers' pneumoconiosis. *See, e.g., Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996).

Dr. Gagon

Dr. Gagon considered Claimant's work and medical histories, symptoms including chronic productive cough, and testing results. Dr. Gagon noted a negative x-ray and pulmonary function study, but qualifying arterial blood gas results demonstrating hypoxia after exercise. Dr. Gagon determined that Claimant suffered from "chronic bronchitis as manifested by hypoxia with exercise and chronic productive cough," which Dr. Gagon attributed to coal dust exposure due to Claimant's history as a never smoker. Dr. Gagon also stated that Claimant's impairment was entirely due to the chronic bronchitis he diagnosed.

Dr. Repsher

Dr. Repsher reviewed Claimant's records and conducted a physical examination. Dr. Repsher noted negative x-rays, normal pulmonary function testing, and interpreted the arterial blood gas testing results as showing mild hypoxemia, which he described as non-qualifying. Dr. Repsher stated in his initial report that CT scans were an acceptable method for showing the presence or absence of coal workers' pneumoconiosis, but noted that there were no CT scans to review at that time. Dr. Repsher reviewed the September 17, 2009, CT scan stating that the changes present, were not consistent with the small, rounded, primarily upper-lobe opacities expected in "medical" coal workers' pneumoconiosis. (EX 11 at 16). Dr. Repsher attributed

the mild obstructive defect on pulmonary function testing to failure by the Claimant to provide full effort and cooperation with testing. (EX 4 at 2). Dr. Repsher attributed Claimant's borderline low arterial pO_2 to an underlying hypertensive cardiovascular disease. (EX 11 at 2). Dr. Repsher concluded in his initial report that there was no evidence of clinical or legal pneumoconiosis or "of any other pulmonary or respiratory disease or condition, either caused or aggravated by his employment as a coal miner with exposure to coal mine dust." (EX 4 at 3). Lastly, Dr. Repsher noted in his supplemental report at EX 11 that he reviewed the hospitalization and treatment records from Dr. Morgan and indicated that he found "nothing relevant to the issue of CWP." (EX 11 at 1).

Dr. Cohen

The Board found that Dr. Cohen's report does not support the Employer's rebuttal burden of affirmatively showing that the Claimant does not suffer from pneumoconiosis or that his disabling respiratory disease is unrelated to coal mine work. (BRB2 at 10-11, n.18).

Dr. Zaldivar

Dr. Zaldivar reviewed Claimant's medical and occupational history. Dr. Zaldivar stated that there was no evidence in this case to justify a diagnosis of clinical or legal pneumoconiosis. Dr. Zaldivar stated that the Claimant's blood gas abnormalities were "due to the disease of his lungs in the lower zones which unfortunately have not been investigated or have been overlooked." (EX 13 at 7). Dr. Zaldivar opined that the CT scans demonstrated abnormalities in the lower lung

consistent with pulmonary fibrosis, which he earlier described as "idiopathic" (EX13 at 7), rather than coal workers pneumoconiosis. Dr. Zaldivar further stated that "[l]egal pneumoconiosis refers to an abnormality of both the blood gases and the ventilatory studies. The ventilatory study in legal pneumoconiosis should become abnormal first followed by a blood gas abnormality." (EX 13 at 7). Dr. Zaldivar opined that the Claimant's condition was best explained by pulmonary fibrosis, "which is clearly affecting the lungs both anatomically as evidenced in the high resolution CT scan, and physiologically in the blood gases. The blood gases are the first abnormalities seen in pulmonary fibrosis before the diffusion and the spirometry becomes abnormal." (EX 13 at 7).

Dr. James

Dr. James examined the Claimant and reviewed Claimant's medical and employment histories and records. Dr. James noted his impressions that Claimant suffers from COPD but that there was no evidence of coal workers' pneumoconiosis because there were no nodular interstitial changes on the chest CT. Dr. James observed that chronic inhalation exposure to coal mine dust is a risk factor for development of COPD. Dr. James stated that

> With a reasonable degree of medical certainty, [Claimant]'s chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner. He has no other significant respiratory exposure to increase his

> likelihood of developing chronic obstructive pulmonary disease.

(CX 1 at 4). Dr. James stated that Claimant has no other likely causes of his airflow limitation and chronic productive cough other than COPD.

Clinical Pneumoconiosis

Judge Malamphy found, and the Board affirmed, that the x-ray evidence showed the Claimant did not suffer from clinical pneumoconiosis. (BRB2 at 9). As summarized above, the CT scan evidence assists the Employer in rebutting the existence of clinical pneumoconiosis. Additionally, as Drs. Gagon and Cohen did not specifically opine on it and Drs. Repsher, Zaldivar, and James explicitly ruled it out, there are no conflicting medical opinions showing that the Claimant had clinical pneumoconiosis. Accordingly, Employer has successfully rebutted the presence of clinical pneumoconiosis.

Legal Pneumoconiosis

The Board affirmed that Dr. Cohen's report does not support the Employer's rebuttal burden of affirmatively showing that the Claimant does not suffer from pneumoconiosis or that his disabling respiratory disease is unrelated to coal mine work. (BRB2 at 10-11, n.18). The Board found that ALJ Malamphy permissibly discounted Dr. Zaldivar's opinion that Claimant did not have legal pneumoconiosis for failure to explain the basis for his opinion. (BRB2 at 11). Of the remaining medical opinions, Drs. Gagon, and James have opined that the Claimant suffers legal pneumoconiosis. Dr. Gagon attributed the Claimant's chronic bronchitis, as manifested by hypoxia with

exercise, and chronic productive cough to his coal dust exposure. Dr. James attributed Claimant's COPD to his chronic exposure to coal dust. Dr. Repsher opined that the Claimant does not have legal pneumoconiosis. As discussed above in the section regarding total disability, both Drs. James and Repsher possess excellent credentials. Dr. Gagon is well-credentialed, though his practice and board certification are related to family practice rather than pulmonary or respiratory medicine specifically.

While each of the medical opinions is generally well-documented in that they each rely on Claimant's histories and objective testing, Dr. Repsher's opinion is less well-documented because of his reliance on a cardiovascular defect without significant support in the record for his theory. The cardiovascular defect Dr. Repsher pointed to for this diagnosis was a review of an echocardiogram in Dr. James' medical report revealing LVH and mild diastolic dysfunction. However, Dr. Repsher points to no medical evidence arising from his own examination of the Claimant or any additional evidence in the Claimant's medical records to support his finding that these abnormalities caused Claimant's condition. While the hospitalization and treatment records from Dr. Morgan indicate that Claimant underwent multiple cardiac tests since 2004, none of the records indicate that the results required further treatment. Following the most recent October 2011 cardiac stress test, Dr. Morgan characterized the perfusion as within normal limits and noted that while the ejection fraction was 53%, the physician who wrote the report determined it was normal. Dr. Repsher disputed Dr. James' diagnosis of COPD based on his conclusion the Claimant did not provide full effort and

cooperation with the pulmonary function tests. However, Dr. Repsher provides no support for speculating the Claimant did not cooperate with the tests and each of the PFTs specifically indicates that Claimant showed good effort. Additionally, Dr. Repsher stated that he found nothing in the hospitalization and treatment records relevant to coal workers' pneumoconiosis despite, as summarized above, the records' frequent references respiratory and pulmonary conditions that Dr. Morgan believed to be related to Claimant's coal mine employment. Finally, Dr. Repsher incorrectly relied on ABGs that he characterized as non-qualifying, as discussed above. Accordingly, this Administrative Law Judge affords Dr. Repsher's opinion little weight regarding the presence of legal pneumoconiosis.

Dr. Gagon's relatively brief report states that Claimant's chronic bronchitis and chronic productive cough is due to coal dust exposure as "patient has no smoking history." (DX 10). This statement is adequately reasoned, if not extensively analyzed. Also, as stated above, Dr. Gagon's practice and board certification are in family practice rather than pulmonary or respiratory medicine. Accordingly, Dr. Gagon's opinion is entitled to reduced weight on the presence of legal pneumoconiosis.

Dr. James found that Claimant suffered from coal mine dust induced COPD based on his particular exposure history, symptoms, and status as a non-smoker. His opinion is well-reasoned in that the underlying testing supports his diagnosis of COPD and its cause being coal dust exposure. Dr. James thoroughly explained why he ruled out conditions

suggested by other physicians and opined that the testing did not show clinical pneumoconiosis in conformity with the findings discussed above. Therefore, Dr. James' opinion that the Claimant suffers legal pneumoconiosis is entitled to great probative weight.

The foregoing demonstrates that there is some conflicting evidence related to the existence of legal pneumoconiosis. In weighing the multiple opinions of record regarding legal pneumoconiosis, Dr. James' opinion is entitled to the greatest weight while Dr. Gagon's opinion is only moderately probative and Dr. Repsher's opinion is entitled to little probative weight. After deliberation on all the credible evidence of record and the professional qualifications of the physicians involved, this presiding Judge finds that the Employer has failed to establish by a preponderance of the evidence that the Claimant does not suffer from legal pneumoconiosis arising out of coal mine employment.

C. The Employer failed to show that the Claimant's totally disabling respiratory or pulmonary impairment did not arise out of his pneumoconiosis.

The Employer may rebut the 20 C.F.R. §718.305 presumption by establishing that no part of the Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, but is due entirely to other medical reasons, such as smoking tobacco products, cancer, asbestos or aspiration of fluids. Pneumoconiosis is defined under the Act as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b). This

definition includes both medical, or "clinical," pneumoconiosis, and statutory, or "legal," pneumoconiosis. 20 C.F.R. § 718.201; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 308, 25 B.L.R. 2-115 (4th Cir. 2012). In *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246, 1-259 n. 18 (2006) the Benefits Review Board cited to *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006) and *Henley v. Cowan & Co.*, 21 B.L.R. 1-147, 1-151 (1999) and adopted the Director's position to hold where the Administrative Law Judge finds the presence of "legal" pneumoconiosis the administrative law judge need not separately determine the etiology of the disease at 20 C.F.R. §718.203 because findings of "legal" pneumoconiosis under 20 C.F.R 718.202(a)(4) necessarily subsume that inquiry. Under 20 C.F.R. §718.305, the fifteen year presumption can only be rebutted by establishing that the miner did not have pneumoconiosis, or that his impairment did not arise out of coal mine employment. If the Employer can prove either of these, the presumption will be considered rebutted, *Id*. "However in no case shall the presumption be considered rebutted on the existence of a totally disabling obstructive respiratory or pulmonary impairment of unknown origin." *Id*. The administrative law judge may discredit the disability causation opinions of physicians who found that the miner did not suffer from pneumoconiosis, contrary to the administrative law judge's findings. *See e.g., Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.); *see also Abshire v. D&L Coal Co.*, 22 B.L.R. 1-202 (2002)(en banc).

Dr. Gagon attributed Claimant's impairment, which he described as of moderate severity, entirely to the

chronic bronchitis with which he diagnosed the Claimant. Dr. Gagon's diagnosis of chronic bronchitis stated that the etiology was coal dust exposure, as the Claimant has no history of smoking. Dr. Gagon's analysis of whether the claimant's impairment was caused by chronic bronchitis constituting legal pneumoconiosis is brief and rules out only one possible exposure source, smoking. Accordingly, Dr. Gagon's opinion is entitled to only moderate probative weight.

Dr. Repsher found that the Claimant did not suffer legal pneumoconiosis and was not disabled, contrary to the findings above, so his analysis of the etiology of Claimant's totally disabling pulmonary or respiratory impairment is brief. Regarding the Claimant's "apparent borderline low arterial pO2," Dr. Repsher suggested that Claimant's symptoms "of left ventricular heart failure, which are most likely due to his underlying hypertensive cardio vascular disease. This is documented by his echocardiogram, which had revealed LVH and diastolic dysfunction." (EX 11 at 2). However, in his initial report, Dr. Repsher diagnosed with Claimant with hypertension "of unknown cause, untreated." (EX 4 at 3). Dr. Repsher's suggestions that Claimant's obstructive abnormality on the PFTs was likely due to less than full effort and that Claimant's qualifying ABG values were likely the result of laboratory error have already been discussed and discounted as poorly- or un- documented. Dr. Repsher's suggestion that Claimant's condition is due to cardiac conditions has also been discussed and discounted in the section regarding legal pneumoconiosis. These comments suffer the same defects in the context of the issue of etiology of total disability and Employer's burden to rule out a link between Claimant's total

disability and pneumoconiosis. Accordingly, Dr. Repsher's opinion regarding disability causation is entitled to little probative weight.

Dr. Cohen's report states that the Claimant had abnormal gas exchange with exercise and stated that "it is difficult to attribute this to coal worker's pneumoconiosis with entirely normal resting pulmonary function testing, including diffusion capacity. The etiology of this gas exchange abnormality cannot be determined from the information above." (DX 12 at 3). The Board found that these comments do not aid the Employer in rebutting the presumption by showing the Claimant does not suffer from pneumoconiosis. Similarly, they do not aid the Employer in showing that there is no causal link between the Claimant's totally disabling respiratory or pulmonary impairment and his pneumoconiosis. The presumption cannot be rebutted on the basis of an impairment of unknown origin. Accordingly, Dr. Cohen's opinion is afforded little probative weight.

Dr. Zaldivar stated that the Claimant's differential diagnoses are "idiopathic pulmonary fibrosis, collagen, vascular disease, non-specific interstitial pneumonitis, and fibrosing drug reactions." (EX 13 at 7). Dr. Zaldivar noted that the Claimant was totally disabled from his usual coal mine employment, in conformity with the findings made above, but stated that the Claimant did not suffer pneumoconiosis, contrary to the findings above. Dr. Zaldivar stated that the Claimant's condition was best explained by pulmonary fibrosis. (EX 13 at 7). Dr. Zaldivar's diagnosis of idiopathic pulmonary fibrosis does not assist the Employer in satisfying its rebuttal burden because the presumption

cannot be rebutted on the basis of an impairment of unknown origin and Dr. Zaldivar does not explain why the Claimant's pulmonary fibrosis is not related to his coal dust exposure and would not constitute legal pneumoconiosis. Additionally, Dr. Zaldivar's finding that the Claimant does not suffer pneumoconiosis, contrary to the findings made above, harms his opinion regarding a causal link between the Claimant's total disability and pneumoconiosis. Accordingly, Dr. Zaldivar's opinion is afforded decreased probative weight.

Dr. James opined that the cause for the Claimant's symptoms is COPD, noting Claimant's status as a never smoker and his significant history of exposure to coal mine dust over approximately twenty years. Dr. James stated that there were no other likely causes of the Claimant's airflow limitation and chronic productive cough other than COPD. Dr. James reviewed Claimant's ABGs and explained why he ruled out hypoventilation and diastolic dysfunction as causes of Claimant's low PO2, which he reiterated was caused instead by COPD. In his second supplemental report, Dr. James explained why pulmonary fibrosis was not causing the Claimant's pulmonary issues as Dr. Zaldivar opined. Accordingly, Dr. James' opinion is entitled to great probative weight on the issue of disability causation.

In view of all the foregoing, the Employer has failed to rebut the 20 C.F.R. §718.305 presumption that the Claimant's totally disabling respiratory or pulmonary impairment is due to pneumoconiosis arising out of coal mine employment. Accordingly, the undersigned Judge

finds that the Claimant is entitled to benefits under the BLBA.

III. The evidence does not indicate the onset date of Claimant's total disability; therefore, the Claimant is entitled to compensation beginning in February of 2008.

The Claimant is entitled to benefits commencing on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis or, if such a date cannot be determined from the record, the month in which the miner filed his claim. Here the miner filed his claim for benefits on February 14, 2008. 20 C.F.R. § 725.503 (2005); *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). Moreover, it is noteworthy that the date of the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306, 1-1310 (1984). Upon review of the record in this case the onset date cannot be determined from the medical evidence and, therefore, benefits, including augmentation for Claimant's dependent wife, are payable from February of 2008.

IV. The Claimant has one dependent, his wife, for purposes of augmentation.

The Claimant has one dependent for augmentation considerations under the Act: his wife. Augmentation of benefits commences with the first month in which

the dependent satisfies all of the conditions applicable to that particular relationship, in this case that of a spouse, according to the regulations at 20 C.F.R. §§ 725.204, 725.205. Claimant testified, and submitted a marriage license indicating, he married his wife of February 28, 2002. Claimant testified that the two had lived together since approximately 1987. Accordingly the dependency requirements were satisfied on February 28, 2002, the date of marriage. As February 28, 2002, predates the commencement of benefits, payments shall be augmented from the first payment date of February 1, 2008. Augmentation continues through the month before the month in which the dependent ceases to qualify under any of the enumerated conditions. 20 C.F.R. § 725.210. The qualification of Claimant's wife for augmentation purposes shall end the month before the month in which any one of the following events first occurs: 1) her death, or 2) her entrance into a valid marriage with a person other than Claimant. § 725.204. The Claimant reported in his claim for black lung benefits that he had one dependent, disabled son over the age of 18. However, no further evidence has been submitted indicating that this child satisfies the dependency requirements at §724.209. Accordingly, Claimant is credited with only one dependent, his wife, for purposes of augmentation.

FINDINGS AND CONCLUSIONS OF LAW

After deliberation on the evidence of record, the following findings of fact and conclusions of law are entered –

1. The current initial claim was timely filed on February 14, 2008.

2. The Claimant is a miner, as that term is defined by the BLBA.
3. The Claimant worked as a miner under the BLBA after December 31, 1969.
4. The Claimant worked as a miner under the BLBA for a period of at least fifteen years, ending on or about September 2, 2003.
5. The Claimant last worked as a miner under the BLBA for Consolidation Coal Company (the named Respondent Employer).
6. The Claimant's most recent period of cumulative employment of not less than one year as a miner under the BLBA was with the named Respondent Employer.
7. The named Respondent Employer is the responsible operator under the BLBA.
8. The Claimant has established that he suffers from a totally disabling respiratory impairment was due to pneumoconiosis arising out of his coal mine employment.
9. The Claimant is entitled to invoke the rebuttable presumption of 20 C.F.R. §718.305 that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis arising out of coal mine employment.
10. The Employer has not rebutted the presumption of 20 C.F.R. §718.305 by establishing that the Claimant does not suffer from legal pneumoconiosis arising from coal mine employment, but has established that the Claimant does not suffer from clinical pneumoconiosis.
11. The Employer has not rebutted the presumption of 20 C.F.R. §718.305 by establishing that the Claimant's totally disabling respiratory or

pulmonary impairment is not due, at least in part, to clinical pneumoconiosis or legal pneumoconiosis arising from coal mine employment.

12. The Claimant is entitled to benefits under the BLBA commencing February 1, 2008.
13. The Claimant has 1 dependent (his wife, Shelly) for purposes of augmentation under the BLBA.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant before this presiding Judge or ALJ Malamphy is made herein since no application has been received. Thirty days is hereby allowed to Claimant's counsel for submission of such an application and his attention is directed to §§ 724.365 and 725.366 of the Regulations. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits filed under the BLBA on February 14, 2008 is hereby **GRANTED**. Consolidation Coal Company is hereby ordered to pay Claimant all benefits to which he is entitled, under the BLBA and Regulations commencing February 2008.

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom,
OU=Administrative Law Judge,
O=Office of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

ALB/RMK/jcb
Newport News, Virginia

* * *

[*Notice of Appeal Rights and Service Sheet Omitted in the Printing of this Appendix*]

APPENDIX D

NOT-PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
P.O. BOX 37601
WASHINGTON, DC 20013-7601

BRB No. 13-0321 BLA

[Issued April 23, 2014]

ROBERT C. THOMPSON	)
	)
Claimant-Respondent	)
	)
v.	)
	)
CONSOLIDATION COAL COMPANY	)
	)
and	)
	)
WELLS FARGO DISABILITY MANAGEMENT/SELF-INSURED THROUGH CONSOL ENERGY	)
	)
Employer/Carrier-Petitioners	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION and ORDER

Appeal of the Decision and Order On Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P. C.), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (09-BLA-5197) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a miner's claim filed

on February 14, 2008, and is before the Board for the second time.

In his initial decision, applying amended Section 411(c)(4),[1] 30 U.S.C. §921(c)(4), the administrative law judge found that claimant established more than fifteen years of qualifying coal mine employment.[2] The administrative law judge further found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section

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[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] The record indicates that claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's decision, and remanded the case so that the parties could submit evidence in response to the change in the law due to the reinstatement of Section 411(c)(4) after the hearing.[3] *Thompson v. Consolidation Coal Co.*, BRB No. 11-0331 BLA, slip op. at 4-6 (Jan. 20, 2012)(unpub.). In remanding the case for the administrative law judge to reopen the record, the Board rejected employer's arguments that the retroactive application of amended Section 411(c)(4) to this claim violates employer's due process rights and constitutes an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. *Thompson*, slip op. at 6.

On remand, following the parties' submission of additional evidence, the administrative law judge accepted employer's stipulation that claimant had over fifteen years of underground coal mine employment. Decision and Order on Remand at 16. The administrative law judge found that the medical

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[3] The Board also instructed the administrative law judge to reconsider his decision to exclude a medical report from Dr. Cohen that was submitted by employer. *Thompson v. Consolidation Coal Co.*, BRB No. 11-0331 BLA, slip op. at 3-4 (Jan. 20, 2012)(unpub.). On remand, the administrative law judge admitted Dr. Cohen's medical report as part of employer's evidence, and the admissibility of Dr. Cohen's report is not at issue in the current appeal.

evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that he is totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge applied an improper rebuttal standard, and erred in his analysis of the evidence in finding that employer failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge applied an

[4] Additionally, employer argues that the retroactive application of Section 411(c)(4) violates its due process rights and constitutes an unlawful taking under the Fifth Amendment to the United States Constitution. Employer's Brief at 31-31. We decline to address these arguments, as we rejected them in the prior appeal, and employer has not demonstrated any exception to the law of the case doctrine. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting).

improper rebuttal standard. Employer has filed a reply brief, reiterating its contentions on appeal.[5]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically challenges the administrative law judge's findings that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[6] Employer argues further that the administrative law judge did not weigh the contrary probative evidence at 20 C.F.R. §718.204(b)(2).

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[5] The administrative law judge's finding that claimant had more than fifteen years of underground coal mine employment is unchallenged on appeal. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the three pulmonary function studies of record did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 17. Further, as there is no evidence of record that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three arterial blood gas studies conducted on May 7, 2008, November 13, 2008, and September 17, 2009. The May 7, 2008 blood gas study, performed by Dr. Gagon, produced non-qualifying values at rest, and qualifying[7] values with exercise. Director's Exhibit 10. The November 13, 2008 and September 17, 2009 blood gas studies, performed by Drs. Repsher and James, respectively, produced qualifying values at rest and did not include an exercise portion. Employer's Exhibit 8 at 18; Claimant's Exhibit 4.

The administrative law judge found that "three qualifying arterial blood gas studies . . . show total disability and no tests . . . contradict the findings. Therefore, the [c]laimant has established total disability under § 718.204(b)(2)(ii)." Decision and Order on Remand at 17. Employer contends that substantial evidence does not support the administrative law judge's finding because he did not address the non-qualifying blood gas study values. Employer's Brief at 8-9. This contention has merit. The administrative law judge did not weigh the non-qualifying resting values of the May 7, 2008 blood gas study. Therefore, the Board is unable to determine whether substantial evidence supports his determination that the blood gas study evidence established that claimant is totally disabled. *See* 30 U.S.C. §923(b). Consequently, we must vacate the administrative law judge's finding pursuant

[7] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

to 20 C.F.R. §718.204(b)(2)(ii), and remand this case for him to consider all of the relevant evidence, and determine whether the blood gas study evidence establishes total disability. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479, 13 BLR 2-196, 2-208 (10th Cir. 1989).

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. James, Repsher, and Zaldivar.[8] Dr. James opined that claimant is totally disabled by a respiratory or pulmonary impairment, based on the results of his pulmonary function and blood gas studies. Claimant's Exhibits 1 at 5; 11 at 3. Dr. Zaldivar opined that, because claimant's blood gas study values are abnormal, he is unable to perform his usual coal mine work from a pulmonary standpoint. Employer's Exhibit 13 at 7. In contrast, Dr. Repsher opined that claimant does not suffer from a totally disabling respiratory impairment. Employer's Exhibits 4 at 4; 11. Specifically, Dr. Repsher noted that claimant's pulmonary function studies reflect "very mild and clinically insignificant" obstruction, and that his blood gas studies are normal when adjusted for age and altitude. Employer's Exhibit 4 at 2-4; Employer's Exhibit 11 at 2. Further, Dr. Repsher opined that, to

[8] The administrative law judge also considered the medical opinions of Drs. Cohen and Gagon, and determined that neither physician addressed whether claimant is totally disabled. Decision and Order on Remand at 17-18; Director's Exhibit 10; Employer's Exhibit 12. On appeal, no party has challenged this aspect of the administrative law judge's decision.

the extent claimant's blood gas studies reflect mild hypoxemia, it is due to heart disease. Employer's Exhibit 6; Employer's Exhibit 11 at 2.

The administrative law judge found the opinions of Drs. James and Zaldivar, that claimant is totally disabled, to be supported by claimant's qualifying blood gas study values. The administrative law judge accorded "less weight" to Dr. Repsher's opinion that claimant is not totally disabled, because he found that Dr. Zaldivar "better explained that[,] even adjusting for age and barometric pressure, [c]laimant's blood gas study values were abnormal." Decision and Order at 18. Further, the administrative law judge discounted Dr. Repsher's opinion, that any blood gas study abnormality present is due to heart disease, because there was no evidence that claimant has been diagnosed with, or treated for, a cardiac condition. The administrative law judge therefore found that the medical opinion evidence established that claimant is totally disabled.

Initially, employer contends that the administrative law judge mischaracterized Dr. Zaldivar's opinion. Employer's Brief at 9 n.4. We disagree. Employer points to Dr. Zaldivar's statement that claimant's pulmonary function studies do not indicate total disability. *Id*. However, a review of Dr. Zaldivar's medical report, as a whole, reveals his opinion that, although claimant's pulmonary function study values do not indicate total disability, his blood gas studies indicate the presence of an impairment that would prevent claimant from performing his usual coal mine

work.[9] Employer's Exhibit 13 at 7. Therefore, substantial evidence supports the administrative law judge's characterization of Dr. Zaldivar's opinion.

We also reject employer's argument that the administrative law judge failed to address whether the medical opinions were documented and reasoned. Employer's Brief at 9-10. As summarized above, the administrative law judge found the opinions of total disability to be supported by claimant's qualifying blood gas study values. Further, he determined that Dr. Zaldivar explained that claimant's blood gas study values were abnormal even if adjusted for age and altitude. Therefore, the administrative law judge considered the documentation and reasoning of the medical opinions. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024-25, 24 BLR 2-297, 2-315 (10th Cir. 2010). However, because the administrative law judge relied on the qualifying blood gas studies to weigh the conflicting medical opinions, and we have vacated his finding that claimant's blood gas studies establish total disability, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On remand, after the administrative law judge has reconsidered the blood gas study evidence, he must reconsider the medical opinions on the issue of the

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[9] Specifically, Dr. Zaldivar stated that claimant's pulmonary function studies, "[b]y themselves. . . do not reveal any pulmonary abnormality that would prevent even heavy manual labor. . . . The blood gas study values[,] however[,] do show that there is an abnormality present . . . ." Employer's Exhibit 13 at 7. Dr. Zaldivar concluded that, "[f]rom the blood gas standpoint, [claimant] would not be able to do his usual coal mining work as he described it . . . ." *Id.*

existence of total disability[10] pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering the medical opinions regarding total disability, the administrative law judge should determine the exertional requirements of claimant's usual coal mine employment, which are of record, and analyze the physicians' opinions in light of those requirements. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); Director's Exhibit 4; Hr'g Tr. at 44-48. When weighing the medical opinions, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Gunderson*, 601 F.3d at 1024, 24 BLR at 2-315.

Additionally, on remand, the administrative law judge must weigh all contrary probative evidence, like and unlike, including the non-qualifying pulmonary function studies, in making a determination regarding the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Bosco*, 892 F.2d at 1479, 13 BLR at 2-208; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195

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[10] Employer challenges the administrative law judge's decision to discount, at 20 C.F.R. §718.204(b)(2)(iv), Dr. Repsher's opinion that any blood gas study abnormality that claimant has is due to heart disease. Reply Brief at 5. Contrary to employer's argument, the proper inquiry at the invocation stage of Section 411(c)(4) is the existence of a totally disabling respiratory or pulmonary impairment, not its cause. *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989). Therefore, the administrative law judge, on remand, need not address the cause of disability at 20 C.F.R. §718.204(b)(2)(iv).

(1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate his determination that claimant invoked the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's arguments regarding rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds that claimant has invoked the Section 411(c)(4) presumption. Once claimant invokes the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Bosco*, 892 F.2d at 1481, 13 BLR at 2-213 (holding that employer must "affirmatively establish[] the lack of either pneumoconiosis or a link with [claimant's coal] mine employment"). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge applied an improper standard by requiring it to disprove the existence of legal pneumoconiosis. Employer's Brief at 13-17, 30-31. Contrary to employer's contention, invocation of the Section 411(c)(4) presumption provides claimant with a presumption of both clinical and legal

pneumoconiosis.[11] Consequently, in order to rebut the Section 411(c)(4) presumption, employer must disprove the existence of both clinical and legal pneumoconiosis.[12] *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345 (10th Cir. 2014); *Bosco*, 892 F.2d at 1481, 13 BLR at 2-213. Employer's reliance on *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), to support its argument that legal pneumoconiosis may not be presumed under Section 411(c)(4), is misplaced, as *Andersen* did not address Section 411(c)(4).[13]

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[11] "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). "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).

[12] The implementing regulation that was promulgated after the administrative law judge issued his decision specifically requires the party opposing entitlement in a miner's claim to establish "both that the miner does not . . . have: (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (see § 718.203)." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(i)).

[13] In *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), the Tenth Circuit addressed the application of Section 411(c)(1) of the Act, 30 U.S.C. §921(c)(1), which provides that where a miner has at least ten years of coal mine employment, it is rebuttably presumed that his or her pneumoconiosis arose out of that employment. The Tenth Circuit held that the Section 411(c)(1) presumption is limited to cases in which the miner establishes the existence of clinical pneumoconiosis. *Andersen*, 455 F.3d at 1106-07, 23 BLR at 2-343.

Employer also contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision.[14] We now turn to the administrative law judge's rebuttal findings.

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge accurately found that the x-ray evidence of record was negative for pneumoconiosis.[15] The administrative law judge summarized negative readings of CT scans, Decision and Order on Remand at 14-15, but a review of his decision discloses no finding as to whether the CT scan evidence assisted employer in disproving the existence of clinical pneumoconiosis. We agree with employer that, on remand, the administrative law judge should address the CT scan evidence and make a finding as to whether it disproves the existence of clinical pneumoconiosis. Further, as we are remanding this case for further consideration, we instruct the administrative law judge

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[14] Moreover, the regulations implementing amended Section 411(c)(4) make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

[15] In making this finding, however, the administrative law judge stated that "claimant has failed to establish that he suffers from pneumoconiosis under § 718.202(a)(1)." Decision and Order on Remand at 20.

to also address the medical opinion evidence on the issue of clinical pneumoconiosis, and make a specific finding as to whether employer has disproved the existence of clinical pneumoconiosis. *See* 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)(i)).

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Gagon, James, Repsher, Zaldivar, and Cohen. Dr. Gagon diagnosed claimant with chronic bronchitis due to coal mine dust exposure, Director's Exhibit 10, and Dr. James diagnosed him with chronic obstructive pulmonary disease due to coal mine dust exposure.[16] Claimant's Exhibits 1 at 4; 11 at 3. In contrast, Dr. Repsher concluded that claimant does not have legal pneumoconiosis, but has mild obstruction reflected on one pulmonary function study, that he opined was likely due to insufficient effort on the test, and has mild hypoxemia that is due to heart disease and is unrelated to coal mine employment. Employer's Exhibits 4, 6, 11. Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but has hypoxemia due solely to pulmonary fibrosis unrelated to coal mine dust exposure. Employer's Exhibit 13. Dr. Cohen indicated that he could not determine the etiology of claimant's blood gas impairment from the information he reviewed, but stated that it would be "difficult to attribute" it to pneumoconiosis, given claimant's normal pulmonary function studies and diffusion capacity tests. Employer's Exhibit 12 at 3. Under the

[16] Both physicians noted that claimant never smoked. Director's Exhibit 10; Claimant's Exhibits 1, 11.

heading "Conclusion," Dr. Cohen diagnosed "mild gas exchange abnormalities of undetermined etiology." *Id*.

The administrative law judge found that Dr. Cohen determined that a diagnosis could not be made, based on the evidence available to him. The administrative law judge discounted Dr. Zaldivar's opinion, because he found that Dr. Zaldivar did not adequately explain his opinion that the pattern of claimant's impairment is inconsistent with legal pneumoconiosis. Further, the administrative law judge discounted Dr. Repsher's opinion, that claimant's impairment is due solely to heart disease, because there was no record evidence of a significant heart condition, "given Dr. James' explanation that, while [c]laimant experienced a mild diastolic dysfunction, his ejection fraction was normal and such diastolic dysfunction would not result in [c]laimant's pO2 levels." Decision and Order on Remand at 22. The administrative law judge further found that Dr. James's opinion was documented and reasoned, and established the existence of legal pneumoconiosis.[17]

Employer contends that the administrative law judge did not sufficiently analyze Dr. Cohen's opinion.[18]

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[17] The administrative law judge also determined that Dr. James's opinion was supported by Dr. Gagon's opinion and Dr. Morgan's treatment records. Decision and Order on Remand at 23.

[18] A substantial portion of employer's brief is devoted to arguing that the medical opinions diagnosing claimant with legal pneumoconiosis are not documented and reasoned. Employer's Brief at 18-19, 22, 24-27. The proper inquiry on rebuttal, however, is the sufficiency of employer's evidence, as employer bears the burden to affirmatively show that claimant does not suffer from pneumoconiosis or that his disabling respiratory disease is

Employer's Brief at 24. This contention lacks merit. Employer must affirmatively establish that claimant does not have legal pneumoconiosis. *Bosco*, 892 F.2d at 1481, 13 BLR at 2-213. Dr. Cohen concluded that claimant has "gas exchange abnormalities of undetermined etiology," and stated only that it was "difficult" to attribute them to pneumoconiosis. Employer's Exhibit 12 at 3. Thus, the administrative law judge did not err in finding that Dr. Cohen's report does not support employer's rebuttal burden. *See* 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(3)).

Additionally, employer argues that the administrative law judge did not provide a valid reason for discounting Dr. Zaldivar's opinion. Employer's Brief at 23; Reply Brief at 14-15. We disagree. In concluding that claimant does not have legal pneumoconiosis, Dr. Zaldivar stated that legal pneumoconiosis "refers to an abnormality of both the blood gas and ventilatory studies," in which the pulmonary function studies "should become abnormal first, followed by a blood gas abnormality." Employer's Exhibit 13 at 7. In part because claimant's pulmonary function study values were normal and his blood gas studies were abnormal, Dr. Zaldivar concluded that claimant does not have legal pneumoconiosis. *Id*. Contrary to employer's contention, the administrative law judge permissibly found that Dr. Zaldivar did not adequately explain the basis for his opinion that legal pneumoconiosis is characterized by the particular pattern of impairment

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unrelated to coal mine work. *See* 30 U.S.C. §921(c)(4). Thus, we focus on the administrative law judge's credibility findings with regard to the opinions of Drs. Cohen, Repsher, and Zaldivar.

he described. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 876, 20 BLR 2-334, 2-344 (10th Cir. 1996). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's credibility determination regarding Dr. Zaldivar's opinion.

Employer argues further that, in discounting Dr. Repsher's opinion as unsupported by evidence of significant heart disease in the record, the administrative law judge did not address Dr. Repsher's explanation that there was evidence of ventricular heart failure, or address treatment record echocardiograms that detected cardiac abnormalities. Employer's Brief at 21. This argument has merit. *See* Employer's Exhibits 4, 8, 11, 14. Further, a review of the administrative law judge's decision discloses no explanation of his basis for crediting Dr. James's interpretation of the cardiac testing evidence over that of Dr. Repsher. As the administrative law judge set forth no other reason for discounting Dr. Repsher's opinion, we must vacate his finding with respect to Dr. Repsher, and instruct the administrative law judge, on remand, to reconsider whether Dr. Repsher's opinion disproves the existence of legal pneumoconiosis, and to explain his findings. *See Gunderson*, 601 F.3d at 1024-25, 24 BLR at 2-315. On remand, regardless of whether the administrative law judge finds that claimant has heart disease, he is instructed to determine whether Dr. Repsher has set forth an opinion establishing that claimant's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2).

Employer lastly contends that the administrative law judge failed to address whether employer rebutted the Section 411(c)(4) presumption by proving that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 28-29. After the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis, he considered whether employer could "rebut the presumption through a physician's documented and reasoned medical report" addressing "the cause or causes of [the] miner's total disability. . . ." Decision and Order on Remand at 23. The administrative law judge determined that, because "the evidence . . . establishes the existence of legal pneumoconiosis, a finding which necessarily requires a finding that [c]laimant's impairment arose out of his coal mine employment," employer "failed to rebut the Section 411(c)(4) presumption." *Id*. Therefore, contrary to employer's contention, the administrative law judge addressed whether employer proved that claimant's disabling impairment was unrelated to his coal mine employment. *See Goodin*, 784 F.3d at 1346.

However, because we have vacated the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we also vacate his finding as to disability causation and instruct the administrative law judge, on remand, that if the issue is reached, he should address whether employer has proved that claimant's impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). To prove that claimant's disability did not arise out of coal mine employment, employer must establish that "no part of the miner's . . . total disability was caused by

pneumoconiosis. . . .” 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); *Goodin*, 743 F.3d at 1346.

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

SO ORDERED.

/s/Nancy S. Dolder, Chief
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
11870 MERCHANTS WALK - SUITE 204
NEWPORT NEWS, VA 23606
(757) 591-5140
(757) 591-5150 (FAX)

BRB No.: 11-0331 BLA
Case No.: 2009-BLA-05197

[Issued March 28, 2013]

In the Matter of:	)
	)
ROBERT C. THOMPSON,	)
Claimant,	)
	)
v.	)
	)
CONSOLIDATION COAL COMPANY,	)
WELLS FARGO DISABILITY	)
MANAGEMENT, SELF-INSURED	)
THROUGH CONSOL ENERGY,	)
Employer,	)
	)
And	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS,)
)
Party-in-interest.)
_____)

APPEARANCES: Jonathan Wilderman
Attorney for the Claimant

Cheryl L. Intravaia
Attorney for the Employer

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. §§ 901-950 ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2008). A hearing was held in Price, Utah, on November 17, 2009. A Decision and Order awarding benefits was issued on January 14, 2011. Employer appealed and, on January 20, 2012, the Benefits Review Board ("Board") remanded for reconsideration. In its decision remanding the case, the Board instructed that the record be reopened on the issue of the rebuttal of the Section 411(c)(4) presumption and stated that the undersigned may allow the parties to withdraw and replace evidentiary exhibits within the evidentiary limitations. The parties conferred with one another and determined that (1) all of Dr. Repsher's reports would remain in the record, (2) treatment records from Dr. Morgan would be admitted as an employer's exhibit, (3) Dr. Zaldivar's report would be admitted as an employer's exhibit, (4) Dr. Cohen's report would be

admitted as an employer's exhibit, (5) the deposition of Dr. Repsher would be withdrawn, and (6) Employer agreed to stipulate that Claimant had over 15 years of underground coal mine employment. The parties were also permitted to file appellate briefs and the record is now considered closed.

I. Issues Presented on Remand

The Board has remanded for further consideration of the following issues based on the evidentiary record as it stands on remand:

1. Whether the evidence establishes a totally disabling respiratory condition invoking the 411(c)(4) presumption.

2. If so, whether Employer has rebutted the presumption.

II. Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718. Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(*en banc*); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Medical Evidence

X-ray Evidence

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[1] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The following chest roentgenogram evidence is in the record:

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[1] A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified radiologist" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. A "Board-eligible radiologist" (BER) denotes a physician who has successfully completed a formally accredited residency program in radiology or diagnostic roentgenology.

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Film Quality	Interpretation
DX10	5/7/08	5/7/08	Roy Hammond, BCR	2	No CWP
DX12	5/7/08	5/15/08	Shiv Navani, BCR/B	2	Quality only
EX1/ DX29	5/7/08	7/28/08	Jerome E. Wiot, BCR/B	1	No CWP, Other abnormalities: plate atelectasis on both sides
EX2	11/13/08	11/29/08	Jerome E. Wiot, BCR/B	2	No CWP, Other abnormalities: plate atelectasis on both sides

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. Tests most often relied upon to establish disability in black lung claims measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1), and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the submitted pulmonary function studies available with the current claim. Pulmonary function studies submitted by the parties in connection with the current claim are in accordance with the limitations contained in 20 C.F.R. § 725.414 (2008). "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.204(b)(2)(i) (2009).

Exhibit No. Date Doctor	**Age/ Height[2]**	**FEV_1 Pre-/ Post**	**FVC Pre-/ Post**	**FEV_1/ FVC Pre-/ Post**	**MVV Pre-/ Post**	**Qualify**	**Physician Impression**
DX10 5/7/08 Gagon	67/ 70”	2.94/ --	4.06/ --	72%/ --	109/ --	No	Good cooperation/ comprehension
CX3 9/17/09 James	69/ 68.5”	2.81/ 2.86	4.46/ 4.28	63%/ 67%	--	No	Good cooperation/ maximal effort
EX8 p.16-17 11/13/08 Repsher	68/ 70”	2.86/ 3.09	4.04/ 4.27	71%/ 72%	102/ 116	No	Good effort

Arterial Blood Gas Tests [2]

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO_2) and the percentage of carbon dioxide (pCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in this case. Arterial blood gas studies submitted by the parties are in accordance with the limitations contained in 20 C.F.R. § 725.414 (2008). A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b) (2009).

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[2] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). I find the Miner's height to be 69.5".

Exhibit Number	**Date**	**Physician**	**pCO_2 at rest/ exercise**	**pO_2 at rest/ exercise**	**Qualify?**	**Altitude**
DX 10	5/7/08	Gagon	45/ 46	56/ 50	No/ Yes	3000- 5999”
EX 8 at 18	11/13/08	Repsher	36	56	Yes	3000- 5999”
CX 4	9/17/09	James	35.8	59	Yes	3000- 5999”

Medical Opinions

Dr. Gagon

Dr. Gagon, Board-Certified in Family Medicine, conducted the DOL sponsored pulmonary exam on May 7, 2008. (DX 10). He noted that Claimant had been working in the mining industry for approximately 20 years and retired in 2003. (DX 10). He wrote that Claimant has never smoked. (DX 10). The Claimant's medical history was significant for chronic bronchitis. (DX 10). Dr. Gagon also noted Claimant has had surgery on his right knee, has benign prostatic hypertrophy, and gastrointestinal reflux. (DX 10).

Dr. Gagon noted that the Claimant's symptoms are daily sputum, dyspnea (shortness of breath) after any exertion, particularly climbing, and productive cough. (DX 10).

A chest x-ray was negative for pneumoconiosis and showed left basilar scar or atelectasis. (DX 10). A pulmonary function study showed good effort, and no bronchodilator was used due to results being within normal of predicted values. (DX 10). The arterial blood gas study showed hypoxia after exercise. (DX 10).

Dr. Gagon diagnosed Claimant as having "chronic bronchitis as manifested by hypoxia at exercise and chronic productive cough." (DX 10). He stated the Claimant's impairment is of moderate severity "due to shortness of breath, hypoxia on exertion." (DX 10). He also stated the etiology of the cardiopulmonary diagnoses is coal dust exposure, because the patient has no smoking history. (DX 10). He did not make any conclusions as to whether Claimant is totally disabled, only that his pulmonary impairment was of moderate

severity, and patient had no non-respiratory conditions that could be considered disabling. DX10.

Dr. Repsher

Dr. Repsher, Board-Certified in Internal Medicine and Pulmonary Diseases, determined based on his examination of Claimant and review of prior records that Claimant did not suffer from either "medical or legal CWP or any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with Consolidated Coal Co. with the inhalation of coal mine dust." (EX 4). Dr. Repsher noted that Claimant worked as a coal miner for about 20 years with all but 6 years above ground, and retired in 2003 because of the mine shutdown. (EX 4). He noted that Claimant was a never smoker. (EX 4). As a result of this determination, Dr. Repsher then concluded that Claimant was fully fit to "perform his usual coal mine work or work of a similarly arduous nature in a different industry." (EX 4). Dr. Repsher found no gallop or murmur in the heart, and no clubbing, phlebitis, or edema in the extremities in his examination of Claimant. (EX 4). The only piece of medical evidence Dr. Repsher had to support any indication of heart problems was upon review of Dr. James's medical report, which included an echocardiogram, which had revealed LVH and mild diastolic dysfunction. (EX 11, CX 1) Dr. Repsher also dismissed the qualifying findings of the arterial blood gas tests as showing " mild hypoxemia, which is nonqualifying [for CWP]." (EX 4).

He stated Claimant complained of "progressive dyspnea on exertion for the past 8 years, as well as a cough productive of scant yellow phlegm." (EX 4).

Claimant denied any chest pain, but "does complain of coughing up minimal amounts of blood." (EX 4). Dr. Repsher wrote that Claimant denied any history of hypertension, asthma, atopy, TIAs, or TB. (EX 4). He wrote that Claimant denied having ankle edema, but had "two-pillow orthopnea, sleeps in a recliner, and has PND every night." (EX 4). He stated that Claimant did have symptoms of gastroesophageal reflux disease and took medication, and had the "symptoms of OSA [obstructive sleep apnea] but has not had a PSNG [polysomnography], nor does have any daytime somnolence." (EX 4). He wrote that vital signs were normal except for an elevated blood pressure of 150/95. When he examined Claimant's chest, he found "the breath sounds are diminished bilaterally. The expiratory phrase is not prolonged. There are no rales, rhonchi, or wheezes, even with forced expiration." (EX 4). He found no gallop or murmur in the heart, and no clubbing, phlebitis, or edema in the extremities. (EX 4). He also wrote that Claimant had symptoms of intermittent bilateral lower extremity claudication. (EX 4). An electrocardiogram at rest was within normal limits. (EX 4).

Dr. Repsher also wrote that the chest x-rays on May 7, 2008 and November 13, 2008, both reviewed by Dr. Wiot, showed no evidence of coal worker's pneumoconiosis. (EX 4). He wrote that the pulmonary function tests "suggest a very mild and clinically insignificant COPD, which is overwhelmingly most likely the result of his failure to provide full effort and cooperation with the testing." (EX 4). He also wrote that the arterial blood gases "show mild hypoxemia, which is nonqualifying [for CWP]." (EX 4). Dr. Repsher's impressions included:

1. No evidence of medical or legal coal workers pneumoconiosis.
2. No evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust.
3. Probable normal pulmonary function.
4. ABGs performed 7 May 2008 suggest primary alveolar hypoventilation. ABGs performed on 13 November 2008 fail to document primary alveolar hypoventilation.
5. Probable OSA, not documented by PSNG.
6. Peripheral vascular disease, manifested by bilateral lower extremity claudication.
7. Hypertension, of unknown cause, untreated.
8. Symptoms of biventricular congestive heart failure.

(EX 4).

Dr. Repsher submitted a second report dated October 28, 2009 regarding the clinical significance of the arterial blood gas values obtained from his November 13, 2008 exam of Claimant at Castleview Hospital in Price, Utah. (EX 6). He stated that the DOL Presumption of Impairment

> [M]akes no correction for age. This is scientifically untenable, since increasing age has a profound and progressive effect on the pO2. This effect is of the same general magnitude, as is the effect of altitude, and is additive to the effect of altitude.

> Further, the altitude at Price is at the very high end of Table #2. The relationship between arterial pO2 and altitude is a nonlinear continuous variable, which does not magically change a defined amount, when going from 5999 feet to 6000 feet altitude.

(EX 6).

Dr. Repsher opined that a more scientifically valid way to measure alveolar function is by measuring the alveolar-arterial oxygen gradient (A-a gradient), which measures both the diffusion function of the alveoli and the ventilation/perfusion ratios in the alveoli. (EX 6).

> Using the alveolar air equation, while taking into account the altitude at the Castleview Hospital, one obtains an expected A-a gradient of 22 torr. Calculation of the A-a gradient for Mr. Thompson reveals a value of 19.5 torr, which is well within the normal range for a man of age 68.

(EX 6).

Dr. Repsher also submitted a third report on November 11, 2009 and November 18, 2009 after review of Dr. James's report dated October 27, 2009 and the results of a CT scan performed at the direction of Dr. James. (EX 11).

Dr. Repsher stated in his report in response to Dr. James's findings regarding Claimant's "apparent borderline low arterial pO2", that

> Dr. James appears to have ignored and/or did not even inquire during his examination about

> Mr. Thompson's symptoms of left ventricular congestive heart failure, which are most likely due to his underlying hypertensive cardiovascular disease. This is documented by his echocardiogram, which had revealed LVH and diastolic dysfunction.
>
> Further, his A-a gradient, when adjusted for his age of 68, is clearly within the normal range at 19.5 torr. Finally, these blood gas tests were not fully adjusted for altitude. The relationship between arterial pO2 and altitude is a continuous variable and, therefore, is not stepwise in 3000 feet increments as in the DOL table. Clearly, his arterial pO2 is well within the normal range…

(EX 11).

He then stated that it was still in his opinion that Claimant did not have CWP, because his FEV1 had always been within the normal range and arterial pO2 had also been within normal limits, with the exception of the May 7, 2008 blood gas test with Dr. Gagon, "suggesting primary alveolar hypoventilation syndrome. It appears that this outlier result was probably the result of laboratory error." (EX 11).

Dr. Repsher then reviewed the CT scan that was performed on September 17, 2009, at the direction of Dr. James. (EX 11). He stated that the CT scans of the chest showed

> [S]eptal increased markings at the bases, but no nodules or ground glass patterns. This is not consistent with medical coal workers pneumoconiosis (CWP), which demonstrates

> small rounded opacities primarily in the upper zones. The pre and post bronchodilator spirometry shows mild and clinically insignificant COPD. The arterial blood gases (ABGs) show borderline hypoxemia for age and an echocardiogram shows LVH [left ventricular hypertrophy] and diastolic dysfunction.

(EX 11).

Dr. James

Dr. James, Board-Certified in Internal Medicine and Pulmonary Diseases, examined the Claimant on September 17, 2009 and submitted a report dated October 27, 2009 on the examination and follow up testing that occurred October 13, 2009 at Castleview Hospital in Price, Utah. (CX 1). He noted that Claimant had a self-reported 20-year coal mine employment history, with 14 years above ground. He wrote that Claimant was a never smoker. (CX 1). He stated that Claimant's primary respiratory complaints were "shortness of breath and morning cough and phlegm production over the past 4 to 5 years." (CX 1). He stated his breathlessness upon exertion had been present in Claimant for 5 to 6 years. (CX 1). He wrote that Claimant could "walk 1 mile at his usual pace and home." (CX 1). He noted that Claimant had tried the Spirivia bronchodilator before without any significant relief from his symptoms. (CX 1). Claimant's phlegm production is occasionally yellowish and has had an episode in which there was some blood speckling in the phlegm. (CX 1). He also wrote that Claimant's wife has heard him wheeze. (CX 1).

Dr. James noted for Claimant's employment history that Claimant worked at the preparation plant towards the end of his mining career, and that he did not normally wear a respirator. (CX 1). He also noted that his last coal mining job required Claimant to walk 3 to 4 miles a day, and "needed to carry up to 50 pound rock dust bags. He would have to go up approximately 2 flights of stairs 3 to 4 times a day." (CX 1).

He stated in his report that Claimant had no chest pain as part of his symptoms. (CX 1). Claimant had no lower extremity edema, and while his sleep history "is remarkable for snoring," he had no witnessed apneas. (CX 1). Claimant felt he slept adequately but feels tired in the morning and takes a nap for half an hour a day. (CX 1). When Dr. James examined Claimant, he noted that the chest showed "normal respiratory excursions," and that the heart was at a "regular rate, no gallop, no murmurs, regular radial pulse." (CX 1). He also noted that there was no cyanosis or clubbing in the extremities and no pitting ankle edema. (CX 1). Claimant's exercise oximetry showed a mild decline in oxygen saturation with activity. (CX 1). His spirometry tests showed a mild airflow limitation. (CX 1). His resting arterial blood gas test showed PCO2 at 35.8 and pO2 at 59, with oxygen saturation 91%. (CX 1). Dr. James also reviewed Claimant's echocardiogram, dated October 13, 2009, and noted "grade 1 diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressures. Estimated ejection fraction 60%." (CX 1).

A high resolution CT scan was conducted of Claimant's chest. (CX 1, CX 5). Dr. James reviewed the CT scan, and his impression was "no nodular

interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1).

Dr. James also reviewed Dr. Morgan's office note, dated July 23, 2008, as well as Dr. Repsher's medical evaluation report dated December 22, 2008. After Dr. James's examination of Claimant and review of the relevant medical evidence, he came to the following impression:

1. Chronic obstructive pulmonary disease. Mr. Thompson has shortness of breath with exertion. He has a regular morning cough and phlegm production for at least 4 to 5 years. There is airflow limitation on lung function testing. This is not chronic bronchitis. There is airflow limitation present and has been observed on previous lung function testing. The airflow limitation would be less likely explained by asthma. There was no significant change with bronchodilators on lung function testing. He has no history of asthma or allergic rhinitis. There was no wheezing on exam.
2. No evidence of coal workers' pneumoconiosis. There are no nodular interstitial changes on chest CT.
3. Mild left ventricular diastolic dysfunction. The ejection fraction was in the normal range of 60%. There is no clinical evidence of heart failure on physical examination.
4. Abnormal sleep history. There is snoring and some morning fatigue. Mr. Thompson is

> overweight, increasing his risk of developing obstructive sleep apnea.

(CX 1).

Dr. James stated in his report that the cause for Claimant's symptoms is chronic obstructive pulmonary disease. (CX 1). He noted Claimant's significant exposure to coal mine dust over approximately 20 years as a coal miner with 14 years above ground, and noted that Claimant worked in some very dusty conditions in the mine, including as a driller. (CX 1). He stated that "chronic inhalation exposure to coal mine dust is a risk factor for development of chronic obstructive pulmonary disease." CX1. He then went on to state:

> With a reasonable degree of medical certainty, Mr. Thompson's chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner. He has no other significant respiratory exposure to increase his likelihood of developing chronic obstructive pulmonary disease. There are no other likely causes of his airflow limitation and chronic productive cough other than chronic obstructive pulmonary disease.

(CX 1).

Dr. James concluded that Claimant has the following impairment:

> Mr. Thompson has mild abnormalities on lung function testing with the FEV1 of 84% predicted prebronchodilator and 86% predicted postbronchodilator. He has mild decline of

> oxygen saturation with activity. His arterial blood gas does meet impairment standards outlined by the US Department of Labor. For an altitude of 4500 feet for a PCO2 of 36 the PO2 needs to be equal to or less than 59. Mr. Thompson's PO2 was 59. The PCO2 is within normal limits and there is no evidence of hypoventilation. Mr. Thompson has mild diastolic dysfunction on the echocardiogram but the ejection fraction was normal. The diastolic dysfunction would not result in the PO2 of 59 mmHg. There was no evidence of pulmonary hypertension on the echocardiogram. More likely than not, Mr. Thompson's chronic obstructive pulmonary disease is the cause of the qualifying PO2 of 59.

(CX 1).

Dr. James then stated that Claimant's prior work requirements as a miner were physically demanding. (CX 1). He concluded "with a reasonable degree of medical certainty" that Claimant would be unable to perform the usual duties of his prior position of coal mine employment because of his obstructive pulmonary disease. As a result, Claimant is totally disabled from his usual coal mine employment. (CX 1). He also stated that "with a reasonable degree of medical certainty, Mr. Thompson's chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner." (CX 1).

Dr. James submitted an additional report on March 19, 2010 after reviewing Dr. Repsher's reports dated October 28, 2009, and November 18, 2009. (CX 10). He

stated in his report that Claimant's "arterial blood gas value from his September 17, 2009 visit shows an abnormal A-a gradient.…His A-a gradient was calculated at 19.5 mmHg. The age-adjusted A-a gradient was 17.0." (CX 10). Dr. James also noted

> Mr. Thompson underwent pulmonary function studies as part of his evaluation that was conducted in Grand Junction by myself on 9/17/2009. The pre and post spirometry meet ATS criteria. The FEV1/FVC percentage pre bronchodilator was 67 with a predicted value of 77%. The normal difference between the predicted and measured FEV1/FVC ratio for males is 8.3% or less. Mr. Thompson's FEV1 predicted minus measured pre and post bronchodilators was 14% and 10%, respectively. These values are abnormal and are consistent with air flow limitation. As I stated in my original report, based on the FEV1, these values are consistent with a mild air flow obstructive process.
>
> These above findings are consistent with and do not significantly change my impression and opinions outlined in my original report from my evaluation of Mr. Thompson that took place 9/17/2009.

(CX 10).

Dr. Zaldivar

Dr. Zaldivar, Board certified in internal medicine and pulmonary diseases, reviewed extensive medical records. (EX 13) Dr. Zaldivar noted that Claimant rarely complained of respiratory symptoms except

when he presented to Dr. Morgan with complaints of wheezing and Dr. Morgan began to hear crackles in Claimant's lungs. (EX 13 at 5)

Dr. Zaldivar explained Dr. Repsher's statements regarding the alveolar arterial gradient to account for barometric pressure and age when interpreting arterial blood gas studies. (EX 13 at 6) Dr. Zaldivar referenced a 1984 study by the Intermountain Thoracic Society finding average PO2 levels at results lower than Claimant's in similar barometric pressure and age conditions. (EX 13 at 6) Dr. Zaldivar continued by stating that Claimant's blood gas studies were abnormal, noting that while Claimant's diffusion capacity appeared to be normal, the CT scan was not normal. (EX 13 at 6) Dr. Zaldivar opined that the CT demonstrated abnormalities in the lower lung consistent with pulmonary fibrosis, rather than CWP. (EX 13 at 6) Dr. Zaldivar also stated that Claimant's pulmonary impairment would prevent him from performing heavy labor. (EX 13 at 7) Dr. Zaldivar stated that "[l]egal pneumoconiosis refers to an abnormality of both the blood gases and the ventilatory studies. The ventilatory study in legal pneumoconiosis should become abnormal first followed by a blood gas abnormality." (EX 13 at 7) He further opined that Claimant's case was most fully explained by pulmonary fibrosis and that CWP does not cause this type of abnormality. (EX 13 at 7)

Dr. Cohen

Dr. Cohen, Board certified in internal medicine, reviewed Claimant's work and smoking histories and medical records. Dr. Cohen opined that the etiology of Claimant's abnormal gas exchange could not be

determined from the information he reviewed. Dr. Cohen noted that it would be difficult to attribute Claimant's arterial blood gas abnormalities to pneumoconiosis given the normal pulmonary function testing and diffusion capacity. (EX 12)

Treatment Records

Dr. Morgan

Claimant and Employer each submitted treatment records by Claimant's primary care physician, Dr. Morgan, F.A.A.F.P. (CX 8; EX 14).

On May 20, 2004, Claimant denied shortness of breath. (EX 13 at 90) December 16, 2004, Claimant denied dyspnea on exertion or at rest or coughing. (EX 13 at 86) Claimant saw Dr. Morgan on June 20, 2005 for runny nose, nasal congestion, sore throat, cough, and body aches. (EX 13 at 82)

On November 20, 2007, Claimant was seen by Dr. Morgan for abdominal pain. At that time Claimant denied dyspnea, cough, and wheezing. (EX 13 at 73)

In the office report dated December 4, 2007, Dr. Morgan had conducted an MRI to determine the cause of unrelated pain primarily in the epigastrium of his abdomen. The MRI showed "linear scarring and atelectasis of the right lung base. There is also some present in the left lung base." He recommended a repeat CT scan of Claimant's lungs, as well as "black lung x-rays" because of possible black lung disease. (CX 8)

Dr. Morgan's office report dated July 21, 2008, stated that Claimant had "cough and congestion of

several years duration. Intermittent in nature. Sometimes cough is productive of a gray-white sputum worse in the am upon rising." He noted that Claimant's cough and wheezing were chronic, and that he had never smoked. He noted that Claimant had "scattered wheezes, decreased breath sounds," and had an "increased AP diameter of the chest." He found that Claimant's heart had no evidence of murmur, gallop, or rub, and was not enlarged. He also did not find any evidence of clubbing, cyanosis, or edema in the extremities. (CX 8; EX 13 at 63)

Dr. Morgan's July 23, 2008 report commented on the findings of the examination performed on July 21, 2008, as well the CT scan performed on the same date. He commented that "in the past several months the cough and symptoms have worsened." His assessment based on his examination and the CT scan was "pneumoconiosis, fibrous changes on CT scan with scarring in lung bases, chronic obstructive pulmonary disease, clinical pneumoconiosis." Dr. Morgan's impression was that Claimant has coal workers pneumoconiosis, and "it does interfere with his daily living and even impairs his ability to perform his usual hobbies." (CX 8; EX 13 at 59)

On January 15, 2009, Claimant visited Dr. Morgan with his chief complaint being sinus congestion. He again noted that Claimant had "cough and congestion of several years duration. Intermittent in nature. Some times cough is productive of a gray-white sputum worse in the am upon rising. Has had wheezing and cough chronically." He wrote in his report that his review of the x-rays "reveal pulmonary fibrosis and probably pneumoconiosis. He complains of nasal stuffiness every

night. He denies dyspnea only with severe exertion but not to [sic] often." He noted that there was no change in Claimant's medical history since his last visit on July 21, 2008. He observed that Claimant had decreased breath sounds and scattered wheezes. Claimant's heart also had not changed- there was no murmur, gallop or rub, and was not enlarged. Dr. Morgan assessed Claimant with chronic obstructive pulmonary disease and pneumoconiosis. He also stated that home oxygen may be needed. (CX 8; EX 13 at 53)

On October 29, 2009, Claimant was seen for a physical examination. Dr. Morgan noted a history of chronic obstructive pulmonary disease, coal dust exposure, and probable pneumoconiosis. Claimant complained of early morning cough productive of grey-white sputum, wheezing, and dyspnea. Claimant repeated these symptoms on a March 10, 2011 visit. (EX 13 28-35)

On May 4, 2011, Claimant was seen for chest pain that had been intermittently occurring for the past several months. Claimant denied associated shortness of breath. A nuclear cardiogram revealed no significant fixed or reversible perfusion defects. (EX 13 at 18, 24)

In several visits between October 24, 2011 and March 1, 2012, Claimant was seen by Dr. Morgan for tinnitus. Claimant informed Dr. Morgan that he worked on top of a mountain and had to travel from low to high altitude every day. (EX 14 at 1-16)

Castleview Hospital

The Claimant's pertinent hospital treatment records are as follows:

- 11/28/2007: Physician: Dr. Morgan; Admission: abdominal pain and pelvic tenderness. CT abdomen and pelvis with contrast performed. Findings included "significant linear scarring and/or atelectasis involving the right lung base and, less so, the left lung base." (EX 8 at 34).

- 7/21/2008: Physician: Dr. Morgan; Admission: wheezing, dyspnea. Indication was "productive cough, wheezing and dyspnea. History of working in a coal mine." Chest x-ray- chest PA and 1 lateral, compared to abdomen CT taken on 11/28/2007. The findings were that the heart and mediastinum were normal, pleural spaces were clear, but "there is a mild heterogeneous opacity in the left lung base, suspicious for an infiltrate in the setting of productive cough." Impression was "mild left lung base airspace disease, suspicious for infiltrate/pneumonia in the setting of productive cough." (EX 8 at 30).

- 8/11/2008: Physician: Dr. Morgan; Admission: cough, congestion. Compared to chest x-ray taken 7/21/2008, a chest PA and 1 lateral was taken, findings were "linear increased density at the left base likely resides atelectasis. Infiltrate cannot be excluded. Lesser changes in the right base. The cardiac silhouette is normal. The pulmonary vasculature is normal. Aorta is ectatic to a mild degree. Conclusion: linear increased density at the lung bases, more

notably on the left, likely representing atelectasis though infiltrate cannot be excluded." (EX 8 at 25).

- 11/13/2008: Physician: Dr. Repsher; Admission: dyspnea, black lung determination; blood gas test showed pCO2 of 36 mm-Hg and abnormal pO2 level of 56 mm-Hg, normal levels of BNP in the blood, normal white and red blood cell count. No presence of cotinine (nicotine metabolite). EX8.11-13. FEV1/FVC pre-bronchodilator at 71%, FEV1/FVC post-bronchodilator at 72%. (EX 8 at 16).

- 11/13/2008: Physician: Dr. Repsher; Compared to chest x-ray taken 8/11/2008, chest PA and 1 lateral, frontal and lateral views, findings were that "the heart and mediastinal contours are normal. The pulmonary vascularity is normal. Linear opacities at the lung bases have decreased slightly. They likely represent atelectasis or potentially mild fibrosis. No focal consolidation. Mild degenerative changes of the thoracic spine. Impression: mild basilar linear opacities, atelectasis versus mild scarring. Slight decrease compared to the prior study." (EX 8 at 19).

- 10/13/2009: Physician: Dr. James; Admission: for COPD dyspnea on exertion; Echocardiography exam resulted in diagnosis of "1. Borderline aortic root enlargement; 2. Borderline left ventricular hypertrophy; 3. Aortic regurgitation, trace; 4. Grade 1

> diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressure." (EX 8 at 4).

Other Medical Evidence

High resolution CT scans and digital chest x-rays may be used to diagnose pneumoconiosis and other respiratory diseases. The regulations provide no guidance for the administration or evaluation of CT scans and digital chest x-rays. Accordingly they must be weighed with other acceptable medical evidence under 20 CFR § 718.107. The proponent of such evidence "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 CFR § 718.107(b) (see *Webber v Peabody Coal Co*., BRB No. 05-0335 BLA (Jan 27, 2006)(en banc, AAJ Boggs concurring); *Harris v. Old Ben Coal Co*., 23 BLR 1-273 (2007)(en banc on recon.).

The Claimant submitted a high resolution CT chest scan without contrast into evidence. (CX 5). The CT scan was conducted on September 17, 2009 at Western Colorado Lung Center and ordered by Dr. James, who is B-reader certified, and incorporated it into his medical report. (CX 1, CX 2, CX 5). The results of the CT scan were as follows:

> There are new areas of alveolitis. There is some minimal bronchial wall thickening as well as some septal increased markings at the bases. This could be indicative of early pulmonary fibrosis.
>
> There are no nodes. No hilar or mediastinal gross abnormalities.

> No gross pulmonary nodules or groundglass patterns.

(CX 5).

In Dr. James's medical report, he noted his impression of the CT scan was "no nodular interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1). He also found in his report that there was no evidence of coal workers pneumoconiosis because "there are no nodular interstitial changes on chest CT." (CX 1).

The Employer submitted an interpretation of the previously mentioned CT scan by Dr. Wiot, a Board-Certified Radiologist and B-reader. (EX 10). Dr. Wiot wrote:

> There is no evidence of coal worker's pneumoconiosis by CT. There is basilar fibrosis with lower lobe traction bronchiectasis consistent with inflammatory change, aspiration, or fibrotic NSIP. This is not a manifestation of coal worker's pneumoconiosis. The CT is otherwise unremarkable.
>
> In summary, there is no evidence of coal worker's pneumoconiosis by CT.
>
> CT is medically acceptable in the medical community for evaluation of pulmonary problems. CT is beneficial in confirming or denying the presence of simple coal worker's pneumoconiosis when it is not evident on the routine chest x-rays. This CT scan is of good quality and is acceptable for interpretation for

> the presence or absence of coal worker's pneumoconiosis.

(EX 10).

The Claimant submitted a CT scan with contrast of Claimant's abdomen and pelvis that was taken on November 28, 2007 at Castleview Hospital under the direction of Claimant's primary care physician, Dr. Morgan, F.A.A.F.P. (CX 9). The findings stated that "there is significant linear scarring and/or atelectasis involving the right lung base and less, so, the left lung base." (CX 9).

However, the Employer submitted an interpretation of this particular CT scan by Dr. Wiot, which stated, "as this is a CT scan of the abdomen and pelvis, there are no lung windows provided which makes this CT unreadable for the presence or absence of coal worker's pneumoconiosis. Therefore, this is no interpretation of this CT." (EX 3).

II. Applicability of the 15-Year Presumption

Because this claim was filed after January 1, 2005 and the miner had 15 or more years of qualifying coal mine employment, the provisions at 20 C.F.R. § 718.305 may be applicable. Section 1556 of the PPACA revives the 15-year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305:

> If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304,

> and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis.

Id.

Underground Coal Mine Employment or Similar Working Conditions

In order for the presumption to apply, Claimant must show that he worked for 15 years or more in underground coal mine employment or that he had 15 or more years working in coal mine employment in conditions "substantially similar" to underground mines. *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995) (stating also that courts will generally defer to the expertise of the judge in determining the similarity of surface and underground mine conditions). In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court held that the judge properly invoked the 15-year presumption at 30 U.S.C. § 921(c)(4) having found that the miner's work at the surface of the mine was under "conditions substantially similar to those in an underground coal mine." The judge found "similarity" based on the miner's unrefuted testimony about his employment conditions.

In the instant case, Claimant testified at the hearing that while he worked as an underground coal miner from 1972 to 1986, the rest of his coal mine employment from 1986 to 2003 was while working at

the surface of the mine. (TR 32-33). Claimant testified that he worked as a preparation plant control operator from 1986 until he retired in 2003. (TR 33). He stated that his duties on the surface included filling coal bins and loading trucks, and that a "mushroom of dust" would come off the conveyor belts as he started them each morning. (TR 38). He also stated that he also would run all the belts in the tipple and operate the machines that crushed and separated the coal, and would shovel any coal spillage from these belts. (TR 39). Additionally, he stated that there was always dust in the areas he would work in. (TR 40). His testimony demonstrates that even while working on the surface of the mine, he was still exposed to sufficiently dusty conditions as to show substantial similarity between his coal mine employment and underground mining employment. Employer has stipulated to over fifteen years of underground coal mine employment.

As Claimant was credited with over 15 years of underground coal mine employment based on his Social Security records and Employer's stipulations, Claimant meets the 15-year requirement for the § 718.305 presumption.

No Complicated Pneumoconiosis under § 718.304

Claimant must have a chest X-ray interpreted as negative with respect to the requirements of § 718.304 (yielding one or more large opacities greater than 1 centimeter in diameter that would be classified in Category A, B or C). As found *supra* under *V. Existence of Pneumoconiosis and Its Etiology, A. X-Ray Evidence*, all of the x-rays interpreted in the record are negative with respect to § 718.304.

Total Disability

The regulations state that "if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis." § 718.305(a).

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304 (2008), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment. 30 U.S.C. § 902(f), 20 C.F.R. § 718.204(b) and (c) (2008).

The Regulations provide five methods of demonstrating total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b) and (d) (2008). Lay testimony may only be used in establishing total disability in certain cases involving deceased miners. On the other hand, in a living miner's claim a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d) (2008); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994).

All three pulmonary function tests in the record do not qualify for disability, so I find that the Claimant has not established total disability under § 718.204(b)(2)(i).

The record contains three qualifying arterial blood gas studies that show total disability and no tests that contradict the findings. Therefore, the Claimant has established total disability under § 718.204(b)(2)(ii).

Subsection 718.204(b)(2)(iii) provides that a miner may establish his total disability if he has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. There is no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, total disability is not established under this subsection.

Total disability may additionally be found if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv).

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 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).

Dr. Gagon did not make any conclusions as to whether Claimant is totally disabled, only that his pulmonary impairment was of moderate severity, and patient had no non-respiratory conditions that could be considered disabling.

Dr. Repsher concluded that Claimant was fully fit to "perform his usual coal mine work or work of a similarly arduous nature in a different industry." (EX 4). He based this opinion on his argument that the arterial blood gas testing did not appropriately account for altitude and age, preferring instead the measure of alveolar-arterial oxygen gradient. Dr. Repsher opined that any abnormal arterial p02 was in fact caused by hypertensive cardiovascular disease. Dr. Repsher found Claimant's COPD to be mild and clinically insignificant.

Dr. James determined that Claimant was permanently disabled from performing his previous coal mine employment due to his respiratory condition. Dr. James noted that Claimant's previous employment was physically demanding and that his arterial blood gas values were qualifying under the Regulations. Dr. James opined that Claimant's FEV1 values were abnormal and consistent with a mild obstructive airflow process.

Dr. Zaldivar found that Claimant's pulmonary impairment would prevent him from performing his

previous coal mine employment. Dr. Zaldivar agreed with Dr. Repsher that alveolar arterial gradient measurements could account for barometric pressure and age when interpreting arterial blood gas studies, but still found that Claimant's blood gas values were abnormal.

Dr. Cohen did not opine as to total disability.

Of the physicians who directly addressed the question of a totally disabling respiratory or pulmonary impairment, both Drs. James and Zaldivar found Claimant to be so disabled while Dr. Repsher found that Claimant was not disabled. I find that Dr. Repsher's opinion regarding total disability is entitled to less weight because Claimant has never been diagnosed or treated for a cardiac condition and Dr. Zaldivar better explained that even adjusting for age and barometric pressure, Claimant's blood gas study values were abnormal. This view is supported by Claimant's qualifying arterial blood gas values under the Regulations. Accordingly, I find that Claimant has established that he suffers from a totally disabling respiratory or pulmonary disability and is entitled to the Section 411(c)(4) presumption.

Rebuttal of the Presumption

Once the presumptions at 20 C.F.R. § 718.305(a) are invoked, the burden shifts to the party opposing entitlement to demonstrate by a preponderance that either: (1) the miner does not, or did not, have pneumoconiosis, or (2) the respiratory or pulmonary impairment did not arise out of coal mine employment. The presumption cannot be rebutted on the basis of evidence demonstrating the existence of a totally

disabling obstructive respiratory or pulmonary disease of unknown origin. 20 C.F.R. § 718.305(d).

Existence of Pneumoconiosis

To rebut the presumption by disproving the existence of pneumoconiosis, the party opposing entitlement must establish that the miner does not have pneumoconiosis as defined in 20 C.F.R. § 718.201 (2010). Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, 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. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or

> silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201. Because the definition includes both clinical and legal pneumoconiosis, to rebut the presumption, the opposing party must establish that the miner does not suffer from either form of the disease. See *Pavesi v. Director, OWCP*, 758 F.2d 956, 965 (3d Cir. 1985); *Shonbom v. Director, OWCP*, 8 BLR 1-434, 1-435-36 (1986).

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound

medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). Because this claim was filed after January 19, 2001, the evidentiary limitations as outlined in § 725.414 apply.

X-ray Evidence

The record contains two x-rays dated May 7, 2008, and November 13, 2008, with two readings of the prior and one of the latter. For the May 7, 2008 x-ray, Dr. Hammond noted a "left basilar scar or atelectasis." He read the x-ray as negative for pneumoconiosis. (DX 10). Dr. Wiot wrote that the x-ray showed "plate atelectasis at both bases, greater on the left than on the right. This is not a manifestation of coal dust exposure." (EX 1). Since both readings were negative for pneumoconiosis, I find that the May 2008 x-ray is negative for pneumoconiosis.

Reading the November 13, 2008 x-ray, Dr. Wiot stated there "is no evidence of coal worker's pneumoconiosis. There is plate atelectasis at both bases." (EX 2). Therefore, I find that the November 2008 x-ray is negative for pneumoconiosis.

Since the weight of the evidence is negative for pneumoconiosis, the Claimant has failed to establish that he suffers from pneumoconiosis under § 718.202(a)(1).

Autopsy and Biopsy Evidence

No autopsy or biopsy reports are present in the record. Therefore, the Claimant has not established the presence of pneumoconiosis pursuant to § 718.202(a)(2).

Presumption

The presumptions described in §§ 718.304 and 718.306 are not applicable in the present action.

Medical Opinion

The final method to be considered by which the Claimant may establish that he suffers from pneumoconiosis is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields*, 10 B.L.R. 1-19. Indeed, whether a medical report is sufficiently documented and reasoned is for the ALJ as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

Dr. Gagon

Dr. Gagon considered Claimant's work and medical histories, symptoms including chronic productive cough, and testing results to determine that Claimant suffered from chronic bronchitis, which he attributed to coal dust exposure due to Claimant's history as a never smoker. Dr. Gagon noted a negative x-ray and pulmonary function study, but qualifying arterial blood gas results demonstrating hypoxia after exercise.

Dr. Repsher

Dr. Repsher reviewed Claimant's records and conducted his own examination. Dr. Repsher noted negative x-rays, normal pulmonary function testing, and interpreted the arterial blood gas testing results as showing mild hypoxemia which he described as nonqualifying. Dr. Repsher attributed the mild obstructive defect on pulmonary function testing to failure to provide full effort and cooperation with testing. Dr. Repsher attributed Claimant's borderline low arterial p02 to an underlying hypertensive cardiovascular disease.

Dr. James

Dr. James examined Claimant and reviewed Claimant's histories and medical records. Dr. James determined that Claimant suffered from COPD with an airflow limitation on lung function testing. Dr. James noted that there was no clinical evidence of heart failure on physical examination. He further observed that chronic inhalation exposure to coal mine dust is a risk factor for development of COPD. Dr. James stated that Claimant has no other significant respiratory exposure to increase his likelihood of developing

chronic obstructive pulmonary disease and no other likely causes of his airflow limitation and chronic productive cough other than chronic obstructive pulmonary disease.

Dr. Zaldivar

Dr. Zaldivar reviewed Claimant's medical records. Dr. Zaldivar opined that the CT demonstrated abnormalities in the lower lung consistent with pulmonary fibrosis, rather than CWP. He further stated that "[l]egal pneumoconiosis refers to an abnormality of both the blood gases and the ventilatory studies. The ventilatory study in legal pneumoconiosis should become abnormal first followed by a blood gas abnormality."

Dr. Cohen

Dr. Cohen reviewed Claimant's work and smoking histories and medical records. Dr. Cohen opined that the etiology of Claimant's abnormal gas exchange could not be determined from the information he reviewed. Dr. Cohen noted that it would be difficult to attribute Claimant's arterial blood gas abnormalities to pneumoconiosis given the normal pulmonary function testing and diffusion capacity.

Treatment Records- Dr. Max Morgan

I also give weight to the diagnoses contained in the treatment records of Dr. Morgan. Dr. Morgan was the Claimant's primary care physician. At 20 C.F.R. § 718.104(d) (2008), the amended regulations set forth specific considerations in weighing a treating physician's opinion, including the nature and duration of the relationship and the frequency and extent of

treatment. I find Dr. Morgan treated the Claimant for respiratory problems and the duration of the relationship allowed him to gain a more in-depth understanding of the Claimant's condition. Over the course of his treatment of the Claimant, Dr. Morgan conducted physical examinations, reviewed x-rays, a CT scan, an MRI, spoke with the claimant, and checked his heart. Dr. Morgan was aware of the Claimant's history as a coal mine worker and diagnosed him with COPD and pneumoconiosis. Although Employer has introduced additional treatment records wherein Claimant denies respiratory symptoms, I do not find these statements dispositive given that the statements were largely given when Claimant was seeking treatment for acute, unrelated illnesses. Further, Dr. Morgan, the person to whom Claimant made the statements, has not disputed that Claimant consistently suffers from respiratory symptoms, a finding supported by the arterial blood gas studies.

Conclusion

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, 10 B.L.R.

1-19. Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

Thus, Drs. Gagon, James, and Morgan have diagnosed Claimant with legal pneumoconiosis, while Drs. Repsher and Zaldivar opine that Claimant does not have medical or legal pneumoconiosis and Dr. Cohen determined that a diagnosis could not be made based on the available evidence. I find each of the opinions to be well documented in that they each rely on Claimant's histories and objective testing. However, I find Dr. Repsher's opinion to be entitled to less weight because of his reliance on a cardiovascular defect without support in the record for a significant heart condition, given Dr. James' explanation that, while Claimant experienced a mild diastolic dysfunction, his ejection fraction was normal and such diastolic dysfunction would not result in Claimant's p02 levels. I further find Dr. Zaldivar's opinion to be entitled to less weight due to his statements that legal pneumoconiosis was almost definitionally a disease characterized by abnormal ventilatory studies followed by abnormal blood gas studies. Dr. Zaldivar provides no support for these assertions and they exist in contrast with the Regulations, which allow miners to demonstrate total disability based on either qualifying pulmonary function studies or qualifying arterial blood gas studies. Dr. James found that Claimant suffered from coal mine dust induced COPD based on his particular exposures and symptoms. I find his opinion to be well-reasoned in that the underlying testing supports his diagnosis of COPD and its cause being coal dust exposure. If a physician concludes that the

miner suffers from chronic obstructive pulmonary disease arising out of coal mine employment, then his/her opinion supports a finding of "legal" coal workers' pneumoconiosis. *See, e.g., Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996). Therefore, I give great weight to Dr. James's opinion that Claimant has legal pneumoconiosis. I further find that the opinions of Drs. Gagon and Morgan support the opinion of Dr. James, since these opinions also link Claimant's coal dust exposure to his symptoms and objective testing. Accordingly, I find that the medical opinion evidence establishes the existence of legal pneumoconiosis.

Cause of Pneumoconiosis

Except as provided by Section 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2). Section 718.204(d) controls the admission of lay evidence to prove total disability. Employer submitted no lay testimony, so § 718.204 is irrelevant to this analysis. Employer can therefore only rebut the presumption through a physician's documented and reasoned medical report. I have found that the evidence as a whole, including the medical opinion evidence, establishes the existence of legal pneumoconiosis, a finding which necessarily requires a finding that Claimant's impairment arose out of his coal mine employment. Accordingly, Employer has failed to rebut the Section 411(c)(4) presumption.

ENTITLEMENT

The Claimant has established that he suffers from pneumoconiosis which is totally disabling and is caused by his coal mine employment. Therefore, he is entitled to benefits under the Act.

Section 725.503(b) of the Regulations provides that payment of benefits is to commence with the month of onset of total disability, but that if the evidence does not establish the month of onset, payment of benefits shall begin with the month in which the claim was filed. 20 C.F.R. § 725.503(b). While the date of the filing is the preferred onset date, this Regulation gives the undersigned the discretion to assign an alternate onset date, if the record contains clear evidence establishing that the Claimant was totally disabled as of a date other than the date of filing. *Johnson v. Director*, 1 B.L.R. 1-600 (1978). However, benefits may not be assessed prior to the fulfillment of the conditions of entitlement to benefits, one such condition being the filing of a claim. *Zimmerman v. Glen-Nan, Inc.*, 2 B.L.R. 1-674 (1979). Accordingly, although the Claimant's testimony and the medical evidence suggest that he may have been disabled prior to the filing of his claim, it is found that the date of onset of total disability is the date beginning with the month in which the Claimant filed his claim, February 2008.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application has been received. Thirty days is hereby allowed to Claimant's counsel for submission of such an application and his attention is directed to §§ 724.365 and 725.366 of the

Regulations. A service sheet showing that services has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits under the Act is hereby **GRANTED**. Consolidation Coal Company is hereby ordered to pay Claimant all benefits to which he is entitled, under the Act and Regulations commencing February 2008.

Digitally signed by Richard Malamphy
DN: CN= Richard Malamphy,
OU=Administrative Law Judge,
O=Office of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/jrs/mrc
Newport News, Virginia

* * *

[*Notice of Appeal Rights and Service Sheet Omitted in the Printing of this Appendix*]

APPENDIX F

NOT-PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
P.O. BOX 37601
WASHINGTON, DC 20013-7601

BRB No. 11-0331 BLA

[Issued January 20, 2012]

ROBERT C. THOMPSON	)
	)
Claimant-Respondent	)
	)
v.	)
	)
CONSOLIDATION COAL COMPANY	)
	)
and	)
	)
WELLS FARGO DISABILITY MANAGEMENT, SELF-INSURED THROUGH CONSOL ENERGY	)
	)
Employer/Carrier-Petitioners	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Party-in-Interest)
_____)

DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Fierich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (09-BLA-05197) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) rendered on a claim filed on February 14, 2008, pursuant to the provisions of the

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that employer stipulated to seventeen years of coal mine employment, based on claimant's Social Security employment record. Additionally, the administrative law judge found that these seventeen years were in underground coal mining or mining in conditions substantially similar to those of underground coal mining. Decision and Order at 6. The administrative law judge further found that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Therefore, based on his determination that claimant had more than fifteen years of qualifying coal mine employment and that claimant had a totally disabling respiratory impairment, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Further, the administrative law judge found that employer failed to rebut the presumption, as

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4). In order to rebut the Section 411(c)(4) presumption, it must be shown that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

employer failed to establish that claimant does not have clinical or legal pneumoconiosis, or that claimant's total disability is not due to pneumoconiosis. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in refusing to admit into the record Employer's Exhibit 12, Dr. Cohen's report, which addresses claimant's blood gas studies. Further, employer asserts that the administrative law judge erred in refusing to remand the case to the district director for further development of the evidence, in light of the change in law created by the new amendments, namely the reinstatement of the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in finding the Section 411(c)(4) presumption invoked and erred in finding that, even if invoked, it was not rebutted. Additionally, employer argues that the new amendments are unconstitutional. Claimant responds, arguing that the administrative law judge properly refused to admit into evidence Employer's Exhibit 12, Dr. Cohen's report. Claimant further contends that the administrative law judge properly found that the Section 411(c)(4) presumption was invoked and not rebutted and, therefore, properly found claimant entitled to benefits.[2] The Director, Office of Workers'

[2] Claimant also alleges that the Board's April 4, 2011 Show Cause Order, directing employer to show cause as to why its appeal should not be dismissed for failure to file a Petition for Review and brief, has not been resolved. By Order dated June 14, 2011, however, the Board noted that it mistakenly issued the April 4, 2011 Show Cause Order, as the Board received employer's Petition for Review and brief on March 23, 2011.

Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge erred in refusing to admit into evidence, Employer's Exhibit 12, Dr. Cohen's report, addressing claimant's blood gas studies. The Director also agrees with employer that the administrative law judge erred in denying employer's request that the case be remanded for further development of the evidence, in light of the change in law created by the new amendments. However, the Director contends that the new amendments are constitutional. Employer replies, reiterating its arguments.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 303 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Invocation
Total Disability
Exclusion of Employer's Exhibit 12,
Dr. Cohen's Report

In addressing the allowable evidence pursuant to 20 C.F.R. §725.414, the administrative law judge excluded Dr. Cohen's report as exceeding the evidentiary limitations, because employer had already submitted

[3] The record reflects that claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

two affirmative reports by Dr. Repsher, dated December 22, 2008 and October 28, 2009, Employer's Exhibits 4 and 6, as well as two rehabilitative reports by Dr. Repsher, dated November 11, 2009 and November 18, 2009, Employer's Exhibit 11.

Employer contends, however, that the administrative law judge erred in refusing to admit Employer's Exhibit 12, Dr. Cohen's report. The Director agrees. Specifically, the Director contends that, because both of Dr. Repsher's affirmative reports were based on a single examination, performed on November 13, 2008, Dr. Repsher's October 28, 2009 report only constituted a supplemental report, Employer's Exhibit 6, which was part of Dr. Repsher's original December 22, 2008 report, and did not constitute a second report.

We agree with the Director. Consequently, we vacate the administrative law judge's award of benefits and remand this case for the administrative law judge to reconsider whether the employer was provided with the opportunity to submit its permissible allotment of evidence under Section 725.414. The administrative law judge may allow the parties to withdraw evidence and re-designate additional evidence, if necessary, in order to conform to the evidentiary limitations. The administrative law judge must then reconsider whether the evidence establishes a totally disabling respiratory impairment, a requisite finding for invocation of the Section 411(c)(4) presumption.

20 C.F.R. §725.456
Good Cause

In the alternative, the administrative law judge found that employer failed to establish "good cause" for

the admission of evidence, namely Dr. Cohen's report, in excess of the evidentiary limitations pursuant to 20 C.F.R. §725.456. The administrative law judge found that, because the effect of the new amendments was unknown, he would follow the current case law on the issue of good cause. He found, therefore, that because employer did not timely submit its evidence, as instructed, or provide a "good cause" reason for the untimely submission of Dr. Cohen's report, the report was not admissible pursuant to Section 725.456.

Employer asserts, however, that Dr. Cohen's report should have been admitted for "good cause," in light of the change in law created by the new amendments, namely the reinstatement of Section 411(c)(4), which provides a presumption of totally disabling pneumoconiosis if, in part, a totally disabling respiratory impairment is established. Employer asserts that because Dr. Cohen's report addresses claimant's blood gas studies, which were qualifying, and the administrative law judge found that claimant's blood gas studies, along with the medical opinion evidence, established a totally disabling respiratory impairment, Dr. Cohen's report addressing the blood gas study evidence is particularly relevant.[4]

"While an administrative law judge is generally afforded broad discretion in dealing with procedural matters, [he] is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on*

[4] Employer also asserts that the fact that the hearing in this case was held on November 17, 2009, approximately four months prior to the enactment of the new amendments, lends further support for its good cause argument.

reconsideration, 9 BLR 1-236 (1987)(*en banc*); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Where a party would be denied the opportunity to fully present its case because it is unable to develop evidence relevant to a change in the law, due process requires that the party be afforded the opportunity to develop such evidence. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock*, 9 BLR at 1-200; *see* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Therefore, we conclude that the administrative law judge should determine whether the change in law created by the new amendments, namely the reinstatement of the Section 411(c)(4) presumption, establishes "good cause" for the admission of Dr. Cohen's report pursuant to Section 725.456. *See Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29; *see also* 30 U.S.C. §921(c)(4). If he so finds, the administrative law judge must reconsider whether the evidence establishes a totally disabling respiratory impairment and, therefore, a basis for invoking the Section 411(c)(4) presumption.

Section 411(c)(4) Invocation
Length of Qualifying Coal Mine Employment

Employer also contends that the record should be reopened to allow it an opportunity to present evidence on the issue of whether claimant had at least fifteen years of "qualifying" coal mine employment, for purposes of Section 411(c)(4), namely underground coal mine employment or coal mine employment that was

performed in conditions substantially similar to those of underground coal mine employment. Employer contends that it was not aware at the time of hearing, which was conducted prior to the enactment of the new amendments, that the length of "qualifying" coal mine employment would be crucial to a finding of entitlement in this case.

We agree. Consequently, we remand this case for the administrative law judge to reopen the record to allow the parties the opportunity to address whether claimant had at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those of underground coal mine employment. *See* 30 U.S.C. §921(c)(4); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

Section 411(c)(4) Rebuttal

Additionally, employer contends that the administrative law judge's Decision and Order must be vacated and the case remanded to reopen the record on the issue of Section 411(c)(4) rebuttal. We agree. The administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption is vacated and the case is remanded for reconsideration of that issue, if reached. On remand, the administrative law judge must provide employer the opportunity to submit additional evidence relevant to rebuttal of the Section 411(c)(4) presumption. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986).

Constitutionality of New Amendments

Finally, employer contends that retroactive application of the new amendments violates the due process and takings clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Employer's Brief at 13-15. The Director disagrees, noting that employer's arguments are similar to those rejected by the Board in *Matthews v. Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), appeal docketed, No. 11-1620 (4th Cir., June 13, 2011). We agree with the Director. We, therefore, reject employer's arguments concerning the constitutionality of the new amendments. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd per curiam*, No. 11-1620, 2011 WL 6062116 (4th Cir., Dec. 7, 2011).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

/s/Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX G

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
11870 MERCHANTS WALK - SUITE 204
NEWPORT NEWS, VA 23606
(757) 591-5140
(757) 591-5150 (FAX)

Case No.: 2009-BLA-05197

[Issued January 14, 2011]

In the Matter of:

ROBERT C. THOMPSON,
Claimant,

v.

CONSOLIDATION COAL COMPANY,
WELLS FARGO DISABILITY
MANAGEMENT, SELF-INSURED
THROUGH CONSOL ENERGY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS,)
Party-in-interest.)
_____)

Appearances: Jonathan Wilderman, Esq.
For the Claimant

Jonathan Mitchell, Esq.
For the Employer

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER AWARDING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. §§ 901-950 ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2008). A hearing was held in Price, Utah, on November 17, 2009. The decision in this matter is based upon the testimony of Claimant at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of the parties. The documentary evidence admitted at the hearing includes Director's Exhibits (DX) 1-38; Claimant's Exhibits (CX) 1-9; and Employer's Exhibits (EX) 1-6, 8, and 10-11. (TR 3).[1]

[1] The following abbreviations will be used as citations to the record:
ALJX – Administrative Law Judge's Exhibits;
EX – Employer's Exhibits;
DX – Director's Exhibits;
CX – Claimant's Exhibits; and
TR – Transcript of the Hearing.

I. Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

II. Procedural History

The Claimant filed this claim for black lung benefits on February 14, 2008. (DX 2). On October 1, 2008, the Department of Labor (DOL) issued a Proposed Decision and Order Awarding Benefits. (DX 31). The Employer contested the District Director's findings and requested a formal hearing on October 9, 2008. (DX 32). Since the Employer contested the Director's finding, interim benefits are being paid by the Black Lung Disability Trust Fund. (DX 35). The case was assigned to the undersigned on July 21, 2009. The formal hearing was held before the undersigned on November 17, 2009, in Price, Utah, and the parties thereafter timely filed their post-hearing briefs.

III. Issues Presented for Adjudication

The issues listed as contested on the CM-1025[2] in this claim and that continued to be contested at the time of the hearing are:

1. The length of the Miner's coal mine employment.
2. Whether Claimant has pneumoconiosis as defined by the Act and regulations.
3. Whether the Claimant's pneumoconiosis arose out of coal mine employment.
4. Whether Claimant is totally disabled.
5. Whether Claimant's disability is due to pneumoconiosis.

IV. Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718.[3] Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine

---

[2] Employer challenges the validity of the amended regulations. In *National Mining Ass'n. et al v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the circuit court concluded that the regulations at issue were valid. Employer's position is noted for appeal purposes only. *See e.g., Kosh v. Director, OWCP*, 8 B.L.R. 1-168, 1-169 (1985).

[3] As the miner last engaged in coal mine employment in the State of Utah, appellate jurisdiction of this matter lies with the Tenth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(*en banc*).

employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(*en banc*); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Factual Background and the Claimant's Testimony

Claimant was born May 22, 1940 and was sixty-nine years old at the time of the hearing. (DX 2, TR 18). He is a high school graduate. (DX 2). The Claimant has one dependent for purposes of augmentation, his wife, Shelly, who he married on February 28, 2002. (DX 2, 8).[4]

The Claimant testified that he started mining in 1972 at the Browning Coal Mine in Emery County, Utah, which was owned by Horace Petty, and continued to work for Horace Petty until 1975. (TR 31). In 1975, Browning Coal Mine was bought by Consolidation Coal Company, and Claimant continued to work at the same coal mine under the ownership of Consolidation Coal Company. (TR 32). Claimant

[4] Although Claimant lists a disabled son, Robert Lee Thompson, born September 26, 1962, on his CM-911, there was no evidence introduced and counsel made no argument as to whether he is an eligible beneficiary for purposes of augmentation. A beneficiary's child may be considered to be a dependent for purposes of augmentation if the child is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d). 20 C.F.R. § 725.209(a)(2)(ii).

testified that from 1972 through 1986, his job duties included being a roof bolter, rock duster, drill operator, cutting machine operator, timber man, and a face man. (TR 32). He stated that all of these tasks were completed underground and near the face of the coal production. (TR 33). The area in which he worked had such thick coal dust that "[y]our light would be dim because there was so much coal dust in the air." (TR 34). The ventilation was poor because "didn't have good fans." (TR 34). During roof bolting, "the dust would just fall all over you." and the drilling and operating the cutting machine created lots of dust because the job entailed dynamiting coal out of the face. (TR 37).

From 1986 through 2003, his job duties changed to include surface mining work as the job of a preparation plant control operator. (TR 33). He stated that if the mine was shut down, he would often work through the shut down and would perform underground jobs. (TR 33). While working as a preparation plant operator, his duties included filling coal bins and loading trucks. He said a "mushroom of dust" would come off the conveyor belts as he started them each morning. (TR 38). The wind would blow coal dust as coal was being hauled. (TR 38). He also would run all the belts in the tipple and operate the machines that crushed and separated the coal, and would shovel any coal spillage from these belts. (TR 39). He stated that there was always dust in the areas he would work in. (TR 40). He had to lift sacks of rock dust by hand that weighed fifty pounds, grease buckets that were forty pounds, load belt rollers that were sixty to seventy pounds, and scrap metal buckets that were between sixty to seventy pounds. (TR 44-46). He had to walk several flights of stairs every day and walked between two to three miles a day at his

job. (TR 47). He does not believe he would be able to perform the duties of a preparation plant control operator today because he does not have enough oxygen and does not have the speed required to keep up. (TR 51).

The mine had a significant shutdown that lasted from 1991 to 2001 in which Claimant had no earnings from Consol. (TR 34). During the mine's shutdown from 1991 to 2001, he worked for a subcontractor, Thermal West, for Utah Power and Light as a metal cutter and insulator. (TR 69-72). He came back to work for the coal mine as soon as it opened back up, but retired in 2003. (TR 70-71).

The Claimant has been treated by his family physician, Dr. Morgan, for his breathing problems. (TR 49). He stated that he was put on inhalers for when he felt that he was not getting enough air, but that they did not really improve his breathing. (TR 50). Dr. Morgan recommended supplemental oxygen at night, but Claimant did not want to use it unless absolutely necessary because he did not want to become adapted to it. (TR 50).

Claimant was also examined by Dr. Repsher, and disagreed with some of Dr. Repsher's medical report. He claimed he never told Dr. Repsher he had two-pillow orthopnea. (TR 52). He also testified that he never told Dr. Repsher that he slept in a recliner at night, and he stated that he does not wake up at night for shortness of breath (paroxysmal nocturnal dyspnea). (TR 52). He stated he has never been diagnosed or treated for heart disease, has never had a heart attack, and has never been diagnosed or

treated for obstructive sleep apnea. (TR 52-53). He also never smoked. (TR 54).

II. Coal Mine Employment

The duration of a miner's coal mine employment (CME) is relevant to the application of various statutory and regulatory presumptions. At the hearing, the Employer stipulated to the findings reflected by the Social Security records that Claimant was employed by Consolidated Coal Company for seventeen years in qualifying coal mine work. (TR 13). The Claimant's Social Security records indicate that he worked for Consolidated Coal in 1975-1990, and from 2002-2003. (DX 6). The Claimant contends that his employment from 1972-1975 for Horace A. Petty, Ferron Auto Service, was also qualifying coal mining work because Horace A. Petty was the previous owner of the Browning Coal Mine that was later purchased by Consolidated Coal. (TR 16). However, the Claimant's Social Security records do not indicate that Ferron Auto Service was the owner of a coal mine. (DX 6). Based upon the evidence of record, the Employer's stipulation is deemed acceptable; and the Claimant is credited with at least seventeen years of coal mine employment.

III. Responsible Operator

Consolidated Coal Company is the last Employer for whom the Miner worked cumulative period of at least one year, and is the properly designated responsible coal mine operator in this case under §§ 725.494 and 725.495. (TR 14, DX 3).

IV. Timeliness

The Regulations state: "[t]here shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c). It is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled. *See Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95 (1994). Since no evidence has been presented to contest timeliness, I find that the claim was timely filed.

V. Applicability of the 15-Year Presumption

Because this claim was filed after January 1, 2005 and the miner had 15 or more years of qualifying coal mine employment, the provisions at 20 C.F.R. § 718.305 may be applicable. Section 1556 of the PPACA revives the 15-year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305:

> If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time

> of death such miner was totally disabled by pneumoconiosis.

Id.

Underground Coal Mine Employment or Similar Working Conditions

In order for the presumption to apply, Claimant must show that he worked for 15 years or more in underground coal mine employment or that he had 15 or more years working in coal mine employment in conditions "substantially similar" to underground mines. *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995) (stating also that courts will generally defer to the expertise of the judge in determining the similarity of surface and underground mine conditions). In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court held that the judge properly invoked the 15-year presumption at 30 U.S.C. § 921(c)(4) having found that the miner's work at the surface of the mine was under "conditions substantially similar to those in an underground coal mine." The judge found "similarity" based on the miner's unrefuted testimony about his employment conditions.

In the instant case, Claimant testified at the hearing that while he worked as an underground coal miner from 1972 to 1986, the rest of his coal mine employment from 1986 to 2003 was while working at the surface of the mine. (TR 32-33). Claimant testified that he worked as a preparation plant control operator from 1986 until he retired in 2003. (TR 33). He stated that his duties on the surface included filling coal bins and loading trucks, and that a "mushroom of dust" would come off the conveyor belts as he started them

each morning. (TR 38). He also stated that he also would run all the belts in the tipple and operate the machines that crushed and separated the coal, and would shovel any coal spillage from these belts. (TR 39). Additionally, he stated that there was always dust in the areas he would work in. (TR 40). His testimony demonstrates that even while working on the surface of the mine, he was still exposed to sufficiently dusty conditions as to show substantial similarity between his coal mine employment and underground mining employment. The Employer offered no evidence to refute Claimant's testimony about his working conditions.

As Claimant was credited with at least 17 years of coal mine employment based on his Social Security records and Employer's stipulations, I also find that he is credited with at least 17 years of coal mine employment in underground mining or mining in substantially similar conditions on the basis of his unrefuted testimony about his working conditions. Claimant therefore meets the 15-year requirement for the § 718.305 presumption.

No Complicated Pneumoconiosis under § 718.304

Claimant must have a chest X-ray interpreted as negative with respect to the requirements of § 718.304 (yielding one or more large opacities greater than 1 centimeter in diameter that would be classified in Category A, B or C). As found *supra* under *V. Existence of Pneumoconiosis and Its Etiology, A. X-Ray Evidence*, all of the x-rays interpreted in the record are negative with respect to § 718.304.

Total Disability

The regulations state that "if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis." § 718.305(a).

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304 (2008), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment. 30 U.S.C. § 902(f), 20 C.F.R. § 718.204(b) and (c) (2008).

The Regulations provide five methods of demonstrating total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b) and (d) (2008). Lay testimony may only be used in establishing total disability in certain cases involving deceased miners. On the other hand, in a living miner's claim a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d) (2008); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994).

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more

severe the lung impairment. Tests most often relied upon to establish disability in black lung claims measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV1), and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the submitted pulmonary function studies available with the current claim. Pulmonary function studies submitted by the parties in connection with the current claim are in accordance with the limitations contained in 20 C.F.R. § 725.414 (2008). "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.204(b)(2)(i) (2009).

Exhibit No. Date Doctor	**Age/ Height[5]**	**FEV_1 Pre-/ Post**	**FVC Pre-/ Post**	**FEV_1/ FVC Pre-/ Post**	**MVV Pre-/ Post**	**Qualify**	**Physician Impression**
DX10 5/7/08 Gagon	67/ 70”	2.94/ --	4.06/ --	72%/ --	109/ --	No	Good cooperation/ comprehension
CX3 9/17/09 James	69/ 68.5”	2.81/ 2.86	4.46/ 4.28	63%/ 67%	--	No	Good cooperation/ maximal effort
EX8 p.16-17 11/13/08 Repsher	68/ 70”	2.86/ 3.09	4.04/ 4.27	71%/ 72%	102/ 116	No	Good effort

All three pulmonary function tests in the record do not qualify for disability, so I find that the Claimant has not established total disability under § 718.204(b)(2)(i).

Arterial Blood Gas Tests

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO_2) and the percentage of carbon dioxide (pCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in this case. Arterial blood gas studies submitted by the parties are in accordance with the limitations contained in 20 C.F.R. § 725.414 (2008). A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b) (2009).

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[5] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). I find the Miner's height to be 69.5."

Exhibit Number	**Date**	**Physician**	**pCO_2 at rest/ exercise**	**pO_2 at rest/ exercise**	**Qualify?**	**Altitude**	**Physician Impression**
DX 10	5/7/08	Gagon	45/ 46	56/ 50	No/ Yes	3000-5999”	
EX 8 at 18	11/13/08	Repsher	36	56	Yes	3000-5999”	
CX 4	9/17/09	James	35.8	59	Yes	3000-5999”	

The record contains three qualifying arterial blood gas studies that show total disability and no tests that contradict the findings. Therefore, the Claimant has established total disability under § 718.204(b)(2)(ii).

Cor Pulmonale

Subsection 718.204(b)(2)(iii) provides that a miner may establish his total disability if he has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. There is no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, total disability is not established under this subsection.

Medical Opinions

Total disability may be found if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv).

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 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).

Dr. Gagon, Board-Certified in Family Medicine, conducted the initial DOL-sponsored pulmonary examination and concluded that Claimant had a pulmonary impairment of moderate severity "due to shortness of breath, hypoxia on exertion (due to Claimant being diagnosed with "chronic bronchitis as manifested by hypoxia at exercise and chronic productive cough")." DX10. He also stated the etiology of the cardiopulmonary diagnoses is coal dust exposure, because the patient has no smoking history. (DX 10). He did not make any conclusions as to whether Claimant is totally disabled, only that his pulmonary impairment was of moderate severity, and patient had no non-respiratory conditions that could be considered disabling. DX10.

Dr. Repsher, Board-Certified in Internal Medicine and Pulmonary Diseases, determined based on his examination of Claimant and review of prior records that Claimant did not suffer from either "medical or legal CWP or any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with Consolidated Coal Co. with the inhalation of coal mine dust." (EX 4). As a result of this determination, Dr. Repsher then concluded that

Claimant was fully fit to "perform his usual coal mine work or work of a similarly arduous nature in a different industry." (EX 4). Instead, Dr. Repsher opined that Claimant's symptoms were due to left-sided congestive heart failure, but admitted that there was no objective data to show congestive heart failure, and "right now, all we have are symptoms." (EX 5 at 35). He also admitted that there were no medical records to his knowledge that show Claimant was treated for heart disease, and that Claimant never reported any chest pain to him, or in any prior records reviewed. (EX 5 at 50-51). Dr. Repsher found no gallop or murmur in the heart, and no clubbing, phlebitis, or edema in the extremities in his examination of Claimant. (EX 4). The only piece of medical evidence Dr. Repsher had to support any indication of heart problems was upon review of Dr. James's medical report, which included an echocardiogram, which had revealed LVH and mild diastolic dysfunction. (EX 11, CX 1). Dr. Repsher also noted that Claimant's medical history was significant for chronic bronchitis, but opined that it was unrelated to his coal mine employment because "he had relatively minimal dust exposure, and he had been out of the mines for more than a year," and as a result, would not attribute Claimant's chronic bronchitis to his coal mine employment. (EX 5 at 28-31). Dr. Repsher also dismissed the qualifying findings of the arterial blood gas tests as showing " mild hypoxemia, which is nonqualifying [for CWP]." (EX 4).

He also essentially dismissed the use of arterial blood gas tests as a whole to determine total disability for pulmonary impairment as "not a particularly good or useful test," and the arterial blood gas values should be considered "rebuttable presumptions." (EX 5 at 24,

43). He also opined that Claimant's arterial blood gas test actually showed a normal level arterial pO2 because the regulations do not account for age: "When you take into account the fact that he is almost 70 years old and his blood gas was done at an altitude that's almost 6,000 feet, that's a normal blood gas for him." (EX 5 at 62).

Additionally, Dr. Repsher does not take into account Claimant's years of coal mine employment as a contributing factor for his chronic bronchitis and the symptoms associated with it. His reasoning that Claimant's symptoms of shortness of breath upon exertion are based on left ventricular congestive heart failure is not well-supported by the medical evidence given. Dr. Repsher even admitted that his own study failed to produce any evidence of heart failure, and the Dr. James stated in his report that the echocardiogram showed an ejection fraction in the normal range of 60%, and "no clinical evidence of heart failure on physical examination." (EX 5 at 35, CX 1).

Dr. James, Board-Certified in Internal Medicine and Pulmonary Diseases, concluded "with a reasonable degree of medical certainty" that Claimant would be unable to perform the usual duties of his prior position of coal mine employment as because of his obstructive pulmonary disease, making Claimant totally disabled from his usual coal mine employment. (CX 1). He stated also stated that "with a reasonable degree of medical certainty, Mr. Thompson's chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner." (CX 1).

Dr. Morgan, F.A.A.C.P and Claimant's treating physician, concluded that Claimant has coal workers pneumoconiosis and chronic obstructive pulmonary disease, and "it does interfere with his daily living and even impairs his ability to perform his usual hobbies." (CX 8). He noted that Claimant had chronic cough, congestion and wheezing, and had never smoked. (CX 8).

I find the medical opinions of Dr. James and Dr. Morgan on the issue of total disability are better reasoned, and supported by the objective medical evidence on the record (including the arterial blood gas studies) and in line with the Regulations. Based on the above discussion regarding Dr. Repsher's reliance on unsupported conclusions about Claimant's heart condition, and his dismissal of the DOL's regulations on arterial blood gas table levels, I give his opinion on disability less weight. I find that the preponderance of the evidence establishes that the Claimant is totally disabled under § 718.204(b)(2)(iv).

Claimant has demonstrated through preponderance of the evidence the existence of a totally disabling respiratory or pulmonary impairment. I find therefore that Claimant meets the rebuttable presumption that he is totally disabled due to pneumoconiosis.

Rebuttal of the Presumption

Once the presumptions at 20 C.F.R. § 718.305(a) are invoked, the burden shifts to the party opposing entitlement to demonstrate by a preponderance that either: (1) the miner does not, or did not, have pneumoconiosis, or (2) the respiratory or pulmonary impairment did not arise out of coal mine employment.

The presumption cannot be rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin. 20 C.F.R. § 718.305(d).

Existence of Pneumoconiosis

To rebut the presumption by disproving the existence of pneumoconiosis, the party opposing entitlement must establish that the miner does not have pneumoconiosis as defined in 20 C.F.R. § 718.201 (2010). Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, 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. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis,

> anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201. Because the definition includes both clinical and legal pneumoconiosis, to rebut the presumption, the opposing party must establish that the miner does not suffer from either form of the disease. See *Pavesi v. Director, OWCP*, 758 F.2d 956, 965 (3d Cir. 1985); *Shonbom v. Director, OWCP*, 8 BLR 1-434, 1-435-36 (1986).

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of

presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). Because this claim was filed after January 19, 2001, the evidentiary limitations as outlined in § 725.414 apply.

X-ray Evidence

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[6] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The following chest roentgenogram evidence is in the record:

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[6] A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified radiologist" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. A "Board-eligible radiologist" (BER) denotes a physician who has successfully completed a formally accredited residency program in radiology or diagnostic roentgenology.

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Film Quality	Interpretation
DX10	5/7/08	5/7/08	Roy Hammond, BCR	2	No CWP
DX12	5/7/08	5/15/08	Shiv Navani, BCR/B	2	Quality only
EX1/ DX29	5/7/08	7/28/08	Jerome E. Wiot, BCR/B	1	No CWP, Other abnormalities: plate atelectasis on both sides
EX2	11/13/08	11/29/08	Jerome E. Wiot, BCR/B	2	No CWP, Other abnormalities: plate atelectasis on both sides

The record contains two x-rays dated May 7, 2008, and November 13, 2008, with two readings of the prior and one of the latter. For the May 7, 2008 x-ray, Dr. Hammond noted a "left basilar scar or atelectasis." He read the x-ray as negative for pneumoconiosis. (DX 10). Dr. Wiot wrote that the x-ray showed "plate atelectasis at both bases, greater on the left than on the right. This is not a manifestation of coal dust exposure." (EX 1). Since both readings were negative for pneumoconiosis, I find that the May 2008 x-ray is negative for pneumoconiosis.

Reading the November 13, 2008 x-ray, Dr. Wiot stated there "is no evidence of coal worker's pneumoconiosis. There is plate atelectasis at both bases." (EX 2). Therefore, I find that the November 2008 x-ray is negative for pneumoconiosis.

Since the weight of the evidence is negative for pneumoconiosis, the Claimant has failed to establish that he suffers from pneumoconiosis under § 718.202(a)(1).

Autopsy and Biopsy Evidence

No autopsy or biopsy reports are present in the record. Therefore, the Claimant has not established the presence of pneumoconiosis pursuant to § 718.202(a)(2).

Presumption

The presumptions described in §§ 718.304 and 718.306 are not applicable in the present action.

Other Medical Evidence

High resolution CT scans and digital chest x-rays may be used to diagnose pneumoconiosis and other respiratory diseases. The regulations provide no guidance for the administration or evaluation of CT scans and digital chest x-rays. Accordingly they must be weighed with other acceptable medical evidence under 20 CFR § 718.107. The proponent of such evidence "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 CFR § 718.107(b) (see *Webber v Peabody Coal Co*., BRB No. 05-0335 BLA (Jan 27, 2006)(en banc, AAJ Boggs concurring); *Harris v. Old Ben Coal Co*., 23 BLR 1-273 (2007)(en banc on recon.).

The Claimant submitted a high resolution CT chest scan without contrast into evidence. (CX 5). The CT scan was conducted on September 17, 2009 at Western Colorado Lung Center and ordered by Dr. James, who is B-reader certified, and incorporated it into his medical report. (CX 1, CX 2, CX 5). The results of the CT scan were as follows:

> There are new areas of alveolitis. There is some minimal bronchial wall thickening as well as some septal increased markings at the bases. This could be indicative of early pulmonary fibrosis.
>
> There are no nodes. No hilar or mediastinal gross abnormalities.

> No gross pulmonary nodules or groundglass patterns.

(CX 5).

In Dr. James's medical report, he noted his impression of the CT scan was "no nodular interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1). He also found in his report that there was no evidence of coal workers pneumoconiosis because "there are no nodular interstitial changes on chest CT." (CX 1).

The Employer submitted an interpretation of the previously mentioned CT scan by Dr. Wiot, a Board-Certified Radiologist and B-reader. (EX 10). Dr. Wiot wrote:

> There is no evidence of coal worker's pneumoconiosis by CT. There is basilar fibrosis with lower lobe traction bronchiectasis consistent with inflammatory change, aspiration, or fibrotic NSIP. This is not a manifestation of coal worker's pneumoconiosis. The CT is otherwise unremarkable.
>
> In summary, there is no evidence of coal worker's pneumoconiosis by CT.
>
> CT is medically acceptable in the medical community for evaluation of pulmonary problems. CT is beneficial in confirming or denying the presence of simple coal worker's pneumoconiosis when it is not evident on the routine chest x-rays. This CT scan is of good quality and is acceptable for interpretation for

> the presence or absence of coal worker's pneumoconiosis.

(EX 10).

The Claimant submitted a CT scan with contrast of Claimant's abdomen and pelvis that was taken on November 28, 2007 at Castleview Hospital under the direction of Claimant's primary care physician, Dr. Morgan, F.A.A.F.P. (CX 9). The findings stated that "there is significant linear scarring and/or atelectasis involving the right lung base and less, so, the left lung base." (CX 9).

However, the Employer submitted an interpretation of this particular CT scan by Dr. Wiot, which stated, "as this is a CT scan of the abdomen and pelvis, there are no lung windows provided which makes this CT unreadable for the presence or absence of coal worker's pneumoconiosis. Therefore, this is no interpretation of this CT." (EX 3).

Medical Opinion

The final method to be considered by which the Claimant may establish that he suffers from pneumoconiosis is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields*, 10 B.L.R. 1-19. Indeed, whether a medical report is sufficiently documented and reasoned is for the ALJ as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

Castleview Hospital

The Claimant's pertinent hospital treatment records are as follows:

- 11/28/2007: Physician: Dr. Morgan; Admission: abdominal pain and pelvic tenderness. CT abdomen and pelvis with contrast performed. Findings included "significant linear scarring and/or atelectasis involving the right lung base and, less so, the left lung base." (EX 8 at 34).
- 7/21/2008: Physician: Dr. Morgan; Admission: wheezing, dyspnea. Indication was "productive cough, wheezing and dyspnea. History of working in a coal mine." Chest x-ray- chest PA and 1 lateral, compared to abdomen CT taken on 11/28/2007. The findings were that the heart and mediastinum were normal, pleural spaces were clear, but "there is a mild heterogeneous opacity in the left lung base,

suspicious for an infiltrate in the setting of productive cough." Impression was "mild left lung base airspace disease, suspicious for infiltrate/pneumonia in the setting of productive cough." (EX 8 at 30).

- 8/11/2008: Physician: Dr. Morgan; Admission: cough, congestion. Compared to chest x-ray taken 7/21/2008, a chest PA and 1 lateral was taken, findings were "linear increased density at the left base likely resides atelectasis. Infiltrate cannot be excluded. Lesser changes in the right base. The cardiac silhouette is normal. The pulmonary vasculature is normal. Aorta is ectatic to a mild degree. Conclusion: linear increased density at the lung bases, more notably on the left, likely representing atelectasis though infiltrate cannot be excluded." (EX 8 at 25).
- 11/13/2008: Physician: Dr. Repsher; Admission: dyspnea, black lung determination; blood gas test showed pCO2 of 36 mm-Hg and abnormal pO2 level of 56 mm-Hg, normal levels of BNP in the blood, normal white and red blood cell count. No presence of cotinine (nicotine metabolite). EX8.11-13. FEV1/FVC pre-bronchodilator at 71%, FEV1/FVC post-bronchodilator at 72%. (EX 8 at 16).
- 11/13/2008: Physician: Dr. Repsher; Compared to chest x-ray taken 8/11/2008, chest PA and 1 lateral, frontal and lateral views, findings were that "the heart and mediastinal contours are normal. The pulmonary vascularity is normal. Linear

opacities at the lung bases have decreased slightly. They likely represent atelectasis or potentially mild fibrosis. No focal consolidation. Mild degenerative changes of the thoracic spine. Impression: mild basilar linear opacities, atelectasis versus mild scarring. Slight decrease compared to the prior study." (EX 8 at 19).

- 10/13/2009: Physician: Dr. James; Admission: for COPD dyspnea on exertion; Echocardiography exam resulted in diagnosis of "1. Borderline aortic root enlargement; 2. Borderline left ventricular hypertrophy; 3. Aortic regurgitation, trace; 4. Grade 1 diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressure." (EX 8 at 4).

Dr. Shane Gagon

Dr. Gagon, Board-Certified in Family Medicine, conducted the DOL sponsored pulmonary exam on May 7, 2008. (DX 10). He noted that Claimant had been working in the mining industry for approximately 20 years and retired in 2003. (DX 10). He wrote that Claimant has never smoked. (DX 10). The Claimant's medical history was significant for chronic bronchitis. (DX 10). Dr. Gagon also noted Claimant has had surgery on his right knee, has benign prostatic hypertrophy, and gastrointestinal reflux. (DX 10).

Dr. Gagon noted that the Claimant's symptoms are daily sputum, dyspnea (shortness of breath) after any exertion, particularly climbing, and productive cough. (DX 10).

A chest x-ray was negative for pneumoconiosis and showed left basilar scar or atelectasis. (DX 10). A pulmonary function study showed good effort, and no bronchodilator was used due to results being within normal of predicted values. (DX 10). The arterial blood gas study showed hypoxia after exercise. (DX 10).

Dr. Gagon diagnosed Claimant as having "chronic bronchitis as manifested by hypoxia at exercise and chronic productive cough." (DX 10). He stated the Claimant's impairment is of moderate severity "due to shortness of breath, hypoxia on exertion." (DX 10). He also stated the etiology of the cardiopulmonary diagnoses is coal dust exposure, because the patient has no smoking history. (DX 10).

Dr. Lawrence Repsher

Dr. Repsher, Board-Certified in Internal Medicine and Pulmonary Diseases, examined the Claimant on November 13, 2008 and submitted a report on December 22, 2008. (EX 4). Dr. Repsher noted that Claimant worked as a coal miner for about 20 years with all but 6 years above ground, and retired in 2003 because of the mine shutdown. (EX 4). He noted that Claimant was a never smoker. (EX 4).

He stated Claimant complained of "progressive dyspnea on exertion for the past 8 years, as well as a cough productive of scant yellow phlegm." (EX 4). Claimant denied any chest pain, but "does complain of coughing up minimal amounts of blood." (EX 4). Dr. Repsher wrote that Claimant denied any history of hypertension, asthma, atopy, TIAs, or TB. (EX 4). He wrote that Claimant denied having ankle edema, but had "two-pillow orthopnea, sleeps in a recliner, and has

PND every night." (EX 4). He stated that Claimant did have symptoms of gastroesophageal reflux disease and took medication, and had the "symptoms of OSA [obstructive sleep apnea] but has not had a PSNG [polysomnography], nor does have any daytime somnolence." (EX 4). He wrote that vital signs were normal except for an elevated blood pressure of 150/95. When he examined Claimant's chest, he found "the breath sounds are diminished bilaterally. The expiratory phrase is not prolonged. There are no rales, rhonchi, or wheezes, even with forced expiration." (EX 4). He found no gallop or murmur in the heart, and no clubbing, phlebitis, or edema in the extremities. (EX 4). He also wrote that Claimant had symptoms of intermittent bilateral lower extremity claudication. (EX 4). An electrocardiogram at resting was within normal limits. (EX 4).

Dr. Repsher also wrote that the chest x-rays on May 7, 2008 and November 13, 2008, both reviewed by Dr. Wiot, showed no evidence of coal worker's pneumoconiosis. (EX 4). He wrote that the pulmonary function tests "suggest a very mild and clinically insignificant COPD, which is overwhelmingly most likely the result of his failure to provide full effort and cooperation with the testing." (EX 4). He also wrote that the arterial blood gases "show mild hypoxemia, which is nonqualifying [for CWP]." (EX 4). Dr. Repsher's impressions included:

1. No evidence of medical of legal coal workers pneumoconiosis.
2. No evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment

as a coal miner with exposure to coal mine dust.
3. Probable normal pulmonary function.
4. ABGs performed 7 May 2008 suggest primary alveolar hypoventilation. ABGs performed on 13 November 2008 fail to document primary alveolar hypoventilation.
5. Probable OSA, not documented by PSNG.
6. Peripheral vascular disease, manifested by bilateral lower extremity claudication.
7. Hypertension, of unknown cause, untreated.
8. Symptoms of biventricular congestive heart failure.

(EX 4).

Dr. Repsher concluded based on his examination and review of prior records that Claimant did not suffer from either "medical or legal CWP or any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with Consolidated Coal Co. with the inhalation of coal mine dust." (EX 4). He also wrote that because Claimant demonstrated "no clinically significant pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry." (EX 4).

Dr. Repsher testified in a deposition on July 22, 2009 that Claimant had a history for chronic bronchitis, and that his coal mine employment had no correlation to his chronic bronchitis:

> [H]e does have chronic bronchitis. He indicates that he has a cough productive of scant yellow-

> gray phlegm. That would meet the criteria for a diagnosis of chronic bronchitis….He had relatively minimal dust exposure, and he had been out of the mines for more than a year. So I would not attribute his chronic bronchitis to his coal mining.

(EX 5 at 28-31).

Dr. Repsher continued to express that he thought the Claimant did not suffer from pneumoconiosis, that Claimant "basically…has normal lung function and no evidence of coal workers pneumoconiosis." (EX 5 at 33). He stated that from a pulmonary point of view, Claimant would be able to return to work as a coal miner. (EX 5 at 36).

He testified that arterial blood gas tests measure the pressure of oxygen in the blood, and that:

> [I]t's not a particularly good test or useful test, but it is a test that's generally more available than a formal exercise test, and it was used by the people that made the regulations for testing for black lung. It was a compromise, that it was—it gives you some information about the person's lungs' ability to transfer oxygen, but recognizing that it's at best a general estimate and not precise. But it is relatively inexpensive to do, and it's generally available in areas where there are a lot of coal miners.

(EX 5 at 24-25).

Dr. Repsher also stated that for someone with a pulmonary impairment or a pulmonary disease, the pulmonary function test would probably reveal that

impairment more than arterial blood gas testing. (EX 5 at 32). He testified that the Department of Labor's blood gas tables[7] were rebuttable presumptions, and that the qualifying value of 56 found by the arterial blood gas test he performed was "a qualifying value as a rebuttable presumption." (EX 5 at 44).

He opined in his testimony that the real reason for Claimant's symptoms was not a result of Claimant's coal mine employment, but rather because of left ventricular congestive heart failure:

> Basically he gives a classic history for left ventricular congestive heart failure, and that's a very, very serious condition. He also probably has some obstructive sleep apnea and some GERD, both of which have potential implications for affecting lung function. And finally he has symptoms of intermittent claudication, which is basically hardening of the arteries to the lower extremities and can be potentially disabling.

(EX 5 at 34).

Dr. Repsher admitted that there was no objective data to show congestive heart failure, and "right now, all we have are symptoms." (EX 5 at 35). He also admitted that there were no medical records to his knowledge that show Claimant was treated for heart disease, and that Claimant never reported any chest pain to him, or in any prior records reviewed. (EX 5 at 50-51).

> Q: On your exam you reported no gallop or murmur?

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[7] From 20 C.F.R. § 718, Appendix C.

> A: That's right.
> Q: Dr. Morgan in his report, as found at Director's Exhibit No.23, he indicated under heart, regular rate and rhythm, no murmur, gallop or rub, not enlarged. Those findings that the treating physician reported don't indicated the presence of heart disease, isn't that right?
> A: That's correct.

(EX 5 at 51).

When asked whether Claimant's arterial blood gas testing would show left ventricular heart failure, Dr. Repsher opined that it might:

> Left ventricular congestive heart failure can affect the arterial blood gases. It can cause a decrease in the pO2. And in a patient who has normal lung function, a decreased pO2 would be far more likely due to heart disease than it would be due to lung disease because people with normal lung function and no other condition are not going to have a low arterial pO2.
>
> He has a normal lung function and he has a lower arterial pO2, although it's probably not qualifying in the sense that he is 68 years old and this blood gas test was taken at an altitude that's very close to 6,000 feet. So if you make—I mean, the—for the administrative presumptions, which are fine because they are approximations, they are only divided in steps of 3,000 feet above latitude.

> Well, the decrease in arterial pO2 when you go up in altitude doesn't go in steps as in the regulations. It's a continuous variable. And then when you take into account the fact that he is almost 70 years old and his blood gas was done at an altitude that's almost 6,000 feet, that's a normal blood gas for him.
>
> But even if he did have hypoxemia, again, I would reiterate that overwhelmingly would be due to—most likely due to heart disease since he has normal lung function.

(EX 5 at 61-62).

Dr. Repsher submitted a second report dated October 28, 2009 regarding the clinical significance of the arterial blood gas values obtained from his November 13, 2008 exam of Claimant at Castleview Hospital in Price, Utah. (EX 6). He stated that the DOL Presumption of Impairment

> [M]akes no correction for age. This is scientifically untenable, since increasing age has a profound and progressive effect on the pO2. This effect is of the same general magnitude, as is the effect of altitude, and is additive to the effect of altitude.
>
> Further, the altitude at Price is at the very high end of Table #2. The relationship between arterial pO2 and altitude is a nonlinear continuous variable, which does not magically change a defined amount, when going from 5999 feet to 6000 feet altitude.

(EX 6).

Dr. Repsher opined that a more scientifically valid way to measure alveolar function is by measuring the alveolar-arterial oxygen gradient (A-a gradient), which measures both the diffusion function of the alveoli and the ventilation/perfusion ratios in the alveoli. (EX 6).

> Using the alveolar air equation, while taking into account the altitude at the Castleview Hospital, one obtains an expected A-a gradient of 22 torr. Calculation of the A-a gradient for Mr. Thompson reveals a value of 19.5 torr, which is well within the normal range for a man of age 68.

(EX 6).

Dr. Repsher also submitted a third report on November 11, 2009 and November 18, 2009 after review of Dr. James's report dated October 27, 2009 and the results of a CT scan performed at the direction of Dr. James. (EX 11).

Dr. Repsher stated in his report in response to Dr. James's findings regarding Claimant's "apparent borderline low arterial pO2", that

> Dr. James appears to have ignored and/or did not even inquire during his examination about Mr. Thompson's symptoms of left ventricular congestive heart failure, which are most likely due to his underlying hypertensive cardiovascular disease. This is documented by his echocardiogram, which had revealed LVH and diastolic dysfunction.
>
> Further, his A-a gradient, when adjusted for his age of 68, is clearly within the normal range at

> 19.5 torr. Finally, these blood gas tests were not fully adjusted for altitude. The relationship between arterial pO2 and altitude is a continuous variable and, therefore, is not stepwise in 3000 feet increments as in the DOL table. Clearly, his arterial pO2 is well within the normal range…

(EX 11).

He then stated that it was still in his opinion that Claimant did not have CWP, because his FEV1 had always been within the normal range and arterial pO2 had also been within normal limits, with the exception of the May 7, 2008 blood gas test with Dr. Gagon, "suggesting primary alveolar hypoventilation syndrome. It appears that this outlier result was probably the result of laboratory error." (EX 11).

Dr. Repsher then reviewed the CT scan that was performed on September 17, 2009, at the direction of Dr. James. (EX 11). He stated that the CT scans of the chest showed

> [S]eptal increased markings at the bases, but no nodules or ground glass patterns. This is not consistent with medical coal workers pneumoconiosis (CWP), which demonstrates small rounded opacities primarily in the upper zones. The pre and post bronchodilator spirometry shows mild and clinically insignificant COPD. The arterial blood gases (ABGs) show borderline hypoxemia for age and an echocardiogram shows LVH [left ventricular hypertrophy] and diastolic dysfunction.

(EX 11).

Dr. David James

Dr. James, Board-Certified in Internal Medicine and Pulmonary Diseases, examined the Claimant on September 17, 2009 and submitted a report dated October 27, 2009 on the examination and follow up testing that occurred October 13, 2009 at Castleview Hospital in Price, Utah. (CX 1). He noted that Claimant had a self-reported 20-year coal mine employment history, with 14 years above ground. He wrote that Claimant was a never smoker. (CX 1). He stated that Claimant's primary respiratory complaints were "shortness of breath and morning cough and phlegm production over the past 4 to 5 years." (CX 1). He stated his breathlessness upon exertion had been present in Claimant for 5 to 6 years. (CX 1). He wrote that Claimant could "walk 1 mile at his usual pace and home." (CX 1). He noted that Claimant had tried the Spirivia bronchodilator before without any significant relief from his symptoms. (CX 1). Claimant's phlegm production is occasionally yellowish and has had an episode in which there was some blood speckling in the phlegm. (CX 1). He also wrote that Claimant's wife has heard him wheeze. (CX 1).

Dr. James noted for Claimant's employment history that Claimant worked at the preparation plant towards the end of his mining career, and that he did not normally wear a respirator. (CX 1). He also noted that his last coal mining job required Claimant to walk 3 to 4 miles a day, and "needed to carry up to 50 pound rock dust bags. He would have to go up approximately 2 flights of stairs 3 to 4 times a day." (CX 1).

He stated in his report that Claimant had no chest pain as part of his symptoms. (CX 1). Claimant had no

lower extremity edema, and while his sleep history "is remarkable for snoring," he had no witnessed apneas. (CX 1). Claimant felt he slept adequately but feels tired in the morning and takes a nap for half an hour a day. (CX 1). When Dr. James examined Claimant, he noted that the chest showed "normal respiratory excursions," and that the heart was at a "regular rate, no gallop, no murmurs, regular radial pulse." (CX 1). He also noted that there was no cyanosis or clubbing in the extremities and no pitting ankle edema. (CX 1). Claimant's exercise oximetry showed a mild decline in oxygen saturation with activity. (CX 1). His spirometry tests showed a mild airflow limitation. (CX 1). His resting arterial blood gas test showed PCO2 at 35.8 and pO2 at 59, with oxygen saturation 91%. (CX 1). Dr. James also reviewed Claimant's echocardiogram, dated October 13, 2009, and noted "grade 1 diastolic left ventricular dysfunction: abnormal relaxation with normal to mildly elevated filling pressures. Estimated ejection fraction 60%." (CX 1).

A high resolution CT scan was conducted of Claimant's chest. (CX 1, CX 5). Dr. James reviewed the CT scan, and his impression was "no nodular interstitial lung disease. There is mild septal thickening in the lung bases. Mild interstitial linear changes along the bases." (CX 1).

Dr. James also reviewed Dr. Morgan's office note, dated July 23, 2008, as well as Dr. Repsher's medical evaluation report dated December 22, 2008. After Dr. James's examination of Claimant and review of the relevant medical evidence, he came to the following impression:

1. Chronic obstructive pulmonary disease. Mr. Thompson has shortness of breath with exertion. He has a regular morning cough and phlegm production for at least 4 to 5 years. There is airflow limitation on lung function testing. This is not chronic bronchitis. There is airflow limitation present and has been observed on previous lung function testing. The airflow limitation would be less likely explained by asthma. There was no significant change with bronchodilators on lung function testing. He has no history of asthma or allergic rhinitis. There was no wheezing on exam.
2. No evidence of coal workers' pneumoconiosis. There are no nodular interstitial changes on chest CT.
3. Mild left ventricular diastolic dysfunction. The ejection fraction was in the normal range of 60%. There is no clinical evidence of heart failure on physical examination.
4. Abnormal sleep history. There is snoring and some morning fatigue. Mr. Thompson is overweight, increasing his risk of developing obstructive sleep apnea.

(CX 1).

Dr. James stated in his report that the cause for Claimant's symptoms is chronic obstructive pulmonary disease. (CX 1). He noted Claimant's significant exposure to coal mine dust over approximately 20 years as a coal miner with 14 years above ground, and noted that Claimant worked in some very dusty conditions in the mine, including as a driller. (CX 1). He stated that

"chronic inhalation exposure to coal mine dust is a risk factor for development of chronic obstructive pulmonary disease." CX1. He then went on to state:

> With a reasonable degree of medical certainty, Mr. Thompson's chronic obstructive pulmonary disease developed from his exposure to chronic coal dust. It is a chronic respiratory inhalation disease resulting from his employment as a coal miner. He has no other significant respiratory exposure to increase his likelihood of developing chronic obstructive pulmonary disease. There are no other likely causes of his airflow limitation and chronic productive cough other than chronic obstructive pulmonary disease.

(CX 1).

Dr. James concluded that Claimant has the following impairment:

> Mr. Thompson has mild abnormalities on lung function testing with the FEV1 of 84% predicted prebronchodilator and 86% predicted postbronchodilator. He has mild decline of oxygen saturation with activity. His arterial blood gas does meet impairment standards outlined by the US Department of Labor. For an altitude of 4500 feet for a PCO2 of 36 the PO2 needs to be equal to or less than 59. Mr. Thompson's PO2 was 59. The PCO2 is within normal limits and there is no evidence of hypoventilation. Mr. Thompson has mild diastolic dysfunction on the echocardiogram but the ejection fraction was normal. The diastolic dysfunction would not result in the PO2 of 59

> mmHg. There was no evidence of pulmonary hypertension on the echocardiogram. More likely than not, Mr. Thompson's chronic obstructive pulmonary disease is the cause of the qualifying PO2 of 59.

(CX 1).

Dr. James then stated that Claimant's prior work requirements as a miner were physically demanding. (CX 1). He concluded "with a reasonable degree of medical certainty" that Claimant would be unable to perform the usual duties of his prior position of coal mine employment as because of his obstructive pulmonary disease. As a result, Claimant is totally disabled from his usual coal mine employment. (CX 1).

Dr. James submitted an additional report on March 19, 2010 after reviewing Dr. Repsher's reports dated October 28, 2009, and November 18, 2009. (CX 10). He stated in his report that Claimant's "arterial blood gas value from his September 17, 2009 visit shows an abnormal A-a gradient….His A-a gradient was calculated at 19.5 mmHg. The age-adjusted A-a gradient was 17.0." (CX 10). Dr. James also noted

> Mr. Thompson underwent pulmonary function studies as part of his evaluation that was conducted in Grand Junction by myself on 9/17/2009. The pre and post spirometry meet ATS criteria. The FEV1/FVC percentage pre bronchodilator was 67 with a predicted value of 77%. The normal difference between the predicted and measured FEV1/FVC ratio for males is 8.3% or less. Mr. Thompson's FEV1 predicted minus measured pre and post

> bronchodilators was 14% and 10%, respectively. These values are abnormal and are consistent with air flow limitation. As I stated in my original report, based on the FEV1, these values are consistent with a mild air flow obstructive process.
>
> These above findings are consistent with and do not significantly change my impression and opinions outlined in my original report from my evaluation of Mr. Thompson that took place 9/17/2009.

(CX 10).

Treatment Records- Dr. Max Morgan

The Claimant submitted four office reports as treatment records by his primary care physician, Dr. Morgan, F.A.A.F.P. (CX 8).

In the first office report, dated December 4, 2007, Dr. Morgan had conducted an MRI to determine the cause of unrelated pain primarily in the epigastrium of his abdomen. CX8. The MRI showed "linear scarring and atelectasis of the right lung base. There is also some present in the left lung base." CX8. He recommended a repeat CT scan of Claimant's lungs, as well as "black lung x-rays" because of possible black lung disease. CX8.

Dr. Morgan's second office report, dated July 21, 2008, stated that Claimant had "cough and congestion of several years duration. Intermittent in nature. Sometimes cough is productive of a gray-white sputum worse in the am upon rising." CX8. He noted that Claimant's cough and wheezing were chronic, and that

he had never smoked. CX8. He noted that Claimant had "scattered wheezes, decreased breath sounds," and had an "increased AP diameter of the chest." CX8. He found that Claimant's heart had no evidence of murmur, gallop, or rub, and was not enlarged. CX8. He also did not find any evidence of clubbing, cyanosis, or edema in the extremities. CX8.

The third office report, dated July 23, 2008, commented on the findings of the examination performed on July 21, 2008, as well the CT scan performed on the same date. CX8. He commented that "in the past several months the cough and symptoms have worsened." CX8. His assessment based on his examination and the CT scan was "pneumoconiosis, fibrous changes on CT scan with scarring in lung bases, chronic obstructive pulmonary disease, clinical pneumoconiosis." CX8. Dr. Morgan's impression was that Claimant has coal workers pneumoconiosis, and "it does interfere with his daily living and even impairs his ability to perform his usual hobbies." CX8.

In the fourth office report, dated January 15, 2009, Claimant had visited Dr. Morgan with his chief complaint being sinus congestion. CX8. He again noted that Claimant had "cough and congestion of several years duration. Intermittent in nature. Some times cough is productive of a gray-white sputum worse in the am upon rising. Has had wheezing and cough chronically." CX8. He wrote in his report that his review of the x-rays "reveal pulmonary fibrosis and probably pneumoconiosis. He complains of nasal stuffiness every night. He denies dyspnea only with severe exertion but not to [sic] often." CX8. He noted that there was no change in Claimant's medical history

since his last visit on July 21, 2008. CX8. He observed that Claimant had decreased breath sounds and scattered wheezes. CX8. Claimant's heart also had not changed- there was no murmur, gallop or rub, and was not enlarged. CX8. Dr. Morgan assessed Claimant with chronic obstructive pulmonary disease and pneumoconiosis. CX8. He also stated that home oxygen may be needed. CX8.

Conclusion

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, 10 B.L.R. 1-19. Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

Dr. James properly considered whether Claimant had clinical or legal pneumoconiosis. He considered Claimant's history of working in the coal mines as well as a variety of medical tests and Claimant's reported symptoms. He concluded Claimant had chronic obstructive pulmonary disease. He maintained that pulmonary function testing was valid and supported

the diagnosis, as did the arterial blood gas study results. He noted there was no hypertension seen on the echocardiogram. He further observed that chronic inhalation exposure to coal mine dust is a risk factor for development of COPD. He explained that Claimant had no other significant respiratory exposure that would have increased his likelihood for developing COPD. I find Dr. James's opinion well-documented in that it is based on his examinations of Claimant and objective testing. I also find his opinion to be well-reasoned in that the underlying testing supports his diagnosis of COPD and its cause being coal dust exposure. If a physician concludes that the miner suffers from chronic obstructive pulmonary disease arising out of coal mine employment, then his/her opinion supports a finding of "legal" coal workers' pneumoconiosis. *See, e.g., Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996). Therefore, I give great weight to Dr. James's opinion that Claimant has legal pneumoconiosis.

Dr. Gagon diagnosed Claimant with chronic bronchitis manifested in hypoxia with exercise and chronic productive cough. He noted Claimant has no history of smoking and concluded the etiology is in coal dust exposure. Dr. Gagon conducted a physical examination and reviewed a chest x-ray, pulmonary function test, and arterial blood gas study prior to concluding Claimant had a cardiopulmonary disease caused by coal dust exposure. I find his opinion adequately documented and reasoned.

I also give weight to the diagnoses contained in the treatment records of Dr. Morgan. Dr. Morgan was the Claimant's primary care physician. At 20 C.F.R.

§ 718.104(d) (2008), the amended regulations set forth specific considerations in weighing a treating physician's opinion, including the nature and duration of the relationship and the frequency and extent of treatment. I find Dr. Morgan treated the Claimant for respiratory problems and the duration of the relationship allowed him to gain a more in-depth understanding of the Claimant's condition. Over the course of his treatment of the Claimant, Dr. Morgan conducted physical examinations, reviewed x-rays, a CT scan, an MRI, spoke with the claimant, and checked his heart. Dr. Morgan was aware of the Claimant's history as a coal mine worker and diagnosed him with COPD and pneumoconiosis.

Dr. Repsher opined that Claimant did not suffer from any respiratory or pulmonary disease, and that the real cause of his symptoms was congestive heart failure. However, he did not adequately explain why he believed coal mine dust exposure did not contribute to Claimant's impairment, which he attributed entirely to heart failure, despite a lack of medical evidence in the record of Claimant complaining of or being treated for any heart disease. He stated that further evaluation would be needed to confirm that Claimant has left ventricular congestive heart failure and his opinion that he did was based on symptoms rather than objective data. (CX 5 at 35). Dr. Repsher did address the possibility of Claimant having COPD and bronchitis. He dismissed the pulmonary function test that suggested mild COPD as being a result of a lack of cooperation on the part of Claimant. He also agreed that Claimant presented with symptoms of chronic bronchitis, but he opined it couldn't be related to coal dust exposure because his exposure was minimal and

he had been out of the mines for more than a year. (EX 5 at 31). I find both opinions not well-supported. Claimant's effort on the pulmonary function test was evaluated as good. Dr. Repsher's dismissal of Claimant's dust exposure as minimal is also not supported by Claimant's employment history, which shows significant dust exposure. The fact that Dr. Repsher failed to provide substantive evidence that would support his assertion that Claimant suffers from heart failure (other than symptoms that could also be symptoms of a respiratory disease), and his dismissal of Claimant's coal mine employment as a factor in any illness the Claimant may have (including chronic bronchitis) leads me to give less weight to his opinion.

I find Dr. James's diagnosis of legal pneumoconiosis to be credible and entitled to probative weight. I weigh it against Dr. Repsher's opinion. Dr. Repsher opined Claimant's symptoms were caused by left ventricular congestive heart failure while admitting no objective data showed such a diagnosis. Dr. Repsher also failed to adequately explain why coal dust exposure could not have exacerbated Claimant's symptoms. Because his report is inadequately reasoned and not well documented I give it less probative weight. Dr. James's opinion is better supported by the objective medical data of record. Therefore, I find based on medical opinion evidence, Claimant has legal pneumoconiosis. Consequently, Employer has not rebutted the presumption by disproving the existence of pneumoconiosis.

Cause of Pneumoconiosis

Except as provided by Section 718.204(d), the cause or causes of a miner's total disability shall be

established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2). Section 718.204(d) controls the admission of lay evidence to prove total disability. Employer submitted no lay testimony, so § 718.204 is irrelevant to this analysis. Employer can therefore only rebut the presumption through a physician's documented and reasoned medical report. The only medical reports submitted by employer were from Dr. Repsher. (EX 4, 6, 11).

Dr. Repsher asserted in his medical reports that Claimant did not suffer from any respiratory or pulmonary disease, and that the real cause of his symptoms was congestive heart failure. I have given his opinion less weight and found that Claimant does suffer from pneumoconiosis. I found that Dr. James diagnosed Claimant with legal pneumoconiosis in a well-reasoned and well-documented opinion supported by the diagnoses of Dr. Gagon and Dr. Morgan. A finding of legal pneumoconiosis necessarily requires a finding that Claimant's impairment arose out of his coal mine employment.

ENTITLEMENT

The Claimant has established that he suffers from pneumoconiosis which is totally disabling and is caused by his coal mine employment. Therefore, he is entitled to benefits under the Act.

Section 725.503(b) of the Regulations provides that payment of benefits is to commence with the month of onset of total disability, but that if the evidence does not establish the month of onset, payment of benefits shall begin with the month in which the claim was

filed. 20 C.F.R. § 725.503(b). While the date of the filing is the preferred onset date, this Regulation gives the undersigned the discretion to assign an alternate onset date, if the record contains clear evidence establishing that the Claimant was totally disabled as of a date other than the date of filing. *Johnson v. Director*, 1 B.L.R. 1-600 (1978). However, benefits may not be assessed prior to the fulfillment of the conditions of entitlement to benefits, one such condition being the filing of a claim. *Zimmerman v. Glen-Nan, Inc.*, 2 B.L.R. 1-674 (1979). Accordingly, although the Claimant's testimony and the medical evidence suggest that he may have been disabled prior to the filing of his claim, it is found that the date of onset of total disability is the date beginning with the month in which the Claimant filed his claim, February 2008.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application has been received. Thirty days is hereby allowed to Claimant's counsel for submission of such an application and his attention is directed to §§ 724.365 and 725.366 of the Regulations. A service sheet showing that services has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits under the Act is hereby **GRANTED**. Consolidation Coal Company is hereby ordered to pay Claimant all benefits to which he is

entitled, under the Act and Regulations commencing February 2008.

/s/R K Malamphy
Richard K. Malamphy
Administrative Law Judge

RKM/sav
Newport News, Virginia

* * *

[*Notice of Appeal Rights and Service Sheet Omitted in the Printing of this Appendix*]

APPENDIX H

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-9524

[Filed July 25, 2017]

CONSOLIDATION COAL COMPANY,	)
	)
Petitioner,	)
	)
v.	)
	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; KIRK HANNA, Personal Representative on behalf of the Estate of Judy K. Noyes,	)
	)
Respondents.	)

Petition for Review from and Order
of the Benefits Review Board
(Benefits No. 15-0228 BLA)

Cheryl L. Intravaia, Feirich/Mager/Green/Ryan, Carbondale, Illinois, for Petitioner.

Sean G. Bajkowski, Counsel for Appellate Litigation, U.S. Department of Labor, Office of the Solicitor, Washington, D.C. (M. Patricia Smith, Solicitor of Labor, Maia S. Fisher, Acting Associate Solicitor, and Emily Goldberg-Kraft, Attorney, United States Department of Labor, Office of the Solicitor, Washington, D.C., with him on the brief), for Director, Office of Workers' Compensation Programs, Respondent.

Jared L. Bramwell, Kelly & Bramwell, P.C., Draper, Utah, for Kirk Hanna, Respondent.

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

LUCERO, Circuit Judge.

Consolidation Coal ("Consolidation") seeks review of a decision by the Department of Labor ("DOL") awarding survivor's benefits to Judy Noyes under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-944. The administrative law judge ("ALJ") assigned to the case determined that Mrs. Noyes was entitled to a statutory presumption that the death of her husband, James Noyes, resulted from his exposure to coal dust in underground coal mines. The ALJ further concluded that Consolidation failed to rebut that presumption by showing either that Mr. Noyes did not suffer from pneumoconiosis or that pneumoconiosis did not cause his death. In its petition for review, Consolidation argues that the ALJ erred in retroactively applying the rebuttal standard from DOL's revised regulations to Mrs. Noyes' claim for benefits. Further, the company

contends that the ALJ's determination that Consolidation failed to meet its burden of rebuttal is not supported by substantial evidence.

We hold that the ALJ permissibly applied the rebuttal standard from the revised regulations to Mrs. Noyes' claim. The statutory presumption under 30 U.S.C. § 921(c)(4) encompasses both clinical and legal pneumoconiosis. And the rebuttal standard set forth in 20 C.F.R. § 718.305(d)(2)(ii), which requires an employer to effectively "rule out" any causal connection between pneumoconiosis and the miner's death, is consistent with the requirements of the Administrative Procedure Act ("APA") and the purposes underlying the BLBA. That standard may further be applied retrospectively to claims, like Mrs. Noyes', that were filed prior to the effective date of the revised regulations.

However, we agree with Consolidation that the ALJ incorrectly stated the revised rebuttal standard in analyzing Mrs. Noyes' claim. Exercising jurisdiction under 33 U.S.C. § 921(c) and 30 U.S.C. § 932(a), we grant Consolidation's petition for review and remand for further proceedings.

I

A

The BLBA provides benefits to coal miners and their surviving dependents for death or disability due to certain respiratory diseases known as "pneumoconiosis" arising out of coal-mine employment. 33 U.S.C. § 901. There are two types of pneumoconiosis under the BLBA: "clinical" and "legal." 20 C.F.R. § 718.201(a). Clinical pneumoconiosis refers to a group

of diseases that are "recognized by the medical community as pneumoconiosis" and "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." § 718.201(a)(1). Legal pneumoconiosis, in contrast, "encompasses a broader class of lung diseases that" do not all constitute "pneumoconiosis as the term is used by the medical community." Andersen v. Dir., OWCP, 455 F.3d 1102, 1104 (10th Cir. 2006). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," including "any chronic restrictive or obstructive pulmonary disease" arising out of such employment. § 718.201(a)(2). A disease "aris[es] out of coal mine employment" if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." § 718.201(b).

An individual claiming survivor's benefits under the BLBA must generally show that: (1) the miner had pneumoconiosis; (2) the miner's pneumoconiosis arose out of coal-mine employment; and (3) the miner's death was due to pneumoconiosis. § 718.205(a). Congress has enacted various presumptions intended to ease a claimant's burden of establishing entitlement to benefits. See generally 30 U.S.C. § 921(c). Under § 921(c)(4), a survivor is entitled to a "rebuttable presumption that . . . [a miner's] death was due to pneumoconiosis" if the "miner was employed for fifteen years or more in one or more underground coal mines" and "evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment." Id.

This fifteen-year presumption was created in 1972. See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4(c), 86 Stat. 150, 154. It was repealed in 1981. See Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 202(b)(1), 95 Stat. 1635, 1643. In 2010, however, Congress revived the presumption as to all claims filed after January 1, 2005, and pending on or after March 23, 2010. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a), (c), 124 Stat. 119, 260 (2010). DOL subsequently issued a regulation providing that a party opposing a survivor's claim may rebut the presumption by establishing that the miner did not have either legal pneumoconiosis or clinical pneumoconiosis arising out of coal-mine employment, or by demonstrating that "no part of the miner's death was caused by pneumoconiosis." § 718.305(d)(2). Although this new regulation went into effect on October 25, 2013, see Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act, 78 Fed. Reg. 59,102, 59,102 (Sept. 25, 2013), it applies to all claims covered by the statutory amendment. § 718.305(a).

B

Between 1976 and 2004, Mr. Noyes worked as a foreman supervisor, mine manager, and mine superintendent for three different coal mining operations in Utah, totaling twenty-two years of coal-mine employment. Mr. Noyes was also a long-time smoker. He died on February 11, 2008, after a prolonged battle with various respiratory conditions, including emphysema/chronic obstructive pulmonary disease ("COPD"), pneumonia, and lung cancer.

In 2008, Mrs. Noyes filed an application for survivor's benefits under the BLBA.[1] Her claim was initially denied on September 3, 2009. While her administrative appeal was pending before DOL's Office of Administrative Law Judges, Congress restored the fifteen-year presumption found in § 921(c)(4). See § 1556(a), (c), 124 Stat. at 260. The ALJ, Richard Malamphy, denied Consolidation's request to remand the case to the District Director for the development of additional evidence in response to the restored presumption. ALJ Malamphy concluded that a remand was unnecessary because his review was de novo and the parties would have the opportunity to submit new evidence regarding the statutory change.

Following a formal hearing, ALJ Malamphy denied Mrs. Noyes' application for benefits, concluding she had failed to establish that pneumoconiosis was a substantially contributing cause or factor in her husband's death. DOL's Benefits Review Board ("BRB") vacated the decision and remanded for consideration of whether Mrs. Noyes was entitled to invoke the fifteen-year presumption under § 921(c)(4). In a new order, ALJ Malamphy determined that the presumption applied and had not been rebutted. He consequently awarded benefits to Mrs. Noyes. Consolidation appealed, and the BRB vacated the ALJ's decision in part for failure to give Consolidation an opportunity to disprove the existence of legal pneumoconiosis before discrediting the employer's rebuttal evidence. The case was remanded to a new ALJ, Paul Johnson, who awarded benefits. Applying the fifteen-year

[1] Mrs. Noyes passed away after filing her claim. Kirk Hanna, the personal representative of her estate, is the respondent.

presumption and the rebuttal standard under § 718.305(d), ALJ Johnson determined that Consolidation had failed to rebut the presumption of death due to pneumoconiosis. The BRB affirmed. Consolidation filed a timely petition for review with this court.

II

Consolidation raises several legal challenges to the BRB's decision. We review the BRB's resolution of legal questions de novo. Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1342 (10th Cir. 2014). In conducting this review, "[w]e give no deference to the [BRB's] interpretation" but accord "considerable weight to [DOL's] construction of the statute it is entrusted to administer and substantial deference to the agency's reasonable interpretation of its own regulations, unless such interpretation is plainly erroneous or inconsistent with the regulation." Id. (quotations, citations, and alteration omitted).

A

Consolidation first argues that § 718.305(d) constitutes an impermissible construction of the BLBA. With respect to claims for survivor's benefits under the Act, that regulation provides that a company may rebut the fifteen-year presumption by:

> (i) Establishing both that the miner did not have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment . . . ; or

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in § 718.201.

§ 718 .305(d)(2). Consolidation contends that the fifteen-year presumption applies only to clinical pneumoconiosis and thus the regulation impermissibly requires a showing that the miner did not have legal pneumoconiosis. We disagree.

Section 921(c)(4) creates a rebuttable presumption that a "miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis" if certain requirements are met. Id. Although "pneumoconiosis" was originally understood to encompass only those diseases recognized as pneumoconiosis by the medical community, the definition was broadened in 1978. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95, 95 (1978); see also Andersen, 455 F.3d at 1106. The BLBA now defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

Following this statutory amendment, numerous circuits recognized that the revised definition encompasses both legal and clinical pneumoconiosis. See, e.g., Gulf & W. Indus. v. Ling, 176 F.3d 226, 231-32 & n.12 (4th Cir. 1999); Bradberry v. Dir., OWCP, 117 F.3d 1361, 1368 (11th Cir. 1997); Consolidation Coal Co. v. Hage, 908 F.2d 393, 395-96 (8th Cir. 1990). And in 2000, DOL promulgated regulations expressly codifying this interpretation. See § 718.201(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed.

Reg. 79,920, 79,937 (Dec. 20, 2000) (explaining that regulation was intended to "conform . . . to the terminology uniformly adopted by the courts to distinguish between the two forms of lung disease compensable under the statute: pneumoconiosis, as that disease is defined by the medical community, and any chronic lung disease arising out of coal mine employment"). There appears to be no dispute that the term pneumoconiosis is generally used in the statute to refer to both clinical and legal pneumoconiosis. See, e.g., § 921(a) (providing for "payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis").

Thus, for purposes of the BLBA, "pneumoconiosis" has been consistently defined—statutorily, judicially, and administratively—to include a wide range of respiratory and pulmonary conditions arising out of coal-mine employment that do not all constitute pneumoconiosis as the term is used by the medical community. "Under settled canons of statutory construction, we presume that identical terms in the same statute have the same meaning." United States v. Richards, 87 F.3d 1152, 1157 (10th Cir. 1996). Accordingly, we must presume that the BLBA's broad definition of "pneumoconiosis" also applies to the fifteen-year presumption contained in § 921(c)(4).

Consolidation argues that our decision in Andersen mandates a contrary conclusion. There, we held that a different presumption under § 921(c)(1) extends only to clinical pneumoconiosis, despite the canon of consistent usage. Andersen, 455 F.3d at 1106. However, we reached that conclusion only because reading the

particular language of that subsection to include legal pneumoconiosis would create "an absurd result." Id. Section 921(c)(1) provides: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment." Id. As we noted in Andersen, this presumption is helpful to a claimant with clinical pneumoconiosis, who is only required to show "that he is afflicted with a disease considered by the medical community as pneumoconiosis." 455 F.3d at 1106. The presumption supplies a causal link between clinical pneumoconiosis and coal-mine employment, which is a prerequisite to obtaining benefits. Id. In contrast, the provision is redundant as applied to legal pneumoconiosis. Only those lung diseases "arising out of coal mine employment" qualify as legal pneumoconiosis. § 718.201(a)(2). Thus, in the context of these claims, § 921(c)(1) would provide that "a miner with over ten years of coal-mine employment who proved his obstructive lung disease arose out of coal-mine employment, and thus proved he suffers from legal pneumoconiosis, would receive a presumption his pneumoconiosis arose out of coal-mine employment." Andersen, 455 F.3d at 1106.

Our holding in Andersen was required to avoid this circularity. But there is no circularity with respect to § 921(c)(4), which establishes that a miner who worked for fifteen years in underground coal mines and had a totally disabling respiratory or pulmonary impairment is presumed to have died as the result of pneumoconiosis. Id. In contrast to § 921(c)(1), this provision creates no redundancy or overlap with the definition of legal pneumoconiosis. Accordingly, we do

not see any reason to depart from the general, inclusive definition of pneumoconiosis employed throughout the BLBA. See Andersen, 455 F.3d at 1103-04 & n.2 (recognizing that the term "pneumoconiosis" has generally been interpreted to include both clinical and legal pneumoconiosis).

Our conclusion accords with decisions by this court and our sibling circuits. Although they have not directly addressed the issue presented in this case, several decisions have applied the fifteen-year presumption to legal pneumoconiosis. See, e.g., Antelope Coal Co., 743 F.3d at 1345-46 (holding substantial evidence supported ALJ's finding that employer failed to rebut presumption that miner suffered from legal pneumoconiosis); Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013) (same); Consolidation Coal Co., v. Dir., OWCP, 721 F.3d 789, 795-96 (7th Cir. 2013) (same). Moreover, the only case the parties cite explicitly interpreting the meaning of "pneumoconiosis" under § 921(c)(4) concluded that the 15-year presumption extends to claims of legal pneumoconiosis. See Barber v. Dir., OWCP, 43 F.3d 899, 900-01 (4th Cir. 1995).

Congress revived the fifteen-year presumption in 2010 against the backdrop of Barber and DOL regulations defining "pneumoconiosis" to include both clinical and legal definitions. We presume that Congress was aware of these interpretations of the BLBA. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); see also W. Va. CWP Fund

v. Bender, 782 F.3d 129, 140 (4th Cir. 2015) (assuming that Congress intended to retain prior administrative standards when it reenacted the statutory presumption in 2010).[2]

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[2] Consolidation argues that the fifteen-year presumption is predicated on the close causal connection between clinical pneumoconiosis and coal-mine employment, and that such a connection is lacking with respect to legal pneumoconiosis. It relies on two studies concerning the prevalence of pneumoconiosis among coal miners.

The first study, which is cited in the Appendix to the House Report on the 1978 amendments to the BLBA, showed that 88% of coal miners with more than fifteen years of underground mining employment had coal workers' pneumoconiosis. H. Rep. 95-151, at 31 (1977), as reprinted in 1978 U.S.C.C.A.N. 237, 267. Consolidation claims that the fifteen-year presumption was "based on" this finding. Yet the presumption was enacted nearly six years prior to issuance of the cited House Report. See Black Lung Benefits Act of 1972, § 411(c)(4), 86 Stat. at 154. Consolidation does not cite any evidence suggesting that this particular study was considered prior to that enactment. See Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) (noting that "post-enactment legislative history by definition could have had no effect on the congressional vote" (quotation omitted)).

The second study cited by Consolidation indicates that only 7.7% of nonsmoking miners with high coal-dust exposure develop severe respiratory obstruction. See Regulations Implementing the Federal Coal Mine Health and Safety Act, as Amended, 65 Fed. Reg. at 79,940. Consolidation argues that this lower percentage cannot support a legal presumption of total disability or death due to legal pneumoconiosis. We fail to see how this study sheds light on Congress' intent as to the fifteen-year presumption. But in any event, the study is inapposite. It reflects the incidence of respiratory impairment among all miners, healthy or unhealthy. The fifteen-year presumption requires a claimant to demonstrate that he is totally disabled due to a respiratory condition, § 921(c)(4), and thus miners who successfully invoke the

To the extent there is any remaining ambiguity as to whether the fifteen-year presumption applies to both clinical and legal pneumoconiosis, we must defer to DOL's reasonable interpretation of the statute. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984); Andersen, 455 F.3d at 1103 (recognizing we give "considerable weight" to DOL's interpretation of the BLBA (quotation omitted)). Based on the foregoing analysis, we conclude that the BRB permissibly applied the fifteen-year presumption to legal pneumoconiosis.

B

Consolidation argues that even if the fifteen-year presumption applies to legal pneumoconiosis, the rebuttal standard under § 718.305(d) violates the APA by shifting the burden of persuasion to the party opposing entitlement. The APA states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).[3] The APA applies to adjudications under the BLBA, unless regulations of the Secretary provide otherwise. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 919(d), which applies the APA to claim adjudications "except as otherwise provided . . . by regulations of the Secretary"); Greenwich Collieries, 512 U.S. at 271. Accordingly, "[t]he burden of proof mandated by the APA is a default rule that applies in the BLBA context

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presumption have already shown that they fall within the class of miners with significant pulmonary dysfunction.

[3] "The phrase "burden of proof" under § 556(d) refers to the burden of persuasion. Dir., OWCP v. Greenwich Collieries, 512 U.S. 267, 275-76 (1994).

only in the absence of an express statutory or regulatory provision to the contrary." Nat'l Mining Ass'n v. Chao, 160 F. Supp. 2d 47, 70 (D.D.C. 2001), rev'd in part on other grounds, Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849 (D.C. Cir. 2002).

We conclude that the BLBA shifts the burden of proof by statute and thus § 556(d) does not apply. Section 921(c)(4) provides that if a miner had a totally disabling respiratory impairment after fifteen years of mine work, "there shall be a rebuttable presumption . . . that his death was due to pneumoconiosis." Id. The provision further states that this presumption may be rebutted "only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine" Id. As we recognized in Bosco v. Twin Pines Coal Co., 892 F.2d 1473 (10th Cir. 1989), the statute "thus shifts the burden to defendants to establish the lack of pneumoconiosis and/or a connection with mine work." Id. at 1481. Other circuits have similarly stated that a claimant's successful invocation of the fifteen-year presumption shifts the burdens of production and persuasion to the employer. See, e.g., Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 479 (6th Cir. 2011) ("Under the [Patient Protection and Affordable Care Act], which revives the 15-year presumption, the burden of production and persuasion lies on the employer . . . to rebut the presumption of disability due to pneumoconiosis."); Blakley v. Amax Coal Co., 54 F.3d 1313, 1320 (7th Cir. 1995) ("The burden of proof lies on the employer to rebut the [fifteen-year] presumption."); U.S. Steel Corp. v. Gray, 588 F.2d 1022, 1027-28 (5th Cir. 1979) (explaining that once the

fifteen-year presumption is triggered, "[t]he statute shifts to the Secretary or to the mine operator the burden . . . to prove by a preponderance of evidence that the claimant does not suffer pneumoconiosis . . . or that the impairment is not connected with his employment in the mines").

Consolidation's citation to Greenwich Collieries does not alter our conclusion. There, the Supreme Court held that DOL's "true doubt" rule, which provided that a benefits claimant would win if the evidence was in equipoise, violated the APA by shifting the burden of persuasion to the party opposing entitlement. Greenwich Collieries, 512 U.S. at 281. But DOL failed to identify a statute authorizing such burden shifting and accordingly lacked a legal basis for departing from the default rule under the APA. In this case, however, § 921(c)(4) shifts the burden at issue; thus, the default burden set forth in § 556(d) does not apply.

C

Consolidation also contends that the "rule-out" standard contained in § 718.305(d)(2)(ii) is impermissibly high. Under that provision, an employer may rebut the fifteen-year presumption by "[e]stablishing that no part of the miner's death was caused by pneumoconiosis." § 718.305(d)(2)(ii). In other words, an employer must rule out any relationship between pneumoconiosis and the miner's death. See Antelope Coal Co., 743 F.3d at 1337 (discussing rule-out standard for miner claims).

As we noted in Antelope Coal Co., our court previously applied a rule-out standard to a similar presumption of pneumoconiosis triggered by proof of

total disability and ten years' coal-mine employment. See id. at 1336 (citing Rosebud Coal Sales Co. v. Weigand, 831 F.2d 926, 928-29 (10th Cir.1987)). To rebut that presumption, employers were required to show that "total disability or death of the miner did not arise in whole or in part out of coal mine employment." Rosebud Coal Sales Co., 831 F.2d at 928 (quoting 20 C.F.R. § 727.203(b)(3) (1987)). In Rosebud Coal, we rejected the argument that this standard only required an employer to show that disability or death did not arise in "significant part" from coal-mine employment. Id. We reasoned that such an interpretation was "wholly at odds with the decisions rendered by six courts of appeals, including this court, which apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal employment be ruled out." Id. Those decisions, which we cited in Rosebud Coal, upheld the "rule-out" standard as a permissible construction of the BLBA. See, e.g., Carozza v. U.S. Steel Corp., 727 F.2d 74, 78 (3rd Cir. 1984); Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123-24 (4th Cir. 1984); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1120 (6th Cir. 1984); Ala. By-Products Corp. v. Killingsworth, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984).

Two of our sibling circuits have likewise concluded that the rule-out standard in the current regulations is consistent with the BLBA. Relying on its prior decision in Massey, the Fourth Circuit held that "the rule-out standard set forth in Section 718.305(d) is a reasonable exercise of the agency's authority . . . and lawfully applies to coal mine operators." Bender, 782 F.3d at 143. Specifically, the court noted that the alternative standard urged by employers, under which they would

only have to show that pneumoconiosis was not a "substantially contributing cause" of a miner's death or disability, "effectively would nullify the statutory presumption for coal miners . . . whom Congress intended to assist." Id. at 141. That "standard would track, in the negative, the evidentiary burden placed on a miner who has not qualified for the statutory presumption." Id. Thus, "a miner entitled to the statutory presumption nevertheless would be placed back at square one, forced to prove the substantial impact of pneumoconiosis on his disability, which is the very situation that Congress intended to eliminate in enacting the presumption." Id. at 141-42 (quotations omitted).

The Third Circuit recently ruled in accord. See Helen Mining Co, v. Elliot, ___ F.3d ___, 2017 WL 2562585 (3d Cir. June 14, 2017). It upheld the rule-out standard as "not merely . . . a reasonable construction of an ambiguous statute, but as the proper construction of the statute as Congress intended it." Id. at *8. Congress crafted the fifteen-year presumption because it "had become dissatisfied with the increasing backlog of unadjudicated claims and the relatively high rate of claim denials under the original Act, and it sought to give preference to those miners most at risk for disease because of their long-term coal dust exposure." Id. (quotation, citation, and alteration omitted). According to the court, "[p]lacing a heightened burden on the party seeking to overcome the presumption" responds to these concerns and is thus a "permissible exercise of the Secretary's rulemaking power." Id. at *8-9.

We are persuaded by the foregoing analyses. The rule-out standard contained in § 718.305(d)(2) is

consistent with both Congress' intent in enacting the fifteen-year presumption and the broad remedial purposes of the BLBA. See Bridger Coal Co. v. Dir., OWCP, 669 F.3d 1183, 1190 (10th Cir. 2012) (because the BLBA "is intended to be remedial in nature, . . . doubts should be resolved in favor of the disabled miner or his or her survivors"). We agree with the Fourth Circuit that the alternative interpretation proposed by Consolidation, which mirrors the standard for claims not subject to the fifteen-year presumption by utilizing a significant or substantial factor test, would undermine Congress' intent in passing § 921(c)(4). See Bender, 782 F.3d at 141.

D

Consolidation lastly asserts that the retroactive application of § 718.305(d)(2) violates its right to due process. The revised regulations went into effect on October 25, 2013, nearly five years after Mrs. Noyes filed her claim for benefits; however, they govern all claims filed after January 1, 2005, and pending on or after March 23, 2010. § 718.305(a).

In Antelope Coal Co., we upheld this retrospective application of the new rebuttal standard contained in § 718.305(d)(1). Antelope Coal Co., 743 F.3d at 1342. As we explained, a revised regulation that is "substantively consistent with prior regulations or prior agency practices, and has been accepted by all Courts of Appeals to consider the issue," may be applied to pending cases. Id. (quotation omitted). After concluding that the revisions to § 718.305(d)(1) satisfied this requirement, we upheld the ALJ's application of the rule-out standard in that provision to a miner's claim for benefits, which, like Mrs. Noyes',

was filed prior to the effective date of the revised regulations. Antelope Coal Co., 743 F.3d at 1337, 1346. Although Consolidation challenges the retroactive application of subsection (d)(2) rather than (d)(1), the two provisions are nearly identical and implement the same section—§ 921(c)(4)—of the BLBA. Compare § 718.305(d)(1) (providing that party opposing miner's claim for benefits may rebut presumption by establishing the miner did not have legal or clinical pneumoconiosis or "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis"), with § 718.305(d)(2) (providing that party opposing survivor's claim for benefits may rebut presumption by establishing the miner did not have legal or clinical pneumoconiosis or "that no part of the miner's death was caused by pneumoconiosis"). Our decision in Antelope Coal Co. therefore controls the analysis in this case. We hold accordingly that § 718.305(d)(2) may be applied retrospectively to benefits claims that were filed before the regulation's effective date.[4]

[4] This conclusion compels us to reject Consolidation's related argument that it is entitled to an opportunity to develop further evidence in light of the revised rebuttal standard. Because the revisions to § 718.305(d) did "not substantively change the law," Antelope Coal Co., 743 F.3d at 1342, Consolidation was not deprived of a meaningful hearing under the APA or its right to due process. See Blue Mountain Energy v. Dir., OWCP, 805 F.3d 1254, 1262 (10th Cir. 2015) (rejecting argument that APA required ALJ to reopen record to allow employer to respond to findings of regulatory preamble because employer was aware of preamble's scientific findings and had ample opportunity to challenge them).

III

Although we reject Consolidation's constitutional and statutory arguments, we are persuaded by its contention that the ALJ incorrectly stated the revised rebuttal standard in analyzing Mrs. Noyes' claim. As noted above, there are two methods for rebutting the fifteen-year presumption. Under the first, an employer must demonstrate that the miner did not have either legal pneumoconiosis or clinical pneumoconiosis arising out of coal-mine employment. § 718.305(d)(2)(i). Under the second, an employer must establish "that no part of the miner's death was caused by pneumoconiosis." § 718.305(d)(2)(ii).

As DOL acknowledges in its brief, the rule-out standard applies to the second method of rebuttal but not the first. See also Bender, 782 F.3d at 141 (noting that the rule-out standard applies only to subsection (d)(2)(ii)). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." § 718.201(a)(2). And a disease "aris[es] out of coal mine employment" if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." § 718.201(b). Accordingly, an employer can rebut the presumption of legal pneumoconiosis under the rebuttal method set forth in § 718.305(d)(2)(i) by proving that the miner's lung disease was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Id.

The ALJ cited this regulatory definition in the introductory section of his order but used decidedly different language in analyzing whether Consolidation

met its burden under subsection (d)(2)(i)(A). In concluding that Consolidation failed to establish rebuttal under that provision, the ALJ stated that the company's expert "ha[d] not ruled out any connection between coal-mine employment and Mr. Noyes's lung cancer." Similarly, he found that "the evidence [did] not rule out any connection between Mr. Noyes' emphysema and his coal-mine employment."

In affirming the ALJ's decision, the BRB considered only the lung cancer ruling. Although it did not expressly use the ALJ's "rule out" language, the BRB cited to Rose v. Clinchfield Coal Co., 614 F.2d 936 (4th Cir. 1980), in which the Fourth Circuit used the term "rule out" in an ambiguous manner. Specifically, the court in that case reasoned that a claimant's "failure to demonstrate . . . a [causal] relationship [between the miner's cancer and pneumoconiosis or between his cancer and his coal-mine employment] . . . does not bar her recovery" because "it is the respondents' failure effectively to rule out such a relationship that is crucial." Id. at 939.

By citing Rose, the BRB's decision joins the ALJ's order in suggesting that an employer must rule out any causal relationship between a miner's "cancer and his coal mine employment" to establish rebuttal under § 718.305(d)(2)(i). But this standard is materially different from the requirement that an employer show a miner's lung disease was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." § 718.201(b). An employer may well show that a miner's lung condition was not "significantly related" to coal-mine employment but fall short of ruling out "any connection."

DOL urges us to treat the ALJ's reference to "rul[ing] out" as a mere colloquialism rather than a misapplication of the rebuttal standard. It relies on Consolidation Coal Co. v. Galusky, 648 F. App'x 316 (4th Cir. 2016) (unpublished), in which the Fourth Circuit concluded that the ALJ did not erroneously apply the rule-out standard to the rebuttal of pneumoconiosis because he used the phrase "rule out" merely "in its everyday sense." Id. at 320-21. In Galusky, however, the ALJ's references to "ruling out" came directly from the testimony of two doctors, which the ALJ quoted in his opinion, and thus it was clear he was not applying the rule-out standard. Id. at 321. The ALJ's decision in this case does not lend itself to the same inference. Moreover, the "rule out" formulation was used twice in the decision—in the analyses of both lung cancer and emphysema.[5]

In Energy West Mining Company v. Estate of Blackburn, 857 F.3d 817 (10th Cir. 2017), we concluded that a similar alleged error would have been harmless because the rebuttal standard did not affect the ALJ's analysis of the medical evidence. See Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1021 (10th Cir. 2010) ("[W]e may overturn the ALJ's decision only if the error . . . prejudicially affected a substantial right of a party."

[5] DOL also suggests that this issue was not raised in Consolidation's opening brief. We disagree. After quoting the ALJ's statement that the medical expert had not "ruled out any connection between coal-mine employment and Mr. Noyes' cancer," Consolidation argues that this analysis was "based on an erroneous interpretation of the 2013 rebuttal standard." It then quotes the proper standard under § 718.201(b) and argues that its expert showed Mr. Noyes' lung cancer was not "significantly related to, or substantially aggravated by" coal-dust exposure.

(quotation and alteration omitted)). Rather than "base his decision on [the employer's] failure to rule out every connection between coal-mine dust and [the miner's] lung disease," the ALJ "reasoned that [the employer's] evidence was not credible." Energy West Mining Co., 857 F.3d at 832.

We cannot say the same in this case. The ALJ's comments below bear some resemblance to those at issue in Energy West Mining, as both ALJ orders criticized an expert for relying on generalities rather than the claimant's particular case. See id. However, in contrast to that case, the ALJ below did not make an express credibility finding, and he further equivocated in his assessment of the positions advanced by Consolidation's expert. See id. at 832-33. In discussing the competing expert opinions on the "connection between coal-dust exposure and the carcinoma of the lung," the ALJ stated that Consolidation's expert "ha[d] the better of th[e] professional dispute."

We think remand is the appropriate course under these circumstances. Although it is unfortunate that we must send this case to an ALJ for yet another round of review, our remand should not require a great deal of time or energy. To the extent the ALJ merely used the term "rule out" in its colloquial sense, proceedings should be very brief. If not, the ALJ will be required to reconsider the existing evidence under the proper standard.

IV

We **GRANT** the petition for review and **REMAND** for further proceedings consistent with this opinion.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-9550

[Filed November 18, 2005]

HAROLD J. ANDERSEN,	)
	)
Petitioner	)
	)
v.	)
	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)
	)
Respondent	)
	)
and	)
	)
ENERGY FUELS MINING COMPANY and OLD REPUBLIC INSURANCE COMPANY,	)
	)
Intervenors-Respondents	)

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHRISTIAN P. BARBER
Counsel for Appellate Litigation

BARRY H. JOYNE
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office
of Workers' Compensation Programs

ORAL ARGUMENT REQUESTED

* * *

[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

Harold J. Andersen is a former coal miner pursuing a claim under the Black Lung Benefits Act (the Act), 30 U.S.C. §§901-44. He asserts that he is entitled to a presumption that his chronic obstructive pulmonary disease (COPD) was caused by his coal mine employment. The Act, however, provides no such presumption. Since Mr. Andersen failed to affirmatively prove that his coal mine employment caused his lung disease, the Court should affirm the decisions below, which denied his claim.

STATEMENT OF JURISDICTION

Mr. Andersen petitions this Court to review a final order of the Benefits Review Board (the Board), which affirmed an administrative law judge's denial of his claim for benefits under the Act. The Court has jurisdiction over Mr. Andersen's petition for review under Section 21(c) of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), 33 U.S.C. §921(c), as incorporated by Section 422(a) of the Act, 30 U.S.C. §932(a). The injury in this case, within the meaning of Section 21(c), occurred in Colorado. The Board affirmed the denial of Mr. Andersen's claim on April 27, 2005. Mr. Andersen timely filed a petition for review with the Court on June 23, 2005. *See* 33 U.S.C. §921(c) (providing sixty-day period for seeking review after final decision of Board).

The Board had jurisdiction to review the administrative law judge's decision under Section 21(b)(3) of the Longshore Act, 33 U.S.C. §921(b)(3), as incorporated. The administrative law judge (ALJ) issued a decision denying Mr. Andersen's claim on April 2, 2004. Mr. Andersen timely filed a notice of appeal with the Board on April 29, 2004. *See* 33 U.S.C.

§921(a) (providing thirty-day period for appeal of ALJ decisions).

STATEMENT OF THE ISSUE

Whether the ALJ and the Board correctly concluded that Mr. Andersen is not entitled to a presumption under 30 U.S.C. §921(c)(1) that his COPD arose out of his coal mine employment.

STATEMENT OF THE CASE

Mr. Andersen filed a claim under the Act on March 26, 1991. Director's Exhibit (DX) 1. An ALJ awarded benefits on October 21, 1993. DX 52. Energy Fuels Mining Company—Mr. Andersen's employer and the party liable for any benefits awarded in this case—appealed, and the Board vacated the ALJ's decision and remanded the case for further consideration on January 30, 1995. DX 67.

On remand, the ALJ again denied Mr. Andersen's claim on April 2, 2004. Petitioner's Appendix A (PAA). Mr. Andersen appealed, but the Board affirmed on April 27, 2005. Petitioner's Appendix B (PAB). Mr. Andersen timely petitioned this Court for review on June 23, 2005.

STATEMENT OF THE FACTS

Mr. Andersen was a coal miner for 40 years. PAA at 2. His chest x-rays were not classified as positive for the presence of pneumoconiosis, and there is no biopsy evidence indicating that he has pneumoconiosis. PAA at 3; *see* 20 C.F.R. §718.202(a)(1), (2).[1] Several

[1] The Secretary of Labor issued sweeping revisions to the black lung program regulations on December 20, 2000, effective January

physicians provided medical opinions, however, all agreeing that Mr. Andersen has COPD. *See* PAA at 3-8.[2] Some of the doctors attributed this condition, at least in part, to his exposure to coal dust during his mine work. Others attributed it either solely to his more-than-40-pack-year history of cigarette smoking, or to a combination of smoking and other non-coal-mine-related sources. COPD that is significantly related to or substantially aggravated by coal mine employment is considered pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b).

19, 2001. 65 Fed. Reg. 79920-80107 (Dec. 20, 2000), as codified at 20 C.F.R. Parts 718, 725 and 726. The Secretary revised the regulations again in response to the decision in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (upholding all but one of the revised regulations challenged by the National Mining Association, but requiring that certain regulations apply prospectively only). 68 Fed. Reg. 69930-35 (Dec. 15, 2003). All of the revised regulations apply to claims filed after January 19, 2001, but some, including the revised versions of 20 C.F.R. §§718.201 and 718.202, also apply to earlier claims such as Mr. Andersen's. Unless otherwise indicated, all citations to the Code of Federal Regulations in this brief are to the version revised as of April 1, 2005.

[2] COPD is a lung disease characterized by airflow obstruction. THE MERCK MANUAL 568 (17th ed. 1999). It encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000). COPD is a disease of the general population, as an estimated 16,000,000 Americans had COPD in 1994. *See* THE MERCK MANUAL 569. There are several causes of the condition, but cigarette smoking accounts for more than 85% of cases. *Id*. at 569-70. It can also be caused simply by breathing polluted air. *Id*. at 570. Coal-mine dust exposure during coal mine employment can also cause COPD. *See* 65 Fed. Reg. 79939-43 (summarizing medical and scientific evidence of link between COPD and coal mine work).

The ALJ found none of the reports linking Mr. Andersen's COPD to his coal mine employment persuasive. PAA at 8. Likewise, he declined to credit any of the reports attributing the condition either to smoking alone or a combination of smoking and other non-coal-mine factors. *Id*. In addition, the ALJ noted that the presumption that pneumoconiosis arose out of coal mine employment in cases where a miner has more than ten years of such employment does not provide a presumption that COPD arose out of coal mine employment. PAA at 6, n. 7; *see* 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203. The judge thus concluded that Mr. Andersen had the burden to prove that his COPD was caused at least in part by his coal mine employment. Because Mr. Andersen failed to produce any convincing evidence linking the two, the ALJ denied benefits. PAA at 9.[3]

The Board affirmed the ALJ's rejection of the medical opinions linking Mr. Andersen's COPD to his coal mine work. PAB at 4-6. The Board did not address the ALJ's rejection of the opinions linking the COPD only to non-coal-mine causes. The Board also affirmed The ALJ's conclusion that there is no presumption that Mr. Andersen's COPD arose out of coal mine employment. PAB at 4; *see* 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203.

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[3] In light of his finding that Mr. Andersen does not have pneumoconiosis, the ALJ did not reach the question of whether he has a totally disabling pulmonary impairment. *See* 20 C.F.R. §718.204.

SUMMARY OF THE ARGUMENT

Mr. Andersen contends that he is entitled to a presumption that his COPD arose out of his coal mine employment. He is wrong. There is no such presumption. Section 411(c)(1) of the Act does afford a long-time miner who proves that he has "pneumoconiosis" a presumption that the disease arose out of his coal mine employment. This presumption, though, applies only to the medical condition recognized by physicians as pneumoconiosis. It does not apply to COPD.

Section 402(b) of the Act broadly defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, *arising out of coal mine employment*." (Emphasis added.) On the other hand, Section 411(c)(1) provides that a miner who had at least ten years of coal mine employment, and who has "pneumoconiosis," is entitled to presumption that his pneumoconiosis arose out of coal mine employment. These two provisions, read in isolation, pose an interpretive problem. If pneumoconiosis in Section 411(c)(1) meant the same thing as in the Act's definitional section, Section 411(c)(1) would be superfluous: a miner who had already proven that his lung disease arose out of coal mine employment would receive a presumption that his lung disease arose out of coal mine employment.

This seeming incongruity is explained by the difference between the Act's definition of pneumoconiosis and the medical community's use of the term. Physicians define pneumoconiosis as the fibrotic reaction of lung tissue to various kinds of dust. This condition may or may not be related to coal mine

employment—it may be caused by work in other occupations or environments. The Act's definition, on the other hand, broadly includes other diseases that physicians would not classify as pneumoconioses, but these diseases—such as COPD—qualify as compensable pneumoconiosis when they arise from coal mine employment. The two provisions of the Act may be harmonized if Section 411(c)(1) applies only to medically defined pneumoconiosis, which may or may not arise from coal mine employment, and does not apply to COPD, as that condition is considered pneumoconiosis under the Act only when already proven to have arisen from coal mine employment. The history of the Secretary's implementing regulations demonstrates that the presumption does not apply when a miner is trying to link his COPD to his coal mine employment.

Because Mr. Andersen is not entitled to the Section 411(c)(1) presumption, he bore the burden to prove that his COPD arose out of his coal mine employment. He does not challenge the ALJ's finding that he failed to do so. The Court should accordingly affirm the denial of his claim on that basis.

ARGUMENT

Mr. Andersen does not challenge The ALJ's finding that he failed to prove that his coal mine employment caused his COPD. Rather, he now argues only that he is entitled to a presumption that his COPD was caused by his employment. According to Mr. Andersen, his COPD is pneumoconiosis even without evidence linking it to his coal mine employment. Since he worked as a miner for more than ten years, Mr. Andersen thus claims that he is entitled to a statutory presumption

that his COPD arose out of his coal mine employment. Understanding why this contention is wrong—and in particular why the statutory provision cited by Mr. Andersen does not provide a presumption that COPD arose out of coal mine employment—requires a close examination of the applicable statutory and regulatory provisions.

1. Standard of review.

Mr. Andersen argues that he invoked the presumption provided by 30 U.S.C. §921(c)(1) and 20 C.F.R. §718.203 as a matter of law based on the undisputed facts that he has COPD and that he was a coal miner for more than ten years. In so doing, he asks the Court to disregard the Secretary's interpretation of the Act and her own regulations—under which the presumption does not apply to cases of COPD.

Whether the presumption applies to cases of COPD is a question of law, involving statutory and regulatory interpretation. Questions of law are subject to the Court's plenary review. *Bridger Coal Co./Pac. Minerals, Inc. v. Director, OWCP [Harrop]*, 927 F.2d 1150, 1153 (10th Cir. 1991). In interpreting the Act, the Court "give[s] considerable weight to [the Secretary's] construction of the statutory sections [she] is entrusted to administer." *Davis v. Director, OWCP*, 936 F.2d 1111, 1115 (10th Cir. 1991) (citation omitted). Likewise, in reviewing the Secretary's regulations implementing the Act, the Court gives "substantial deference" to the Secretary's reasonable interpretation of her own regulations. *Lukman v. Director, OWCP*, 896 F.2d 1248, 1251 (10th Cir. 1990).

2. Neither the Act nor its implementing regulations provide a presumption that any miner's COPD arose out of coal mine employment.

The Act provides benefits to coal miners who are totally disabled by pneumoconiosis caused by coal mine employment. 30 U.S.C. §901. A miner seeking benefits must establish that: 1) he has pneumoconiosis; 2) the pneumoconiosis arose out of his coal mine employment; 3) he has a totally disabling pulmonary impairment; and 4) his total disability was caused by his pneumoconiosis. 20 C.F.R. §725.202(d)(2)(i)-(iv); *see Mangus v. Director, OWCP*, 882 F.2d 1527, 1529 (10th Cir. 1989). The first two elements are at issue in this appeal.

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b); *see also* 20 C.F.R. §718.201(a). The broad statutory definition includes both pneumoconiosis as the term is used by physicians, as well as the broader category of any chronic lung disease caused by coal mine employment, which includes other conditions (such as COPD) that physicians would not classify as pneumoconiosis. *See*, *e.g.*, *Campbell v. Consolidation Coal Co.*, 811 F.3d 302, 304 (6th Cir. 1987); 20 C.F.R. §718.201(a); 65 Fed. Reg. 79937 (Dec. 20, 2000).[4]

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[4] In describing the conditions that are compensable under the Act, the regulatory definition of pneumoconiosis includes "clinical" pneumoconiosis and "legal" pneumoconiosis. 20 C.F.R. §718.201(a). Clinical pneumoconiosis refers to pneumoconiosis as the term is used by physicians—but only where the disease is linked to coal

In the medical community, pneumoconiosis is "a condition characterized by permanent deposition of substantial amounts of particulate matter in the lungs, usually of occupational or environmental origin, and by the tissue reaction to its presence." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1315 (28th ed. 1994); *see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1999) ("Clinically, pneumoconiosis may described . . . as a chronic lung disease marked by an overgrowth of connective tissues caused by the inhalation of certain dusts.") (citation omitted).

Physicians use the term pneumoconiosis to refer both to a disease arising out of coal mine employment, and to diseases resulting from other occupational exposures. As noted by the Supreme Court, "[c]oal workers' pneumoconiosis is a distinct clinical entity, and is not the only type of pneumoconiosis. . . . [P]neumoconiosis may also be caused by inhalation of other dusty materials, such as cotton fibers or silica." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 n. 1 (1976) (citation omitted). Pneumoconiosis also may be caused by inhalation (typically in an occupational or environmental setting) of dust from aluminum, bauxite, asbestos, iron and talc, among other substances, and may also be a side effect (known as Caplan's syndrome) of rheumatoid arthritis. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1315 (28th ed. 1994). Occupations involving sand-blasting, foundry

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mine employment. 20 C.F.R. §718.201(a)(1). In other words, clinical pneumoconiosis is the compensable subset of the condition physicians call pneumoconiosis. Legal pneumoconiosis refers to the broader set of conditions arising out of coal mine employment, including those that physicians would not describe as pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

work, manufacture of china or earthenware, dressing of granite, use of a grindstone, handling of asbestos, and boiler scaling may all give rise to pneumoconiosis. HUNTER'S DISEASES OF OCCUPATIONS 224-25 (P.A.B. Raffle *et al.*, eds., 1987).

Medically defined pneumoconiosis is generally diagnosed by the presence of certain x-ray opacities, but may be shown by autopsy or biopsy evidence even when not present on x-rays. 20 C.F.R. §718.202(a)(1), (2); *see Usery*, 428 U.S. at 7. The presence of x-ray opacities alone suffices to establish pneumoconiosis; the opacities need not be linked to coal mine employment to be characterized as pneumoconiosis (although such a linkage is necessary for the pneumoconiosis to be compensable). *See* 20 C.F.R. §718.202(a)(1) (miner may establish pneumoconiosis by x-ray; no link to coal mine employment required to establish presence of disease); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-6 (BRB 1999) (physician's comments on cause of x-ray opacities relevant to cause of pneumoconiosis, not its existence). Likewise, a finding of medically defined pneumoconiosis on biopsy or autopsy—even without evidence linking it to coal mine employment—establishes the presence of the disease. *See* 20 C.F.R. §718.202(a)(2). Thus, medically defined pneumoconiosis may or may not arise from coal mine employment. Accordingly, once a miner establishes that he suffers from medically defined pneumoconiosis, he must show, either by proof or presumption, that the disease arose out of his coal mine employment in order for it to be compensable. 20 C.F.R. §718.203.

By contrast, the broader category of "pneumoconiosis" covered by the Act is defined as any

chronic pulmonary disease or impairment "arising out of coal mine employment." 30 U.S.C. §902(b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000). It specifically encompasses "chronic restrictive or obstructive pulmonary disease arising out of coal mine employment," 20 C.F.R. §718.201(a)(2), and may be diagnosed—even in the absence of x-ray evidence of medically defined pneumoconiosis—by a reasoned medical opinion concluding that the miner has "pneumoconiosis as defined in § 718.201," 20 C.F.R. §718.202(a)(4).[5]

The issue in this case arises because there is an inherent ambiguity in the statute if the above-noted broader category of "pneumoconiosis" is read into Section 411(c)(1), which provides that "[i]f a miner who is suffering from . . . pneumoconiosis was employed for 10 years or more [as a coal miner] there shall be a rebuttable presumption that his pneumoconiosis arose out of his employment." 30 U.S.C. §921(c)(1).[6] If Congress had used "pneumoconiosis" to mean the same

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[5] Section 718.202(a)(4) permits a physician to make such a judgment based on non-x-ray evidence, such as "blood-gas studies, electrocardiograms, pulmonary functions studies, physical performance tests, physical examination, and medical and work histories." 20 C.F.R. §718.202(a)(4).

[6] This "ten-year" presumption shifts the burden of production to the party opposing entitlement. *Usery*, 428 U.S. at 27. Section 411(c)(1) is implemented by 20 C.F.R. §718.203. The regulatory presumption is identical to the statutory one. 20 C.F.R. §718.203(b). The regulation further provides that if the presumption is not applicable, the miner must prove the connection between his pneumoconiosis and his coal mine work by "competent evidence establish[ing] such a relationship." 20 C.F.R. §718.203(c).

thing in both provisions, then the miner who had already proven that he had a lung disease arising out of coal mine employment under Section 402(b) would be given a superfluous presumption that his lung disease arose out of coal mine employment under Section 411(c)(1).

In general, identical terms in the same statute have the same meaning. *U.S. v. Richards*, 87 F.3d 1152, 1157 (10th Cir. 1996). Application of that rule in the present case, however, would lead to anomalous results The Court should "not construe a statute in a way that renders any words or phrases meaningless, redundant or superfluous." *Harrop*, 927 F.2d at 1153 (citations omitted).

In the Director's view, this ambiguity is clarified by taking into account the difference between the way physicians use the term "pneumoconiosis" and the statutory definition of pneumoconiosis, a distinction incorporated into the structure of the Secretary's regulations. Thus, as noted previously, unlike the Act's definition, physicians use the term pneumoconiosis without regard to whether the disease was caused by coal mine employment—*i.e.*, medically defined pneumoconiosis may or may not be related to coal mine employment. Hence, to establish pneumoconiosis as a doctor would use the term, a miner can rely on x-ray or biopsy evidence of the disease, 20 C.F.R. §718.202(a)(1), (2), and does not have to prove that the condition arose out coal mine employment to prove that he has pneumoconiosis. *See id*. Once he establishes that he has medically defined pneumoconiosis, he must show (by proof or presumption) that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203.

Thus, a miner who has medically defined pneumoconiosis will not qualify for benefits if his condition did not arise out of coal mine employment. *See Wisniewski v. Director, OWCP*, 929 F.2d 952, 959 (3d Cir. 1991) (affirming denial of benefits where widow of short-time miner failed to prove that pneumoconiosis—established by x-ray—arose out of coal mine employment rather than from long-term exposure to coal dust from a bakery oven).

Under the Act and the Secretary's regulations, however, other lung diseases are not even considered pneumoconiosis unless the miner proves that his disease arose out of coal mine employment. 30 U.S.C. §902(b); *see also* 20 C.F.R. §718.201(a)(2), (b). Thus, a miner seeking compensation for COPD (or some other disease), which is not classified as pneumoconiosis by the medical community, must present convincing evidence that the disease arose out of coal mine employment in order to prove that he has pneumoconiosis as defined in the Act. 20 C.F.R. §718.202(a)(4). With respect to these conditions, causation is subsumed in proving the existence of pneumoconiosis and the ten-year presumption never comes into play. By the same token, where a miner fails to affirmatively link his COPD to coal mine employment (such as Mr. Andersen failed to do here), he has failed to prove that he has pneumoconiosis as defined in the Act. *See Hansen v. Director, OWCP*, 984 F.2d 364, 369 (10th Cir. 1993) (affirming an administrative law judge's finding that a diagnosis of

COPD not linked to coal mine employment was not a finding of pneumoconiosis).[7]

Thus, "pneumoconiosis" in Section 411(c)(1) and in the Secretary's regulation implementing the presumption must refer to pneumoconiosis as the term is used by the medical community rather than as it is used in Section 402(b), as only medically defined pneumoconiosis may or may not be related to coal mine employment. *See Sun v. Ashcroft*, 370 F.3d 932, 939-40 (9th Cir. 2004) ("'Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different . . .,'" the same word may have different meanings in different parts of the same statute.) (quoting *Atlantic Cleaners & Dyers v. U.S.*, 286 U.S. 427, 433 (1932)). Section 411(c)(1) cannot refer to pneumoconiosis as defined in Section 402(b), which limits pneumoconiosis to diseases arising out of coal mine employment.

Beyond the structure of the statute and the regulations, the history of the revised regulatory definition of pneumoconiosis refutes any notion that the ten-year presumption applies where a miner is attempting to prove that his COPD is pneumoconiosis. In proposing the revised regulations, the Secretary made plain that a miner with COPD must affirmatively prove that the condition arose out of coal mine employment. The Secretary explained that the revised Section 718.201 clarified that "obstructive lung disease may fall within the definition of pneumoconiosis if it is shown to have arisen from coal mine employment," but that this clarification "would not alter the current

[7] The claimant in *Hansen* apparently did not attempt to rely on the Section 411(c)(1) presumption.

[1999] regulations' requirement that each miner bear the burden of proving that he has pneumoconiosis." 64 Fed. Reg. 54978 (Oct. 8, 1999) (citations omitted); *see also* 65 Fed. Reg. 79937 (Dec. 20, 2000). The Secretary further explained:

> If a miner's chest X-rays, autopsy or biopsy demonstrate the presence of the disease [*i.e.*, the miner has pneumoconiosis as defined in the medical community], and the miner had at least ten years of coal mine employment, he is aided by [the Section 411(c)(1)] presumption that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. 921(c)(1). If, however, the miner fails to demonstrate the existence of [medically defined] pneumoconiosis . . . , *he must prove that his lung disease arose out of coal mine employment in order to carry his burden and establish that he has pneumoconiosis*.

64 Fed. Reg. 54978 (emphasis added); *see* 65 Fed. Reg. 79938. The Court should defer to the Secretary's reasonable interpretation of her own regulations as embodied in these comments and, by extension, to her reasonable interpretation of the Act. *See Davis*, 936 F.2d at 1115; *Lukman*, 896 F.2d at 1251.

The District of Columbia Circuit, in the only published court of appeals decision addressing the applicability of the ten-year presumption to COPD of which we are aware, sustained the Secretary's interpretation of the regulations (and, by extension, the Act). *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 862-63 (D.C. Cir. 2002). In that case, the industry challenged the facial validity of certain of the revised regulations, including Section 718.201, the revised

definition of pneumoconiosis. In rejecting the industry's argument that the revised Section 718.201 created a presumption that COPD arose out of coal mine employment—much as Mr. Andersen argues here—the court noted the regulatory history cited above and held that the revised regulation "does not . . . create a presumption that all or even most obstructive disease is caused by exposure to coal dust." 292 F.3d at 862. Rather, "under both the old and new regulations, 'each miner bear[s] the burden of proving that *his* obstructive lung disease did in fact arise out of his coal mine employment.'" 292 F.3d at 863 (quoting *Nat'l Mining Ass'n v. Chao*, 140 F.Supp.2d 47, 79 (D.D.C. 2001) (in turn quoting 65 Fed. Reg. 79938 (Dec. 20, 2000)) (emphasis in appellate decision).

In sum, the structure of the statute and the regulations compel the conclusion that the ten-year presumption does not apply where a miner is attempting to show that his COPD arose out of coal mine employment. The presumption can only apply where the miner has pneumoconiosis as physicians use the term—*i.e.*, a disease that may or may not result from coal mine work. A miner seeking benefits for COPD, however, must prove a connection between the disease and coal mine employment in order to show that he has pneumoconiosis.

Mr. Andersen's arguments—that a diagnosis of COPD alone is a finding of pneumoconiosis and that, since the Section 411(c)(1) presumption links pneumoconiosis to coal mine employment, he is entitled to a presumption that his COPD arises out of his coal mine employment—have no merit. Mr. Andersen incorrectly assumes that COPD always comes within

the Act's definition of pneumoconiosis. While the revised Section 718.201 makes clear that a miner does not have to prove that coal mine employment can cause COPD generally, he still must prove that his individual COPD was caused by his coal mine employment. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.2d at 862-63.[8] There is no presumption that COPD arose out of coal mine employment. *Id*.

Similarly, Mr. Andersen's assertion that because all of the statutory and regulatory provisions defining compensable pneumoconiosis include a requirement that the disease arise out of coal mine employment, there is no basis for treating medically defined pneumoconiosis and COPD differently—*i.e.*, the ten-year presumption should apply to both—does not withstand scrutiny. While all compensable pneumoconiosis must arise out of coal mine employment, there is a rational basis to apply the presumption only to medically defined pneumoconiosis. The presumption rationally applies to medically defined pneumoconiosis because that condition is an occupational disease that is closely linked to dust exposure, especially dust in coal mine employment. *See Usery*, 428 U.S. at 28-29. Indeed, even where a miner had less than ten years of coal mine employment but had no other dust exposure, a fact-finder can infer that his medically defined pneumoconiosis arose out of coal

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[8] The regulation was adopted, based on essentially unanimous medical and scientific research, to preclude physicians from asserting that dust exposure could never cause COPD. For a number of years, many doctors retained by coal companies had opined—without any medical or scientific basis—that coal dust could never cause an obstructive disease. *See*, *e.g.*, *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175 (4th Cir. 1995).

mine employment even in the absence of affirmative evidence. *Wisniewski*, 929 F.2d at 959; *Maxey v. Califano*, 598 F.2d 874, 876 n. 3 (4th Cir. 1979). In contrast, COPD is a disease of the general population, and cigarette smoking is the cause of an overwhelming majority of cases. The more exclusive connection between medically defined pneumoconiosis and coal mine employment is lacking. Therefore, a presumption linking COPD and coal mine employment would be far less rational, if rational at all.

Mr. Andersen also argues that the Secretary's interpretation would require a miner seeking benefits for COPD to prove causation twice, once under Section 718.202(a)(4) and again under Section 718.203. Mr. Andersen is mistaken in arguing that he would have to establish causation twice. In cases of COPD, causation is subsumed in establishing the presence of the disease. Establishing a link between COPD and coal mine employment establishes both the disease and its cause.

Finally, Mr. Andersen cites the Sixth Circuit's decision in *Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984), in support of his position. *Southard*, however, is inapposite. There, the miner had medically defined pneumoconiosis, but less than ten years of coal mine employment (*i.e.*, the ten-year presumption was not at issue). The issue was whether the former Section 718.201, 20 C.F.R. §718.201 (1999), imposed a more stringent causation standard than that contained in Section 718.203. *See* 732 F.2d at 70-72. The court did not address whether the ten-year presumption was applicable in cases of COPD. Indeed, the Sixth Circuit subsequently clarified that *Southard* has no applicability outside the context of medically defined

pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 822 n. 4. (6th Cir. 1989).

Mr. Andersen does not have pneumoconiosis as the medical community uses the term. He does have COPD, but he failed to prove that this condition arose out of his coal mine work. Since there is no presumption linking COPD to his employment, he necessarily failed to prove that he has pneumoconiosis, an essential element of his claim for benefits. Therefore, the ALJ and the Board correctly denied his claim.

CONCLUSION

The Court should affirm the decisions below.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
CHRISTIAN P. BARBER
Counsel for Appellate Litigation
/s/ Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
e-mail address: joyner.barry@dol.gov
Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

Mr. Anderson and Energy Fuels Mining have requested oral argument. The Director agrees that oral argument is appropriate. This case presents a novel issue, and oral argument may aid the Court in deciding the case.

* * *

[*Certificate of Service, Certificate of Compliance and Certificate Regarding Electronic Filing Omitted in the Printing of this Appendix*]

APPENDIX J

20 C.F.R. §718.201 Definition of pneumoconiosis

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. §718.305 Presumption of pneumoconiosis

(a) *Applicability*. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

(b) *Invocation*.

(1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) The miner or survivor cannot establish entitlement under §718.304 by means of chest x-ray evidence; and

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to §718.204, except that §718.204(d) does not apply.

(2) The conditions in a mine other than an underground mine will be considered "substantially similar" to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the

existence of a totally disabling respiratory or pulmonary impairment.

(4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(c) *Facts presumed*. Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) *Rebuttal*—

(1) *Miner's claim*. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in §718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.

(2) *Survivor's claim*. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in §718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in §718.201.

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

APPENDIX K

Benefit Review Board Decisions (non-published) Addressing the 15-year Presumption from 2011 to 2017

Year	Presumption Upheld	Presumption Rebutted
2011	36	2
2012	107	10
2013	110	6
2014	111	3
2015	91	0
2016	125	2
2017	125	1
Totals	705	24

2011 Decisions

Presumption Rebutted - 2

Lester Gibson v. Consol of Kentucky, 10-0724 BLA (Sept. 29, 2011); *Christine Hensley v. Pathfork Harlan Coal Co.*, 11-0304A; 11-0478 A, (Dec. 22, 2011).

Presumption Upheld - 36

James A. Adams v. A & E Coal Company, 10-0264 BLA (Feb. 23, 2011); *Wilbur E. Harkins v. Peabody Coal Company* 10-0349 BLA (Feb 18, 2011); *Phyllis A. Crawford v. Shamrock Coal Co.*, 10-0294 BLA (Feb. 25, 2011); *Harold Gosnell v. Eastern Associated Coal* Corp.,

10-0384 BLA (Mar. 11, 2011); *Gerald A. Hunt v. Consolidation Coal Co.,* 10-0392 BLA, (Mar. 25, 2011); *Anthony Marusa v. Canterbury Coal Co.*, 10-0593 BLA (May 25, 2011); *Leota Dickens v. Marfork Coal Co.*, 10-0673 BLA (June 28, 2011); *Russell Franks v. Golden Glow Coals, Inc.*, 10-0656 BLA (June 28, 2011); *Leslie Baker v. Fleetwood Energy, Inc.,* 10-0635 BLA (July 6, 2011); *Franklin Farmer v. Harlan Cumberland Coal Co.*, 10-0571 BLA (July 12, 2011); *Billy Richardson v. Sea "B" Mining Co.*, 10-0713 BLA (Aug. 17, 2011); *Alda Dameron v. Big Bear Mining Co.*, 10-0685 BLA (Aug. 25, 2011); *Charles Prater v. Bevins Branch Resources*, 10-0667 BLA (Aug. 26, 2011); *Sheba Prater v. Bevins Branch Resources, Inc.*, 10-0668 BLA (Aug. 26, 2011); *Sherrol Jennings v. Island Creek Kentucky Mining,* 10-0684 BLA (Sept. 16, 2011); *Brenda Jennings v. Island Creek Kentucky Mining,* 11-0171 BLA (Sept. 16, 2011); 17. *Mildred Mosko v. Eighty Four Mining Co.*, 10-0672 BLA (Sept. 27, 2011); 18. *Clarence Naugle v. Calvert Coal Co.*, 11-0103 BLA (Sept. 27, 2011); *Robert Nipper v. Panther Branch / Long Branch*, 10-0728 BLA (Sept. 29, 2011); *Shelly Wells v. Peabody Coal Co.*, 11-0212 BLA (Sept. 29, 2011); *Mike Zaborek v. Consolidation Coal Co.*, 10-0726 BLA (Oct. 5, 2011); *Maurice Miles v. Omar Mining Co.*, 11-0169A BLA (Oct. 19, 2011); *Powell Morgan v. Island Creek Kentucky Mining*, 11-0105 BLA (Oct. 24, 2011); *Bernard Baker v. Mudlick Mining Corp*., 11-0128 BLA (Oct. 26, 2011); *Ardis Gump v. Daniel Boone Coal Co.*, 11-0134 BLA (Oct. 26, 2011); *George Bailey v. Consolidation Coal Co.*, 11-0142 BLA (Oct. 27, 2011); *Wanda Vanhoose v. Shamrock Processing Co.*, Inc. 11-0129 BLA (Oct. 28, 2011); *Robert Joseph v. Coastal Coal Co.*, 11-0183 BLA (Oct. 28, 2011); *Richard Crusenberry v. Black Mountain Mining Co*., 11-0197 BLA (Nov. 18, 2011); *Chester C.*

Adams v. Harlan Cumberland Coal, Co., LLC, 11-0265 BLA (Nov. 30, 2011); *Jimmy Mullins v. Silver Eagle Mining Co. Inc.*, 11-0164 BLA (Dec. 1, 2011); *Clara R. Sisk v. Peabody Coal Co.*, 11-0159 BLA (Dec. 14, 2011); *Denny Middleton v. B & D Enterprises, Inc.*, 11-0225 BLA (Dec. 15, 2011); *Lila Groom v. Union Carbide Corp.*, 11-0204 BLA (Dec. 16, 2011); *Basil Holbrook v. Westmoreland Coal Co.*, 11-0260 BLA (Dec. 21, 2011); *Charles Scott v. U.S. Steel Mining Co.*, 11-0213 BLA (Dec. 22, 2011).

2012 Decisions

Presumption Rebutted - 10

Daniel Smouse v. Consolidation Coal Co., 11-0306 BLA (Jan. 26, 2012); *Jeanette Blankenship v. Kedco, Inc.*, 11-0394 BLA (Feb. 28, 2012); *Walter Smith v. Pine Ridge Coal Co.*, 11-0457 (Mar. 23, 2012); *Mitchell Noble v. Star Fire Coals, Inc.*, 11-0575 BLA (Apr. 24, 2012); *Rebecca Wayne v. Maple Meadow Mining Co.*, 11-0645 BLA (June 22, 2012); *David Darnell v. Clinchfield Coal Co.,* 11-0716 BLA (June 25, 2012); *Michael Day v. Eastern Associated Coal Corp.*, 11-0667 BLA (July 13, 2012); *Dorothy Mcmann v. Sewell Coal Co.*, 11-0673 BLA (July 27, 2012); *Matney v. McNamee Resources, Inc.,* 12-0174 BLA (Dec. 12, 2012); *Lee Hayes v. Clinchfield Coal Co.*, 12-0178 BLA (Dec. 21, 2012).

Presumption Upheld - 103

Rocky Childress v. Consolidation Coal Co., 11-0284 BLA (Jan 11, 2012); *Thelma Childress v. Consolidation Coal Co.*, 11-0291 BLA (Jan. 11, 2012); *David Meade v. Kiah Creek Mining, Inc.*, 11-0330 BLA (Jan. 20, 2012); *John Salazar v. United States Fuel Co.*, 11-0336 BLA

(Jan 20, 2012); *Norman White v. Tennessee Coal Co.*, 11-0278 BLA (Jan. 26, 2012); *James Clay v. Performance Coal Co.*, 11-0310 BLA (Jan. 26, 2012); *Kathleen Duriez v. Greenwich Collieries*, 11-0374 BLA, (Jan. 26, 2012); *Sandra White v. Tennessee Coal Co.*, 11-0386 BLA, (Jan. 26, 2012); *Wanless Harvey v. Elk Run Coal Co.*, 11-0305 BLA (Jan. 30, 2012); *Larry Willoughby v. Peabody Coal Co.*, 11-0311 BLA (Jan. 30, 2012); *Vanuard Engle v. Jericol Mining, Inc.*, 11-0286 BLA (Jan. 31, 2012); *James Burris v. Consolidation Coal Co.*, 11-0317 BLA (Jan. 31, 2012); *Henry Sweeney v. Jim Walker Resources, Inc.*, 11-0346 BLA (Feb. 16, 2012); *Clinard Bentley v. Kentucky Carbon Corp.*, 11-0349 BLA (Feb. 21, 2012); *Raymond Culbertson v. Clinchfield Coal Co.*, 11-0391 BLA (Feb. 23, 2012); *James Martin v. Pikeville Coal Co.*, 11-0466 BLA (Feb. 27, 2012); *James Thornsberry v. Island Creek Coal Co.*, 11-0350 BLA (Feb. 28, 2012); *Hurshel Wright v. Pinnacle Processing, Inc.*, 11-0380 BLA (Feb. 28, 2012); *Darlene Wright v. Pinnacle Processing, Inc.*, 11-0427 BLA (Feb. 28, 2012); *Larry Barker v. Cumberland Resources Corp.*, 11-0406 BLA (Mar. 8, 2012); *Roger D. Adkins v. Ragland Coal Co., Inc.* 11-0450A BLA (Mar. 23, 2012); *Donald Daniel v. Magic Coal Co.*, 11-0486 BLA (Mar. 27, 2012); *Brice Bartley v. Pride Mining Co.*, 11-0468 BLA (Mar. 28, 2012); *Charles Hash v. Mudlick Mining Corp.*, 11-0402 BLA (Mar. 29, 2012); *Jennifer Hardison v. Pittsburg & Midway Coal Mining*, 11-0420 BLA (Mar. 29, 2012); *Jack Lake v. Consolidation Coal, Co.*, 11-0467 BLA (Apr. 16, 2012); *Bobby Hedgpath v. Peabody Coal Co.*, 11-0437 BLA (April 18, 2012); *Mary Hedgpath v. Peabody Coal Co.*, 11-0686 BLA (April 18, 2012); *Mack Hall v. Virginia Crews Coal Co.*, 11-0482 BLA (Apr. 19, 2012); *Dorothy Kinney v. Peabody Coal Co.*, 11-0463 BLA (Apr. 24, 2012); *William Hopes v.*

Emerald Coal Resources, 11-0485 BLA (Apr. 25, 2012); *Walter Lockhart v. U.S. Steel Mining Co.,* 11-0509 BLA (Apr. 25, 2012); *Elmer Payne v. Harman Mining Co.*, 11-0474 BLA (Apr. 27, 2012); *Elmer Payne v. Harman Mining, Co.*, 11-0830 BLA (Apr. 27, 2012); *Henry Chapman v. Peabody Coal Co.,* 11-0489 BLA (Apr. 30, 2012); *Charles Coleman v. Powell Mountain Coal Co.*, 11-0551 BLA (May 17, 2012); *Carles Dykes v. Island Creek Coal Co.*, 11-0558 BLA (May 17, 2012); *Roy Ramage v. Island Creek Kentucky Mining*, 11-0530 BLA (May 22, 2012); *James Sizemore v. Westmoreland Coal Co.,* 11-0544 BLA (May 24, 2012); *Edward Stidham v. Westmoreland Coal Co.*, 11-0588 BLA (May 24, 2012); *Bennie Elkins v. Southland Enterprises, Inc.*, 11-0579 BLA (May 29, 2012); *Wendell Rollins v. Mystic, LLC*, 11-0585A BLA (May 29, 2012); *Harry Swan v. Midwest Coal Co.*, 11-0617 BLA (June 8, 2012); *Joella Swan v. Midwest Coal Co.*, 11-0677 BLA (June 8, 2012); *Wallace Meyers v. Labelle Processing Co.*, 11-0709 BLA (June 8, 2012); *Hansley Sisk v. Green River Coal Co.*, 11-0592 BLA (June 12, 2012); *Edith Sisk v. Green River Coal Co.*, 11-0593 BLA (June 12, 2012); *Johnny Bunner v. Island Creek Coal Co.*, 11-0528 BLA (June 15, 2012); *James Bowes v. Cannelton Industries, Inc.* 11-0568 BLA (June 15, 2012); *Donald Napier v. Pine Brach Coal Sales, Inc.* 11-0656 BLA (June 20, 2012); *Page Bender v. Logan Coals, Inc.*, 11-0683 BLA (June 25, 2012); *Larry Ward v. North Star Contractors, Inc.*, 11-0589A BLA (June 27, 2012); *Thomas Hyneman v. Wabash Mining Holding Co.*, 11-0711 BLA (June 27, 2012); *Curtis Huff v. Peabody Coal Co.*, 11-0626 BLA (July 12, 2012); *Phyllis Dardi v. Marrowbone Development Co.*, 11-0701 BLA (July 19, 2012); *Phyllis Dardi v. Marrowbone Development Co.* 11-0702 BLA (July 19, 2012); *Herbert Newberry v. J&L Coal Inc.*, 11-

0743 BLA (July 30, 2012); *James Davis v. Dominion Coal Corp.,* 11-0688 BLA (July 31, 2012); *Albert Lawson v. Arkansas Coals, Inc.* 11-0703 BLA (July 31, 2012); *John Jones v. Dunkard Mining Co.*, 11-0782 BLA, (Aug. 16, 2012); *James Storey v. B&G Construction Co.*, 11-0765 BLA (Aug. 22, 2012); *Irma Goff v. Peabody Coal Co.*, 11-0788 BLA; 11-0794 BLA (Aug. 24, 2012); *William Howell v. Red Hawk Mining, Inc.,* 11-0760 BLA (Aug. 29, 2012); *Peggy Vanover v. Green Coal Co.*, 11-0785 BLA (Aug. 29, 2012); *Wilbur Reed v. Slab Fork Coal Co.*, 11-0707 BLA (Aug. 30, 2012); *Marshall Peace v. Andalex Resources, Inc.,* 11-0783 BLA (Aug. 30, 2012); *Andrew Barber v. U.S. Steel Mining Co.*, 11-0864 BLA (Sept. 12, 2012); *Joseph McKnight v. Island Creek Kentucky Mining*, 11-0858 BLA (Sept. 13, 2012); *Helen Church v. Brent Coal Corp.*, 11-0822 BLA (Sept. 20, 2012); *Edgar Estep v. Royalty Smokeless Coal Co.*, 11-0824 BLA (Sept. 25, 2102); *Columbus Hale v. Three H Coal Co.*, 12-0005 BLA (Sept. 25, 2012); *Mabel Layne v. Chisholm Coal Co., Inc.* 12-0053 BLA (Sept. 25, 2012); *Rolland Goodin v. Antelope Coal Co.*, 11-0843 BLA (Sept. 27, 2012); *Kenneth Canady v. Mountain Laurel Resources*, 12-0265 BLA (Sept. 27, 2012); *Violet Craft v. Slab Fork Coal Company*, 12-0015 BLA (Oct. 10, 2012); *Eugene Walker v. Sumate Mining Co.*, 12-0042 BLA (Oct. 17, 2012); *Cecil Marlow v. Mountainside Coal Co.*, 12-0074 BLA (Oct. 24, 2012); *Patricia Maynard v. Laurel Run Mining Co.*, 11-0817A BLA (Oct. 31, 2012); *Patricia Maynard v. Laurel Run Mining Co.*, 12-0032 BLA (Oct. 31, 2012); *Carl Price v. Quintana Coal Co.*, 12-0066 BLA (Oct. 31, 2012); *Harold Reneer v. Midwest Coal Co.*, 12-0069 BLA (Oct. 31, 2012); *Larry Dingess v. Mountaineer Coal Development Co.*, 12-0034 BLA (Nov. 6, 2012); *Odas Addington v. Greater Wise, Inc.*,

11-0804 BLA; 12-0086 BLA (Nov. 19, 2012); *Richard Kuhn v. Kanawha Coal Co.*, 12-0081 BLA (Nov. 19, 2012); *Edward Ivey v. Roberts Brothers c/o Warrior Coal,* 12-0110 BLA (Nov. 19, 2012); *Curtis Caudill v. ICG Knott County LLC* 12-0095 BLA (Nov. 20, 2012); *James Thomas v. Bill Branch Coal Co.*,12-0096 BLA (Nov. 20, 2012); *Etta Daugherty v. Island Creek Kentucky Mining* 12-0129 BLA (Nov. 23, 2012); *Larry Halstead v. Essential Fuels, Inc.* 12-0059 BLA (Nov. 28, 2012); *Ray Boggs v. U.S. Steel Corp.,* 12-0088 BLA (Nov. 28, 2012); *Haskell Swiney v. Westmoreland Coal Co.*, 12-0126 BLA (Nov. 28, 2012); *Luther Manns v. Kristi-Ann Coal Co.*, 12-0092 BLA (Nov. 29, 2012); *Henry Robinson v. T&C Coal Co.*, 12-0176 BLA (Nov. 30, 2012); *Dorothy Gephart v. Peabody Coal Co.*, 11-0644 BLA (Dec. 7, 2012); *Dorothy Gephart v. Peabody Coal Co.*, 11-0757 BLA (Dec. 7, 2012); *Dorothy Gephart v. Peabody Coal Co.*, 12-0269 BLA (Dec. 7, 2012); *John Fortner v. Westmoreland Coal Co.,* 12-0163 BLA (Dec. 12, 2012); *Ned York v. FM Coal Corp.*, 12-0172 BLA (Dec. 13, 2012); *Larry Hargett v. Island Creek Coal Co.*, 12-0158 BLA (Dec. 17, 2012); *Aubrey Gent v. Mahon Enterprises, Inc.*, 12-0145 BLA (Dec. 18, 2012); *Polly Bloomer v. Debra Lynn Coals, Inc.*, 12-0197 BLA (Dec. 18, 2012); *James Lane v. Koch Carbon Raven Division,* 12-0198 BLA (Dec. 18, 2012); *Jennie Roberts v. Mountain Clay,* 12-0139 BLA (Dec. 20, 2012); *Jennie Roberts v. Mountain Clay,* 12-0259 BLA (Dec. 20, 2012); *Valeria Bowen v. Westmoreland Coal Co.*, 12-0183 BLA (Dec. 20, 2012); *Cecil Daniels v. Spartan Mining Co.*, 12-0142 BLA (Dec. 21, 2012); *Ora Atwell v. Consol of Kentucky, Inc.*, 12-0151 BLA (Dec. 21, 2012).

2013 Decisions

Presumption Rebutted - 6

Adams v. Miller Brothers, 12-0331 BLA (Mar. 15, 2013); *Pauline Thacker v. Canada Coal Co.*, 12-0386 BLA (Feb. 28, 2013); *Margaret Hancherick v. Helvetia Coal Co.,* 12-0597 BLA (Aug. 14, 2013); *Dana Vaughn v. Island Creek Coal Co.*, 12-0621 BLA (Aug. 23, 2013); *Omar Helm v. Eastern Associated Coal Co.,* 13-0145 BLA (Aug. 29, 2013); *Donna Edmonds v. Clinchfield Coal Co.*, 13-0264 BLA (Oct. 31, 2013).

Presumption Upheld - 110

John Ogle v. Big Branch Resources, Inc., 12-0194 BLA (Jan. 9, 2013); *Linda Sue James v. Island Creek Coal,* 12-0231 BLA (Jan 14, 2013); *Robert D. Shores v. Donaldson Mining Co.*, 12-0221 BLA (Jan. 18, 2013); *William Varney v. Mccoy Elkhorn Coal Co.*, 12-0227 BLA (Jan. 22, 2013); *Harold Taylor v. South Hopkins Coal Co.,* 12-0201 BLA (Jan. 29, 2013); *Eric Morris v. Dakota, LLC*, 12-0186 BLA (Jan. 30, 2013); *Beatrice Dotson v. Mccoy Elkhorn Coal*, 12-0239 BLA; 13-0064 BLA (Jan. 30, 2013); *Clarence Matney v. Four Corners Corp.*, 12-0279 BLA (Jan. 30, 2013); *Virginia Tackett v. West Virginia Solid Energy, Inc.*, 12-0237 BLA (Jan. 31, 2013); *Cynthia Howard v. Martin County Coal Corp.*, 12-0284 BLA (Jan. 31, 2013); *Paul Bloomer v. Westmoreland Coal Co.*, 12-0286 BLA (Jan. 31, 2013); *Clyde Connelly v. Eighty Four Mining Co.,* 12-0343 BLA (Feb. 19, 2013); *Helen Taylor v. Hawkins Coal*, 12-0275 BLA (Feb. 21, 2013); *Helen Taylor v. Hawkins Coal*, 12-0276 BLA (Feb. 21, 2013); *Ethel Collins v. Kentland-Elkhorn Coal Corp.*, 12-0148 BLA (Feb. 27, 2013); *James Blankenship v. Clinchfield Coal Co.,* 12-

0316 BLA (Feb. 27, 2013); *John Milbauer v. Solid Mining Co., Inc.,* 12-0408 BLA (Feb. 27, 2013); *Larry Sterling v. Central Ohio Coal Co.*, 12-0285 BLA (Feb. 28, 2013); *Linda Belcher v. Harman Mining Co.*, 12-0313 BLA; 12-0430 BLA (Feb. 28, 2013); *Earnel O'Quinn v. Island Creek Kentucky Mining*, 12-0369 BLA (Mar. 7, 2013); *Donald Lane v. East Star Mining, Inc.,* 12-0347 BLA (Mar. 11, 2013); *Wiles v. Cumberland Resources, Corp.,* 12-0354 BLA (Mar. 13, 2013); *Thomas White v. Alfred Whited Coal Co.,* 12-0292 BLA (Mar. 15, 2013); *Frank Barker v. Lost Mountain Mining, Inc.,* 12-0329 BLA (Mar. 26, 2013); *Steve Blackwell v. Hiope Mining, Inc.*, 12-0333 BLA (Mar. 26, 2013); *Joseph Markovich v. Emerald Coal Resources*, 12-0314 BLA (Mar. 27, 2013); *Gilbert Wriston v. U.S. Steel Mining Co.,* 12-0352 BLA (Mar. 27, 2013); *Walter Delp v. Mountain Springs Coal Co.,* 12-0380 BLA (Mar. 27, 2013); *Wayne Deel v. Clinchfield Coal Co.*, 12-0439 BLA (Mar. 27, 2013); *Marylou Schoffstall v. Harriman Coal Co.*, 12-0388 BLA; 12-0389 BLA (Mar. 28, 2013); *Denver Miller v. McCoy Caney Coal Co.*, 12-0391 BLA (Mar. 28, 2013); *Sandra Coleman v. West Virginia CWP Fund* 12-0404A BLA (Apr. 12, 2013); *Imogene Shepherd v. Incoal, Inc.* 12-0403 BLA (Apr. 19, 2013); *Raymond Hostutler v. Consolidation Coal Co.,* 12-0412 BLA (Apr. 19, 2013); *Roger Sexton v. Golden Oak Mining Co.,* 12-0397 BLA (Apr. 25, 2013); *Harold Dennison v. Plowboy Coal Co.*, 12-0398 BLA (Apr. 25, 2013); *Henry Caudill v. Arch on the North Fork, Inc.*, 12-0416 BLA (Apr. 25, 2013); *Basil Thomas v. Bill Branch Coal Co.*, 12-0511 BLA (Apr. 25, 2013); *Sandra Riffe v. Rocky I, Inc.*, 12-0438 BLA (Apr. 26, 2013); *James Daugherty v. Chisholm Coal Co.*, 12-0472 BLA (Apr. 26, 2013); *Tonda Napier v. Shamrock Coal Co.*, 12-0540 BLA (Apr. 29, 2013);

Tonda Napier v. Shamrock Coal Co., 12-0541 BLA (Apr. 29, 2013); *Kenneth Minnix v. Minnix Mining Construction Co.*, 12-0344 BLA (Apr. 30, 2013); *Steven B. Hilliard v. Hopkins County Coal*, LLC, 12-0459 BLA (Apr. 30, 2013); *Donald Fleming v. NOW Coal Co.*, 12-0351 BLA (May 6, 2013); *Richard A. Carte v. Meadow River Coal Co.*, 12-0401 BLA (May 13, 2013); *Raymond Hays v. Buck Creek Coal Co.*, 12-0469 BLA (May 16, 2013); *Bernard Cline v. Economy Fuel Co.*, 12-0527A BLA (May 24, 2013); *Ines Grachen v. Shannopin Mining Co.*, 12-0539 BLA (May 24, 2013); *Donald Gilbert v. Consolidation Coal Co.,* 12-0427 BLA (May 30, 2013); *Edward Gibson v. Eastern Associated Coal Corp.*, 12-0465 BLA (June 12, 2013); *Lewis Armes v. Gex Kentucky, Inc.,* 12-0476 BLA (June 12, 2013); *Jackie Slone v. Diamond May Coal Co.*, 12-0556 BLA (June 25, 2013); *Raymond Dotson v. Kentucky Carbon Corp.*, 12-0602 BLA (June 25, 2013); *William Hall v. Sky Coal Company, Inc.*, 12-0649 BLA (June 26, 20 13); *Terry Forester v. Navistar*, 12-0442 BLA (June 27, 2013); *Ronald Lynch v. Old Ben Coal Co.*, 12-0553 BLA (June 27, 2013); *Rita Jean Owens v. Consolidation Coal Co.*, 12-0593 BLA (June 27, 2013); *Rita Jean Owens v. Consolidation Coal Co.*, 12-0594 BLA (June 27, 2013); *Eddie Owens v. Postar Coal Co.*, 12-0493 BLA (July 9, 2013); *Paul Given v. Sewell Coal Company*, 12-0544 BLA (July 15, 2013); *Darrell Julian v. Midwest Coal Co.*, 12-0453 BLA (July 16, 2013); *Glenn Pennington v. Evans Coal Corp.,* 12-0497 BLA (July 17, 2013); *Grady Shortridge v. Clinchfield Coal Co.*, 12-0604 BLA (July 19, 2013); *Bill Cantrell v. Dotco Energy Co. Inc.*, 12-0574 BLA (July 22, 2013); *Ella Hayes v. Drummond Co. Inc.*, 12-0558 BLA (July 23, 2013); *Jack McPeek v. Spartan Mining Co.*, 12-0596 BLA (July 30, 2013); *Jacob Johnson v. Trojan Mining & Processing*, 12-0585

BLA (Aug. 21, 2013); *Randal Charles v. Consolidation Coal Co.*, 12-0616 BLA (Aug. 27, 2013); *Toney Mahon v. Pen Coal Corp.*, 12-0624 BLA (Aug. 27, 2013); *Rondal Middleton v. Bledsoe Coal Corp.*, 13-0086 BLA (Aug. 27, 2013); *Clarence Clutter v. Roblee Coal Co.*, 13-0100 BLA (Aug. 27, 2013); *Ann Stipcak v. Valley Camp Coal Co.*, 12-0567 BLA (Aug. 29, 2013); *Sylus Burkhart v. Triple C. Coal, Inc.*, 12-0648 BLA (Aug. 29, 2013); *Valla Loudermilk v. Lafayette Springs Enterprises*, 13-0030 BLA (Aug. 29, 2013); *Valla Loudermilk v. West Virginia CWP Fund,* 13-0031 BLA (Aug. 29, 2013); *Gatha Sykes v. Sun Glo Coal Co.*, 12-0613 BLA (Aug. 30, 2013); *Gatha Sykes v. Sun Glo Coal Co.*, 12-614 BLA (Aug. 30, 2013); *James Bentley v. AA&W Coals, Inc.* 13-0114 BLA (Aug. 30, 2013); *Darrell Penrod v. Green River Coal Co.*, 12-0668 BLA (Sept. 4, 2013); *Sadie Chaffins v. Nats Creek Mining Co.*, 13-0027 BLA (Sept. 6, 2013); *Melvin Muncy v. Elkay Mining Co.*, 13-0007 BLA (Sept. 17, 2013); *Danny Brown v. New Hope Co. of Kentucky,* 12-0660 BLA (Sept. 18, 2013); *Boger Stanley v. Big Hill Coal Co.*, 12-0659 BLA (Sept. 19, 2013); *Howard Lewis v. Bledsoe Coal Corp.*, 13-0253 BLA (Sept. 19, 2013); *Geraldine Cain v. GAJK Coal Corp.*, 13-0091 BLA (Sept. 20, 2013); *Johnny Thompson v. Swamp Fox Development*, 13-0189 BLA (Sept. 20, 2013); *Charles Stawser v. Patriot Mining Co. Inc.,* 12-0627 BLA (Sept. 23, 2013); *Herbert Plum v. Consolidation Coal Co.*, 12-0630 BLA (Sept. 23, 2013); *Berkley Radabaugh v. Consolidation Coal Co.*, 12-0655BLA (Sept. 24, 2013); *Mikel Trader v. McElroy Coal Co.*, 12-0658 BLA (Sept. 24, 2013); *Haley Hatfield v. Habet Mining*, 13-0097 BLA (Sept. 24, 2013); *Harold Bostic v. Clinchfield Coal Co.*, 13-0046 BLA (Sept. 25, 2013); *Louis Williams v. Peabody Coal Co.*, 12-0664 BLA (Sept. 26, 2013); *Donald Hall v. U.S.*

Steel Corp., 13-0082 BLA (Sept. 27, 2013); *Roy Fleming v. Phil Strouth Coal Co.*, 13-0004 BLA (Oct. 23, 2013); *Eldon Newport v. Sam Daugherty,* 13-0194 BLA (Oct. 23, 2013); *Herman Williams v. Consolidation Coal Co.*, 13-0036 BLA (Oct. 30, 2013); *Clarence Bowman v. Consolidation Coal Co.*, 13-0080 BLA (Oct. 31, 2013); *Judith Stout v. Top Hill Mining Co.*, 13-0065 BLA (Nov. 12, 2013); *Herbert Keathley v. Sunny Ridge Mining Co.*, 13-0211 BLA (Nov. 13, 2013); *Elmer Casey v. Island Creek Coal*, 13-0123 BLA (Nov. 21, 2013); *Bobby Estep v. Coal Branch Coal Co.*, 13-0044 BLA (Nov. 25, 2013); *Rita Vance v. Island Creek Coal Co.*, 13-0112 BLA (Nov. 25, 2013); *Roger Waugh v. Clinchfield Coal Co.*, 13-0142 BLA (Nov. 25, 2013); *Elijah Farmer v. Habet Mining LLC*, 13-0073 BLA (Nov. 26, 2013); *Arnold Street v. Dominion Coal Corp.*, 13-0116 BLA (Nov. 27, 2013); *John Ritchie v. James River Coal Service Co.*, 13-0152 BLA (Dec. 4, 2013); *Jerome Dixon v. Highland Mining Co.*, 13-0133 BLA (Dec. 11, 2013).

2014 Decisions

Presumption Rebutted - 3

Willie Carson v. Jim Walker Resources, Inc. 13-0380 BLA (Apr. 3, 2014); *Delmus Moore v. Clinchfield Coal Co.*, 13-0525 BLA (June 5, 2014); *Carl Kanipe v. Peabody Coal Co.*, 13-0512 BLA (June 11, 2014).

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John West v. Peabody Coal Co., 13-0226 BLA (Jan. 6, 2014); *Iva West v. Clinchfield Coal Co.*, 13-0245 BLA (Jan. 13, 2014); *Donn Wnek v. McElroy Coal Co.*, 13-0224 BLA (Jan. 14, 2014); *Romaine Short v. Sahara Coal Trust,* 13-0184 BLA (Jan. 23, 2014); *Calvin*

Blankenship v. New Elk Coal Co., 13-0151 BLA (Jan. 31, 2014); *Glenn Stout Jr. v. WolfRun Mining Co.*, 13-0169 BLA (Jan. 31, 2014); *Patricia Shrader v. Pinnacle Mining Co.*, 13-0239 BLA (Jan. 31, 2014); *Hugh Linkous v. Consolidation Coal Co.*, 13-0280 BLA (Jan. 31, 2014); *Fuller Varner v. Consolidation Coal Co.,* 13-0188 BLA (Feb. 5, 2014); *Carmel Jarrell v. Jim Walker Resources, Inc.,* 13-0242 BLA (Feb. 7, 2014); *Kyle Osborne v. Koch Carbon Raven Div.*, 13-0220 BLA (Feb. 20, 2014); *Therman McKamey v. Beech Grove Processing Co.*, 13-0246 BLA (Feb. 20, 2014); *Argus Trent v. JuMacris Mining, Inc.*, 13-0320 BLA (Feb. 20, 2014); *Reddin Byrge v. Premium Coal Co.*, 13-0210 BLA (Feb. 24, 2014); *Jennifer Hardison v. Pittsburg & Midway Coal Mining*, 13-0243 BLA (Feb. 24, 2014); *Clifford Marcum v. Quarto Mining Co.*, 13-0279 BLA (Feb. 24, 2014); *Jerry Floyd v. Brooks Run Mining*, 13-0324 BLA (Feb. 25, 2014); *Wayne Jones v. Big Ridge, Inc.,* 13-0257 BLA (Feb. 26, 2014); *Febel Crum v. Champion Coal Co.*, 13-0207 BLA (Feb. 27, 2014); *Charles Trosper v. Roncat Mining, Inc.*, 13-0238 BLA (Feb. 27, 2014); *Jimmy Walker v. Royalty Smokeless Coal Co.*, 13-0359 BLA (Feb. 28, 2014); *Roseanna Huffman v. Pen Coal Corp.,* 13-0273A BLA (Mar. 6, 2014); *Ernie Reynolds v. Judith Trucking Co.*, 13-0336 BLA (Mar. 7, 2014); *Terry Sutton v. Harlan Fuel Co. Inc.*, 13-0334 BLA (Mar. 10, 2014); *Gary Lowery v. Cannelton Industries, Inc.*, 13-0306 BLA (Mar. 12, 2014); *Shirley Amburgery v. Gum Branch Coal Co.*, 13-0217 BLA (Mar. 14, 2014); *Herman Salyers v. Spring Hollow Mining, Inc.*, 13-0305 BLA (Mar. 25, 2014); *Jerry Townsend v. Westmoreland Coal Co.*, 13-0315 BLA (Mar. 25, 2014); *Darrell May v. Leeco, Inc.*, 13-0297 BLA (Mar. 26, 2014); *David Dorsey v. Midwest Coal Co.,* 13-0391 BLA (Mar. 26, 2014); *Juanita Helton*

v. Mamalapan Mining Co. Inc., 13-0395 BLA (Mar. 31, 2014); *Carolyn Justus v. Rife & Hall Coal Co.*, 13-0313 BLA (Apr. 9, 2014); *Carolyn Justus v. Rife & Hall Coal Co.*, 13-0314 BLA (Apr. 9, 2014); *Johnny Hill v. Lone Mountain Processing, Inc.*, 13-0327 BLA (Apr. 17, 2014); *Curtis Stover v. Fola Coal Co. Inc.*, 13-0307 BLA (Apr. 18, 2014); *Jerry Trimble v. Bull Creek Coal Corp.*, 13-0335 BLA (Apr. 21, 2014); *Claude Vandyke v. Vandyke Brothers Coal Co.*, 13-0339 BLA (Apr. 21, 2014); *Carl Davis v. County Boy Mining, Inc.*, 13-0410 BLA (Apr. 22, 2014); *Cy Smith v. Big Elk Coal Co.*, 13-0337 BLA (Apr. 24, 2014); *Frank Snider v. Consolidation Coal Co.*, 13-0358 BLA (Apr. 28, 2014); *Gerald Mabe v. Westmoreland Coal Co.*, 13-0316 BLA (Apr. 30, 2014); *Bobby Shepard v. Cumberland Resources Corp.*, 13-0392 BLA (Apr. 30, 2014); *Robert Coulson v. McElroy Coal Co.*, 13-0415 BLA (May 9, 2014); *Richard Kennard v. Brandywine Explosives & Supply*, 13-0442 BLA (May 12, 2014); *Doris Kiser v. Virginia Pocahontas Co.*, 13-0424 BLA (May 14, 2014); *William Yourich v. U.S. Steel Corp.,* 13-0462 BLA (May 14, 2014); *James D. Smitley v. BCNR Mining Corp.*, 13-0468 BLA (May 15, 2014); *Wilburn Stacy v. D&F Mining*, 13-0408 BLA (May 16, 2014); *Darrell Barnett v. Decker Coal Co.,* 13-0443 BLA (May 16, 2014); *Margaret Phipps v. Bud Davis Trucking,* 13-0361 BLA (May 21, 2014); *Paul A Haynes v. Marfork Coal Co.*, 13-0419 BLA (May 23, 2014); *Jimmy Dye v. Red Baron, Inc.*, 13-0464 BLA (May 29, 2014); *Edward Warf v. Century Operations LLC*, 14-0057 BLA (May 29, 2014); *David Brown v. Consolidation Coal Co.*, 13-0398 BLA (May 30, 2014); *Aiva Cogar v. Pammlid Coal Co.*, 13-0490 BLA (May 30, 2014); *Stevie Boggs v. Laural Coal Corp.*, 13-0473 BLA (June 24, 2014); *Charles E. Ball v. Apogee Coal Co.*, 13-0533 BLA

(June 24, 2014); *Timothy Mahon v. Highland Mining Co.*, 13-0485 BLA (June 25, 2014); *Stevie Ward v. C&O Mining Inc.*, 13-0582 BLA (June 25, 2014); *Juanita Oslonian v. METEC, Inc.*, 13-0447 BLA (June 26, 2014); *Juanita Oslonian v. METEC,* Inc.,14-0134 BLA (June 26, 2014); *George Hagar v. Eastern Associated Coal Corp.*, 13-0569 BLA (June 26, 2014); *Wayne Conley v. National Mines Corp.*, 13-0489 BLA (June 30, 2014); *Archie Elkins v. Webster County Coal Corp.*, 13-0510 BLA (June 30, 2014); *Arvis Toler v. Eastern Associated Coal Corp.*, 13-0531 BLA (July 7, 2014); *Stacy Ellis v. Donaldson Mining Co.*, 13-0455 BLA (July 9, 2014); *Larry Lester v. Bluestone Coal Corp.*, 13-0515 BLA (July 15, 2014); *Verdie Vandyke v. Beatrice Pocahontas Co.*, 13-0520 BLA (July 15, 2014); *Gary Jackson v. Island Creek Coal Co.*, 13-0534 BLA (July 22, 2014); *Charles Morris v. Eighty Four Mining Co.*, 13-0518 BLA (July 25, 2014); *Carl Tinnel v. Island Creek Kentucky Mining*, 13-0548 BLA (July 28, 2014); *James Bounds v. Marfork Coal Co. Inc.*, 13-0522 BLA (July 29, 2014); *Robert McKinney v. Midwest Coal Co.*, 13-0562 BLA (July 29, 2014); *Harvey Gower v. Eastern Associated Coal Co.*, 13-0586 BLA (July 29, 2014); *Roger Kennedy v. McElroy Coal Co.*, 13-0592 BLA (July 29, 2014); *Dorothy Skala v. Florence Mining Co.*, 14-0008 BLA (Aug. 5, 2014); *Albert Holiday v. Peabody Coal Co.*, 14-0061 BLA (Aug. 19, 2014); *Cortland Morgan v. Barnes and Tucker Co.*, 14-0193 BLA (Aug. 20, 2014); *Douglas Barr v. Kindill Mining Co.*, 14-0077 BLA (Aug. 21, 2014); *Albert Mink v. Catenary Coal Co.*, 13-0563A BLA (Aug. 22, 2014); *James Davis v. Dominion Coal Co.*, 14-0016 BLA (Aug. 22, 2014); *Kenneth Davis v. PBS Coals Inc.*, 13-0545 BLA (Aug. 26, 2014); *Keith Williams v. Pine Ridge Coal Co.*, 14-0142 BLA (Aug. 26, 2014); *Phillip Caudill v. Lance*

Coal Corp., 13-0558 BLA (Aug. 27, 2014); *Lindsey Yocum v. Nesco, Inc.*, 14-0072 BLA (Aug. 27, 2014); *Charles Cutlip v. Brooks Run Mining Co. LLC*, 14-0028 (Aug. 28, 2014); *Samuel Ramsey v. Consolidation Coal Co.,* 13-0561 BLA (Sept. 3, 2014); *Allen Collins v. Coastal Coal Co.*, 14-0089 BLA (Sept. 24, 2014); *Phillip Hess v. Dominion Coal,* 14-0104 BLA (Sept. 30, 2014); *Thomas Jarvis v. Peabody Coal Co.*, 14-0233 BLA (Oct. 2, 2014); *Rollin Linxwiler v. Wabash Mine Holding Co.*, 14-0063 BLA (Oct. 6, 2014); *Michael Hayes v. Reedy Coal Co.*, 14-0092 BLA (Oct. 6, 2014); *Jackie Fortner v. Bresee Trucking Co.*, 14-0106 BLA (Oct. 29, 2014); *Kenneth Warfield v. E&L Construction,* 14-0225 BLA (Oct. 31, 2014); *Edna Sauls v. Clinchfield Coal Co.*, 14-0208 BLA (Nov. 4, 2014); *Leonard Cumbridge v. Donaldson Mine Co.*, 14-0075 BLA (Nov. 17, 2014); *Franklin Christenberry v. Heritage Coal Co.*, 14-0232 BLA (Nov. 20, 2014); *Fred Connell v. Keystone Coal Mining Corp.*, 14-0126 BLA (Nov. 21, 2014); *A.W. Garrett v. Karst Robbins Coal Co.*, 14-0076 BLA (Nov. 24, 2014); *Robert Stewart v. Cliffco Enterprises, Inc.,* 14-0118 BLA (Nov. 25, 2014); *Larry Rice v. Ranger Fuel Corp.*, 14-0144 BLA (Dec. 4, 2014); *Carl Edwards v. Empire Mining, Inc.,* 14-0207 BLA (Dec. 31, 2014).

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Presumption Rebutted - 0

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Leroy Adkins v. Ragland Coal Co., 14-0145 BLA (Jan. 23, 2015); *Billy Spires v. Southern Ohio Coal Co.,* 14-0190 BLA (Jan. 27, 2015); *Lyndell Clark v. Green Coal Co.*, 14-0125 BLA (Jan. 28, 2015); *Elizabeth*

Cantley v. Gold River Mining Co., 14-0068 BLA (Jan. 30, 2015); *Elizabeth Cantley v. Gold River Mining Co.*, 14-0069 BLA (Jan. 30, 2015); *Everett Galusky v. Consolidation Coal Co.*, 14-0187 BLA (Jan. 30, 2015); *Roberta Lusk v. Shannon Pocahontas Mining Co.*, 14-0230 BLA (Feb. 3, 2015); *Gazi Bokkon v. Island Creek Coal Co.*, 14-0209 BLA (Feb. 13, 2015); *Michael Sweeney v. Consol Energy, Inc.*, 14-0078 BLA (Feb. 20, 2015); *Ermil Freeman v. Arch of WV*, 14-0252 BLA (Feb. 20, 2015); *Alan Busch v. Pine Ridge Coal Co.*, 14-0219 BLA (Feb. 27, 2015); *James Patterson v. Consolidation Coal Co.*, 14-0315 BLA (Mar. 18, 2015); *Herbert Salley v. Kentucky Prince Mining Co.*, 14-0347 BLA (Mar. 18, 2015); *Steve Ezarik v. Eighty Four Mining Co.*, 14-0146 BLA (Mar. 26, 2015); *Ruth Horn v. Mountain County Coal Corp.*, 14-0247 BLA (Mar. 26, 2015); *Ruth Horn v. Mountain County Coal Corp.*, 14-247A BLA (Mar. 26, 2015); *Ruth Horn v. Mountain County Coal Corp.*,14-0248 BLA (Mar. 26, 2015); *Ruth Horn v. Mountain County Coal Corp.*,14-0248A BLA (Mar. 26, 2015); *Jeffrey Stupak v. Quarto Mining Co.*, 14-0229 BLA (Mar. 27, 2015); *Gary Justice v. Justice Trucking,* 14-0268 BLA (Mar. 27, 2015); *Ott Kennedy v. Consolidation Coal Co.*, 14-0304 BLA (Mar. 27, 2015): *Earon Hardison v. Peabody Coal Co.*, 14-0274 BLA (Mar. 30, 2015); *Tracey Carter v. Timco Energy, Inc.*, 14-0330 BLA (Mar. 30, 2015); *Charles Hoops v. Elk Run Coal Co.*, 14-0284 BLA (Apr. 14, 2015); *Roy Griffith v. Excel Mining LLC*, 14-0355 BLA (Apr. 15, 2015); *Wilma Brown v. Heritage Coal Co.*, 14-0244 BLA (Apr. 22, 2015); *Patricia Fitzwater v. Westmoreland Coal Co.*, 14-0261 BLA (Apr. 29, 2015); *Lonnie Stout v. U.S. Steel Corp.*, 14-0351 BLA (May 8, 2015); *Guy Wolfe v. Olga Coal Co.*, 14-0338 BLA (May 13, 2015); *Willie Harmon v. Eastern Associated Coal Corp.*, 14-

0310 BLA (May 27, 2015); *Kathryn Bernard v. Consolidation Coal*, 13-0232 BLA (May 29, 2015); *Lucian Love v. Heritage Coal Co.*, 14-0321 BLA (June 23, 2015); *Eddie Smith v. Andalex Resources, Inc.* 14-0324 BLA (June 23, 2015); *Leroy Dickerson v. Heritage/Patriot Coal Co.*, 14-0215 BLA (June 29, 2015); *Emzie Coleman v. Chisholm Coal Co.*, 14-0372 BLA (June 29, 2015); *Henry Cherry v. Chevron Mining, Inc.* 14-0382 BLA (June 29, 2015); *Betty Lane v. Elk Run Coal Co.*, 14-0336 BLA; 14-0354 BLA (June 30, 2015); *Marvin Bruner v. Peabody Coal Co.*, 14-0340 BLA (July 10, 2015); *Roosevelt Neal v. Baylor Mining, Inc.*, 14-0353 BLA (July 10, 2015); *Earl Hagy v. Eastern Associated Coal Corp.*, 14-0377 BLA (July 10, 2015); *Gerdie Gearhart v. E&H Mining and Trucking*, 14-0352 BLA (July 21, 2015); *Georgia Brock v. Powell Mountain Coal Co.*, 14-0350 BLA (July 23, 2015); *Willis Brewer v. Mare Development LLC*, 14-0358 BLA (July 30, 2015); *Frank Walk v. Lady Jane Collieries*, 14-0383 BLA (July 30, 2015); *Joseph Fleming v. Aberry Coal, Inc.*, 14-0329 BLA (July 31, 2015); *Kenneth Wardv. Elk Run Coal Co.*, 14-0374 BLA (July 31, 2015); *Carnis Delp v. Eastern Associated Coal Corp.*, 14-0428 BLA (July 31, 2015); *Astor Smith v. Apogee Coal Co.*, 14-0333 BLA (July 16, 2015); *Norma Barnes v. Cowin & Co.*, 14-0367 BLA (Aug. 25, 2015); *Eddie Bullock v. Heritage Coal Co.*, 14-0442 BLA (Aug. 25, 2015); *Terry Rhodes v. Spartan Mining Co.*, 14-0413 BLA (Aug. 27, 2015); *Okey May v. Aero Energy, Inc.* 14-0401 BLA (Aug. 28, 2015); *Geraldine Clevenger v. EF&B Coal*, 14-0387 BLA (Aug. 31, 2015); *Danny Hall v. Island Creek Kentucky Mining*, 14-0397 BLA (Aug. 31, 2015); *Archie Bulliner v. Heritage Coal*, 14-0405 BLA (Aug. 31, 2015); *Douglas Stone v. Cumberland River Coal Co.*, 13-0303 BLA; 14-0398 BLA (Sept. 9, 2015); *Paul Stout v. Consolidation*

Coal Co., 15-0013 BLA (Sept. 29, 2015); *Crandall Walls v. Cove Coal Co.*, 14-0407 BLA (Sept. 30, 2015); *John Fortner v. Westmoreland Coal Co.*, 14-0412 BLA (Sept. 30, 2015); *James Jenkins v. Interstate Mining Corp.*, 14-0427 BLA (Sept. 30, 2015); *Margaret Maggard v. Westmoreland Coal Co.* 14-0433 BLA; 14-0434 BLA (Sept. 30, 2015); *John Chinn v. Highland Mining Co.*, 15-0074 BLA (Oct. 19, 2015); *James Belcher v. Island Creek Coal Co.*, 15-0038 BLA (Oct. 20, 2015); *Kenneth Layne v. Consolidation Coal Co.*, 15-0069 BLA (Oct. 22, 2015); *Kenneth Long v. Eastern Associated Coal Co.*, 15-0018 BLA (Oct. 27, 2015); *Earl Prater v. Arch on the North Fork, Inc.*, 15-0005 BLA (Oct. 29, 2015); *Emma Dalman v. Consolidation Coal Co.*, 15-0022 BLA (Oct. 30, 2015); *Florence Ward v. Island Creek Coal Co.*, 15-0050 BLA (Oct. 30, 2015); *Clarence Lester v. Island Creek Coal Co.*, 15-0049 BLA (Nov. 3, 2015); *Roger Richmond v. No Coal, Inc.*, 15-0058 BLA (Nov. 16, 2015); *Starling Bowling v. Key Mining, Inc.*, 15-0102 BLA (Nov. 17, 2015); *Arnel McGlothlin v. Beatrice Pocahontas Co.*, 15-0103 BLA (Nov. 19, 2015); *Charles Gulley v. Premier Elkhorn Coal Co.*, 15-0045 BLA (Nov. 23, 2015); *Charles Gulley v. Premier Elkhorn Coal Co.*, 15-0046 BLA (Nov. 23, 2015); *Lawrence Long v. Elk Run Coal Co.*, 15-0061 BLA (Nov. 23, 2015); *James Elliott v. Helen Mining Co.*, 15-0067 BLA (Nov. 23, 2015); *Melvin Muncy v. Elkay Mining Co.*, 15-0068 BLA (Nov. 23, 2015); *William Estes v. Kentucky Processing Co., Inc.*, 15-0073 BLA (Nov. 23, 2015); *Lesia Reynolds v. Black Beauty Coal Mining Co.*, 15-0056 BLA (Dec. 3, 2015); *Lesia Reynolds v. Black Beauty Coal Mining Co.*, 15-0057 BLA (Dec. 3, 2015); *Linda Pyle v. Rochester & Pittsburgh Coal Co.*, 15-0149 BLA (Dec. 8, 2015); *Kenneth Arduini v. Helvetia Coal Co.*, 15-0047 BLA

(Dec. 9, 2015); *Lonnie Absher v. Powell Mountain Coal Co.*, 15-0078 BLA (Dec. 15, 2015); *Dolly Gibbons v. Cyprus Cumberland Mountain Corp.*, 15-0072 BLA (Dec. 16, 2015); *Dolly Gibbons v. Cyprus Cumberland Mountain Corp.*, 15-0075 BLA(Dec. 16, 2015); *James Strahin v. Micon,* 15-0082 BLA (Dec. 18, 2015); *Phyllis Stacy v. Diamond May Coal Co.*, 15-0084 BLA (Dec. 22, 2015); *Raymond Hinzman v. Donaldson Mining Co.*, 15-0065 BLA (Dec. 23, 2015).

2016 Decisions

Presumption Rebutted - 2

James Tilley v. Maple Meadow Mining Co., 15-0399 BLA (June 14, 2016); *Thomas Peters v. David Stanley Consultants,* 16-0170 BLA (Dec. 22, 2016).

Presumption Upheld - 125

Arthur Riley v. Glen Allen Mining Inc., 15-0113 BLA (Jan. 13, 2016); *Richard Burden v. Warrier Coal, LLC,* 15-0145 BLA (Jan. 15, 2016); *Marvin Lawrence v. Itmann Coal Co.*, 15-0123 BLA (Jan. 29, 2016); *James Layton v. Shrewsbury Coal Co.*, 15-0128 BLA (Feb, 4, 2016); *Billy Engle v. Day Branch Coal Co.*, 15-0164 BLA (Feb. 9, 2016); *James Melvin v. Brushy Creek Coal Co.*, 15-0165 BLA (Feb, 9, 2016); *Roy Blackburn v. Southern Ohio Coal Co.,* 15-0183 BLA (Feb. 9, 2016); *Christine Combs v. Coal Power Corp.*, 15-0118 BLA (Feb. 10, 2016); *Christine Combs v. Coal Power Corp.*, 15-0119 BLA (Feb. 10, 2016); *Hazel Smith v. Elkay Mining Co.*, 15-0100A BLA (Feb. 23, 2016); *James Mills v. U.S. Steel Corp.,* 15-0147 BLA (Feb. 23, 2016); *Nolan Brantley v. Jim Walter Resources, Inc.*, 15-0168 BLA (Feb. 23, 2016); *Peggy Conley v. Island Creek Coal Co.*, 15-0171 BLA (Feb. 23, 2016); *Peggy Conley v. Island*

Creek Coal Co., 15-0173 BLA (Feb. 23, 2016); *Herskel Stallard v. Westmoreland Coal Co.*, 15-0156 BLA (Feb. 24, 2016); *Harold Wright v. Webster County Coal*, 15-0131 BLA (Feb. 25, 2016); *James Baker v. B&P Coal Co. Inc.*, 15-0150 BLA (Feb. 25, 2016); *James Tinnel v. Coastal Coal WV*, 15-0157 BLA (Feb. 25, 2016); *Billy Dingus v. Clinchfield Coal Co.*, 15-0210 BLA (Feb. 25, 2016); *Sharon Fleming v. Clinchfield Coal Co.*, 15-0201 BLA (Feb. 26, 2016); *Jackie Angles v. Consolidation Coal Co.*, 15-0272 BLA (Feb. 29, 2016); *Harold Ford v. Marfork Coal Co.*, 15-0125 BLA (Mar. 3, 2016); *Chris Newsome v. Excel Mining, LLC*, 15-0185 BLA (Mar. 3, 2016); *Harold Davis v. Shannopin Mining Co.*, 15-0188 BLA (Mar. 10, 2016); *William Smith v. Westmoreland Coal Co.*, 15-0154 BLA (Mar. 21, 2016); *Billy Fowler v. U.S. Steel Mining Co. LLC,* 15-0240 BLA (Mar. 23, 2016); *Wilma Holmes v. Island Creek Coal Co.*, 15-0241 BLA (Mar. 23, 2016); *Nicky Weaver v. Southern Ohio Coal Co.*, 15-0246 BLA (Mar. 24, 2016); *Judy Noyes v. Consolidation Coal Co.*, 15-0228 BLA (Mar. 28, 2016); *Jerry Williams v. Wabash Mine Holding Co.,* 15-0231 BLA (Mar. 28, 2016); *Larry Darnell v. Phoenix Coal*, 15-0273 BLA (Mar. 28, 2016); *Joan Street v. Island Creek Coal Co.*, 15-0166 BLA (Mar. 30, 2016); *Joan Street v. Island Creek Coal Co.*, 15-0170 BLA (Mar. 30, 2016); *Reta Blair v. Midwest Coal Co.*, 15-0245 BLA (Mar. 30, 2016); *Billy Hazelwood v. U.S. Steel Mining Co., LLC*, 15-0264 BLA (Mar. 30, 2016); *Eldon Hintze v. Plateau Mining Corp.*, 15-0301 BLA (Mar. 30, 2016); *Paul Dayton v. Island Creek Coal Co.*, 15-0266 BLA (Apr. 5, 2016); *Bennie Workman v. Lighting Contract Services, Inc.*, 15-0292 BLA (Apr. 5, 2016); *Violet Spurlock v. Island Creek Kentucky Mining*, 15-0302 BLA (Apr. 18, 2016); *Violet Spurlock v. Island Creek Kentucky Mining*,15-0308 BLA (Apr. 18, 2016); *Denver*

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Thompson v. Consolidation Coal Co., 15-0342 BLA (June 30, 2016); *Danny Bradley v. Ranger Fuel Corp.*, 15-0345 BLA (June 30, 2016); *Charles Simpson v. Wayco Limited Partnership*, 15-0367 BLA (June 30, 2016); *Peggy Dudleson v. National Mines Corp.*, 15-0333 BLA (July 13, 2016); *Buster Dudleson v. National Mines Corp.*, 15-0334 BLA (July 13, 2016); *Freida Taylor v. Clinchfield Coal Co.*, 15-0414 BLA (July 18, 2016); *Freida Taylor v. Clinchfield Coal Co.*, 15-428 BLA (July 18, 2016); *Robert Walker v. Sahara Coal Trust*, 15-0453 BLA (July 18, 2016); *Carlie Miracle v. Cyprus Cumberland Mountain Coal*, 15-0479 BLA (July 20, 2016); *Anthony Johnson v. Manalapan Mining Co.*, 15-0459 BLA (July 28, 2016); *Lena Faye Wright v. KC Rogers Coal Co., Inc.*, 15-0464 BLA; 15-0482 BLA (July 28, 2016); *Darlene Moye v. Meadow River Coal Co.*, 15-0418 BLA (July 29, 2016); *Rosa L. Miller v. National Mines Corp.*, 15-0474 BLA (Aug. 15, 2016); *Paul Garrett v. Powell Mountain Coal Co.*, 15-0445 BLA (Aug. 16, 2016); *Fay Hall v. The Pittson Co.*, 16-0076 BLA (Aug. 17, 2016); *Fay Hall v. The Pittson Co.*, 16-0077 BLA (Aug. 17, 2016); *Foree Martin v. Jim Walter Resources*, 15-0527 BLA (Aug. 22, 2016); *Gary Byrd v. AEP Kentucky Coal, LLC*, 15-0536 BLA (Aug. 22, 2016); *Shirley Stallard v. Westmoreland Coal Co.*, 15-0374 BLA (Aug. 23, 2016); *Shirley Stallard v. Westmoreland Coal Co.*, 15-0375 BLA (Aug. 23, 2016); *Marsha Hall v. Topmost Coal Co.*, 16-0092 BLA; 16-0093 BLA (Aug. 29, 2016); *Natalie Phillip v. Perry & Hylton, Inc.*, 16-0095A BLA (Aug. 30, 2016); *Peter Doerr v. Freeman United Coal Mining*, 16-0120A BLA (Aug. 30, 20 16); *Bill Fitzpatrick v. Old Ben Coal Co.*, 15-0444 BLA (Aug. 31, 2016); *Linda Irvin v. Harlan Cumberland Coal Co.*, 15-0461 BLA (Aug. 31, 2016); *Lennix Conn v. Coal Mac, Inc.*, 16-0014 BLA (Aug. 31,

2016); *Raymond Davis v. Advent Mining, LLC*, 16-0025 BLA (Aug. 31, 2016); *Michael Dye v. East Star Mining Inc.*, 16-0056 BLA (Aug. 31, 2016); *Roger Titchenell v. Valley Camp Coal Co.*, 15-0506 BLA (Sept. 14, 2016); *Charles Maiden v. Millennium Mining, Inc.*, 16-0047 BLA (Sept. 20, 2016); *Jimmy Bowling v. Island Fork Construction*, 16-0057 BLA (Sept. 21, 2016); *Kenneth Caldwell v. Shamrock Coal Co., Inc.*, 16-0050 BLA (Sept. 22, 2016); *Nyoka Matney v. McNamee Resources, Inc.*, 16-0013 BLA (Sept. 26, 2016); *Eugene Osborne v. Liberty Bell Fuel Inc.*, 16-0062 BLA (Sept. 26, 2016); *James Harrison v. Island Creek Coal Co.*, 15-0484 BLA (Sept. 30, 2016); *Obie Parrish v. Southern Edge, Inc.*, 16-0001 BLA (Sept. 30, 2016); *William Maynard v. Argus Energy LLC*, 16-0107 BLA (Sept. 30, 2016); *Arlin Shepherd v. Wilder Coal Co.*, 16-0034 BLA (Oct. 17, 2016); *Sylvester Linton v. Cannelton Industries, Inc.*, 16-0122 BLA (Oct. 26, 2016); *Billy Noble v. Lawson Trucking Co., Inc.*, 16-0113 BLA (Oct. 28, 2016); *Acie Hager v. Apex Minerals, Inc.*, 16-0125 BLA (Oct. 28, 2016); *Lonnie Smith v. Mountaineer Coal Development,* 15-0522A BLA (Oct. 31, 2016); *Warren Trout v. Leckie Smokeless Coal Co.*, 16-0048 BLA (Nov. 3, 2016); *Albert Murdock v. Mountain Laurel Resources, Co.*, 15-0533 BLA (Nov. 9, 2016); *Ralph Miller v. Scottie Coal Co., Inc.*, 16-0089 BLA (Nov. 15, 2016); *Charlene Hargrove v. Island Creek Coal Co.*, 16-0096 BLA (Nov. 15, 2016); *Charlene Hargrove v. Island Creek Coal Co.*, 16-0096 16-0097 BLA (Nov. 15, 2016); *Dorothy Benfield v. Delyn Ltd.*, 16-0103 BLA (Nov. 18, 2016); *Eugene Sturgill v. Double M Coal Co.*, 15-0294 BLA (Nov. 28, 2016); *James Dye v. Sea "B" Mining Co.*, 16-0111 BLA (Nov. 28, 2016); *Nancy Deskins v. Island Creek Coal Co.*, 16-0068 BLA (Nov. 29, 2016); *Fred Childers v. North Fork Coal Corp.*, 16-0118 BLA (Nov. 29, 2016);

Othello Massey v. Peabody Coal Co., 16-0091 BLA (Nov. 30, 2016); *JoAnn Henry v. Consol, Inc.*, 16-0209 BLA (Dec. 6, 2016); *Harry Sneigle v. McElroy Coal Co.*, 16-0087 BLA (Dec. 13, 2016); *Douglas Smith v. Bar-K Inc.*, 16-0150 BLA (Dec. 15, 2016); *Marilyn Kerstetter v. Kerris & Helfrick, Inc.*, 16-0228 BLA (Dec. 19, 2016); *Marilyn Kerstetter v. Kerris & Hefrick, Inc.*, 16-0229 BLA (Dec. 19, 2016); *Paul Shay v. Keystone Coal Mining Corp.*, 16-0284 BLA (Dec. 21, 2016).

2017 Decisions

Presumption Rebutted - 1

Earl Duncan v. Cam Mining, LLC, 17-0234 BLA (Dec. 28, 2017)

Presumption Upheld - 125

Albert Perry v. Westmoreland Coal Co., 16-0136 BLA (Jan. 17, 2017); *Virginia Reilly v. Girardville Coal Co.*, 16-0156 BLA (Jan. 17, 2017); *Larry L. Straub v. Summit Anthracite, Inc.,* 16-0186 BLA (Jan. 17, 2017); *Ellen Shaffer v. Consolidation Coal Co.*, 16-0201 BLA (Jan. 23, 2017); *Irma Lester v. Carol Coal Co.*, 16-0204 BLA (Jan. 30, 2017); *Rachel Riggsby v. Harman Mining Corp.*, 16-0146 BLA (Feb. 2, 2017); *Alice Thomas v. Keystone Service Industries*, 16-0193 BLA (Feb. 9, 2017); *Alice Thomas v. Keystone Service Industries*, 16-0194 BLA (Feb. 9, 2017); *John Jennelle v. Consolidation Coal Co.*, 16-0207 BLA (Feb. 13, 2017); *Susan McLean v. Maple Spring Creek Coal Co.*, 16-0108 BLA (Feb. 16, 2017); *Betty Pullen v. Donaldson Mining Co.*, 16-0182 BLA (Feb. 17, 2017); *Betty Pullen v. Donaldson Mining Co.*, 16-0183 BLA (Feb. 17, 2017); *Dorothy Matney v. Maverick Mining Co.*, 16-0222 BLA (Feb. 23, 2017); *Randy McGlothin v. Island Creek Coal*

Co., 16-0236 BLA (Feb. 23, 2017); *Jimmie May v. Premier Elkhorn Coal Co.*, 16-0272 BLA (Feb. 23, 2017); *Barbara Coleman v. RBM Enterprises, Inc.* 16-0244 BLA (Feb, 24, 2017); *Jerry Coleman v. Speed Mining, Inc.*, 16-0308 BLA (Feb. 24, 2017); *Chucky Bailey v. Hart Hat Coal Co.*, 15-0315 BLA (Feb. 27, 2017); *Ellis Traylor v. Andalex Resources, Inc.*, 16-0230 BLA (Mar. 2, 2017); *James Minich v. Keystone Coal Mining Corp.*, 16-0253 BLA (Mar. 2, 2017); *Annette Cody v. National Mines Corp.*, 16-0286 BLA (Mar. 2, 2017); *Patrick Conley v. Guest Mountain Mining Corp.*, 16-0282 BLA (Mar. 6, 2017); *William Legg v. Westmoreland Coal Co.*, 16-0257 BLA (Mar. 9, 2017); *Charlie Woods v. Coastal Coal Co., LLC*, 16-0239 BLA (Mar, 15, 2017); *Ricky Mullins v. New Era Coal Co., Inc.*, 16-0267 BLA; (Mar, 16, 2017); *Ricky Mullins v. New Era Coal Co., Inc.*, 16-0267A BLA (Mar. 16, 2017); *Jessie Dotson v. Jim Walter Resources, Inc.*, 16-0249 BLA (Mar. 20, 2017); *Evelyn Bryan v. Consolidation Coal Co.*, 16-0300 BLA (Mar. 20, 2017); *Evelyn Bryan v. Consolidation Coal Co.*, 16-0316 BLA (Mar. 20, 2017); *Margaret Dotson v. Jim Walter Resources, Inc.*, 16-0679 BLA (Mar. 20, 2017); *Howard Bowyer v. Central Appalachian Coal Co.*, 16-0271 BLA (Mar. 21, 2017); *Arlin Curneal v. Chistus Trucking, LLC*, 16-0276 BLA (Mar, 21, 2017); *Donald Helton v. Coastal Coal Co., LLC*, 16-0397 BLA (Mar. 21, 2017); *Jay Wilkerson v. Island Creek Coal Co.*, 16-0331 BLA (Mar. 21, 2017); *Wilbur Greene v. Island Creek Coal Co.*, 16-0309 BLA (Mar. 28, 2017); *Isaac McQuinn v. Arch on the North Fork, Inc.*, 16-0265 BLA (Mar, 29, 2017); *Pearl Treadway v. Mystic Energy*, 16-0274 BLA (Mar. 31, 2017); *Philip Newton v. Big Ridge Coal Co.*, 16-0285 BLA (Mar. 31, 2017); *Charles Chemelli v. Penn Allegheny Coal Co.*, 16-0318 BLA (Apr. 11, 2017);

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Charles Ooten v. Mountaineer Coal Dev. Co., 16-0619 BLA (June 20, 2017); *Wilma Alexander v. Jim Walter Resources, Inc.*, 16-0505 BLA (June 26, 2017); *JoAnn Ashby v. Sextet Mining Corp.*, 16-0514 BLA (June 26, 2017); *Jimmy Maggard v. Westmoreland Coal Co.*, 16-0555 BLA (June 26, 2017); *Troy Yates v. Black Gold Coal Co.*, 16-0504 BLA (June 27, 2017); *Pearl Barton v. Cedar Coal Co.*, 16-0588 BLA (June 27, 2017); *Jerry Westfall v. Upshur Coals Corp.*, 16-0669 BLA (June 28, 2017); *Tamara Mullins v. H&G Mining Co.*, 16-0507 BLA (June 30, 2017); *Tamara Mullins v. H&G Mining Co.*, 16-0508 BLA (June 30, 2017); *Edward Mortenson v. Consolidation Coal Co.*, 16-0492 BLA (July 12, 2017); *Filbert Vialpando v. Chevron Mining, Inc.*, 16-0573 BLA (July 12, 2017); *Geraldine Clevenger v. EF&B Coal Co.*, 16-0540 BLA (July 18, 2017); *Vickie Salyers v. Kenwest Terminal, LLC* 16-0557 BLA (July 18, 2017); *Vida Baird v. Westmoreland Coal Co.*, 16-0532 BLA (July 19, 2017); *Vida Baird v. Westmoreland Coal Co.*, 16-0533 BLA (July 19, 2017); *Brandt Yates v. Island Creek Coal Co.*, 16-0565 BLA (July 24, 2017); *Brandt Yates v. Island Creek Coal Co.*, 16-0566 BLA (July 24, 2017); *Linda Hunt v. Island Creek Coal Co.*, 16-0556 BLA (July 26, 2017); *Charles Conley v. Turner Brothers, Inc.*, 16-0572 BLA (July 27, 2017); *Thelma Hensley v. Whitaker Coal Corp.*, 16-0598 BLA (July 31, 2017); *Michael Hall v. Paramount Coal Co. of Virginia, LLC*, 16-0610 BLA (July 31, 2017); *Billy Furgerson v. Jericol Mining, Inc.*, 16-0597 BLA (Aug. 7, 2017); *Charlotte Atkins v. Westmoreland Coal Co.*, 16-0671 BLA (Aug. 8, 2017); *Charlotte Atkins v. Westmoreland Coal Co.*, 16-0672 BLA (Aug. 8, 2017); *Kirby Rose v. Trojan Mining, Inc.*, 16-0618 BLA (Aug. 14, 2017); *Wilbur Greene v. Island Creek Coal Co.*, 16-0309 BLA (Aug. 30, 2017); *Willie Sowards v. Trojan Mining Inc.*,

16-0644 BLA (Aug. 30, 2017); *George Smith v. Ridge Top Mining, Inc.*, 16-0652 BLA (Aug. 30, 2017); *Ray Campbell v. Enterprise Mining Co., LLC*, 16-0674 BLA (Aug. 30, 2017); *Robert Hamilton v. Blue Diamond Coal Co.*, 16-0675 BLA (Aug. 30, 2017); *Jim Banks v. Cumberland River Coal Co.*, 16-0667 BLA (Aug. 31, 2017); *Eugene Rogers v. Consol of KY, Inc.*, 17-0018 BLA (Sept. 26, 2017); *Malcolm Stout v. Manapalan Mining, Inc.* 17-0022 BLA (Sept. 27, 2017); *Hershel Sparks v. Wilgar Land Co.*, 16-0692 BLA (Sept. 28, 2017); *Richard Rose v. Coal River Mining, LLC*, 17-0008 BLA (Oct. 6, 2017); *Gary Gross v. Unicorn Mining, Inc.* 17-0027 BLA (Oct. 12, 2017); *Eddie Combs v. Cave Spur Coal Co.*, 17-0003 BLA (Oct. 18, 2017); *William Bonar v. Quarto Mining Co.*, 17-0037 BLA (Oct. 18, 2017); *Glenn Handshoe v. Crager Fork Mining, Inc.* 17-0042 BLA (Oct. 19, 2017); *Irona Amos v. McElroy Coal Co.*, 17-0060 BLA (Oct. 19, 2017); *Paul Gibson v. Cam Mining LLC*, 17-0028 BLA (Oct. 23, 2017); *Jimmy McCall v. Holbrook Mining Co.*, 17-0033 BLA (Oct. 30, 2017); *Teddy Belcher v. Elkay Mining Co.*, 17-0053 BLA (Oct. 30, 2017); *Cassandra Terry v. U.S. Steel Mining Co.*, 17-0105 BLA (Oct. 30, 2017); *Cassandra Terry v. U.S. Steel Mining Co.*, 17-107 BLA (Oct. 30, 2017); *Jesse Wilder v. Manalapan Mining Co.*, 17-0052 BLA (Oct. 31, 2017); *James Clutter v. Island Creek KY Mining Co.*, 17-0063 BLA (Nov. 2, 2017); *John Hobbs v. Brock & Brock Contracting Co., Inc.*, 17-0031 BLA (Nov. 9, 2017); *Stanley Sturgill v. Good Coal Co., Inc.*, 17-0043 BLA (Nov. 9, 2017); *Harold Hammonds v. Gibber Trucking, Inc.*, 17-0057 BLA (Nov. 14, 2017); *Gary Orrahood v. The Monongalia County Coal Co.*, 17-0065 BLA (Nov. 14, 2017); *William Tomasek v. Consolidation Coal Co.*, 17-0071 BLA (Nov. 17, 2017); *William Salyer v. Stoney Fork Coal*

Co., 17-0075 BLA (Nov. 28, 2017); *Terry Bryant v. Newtown Energy, Inc.*, 17-0087 BLA (Nov. 28, 2017); *Stanley Daugherty v. Scott Machine & Hydraulic Co.*, 17-0068 BLA (Nov. 29, 2017); *Glendine Bell v. Island Creek KY Mining*, 17-0095 BLA (Nov. 29, 2017); *Glendine Bell v. Island Creek KY Mining*, 17-0096 BLA (Nov. 29, 2017); *Robert Porth v. Conesville Coal Prep*, 17-0009 BLA (Nov. 30, 2017); *Clifford Crank v. Scott Branch Coal Co., Inc.*, 17-0113 BLA (Nov. 30, 2017).

APPENDIX L

PL 95-239 LH
92 Stat. 95

LEGISLATIVE HISTORY OF THE
BLACK LUNG BENEFITS REFORM ACT OF 1977.
PL 95-239
March 01, 1978

An act to amend the Federal Coal Mine Health and Safety Act to improve the black lung benefits program established under such Act, and for other purposes.

HR 4544, 95th Cong. 95th, HR 4544 Print to accompany H. Rept 95-151, 3-31-77, is unavailable (Sept. 14, 1982, March 31, 1977)
H.Res. 702, 95th Cong. 95th, H.Res. 702 is unavailable
See text Cong. Rec. of 7-25-77, p H24763 (Sept. 14, 1982, July 25, 1977)

CONGRESSIONAL MATERIALS

Senate Human Resources Comm., Calendar, S 1538, HR 4544 (March 1, 1978)
Calendar of the House of Representatives, Calendar, HR4544, H.Res. 702, S 1538 (March 1, 1978)
PL 95-239, 92 Stat. 95 (March 1, 1978)
124 Cong. Rec. H1327 (daily ed. Feb. 21, 1978)
124 Cong. Rec. H1022-1030 (daily ed. Feb. 15, 1978)
124 Cong. Rec. S1443-1448 (daily ed. Feb. 7,1978, Feb. 6, 1978)
124 Cong. Rec. H623-631 (daily ed. Feb. 2, 1978)
H.R.Conf.Rep.No. 95-864, 95th Cong., 2d Sess. (Feb. 2, 1978)
123 Cong. Rec. S15880 (daily ed. Sept. 28, 1977)

123 Cong. Rec. H10127 (daily ed. Sept. 27, 1977)
123 Cong. Rec. S15193 (daily ed. Sept. 20, 1977)
123 Cong. Rec. E5704 (daily ed. Sept. 20, 1977)
123 Cong. Rec. E5711 (daily ed. Sept. 20, 1977)
123 Cong. Rec. H9610-33 (daily ed. Sept. 19, 1977)
HR4544, 95th Cong., 1st Sess. (Sept. 19, 1977)
123 Cong. Rec. H9515 (daily ed. Sept. 15, 1977)
123 Cong. Rec. E7705-24 (daily ed. July 25, 1977)
123 Cong. Rec. E4736 (daily ed. July 22, 1977)
123 Cong. Rec. H7687 (daily ed. July 22, 1977)
123 Cong. Rec. E4764-67 (daily ed. July 22, 1977)
HR 8484, 95th Cong., 1st Sess. (July 22, 1977)
123 Cong. Rec. E4700-02 (daily ed. July 21, 1977)
123 Cong. Rec. S12514-45 (daily ed. July 21, 1977)
H.Rep.No. 95-512, 95th Cong., 1st Sess. (July 21, 1977)
Amdt. No. 538, Calendar No. 312, S 1538 (July 20 (legislative day, May 18), 1977)
123 Cong. Rec. S12462 (daily ed. July 20, 1977)
S 1538 [Report No. 95-209, Report No. 95-336], 95th Cong., 1st Sess. (July 12 (legislative day, May 18), 1977)
S.Rep.No. 95-336, 95th Cong., 1st Sess. (July 12, 1977)
S 1538 [Report No. 95-209], 95th Cong., 1st Sess. (May 26 (legislative day, May 18), 1977)
123 Cong. Rec. S7691 (daily ed. May 16, 1977)
S 1538 [Report No. 95-209], 95th Cong., 1st Sess. (May 16, 1977)
S.Rep.No. 95-209, 95th Cong., 1st Sess. (May 16, 1977)
H.Rep.No. 95-151, 95th Cong., 1st Sess. (March 31, 1977)
HR 5152, 95th Cong., 1st Sess. (March 16, 1977)
HR 4858, 95th Cong., 1st Sess. (March 10, 1977)
HR 4544, 95th Cong., 1st Sess. (March 7, 1977)
HR 4426, 95th Cong., 1st Sess. (March 3, 1977)
HR 4388, 95th Cong., 1st Sess. (March 2, 1977)

123 Cong. Rec. E318 (daily ed. Jan. 26, 1977)
123 Cong. Rec. H387-389 (daily ed. Jan. 17, 1977)
H.J.R. 151, 95th Cong., 1st Sess. (Jan. 17, 1977)
HR1532, 95th Cong., 1st Sess. (Jan. 6, 1977)
122 Cong. Rec. S18149 (daily ed. Oct. 26, 1976)
122 Cong. Rec. S18166 (daily ed. Oct. 26, 1976)
122 Cong. Rec. S18085-18086 (daily ed. Oct 1, 1976)
122 Cong. Rec. S17285-17292 (daily ed. Sept. 30, 1976)
S.Res. 559, HR 10760 S.Rept no 94-1376, 9-29-76 to accompany S.Res. 559 (HR 10760) is unavailable (Sept. 29, 1976)
Amdt. No. 2498, Calendar No. 1236, HR 10760 (Sept. 29 (legislative day, Sept. 24), 1976)
122 Cong. Rec. S17124 (daily ed. Sept. 29, 1976)
S.Res. 559, 94th Cong., 2d Sess. (Sept. 21, 1976, Sept. 29, 1976)
Amdt No. 2441, Calendar No. 1236, HR 10760 (Sept. 24, 1976)
Amdt. No. 2442, Calendar No. 1236, HR 10760 (Sept. 24, 1976)
122 Cong. Rec. S16595 (daily ed. Sept. 24, 1976)
HR 10760 [Report No. 94-1254, Report No. 94-1303], 94th Cong., 2d Sess. (Sept. 24, 1976)
S.Rep.No. 94-1303, 94th Cong., 2d Sess. (Sept. 24, 1976)
122 Cong. Rec. S16390-16391 (daily ed. Sept. 22, 1976)
122 Cong. Rec. S16277 (daily ed. Sept. 21, 1976)
S.Res. 559, 94th Cong., 2d Sess. (Sept. 21, 1976)
S.Rep.No. 94-1254, 94th Cong., 2d Sess. (Sept. 20, 1976)
122 Cong. Rec. S16054 (daily ed. Sept. 16, 1976)
HR 10760 [Report No. 94-1254], 94th Cong., 2d Sess. (Sept. 16, 1976)
122 Cong. Rec. S14231 (daily ed. August 23, 1976)
122 Cong. Rec. S14013 (daily ed. August 10, 1976)

122 Cong. Rec. E1594 (daily ed. March 29, 1976)
122 Cong. Rec. D 378 (daily ed. March 23, 1976)
122 Cong. Rec. S3726-3728 (daily ed. March 18, 1976)
S 3183, 94th Cong., 2d Sess. (March 18, 1976)
122 Cong. Rec. S2847-2850 (daily ed. March 4, 1976)
H.Res. 1056, 94th Cong. 94th, H.Res. 1056 is unavailable See text Cong. Rec. 3-2-76, p H1424 (March 2, 1976)
122 Cong. Rec. H1424-1465 (daily ed. March 2, 1976)
122 Cong. Rec. E948-949 (daily ed. March 1, 1976)
122 Cong. Rec. H1421 (daily ed. March 1, 1976)
H.Rep.No. 94-850, 94th Cong., 2d Sess. (Feb. 25, 1976)
HR 10760 [Report No. 94-770], 94th Cong., 1st Sess. (Dec. 31, 1975)
121 Cong. Rec. H11303 (daily ed. Nov. 17, 1975)
HR 10760, 94th Cong., 1st Sess. (Nov. 14, 1975)
121 Cong. Rec. E5437 (daily ed. Oct. 20, 1975)
HR 10238, 94th Cong., 1st Sess. (Oct. 20, 1975)
121 Cong. Rec. H9022 (daily ed. Sept. 23, 1975)
HR 5283, 94th Cong., 1st Sess. (March 20, 1975)
HR 3413, 94th Cong., 1st Sess. (Feb. 20, 1975)
HR 3333, 94th Cong., 1st Sess. (Feb. 19, 1975)
HR 2913, 94th Cong., 1st Sess. (Feb. 5, 1975)
HR 7, 94th Cong., 1st Sess. (Jan. 14, 1975)
HR 8, 94th Cong., 1st Sess. (Jan. 14, 1975)
HR 1340, 94th Cong., 1st Sess. (Jan. 14, 1975)
HR 17302, 93d Cong., 2d Sess. (Oct. 11, 1974)
120 Cong. Rec. H10296-10298 (daily ed. Oct. 9, 1974)
HR 17177, 93d Cong., 2d Sess. (Oct. 9, 1974)
HR 17178, 93d Cong., 2d Sess. (Oct. 9, 1974)
HR 17134, 93d Cong., 2d Sess. (Oct. 8, 1974)
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120 Cong. Rec. H8855-8856 (daily ed. August 21, 1974)
HR 16511, 93d Cong., 2d Sess. (August 21, 1974)
HR 9728, 93d Cong., 1st Sess. (July 31, 1973)

HR 9525, 93d Cong., 1st Sess. (July 24, 1973)
HR 9526, 93d Cong., 1st Sess. (July 24, 1973)
HR 9252, 93d Cong., 1st Sess. (July 12, 1973)
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HR 8835, 93d Cong., 1st Sess. (June 20, 1973)
HR 8838, 93d Cong., 1st Sess. (June 20, 1973)
HR 3476, 93d Cong., 1st Sess. (Jan. 31, 1973)
HR 8783, 92d Cong., 1st Sess. (June 1, 1971)
HR 9795, HR 3333, 94th Cong. 94th, HR 9795 not printed See: 94th, HR 3333
HR 10760, 94th Cong. Amendment no. 2443 to 94th, HR 10760 is unavailable
HR 4389, HR 4388, 95th Cong. 95th, HR 4389 not printed See 95th, HR 4388, identical

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Tax Aspects of the Black Lung Benefits Reform Act of 1977, Subcomm. on Taxation and Debt Management Generally of the Comm. on Finance (June 17, 1977)
95th Cong., 1st Sess. The following hearing was not available for inclusion in this legislative history: Oversight of the Administration of the Black Lung Program, 1977: Hearings before the Subcomm. on Labor of the Senate Comm. on Human Resources. 95th Cong., 1st Sess. (Apr. 4 and 6, 1977) (April 4 and 6, 1977)
95th Cong., 1st Sess. The following hearing was not available for inclusion in this legislative history: Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings before the House Comm. on Education and Labor. 95th Cong., 1st Sess. (Mar. 14-17, 21, 1977) (March 14-17, 21, 1977)
Tax Aspects of Black Lung Benefits Legislation, Comm. on Finance (Sept. 21, 1976)
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Black Lung Benefits Reform Act of 1975, Subcomm. on Labor Standards of the Comm. on Education and Labor (Feb. 25, 26, 27; March 6, 12, and 13, 1975)
PRESIDENTIAL DOCUMENTS
14 Weekly Comp. Pres. Doc. 432, Remarks on Signing HR 4544 Into Law. (March 1, 1978)

PL 97-119 LH
95 Stat. 1635

LEGISLATIVE IDS TORY OF THE
ACT OF DECEMBER 29, 1981
PL 97-119
December 29, 1981

An act to amend the Internal Revenue Code of 1954 to provide a temporary increase in the tax imposed on producers of coal, and for other purposes.

CONGRESSIONAL MATERIALS

PL 97-119, 95 Stat. 1635 (Dec. 29, 1981)
HR 5159, Public Law 97-119, Summary (Dec. 29, 1981)
127 Cong. Rec. S15474-98 (daily ed. Dec. 16, 1981)
127 Cong. Rec. H9788-98 (daily ed. Dec. 16, 1981)
127 Cong. Rec. H9817-18 (daily ed. Dec. 16, 1981)
127 Cong. Rec. E5965-66 (daily ed. Dec. 16, 1981)
127 Cong. Rec. E5976-77 (daily ed. Dec. 16, 1981)
127 Cong. Rec. E5981 (daily ed. Dec. 16, 1981)
127 Cong. Rec. E6004 (daily ed. Dec. 16, 1981)
127 Cong. Rec. H9600-06 (daily ed. Dec. 15, 1981)
127 Cong. Rec. H9682 (daily ed. Dec. 15, 1981)
HR 5159, 97th Cong., 1st Sess. (Dec. 15 (legislative day, Nov. 30), 1981)
S 1957, 97th Cong., 1st Sess. (Dec. 15 (legislative day, Nov. 30), 1981)
HR 5159 [Report No. 97-406, Part 1], 97th Cong., 1st Sess. (Dec. 14, 1981)
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127 Cong. Rec. H9342-44 (daily ed. Dec. 10, 1981)
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127 Cong. Rec. S14764-68 (daily ed. Dec. 8, 1981)
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HR4908, 97th Cong., 1st Sess. (Nov. 5, 1981)
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HR 1410, 97th Cong., 1st Sess. (Jan. 28, 1981)
HR 1177, 97thCong., 1st Sess. (Jan. 22, 1981)
HR 890, 97th Cong., 1st Sess. (Jan. 16, 1981)
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126 Cong. Rec. E4902-03 (daily ed. Nov. 12, 1980)
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HR 8214, 96th Cong., 2d Sess. (Sept. 25, 1980)
126 Cong. Rec. E 4318 (daily ed. Sept. 10, 1980)
HR 8092, 96th Cong., 2d Sess. (Sept. 9, 1980)
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Safe Harbor Leasing Provisions of the Economic Recovery Tax Act of 1981, Subcomm. on Oversight of the Comm. on Ways and Means (Dec.15, 1981)

Black Lung Benefits and Revenue Amendments of 1981, Subcomm. on Labor of the Comm. on Labor and Human Resources (Dec. 14, 1981)
Legislative Proposals Relating to Section 280A and Other Minor Tax Bills, Subcomm. on Select Revenue Measures of the Comm. on Ways and Means (Oct. 19, 1981)

Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Subcomm. on Oversight of the Comm. on Ways and Means (July 27; Sept. 28, 1981)

PRESIDENTIAL DOCUMENTS
17 Weekly Comp. Pres. Doc. 1426, Statement on Signing H.R. 5159 Into Law. (Dec. 29, 1981)

APPENDIX M

204-206
REQUIRED SUPPLEMENTARY INFORMATION
(UNAUDITED)

Black Lung

The *Federal Coal Mine Health and Safety Act of 1969* created the Black Lung Disability Benefit Program to provide compensation, medical, and survivor benefits for eligible coal miners who are totally disabled due to pneumoconiosis (black lung disease) arising out of their coal mine employment and to eligible survivors of coal miners who died due to pneumoconiosis. DOL operates the Black Lung Disability Benefit Program. Prior to fiscal year 2016, the beneficiary population was assumed to be a nearly closed universe in which attrition by death exceeds new entrants by a ratio of more than ten to one. During fiscal year 2016, the number of participants who joined the rolls increased due to, among other things, adjudicated liability as a result of responsible mine operator (RMO) bankruptcy.

Excise taxes on coal mine operators, based on the domestic sale of coal, are the primary source of financing black lung disability payments and related administrative costs. The *Black Lung Benefits Revenue Act* provided for repayable advances to the BLDTF from the General Fund, in the event that BLDTF resources were not adequate to meet program obligations. Prior to legislation enacted in 2008 that

allowed for the restructuring of BLDTF debt, the trust fund had accumulated large liabilities from significant and growing shortfalls of excise taxes relative to benefit payments and interest expenses.

The *Energy Improvement and Extension Act of 2008* (Public Law 110-343), enacted on October 3, 2008, contained several provisions that significantly improved the BLDTF's financial position, including:

- Continuation of a previously-enacted increase in coal excise tax rates for an additional 5 years, through December 2018;
- Provision for the restructuring of BLDTF debt by refinancing the outstanding repayable advances with proceeds from issuing new debt instruments with lower interest rates; and
- Establishment of a one-time appropriation that significantly reduced the outstanding debt of the BLDTF.

This Act also allowed that any debt issued by the BLDTF subsequent to the refinancing may be used to make benefit payments, other authorized expenditures, or to repay debt and interest from the initial refinancing, All debt issued by the BLDTF was effected as borrowing from the Treasury's Bureau of the Fiscal Service.

On September 30, 2016, total liabilities of the BLDTF exceeded assets by $5.6 billion. This net position represents the accumulated shortfall of excise taxes necessary to meet benefit payments, administrative costs, and interest expense incurred prior to and subsequent to the debt refinancing pursuant to P.L. 110-343. Prior to the enactment of Public Law 110-343, this shortfall was funded by repayable advances to the BLDTF, which were repayable with interest. Pursuant to Public Law 110-

343, these repayable advances were restructured as zero coupon bonds and any future shortfall is financed with one-year borrowing from Treasury. Outstanding debt at September 30, 2016 was $5.7 billion, bearing interest rates ranging from 0.589% to 4.556%. Excise tax revenues of $439.6 million, benefit payment expense of $122.8 million, and interest expense of $213.7 million were recognized for the year ended September 30, 2016. The interest expense is accrued and capitalized to the principal of the debt until the debt reaches its face value at the time of maturity. On September 30, 2016, the BLDTF issued debt in the amount of $910.0 million, bearing interest at 0.589% and maturing on September 30, 2017. At September 30, 2016, there were 25 debt instruments with staggered maturities of September 30 for years 2017 through 2040, with a total carrying value of nearly $5.7 billion and a total face value at maturity of nearly $8.9 billion. Of these 25 debt instruments, 24 are from the October 2008 refinancing and one debt instrument was issued on September 30, 2016.

From the budget or consolidated financial perspective, Chart 13 shows projected black lung expenditures (excluding interest) and excise tax collections for the period 2017-2040 in constant dollars. The significant assumptions used in the most recent set of projections, in constant dollars, are coal excise tax revenue estimates, the tax rate structure, the number of beneficiaries, life expectancy, federal civilian pay raises, medical cost inflation, the interest rate on new debt issued by the BLDTF, and the CPI-U for goods and services. The projected coal excise tax revenue estimates reflect, among other things, regulation pursuant to the Clean Power Plan, and future cash inflows from excise taxes have decreased significantly

from those reported in prior years. The projections, in constant dollars for the open group, made over the 24-year period ending September 30, 2040, indicate that cash inflows from excise taxes will exceed cash outflows for benefit payments and administrative expenses for most of the years in the projection period. Cumulative net cash inflows are projected to reach $827.0 million by fiscal year 2040. However, when payments from the BLDTF's maturing debt are applied against this surplus cash inflow, the BLDTF's cash flow turns negative in all periods included in the projections. Net cash outflows after payments on maturing debt are projected to reach $8.1 billion by the end of fiscal year 2040, resulting in a projected deficit of nearly $10.95 billion at September 30, 2040.

Chart 13—Estimated Black Lung Disability Trust Fund Income and Expenditures (Excluding Interest) in Constant (or Inflation-Adjusted) Dollars 2017-2040

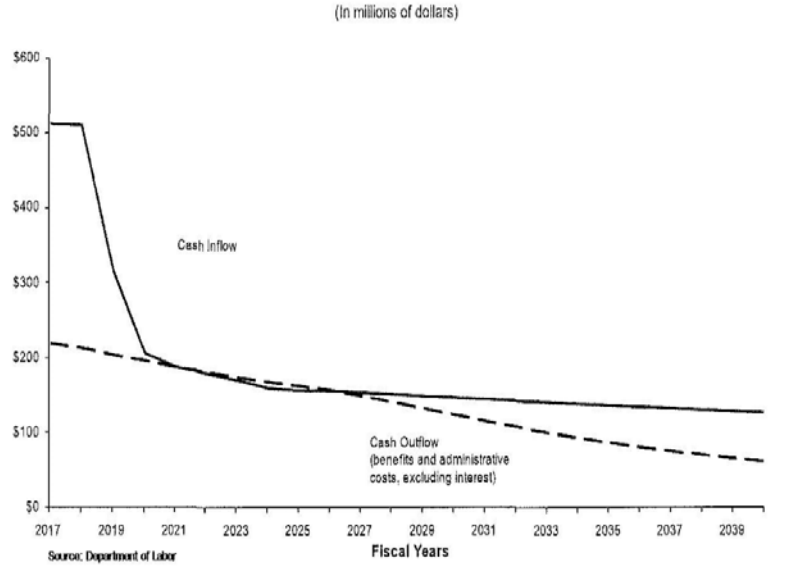


Table 9
Present Values of 24-Year Projections of Expenditures and Revenues for the Black Lung Disability Trust Fund

(in billions of present value dollars as of September 30, 2016)

Projected future expenditures	3.5
Projected future tax income	4.8
Net obligations from budget perspective (expenditures less income)	(1.3)
Accumulated balance due General Fund	5.6
Net obligations from trust fund perspective	4.3

Note: Totals may not equal the sum of components due to rounding.

Source: Department of Labor

Table 9 shows present values of 24-year projections of expenditures and revenues for the Black Lung Disability Trust Fund computed as of September 30, 2016. Cash flows were discounted using a rate of 1.63 percent. From a governmentwide (budget) perspective, the present value of expenditures is expected to be less than the present value of income by $1.3 billion (a surplus). From a trust fund perspective, a large balance ($5.6 billion) is owed to the General Fund. From that perspective, when that accumulated balance is combined with the cash flow surplus, the program has a shortfall of $4.3 billion in present value dollars.

APPENDIX N

Roster of US Coal Companies Turning to Bankruptcy Continues to Swell

Coal Company Bankruptcy Filings since 2012

[*Fold-Out Exhibit, see next 2 pages*]

Thursday, June 04, 2015 3:11 PM ET Exclusive

Roster of US coal companies turning to bankruptcy continues to swell

By Taylor Kuykendall

As coal market conditions squeeze even the most optimally balanced mining companies, more than three dozen coal operations have been forced into bankruptcy in just over three years.

A review of bankruptcy filings by SNL Energy found that most of the operators turning to the bankruptcy courts in the U.S. are primarily doing so in Central Appalachia. The coal mining region has been hardest hit by market pressures as the region's increasingly difficult geology has left neighboring coal basins with a competitive advantage as the entire sector battles increased regulatory scrutiny, weak export markets and inexpensive natural gas.

Coal company bankruptcy filings since 2012

01/23/12	Evergreen Energy	7	$240M	Delaware
01/26/12	Larry Addington	11^	$7.1M	Kentucky
02/15/12	Alpha & Omega Coal	7	Up to $1M	West Virginia
03/29/12	H & D Mining	7	Up to $50,000	Kentucky
06/11/12	B&B Coal	7	$125,750	Kentucky
06/29/12	Panther Branch Coal	7	$2.4M	West Virginia
07/09/12	Patriot Coal	11	More than $1B	Missouri
07/11/12	Conshor Mining	7	Up to $50,000	Kentucky
09/21/12	Tennessee Classic Coal	11	Up to $500,000	Tennessee
10/01/12	Haley Bros. Coal	7	Up to $10M	Alabama
11/07/12	King Coal Trucking	11	Up to $50,000	West Virginia
02/01/13	Cobra Mining	7	Up to $50,000	Pennsylvania
02/01/13	America West Resources	11	$18.3M	Nevada
02/14/13	Trinity Coal	11	NA	Kentucky
02/14/13	Excell Energy and Coal	11	Up to $50K	Kentucky
02/19/13	T&T Energy	11^	$8.5M	Kentucky
06/28/13	Twin Star Coal	11	$2.8M	Kentucky
07/01/13	Detherage Coal Sales	7	$10,398	Kentucky
09/23/13	Lily Group	11	Up to $50M	Indiana
10/08/13	Valley Mining	7	Up to $50,000	Ohio
11/22/13	Manalapan Mining[1]	7	$2.3M	Kentucky
11/22/13	Left Fork Mining[1]	7	$56,700	Kentucky
11/22/13	Cloverfork Mining & Excavating[1]	7	$61,609	Kentucky
11/22/13	Cumberland River Energies[1]	7	$14,000	Kentucky
11/22/13	B&S Trucking[1]	7	$10,845	Kentucky
11/22/13	Bennett Resources	7	No assets	Kentucky
02/07/14	Cobalt Coal	7	$30,000	West Virginia
04/07/14	James River Coal	11	Up to $1B	Virginia

05/22/14	**US Coal***	11^	NA	Kentucky
05/22/14	**Licking River Mining***	11^	NA	Kentucky
06/27/14	**IBCS Mining**	11	Up to $50M	Virginia
10/08/14	**Coal Valley**	7	Up to $50,000	Pennsylvania
12/01/14	**Bumi Investment**	15	Up to $1B	New York
12/01/14	**Bumi Capital[2]**	15	Up to $500M	New York
12/01/14	**Enercoal Resources[2]**	15	Up to $500M	New York
12/03/14	**Cline Mining**	15	Up to $100M	Colorado
02/24/15	**Covington Coal[2]**	11	$1.1M	West Virginia
04/06/15	**Xinergy**	11	Less than $50,000	Virginia
04/15/15	**Grass Creek Coal**	11	Up to $500,000	Wyoming
05/12/15	**Patriot Coal**	11	More than $1B	Virginia
05/27/15	**Birmingham Coal & Coke**	11	Up to $50M	Alabama
06/03/15	**A & M Coal**	7	Up to $500,000	Kentucky

List may not be comprehensive.
[1] Companies of coal operator Benjamin Bennett and his family.
[2] U.S. units of Indonesia's PT Bumi Resources Tbk.
* Jointly filed.

^ Later converted to a Chapter 7 case.
NA = not available
Sources: SNL Energy, assorted court filings
Credit: Cat Weeks

SNL

Patriot Coal Corp., now on its second bankruptcy since it first filed in 2012, noted the sector's challenges in a declaration from Chief Restructuring Officer Ray Dombrowski.

"Coal's share of the U.S. energy market and prices for thermal and metallurgical coal have both declined markedly," Dombrowski wrote. "The lethargic economic environment, lack of growth in energy demand generally, and a number of scheduled coal-fired plant retirements have precipitated this decline. … Additionally, the demand and price for metallurgical coal are dependent on the strength of the global economy and, in particular, on steel production in countries such as China and India, as well as Europe, Brazil and the United States. The global metallurgical coal market continues to suffer from oversupply in addition to reduced demand from China, further depressing the price of coal."

Patriot also cited increased regulatory impediments, including not just environmental protections, but also worker health and safety obligations as reasons for the company's stress. Many companies, particularly in Central Appalachia, have also amassed a large amount of legacy liabilities.

Now, it appears Blackhawk Mining LLC is poised to capture a substantial amount of Patriot's assets. It also made a move on the distressed assets of James River Coal Co., which expressed concerns similar to Patriot about the state of coal markets in early 2014.

"Domestic demand for coal has decreased dramatically, in large part because alternative sources of energy have become increasingly attractive to electricity generators in light of declining natural gas prices and more burdensome environmental and other governmental regulations," wrote former James River Chairman and CEO Peter Socha in an April 7, 2014, bankruptcy filing. "Similarly, the seaborne markets have experienced an oversupply of coal products, primarily in response to slow economic growth in key international markets."

Murray Energy Corp. President and CEO Robert Murray warned attendants of an industry conference in September 2014 that more coal companies could soon resort to bankruptcy. He said those publicly touting their ability to shed costs in tough markets — as Alpha Natural Resources Inc., Arch Coal Inc. and other companies have done — are in trouble.

"Because in the coal business, you already had your costs as low as you could possibly make them every day," Murray said. "That is garbage from public coal companies who are worried about their stock price. Be alerted."

Arch has been reported to have hired restructuring advisers to help the company reduce its debt.

While the met coal market has shown some signs of hitting bottom, any recovery may not be rapid enough to save producers that are closest to the edge. Though Alpha and Arch have significant liquidity cushions, many analysts have kept a watchful eye on Walter Energy Inc., a met coal producer with a lower pool of liquidity.

While regulations expected to restrict demand are on the horizon for domestic thermal coal companies, at least one company believes that those with heavy thermal coal portfolios are in better shape than those that primarily produce met coal. Credit Suisse, which recently initiated coverage on several in the coal sector, warned investors considering picking up cheap coal stocks that the industry faces a "dire macro outlook."

Many producers that have filed for bankruptcy are seeking to liquidate their assets, but some are hoping to restructure and emerge as a stronger company. Mark Levin, a BB&T Capital Markets analyst, noted in a recent report that coal companies looking around at distressed competitors may seek a "first mover" advantage and file bankruptcy soon. He also suggested a major bankruptcy, like that of Walter, could trigger a domino effect that ripples through the industry.

Article updated at 3:22 p.m. EST on June 5, 2015, to correct the date of Cobalt Coal's bankruptcy filing.