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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**CONSOLIDATION COAL COMPANY,**

**Petitioner**

**v.**

**TERRY L. SHIPLEY,**

**and**

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

**Respondents**

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**On Petition for Review of an Order of the Benefits Review Board,  
United States Department of Labor**

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**No. 19-1738**

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

**Respondents**

---

**On Petition for Review of an Order of the Benefits  
Review Board, United States Department of Labor**

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**JURISDICTIONAL STATEMENT**

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Terry L. Shipley, a long-term coal miner. On September 15, 2017, Administrative Law Judge Drew A. Swank issued a decision awarding benefits and ordered Consolidation Coal Company (Consolidation), Shipley's former employer, to pay them. Joint



Appendix (JA) 406. Consolidation appealed this decision to the United States Department of Labor (DOL) Benefits Review Board (Board) on October 9, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on May 14, 2019, JA 428, and this Court docketed Consolidation's petition for review on July 12, 2019, JA 435. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals for the circuit in which the injury occurred. The miner's exposure to coal-mine dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in West Virginia, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Consolidation's petition for review.

### **STATEMENT OF THE ISSUES**

It is undisputed that Shipley, who worked in coal mines for at least forty years and also had a significant smoking history, suffers from a totally disabling respiratory impairment. These facts trigger a statutory presumption of entitlement.

Consolidation therefore bears the burden of proving either that Shipley does not have pneumoconiosis or that pneumoconiosis plays no part in his respiratory disability. The company attempted to meet that burden with the testimony of two

physicians who opined that Shipley's lung disease was caused solely by cigarette smoking. The particular questions at issue in this appeal are:

1. The Board remanded this case twice before affirming the ALJ's 2017 award of benefits. Consolidation argues that the Board exceeded its scope of review in its remand decisions by ordering the ALJ to consider an argument raised by the claimant that was ignored by the ALJ, namely that the testimony of Consolidation's medical experts should not be credited because it was based on assumptions contrary to DOL's evaluation of the medical science as expressed in the preamble to the BLBA's implementing regulations.

The first question presented is whether the Board exceeded its scope of review by vacating and remanding the ALJ's denials.

2. Consolidation submitted reports from two experts in an effort to prove that Shipley did not have legal pneumoconiosis, and that pneumoconiosis played no role in Shipley's respiratory disability. In his 2017 decision awarding benefits, the ALJ found neither opinion persuasive for several reasons. One of those reasons was that their diagnoses did not adequately account for the fact that Shipley's cigarette smoking and lengthy coal-mine dust exposure posed additive risks for the development of significant respiratory disease, as explained in the regulatory preamble. The Board affirmed the ALJ's award on this basis alone.

The second question presented is whether the ALJ permissibly discredited Consolidation's experts on this ground.<sup>1</sup>

## **STATEMENT OF THE CASE**

### **A. Statutory and Legal Background**

The BLBA provides disability compensation and medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as “black lung disease.” 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis is “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).

There are two types of pneumoconiosis, “clinical” and “legal.” 20 C.F.R. § 718.201. “Clinical pneumoconiosis” refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the “permanent deposition of substantial amounts of particulate matter in the lungs.” 20 C.F.R. § 718.201(a)(1). “Legal pneumoconiosis” is a broader category, including “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is “significantly related to, or substantially aggravated by” dust exposure in coal mine

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<sup>1</sup> In its opening brief, Consolidation also challenges the other justifications the ALJ gave for discrediting its medical experts. Because those alternate justifications were not considered by the Board, they are not properly before this Court. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006); *see infra* at 33-34.

employment is legal pneumoconiosis; coal-mine dust need not be the disease's sole or even primary cause. 20 C.F.R. § 718.201(b).

Coal miners seeking federal black lung benefits must prove that (1) they suffer from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) they are totally disabled by a respiratory or pulmonary impairment; and (4) the pneumoconiosis contributes to the totally disabling impairment. 20 C.F.R.

§ 725.202(d); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000). These elements are generally referred to as “disease,” “disease causation,” “disability,” and “disability causation.”

The elements of entitlement can be established with medical evidence or by presumption. One such presumption is 30 U.S.C. § 921(c)(4)'s “fifteen-year presumption,” which the ALJ applied here. The fifteen-year presumption is invoked if the miner (1) “was employed for fifteen years or more in one or more underground coal mines” or in surface mines with conditions “substantially similar to conditions in an underground mine” and (2) suffers from a “totally disabling respiratory or pulmonary impairment[.]” 30 U.S.C. § 921(c)(4). If those criteria are met, then it is presumed that the miner is totally disabled by pneumoconiosis, and therefore entitled to benefits. *Id.*; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013).

Once a miner invokes the fifteen-year presumption, the burden shifts to the employer to rebut it by demonstrating (1) that the miner does not have pneumoconiosis arising out of coal mine employment or (2) that “no part” of the miner’s disability was caused by pneumoconiosis. 20 C.F.R. § 718.305(d); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015). To satisfy its burden under the first method of rebuttal, the employer must demonstrate that the miner has neither clinical nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i). To satisfy its burden under the second method, the employer must “rule out” pneumoconiosis as a cause of the miner’s disability. *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 141 (4th Cir. 2015); 20 C.F.R. § 718.305(d)(1)(ii).

## **B. Relevant Facts**

### **1. General facts**

Shipley worked as a coal miner for at least forty years, with at least thirty of those years spent underground (JA 308), ending in 2011. He testified that he smoked one-half to one package of cigarettes per day for 36 to 38 years, ending in 2006. JA 313-314. He suffers from totally disabling chronic obstructive pulmonary disease (COPD). Pet. br. 30; JA 20, 123.<sup>2</sup>

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<sup>2</sup> “COPD” is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011). COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); *Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121, n.2 (9th Cir. 2014). Both cigarette smoking and dust exposure during coal mine employment can cause COPD. *See* 65 Fed. Reg. 79939-43 (Dec. 20, 2000) (summarizing medical and scientific evidence of link between COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as a cause of COPD).

## 2. Shipley's medical opinions

The ALJ awarded benefits in this case because he found Consolidation's evidence insufficient to rebut the fifteen-year presumption. JA 426-427. As a result, the testimony of the three physicians who provided affirmative evidence that Shipley is entitled to BLBA benefits is summarized only briefly here.<sup>3</sup>

Dr. Andrzej Jaworski (JA 5, 38), who is Board-certified in internal medicine, pulmonary disease and critical care medicine, examined Shipley pursuant to DOL's statutory obligation to provide each miner-claimant with a complete pulmonary evaluation. He reported that Shipley's severe obstructive airways disease was due to both smoking and coal-mine dust exposure, and that coal-mine dust contributed significantly to Shipley's severe obstructive impairment. JA 57.

Dr. John Schaaf (JA 22, 190), who is Board-certified in internal medicine with a sub-specialty in pulmonary and critical care medicine, reported that Shipley's severe COPD is related to both coal mine employment and smoking, and that both are substantial contributing factors. JA 210, 213. The doctor could not apportion the percentage of contribution of each exposure to Shipley's obstructive defect, but stated that it was highly unlikely that cigarette smoking was the sole cause. JA 211. The doctor also stated that it was not possible to distinguish obstruction induced by

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<sup>3</sup> This brief does not summarize the evidence on whether Shipley suffers from clinical pneumoconiosis because the Board affirmed the award based on the ALJ's finding that Consolidation had failed to disprove the existence of legal pneumoconiosis. JA 430 n.3; *see infra* at 27 n.11.

coal-mine dust from smoking-induced obstruction by looking at the FEV<sub>1</sub>/FVC ratio obtained during pulmonary function testing because “there is not sufficient data to evaluate that.”<sup>4</sup> JA 221. Although he was aware that “the claim has been made” that FEV<sub>1</sub> reduces more rapidly than the FVC among smokers in contrast to miners, he “believe[d] there’s information that says just the opposite, that they decline at an equal rate given the exposure.” JA 223.

Dr. Christopher Begley (JA 92, 319), Board-certified in internal medicine, pulmonary medicine and critical care medicine, reported that Shipley suffers from severe emphysema, and that Shipley’s use of tobacco products and exposure to coal dust were significant contributing causes for his pulmonary impairment.

JA 331-332. In Dr. Begley’s view, both exposures contributed equally to Shipley’s impairment. JA 348.

### **3. Consolidation Coal Company’s medical opinions**

Dr. John Bellotte (JA 15,131), Board-certified in internal and pulmonary medicine, reported that Shipley has a severe obstructive ventilatory impairment (emphysema and asthma). JA 20, 136. The doctor attributed Shipley’s emphysema to “long

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<sup>4</sup> The FEV<sub>1</sub>/FVC ratio is one result of a pulmonary function test, one of the methods commonly used to determine whether a miner is totally disabled from a respiratory or pulmonary perspective. The FEV<sub>1</sub> measures the amount of air that is forcibly exhaled in the first second of exhalation, and the FVC measures the total amount of air exhaled. The FEV<sub>1</sub>/FVC ratio is a computation rendered as a percentage that compares the amount of air exhaled in the first second to the total amount of air exhaled. 20 C.F.R. § 718.103(a); *see Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 nn. 6, 7 (7th Cir. 1988). A FEV<sub>1</sub>/FVC ratio of 55% or less is indicative of total respiratory disability. 20 C.F.R. § 718.204(b)(2)(i)(C).

heavy tobacco abuse.” JA 20. The doctor explained that “the type of emphysema seen on his Chest x-ray is a manifestation of his tobacco induced lung disease.

There is no dust burden on this Chest x-ray. To see emphysema related to coal dust exposure on the Chest x-ray, one would need a much heavier dust burden.” *Id.* He also stated that Shipley’s pulmonary test results showed some reversibility with treatment, which was inconsistent with a diagnosis of pneumoconiosis, which “is not reversible.” JA 19.

In his deposition, Dr. Bellotte explained that he attributed Shipley’s COPD to tobacco largely because of Shipley’s reduced FEV<sub>1</sub>/FVC ratio. JA 144-45.

According to Dr. Bellotte, if the FEV<sub>1</sub> and FVC values obtained during pulmonary testing reveal a symmetrical decrease (a gradual, gentle sloping decline that maintains roughly the same ratio), the obstructive ventilatory impairment is due to coal dust exposure. JA 145, 147. If the numbers decline in an asymmetrical fashion; that is, the FEV<sub>1</sub> shows a much more rapid decline than the FVC (resulting in a decreased FEV<sub>1</sub>/FVC ratio), then the obstructive impairment is due to tobacco use. *Id.*, JA 171.

Dr. Bellotte concluded that coal-mine dust exposure did not materially contribute to Shipley’s obstruction because smoking more than adequately explained the abnormalities the doctor saw. JA 180. He continued:

In medicine, I always just look for the most likely answer to the question, and if I have an adequate explanation for what I think is the primary



problem, then there's no reason to run an obscure test for some strange disease that he probably doesn't have.

JA 180.

Dr. Stephen Basheda (JA 99), Board-certified in internal, pulmonary, critical care, and sleep medicine, reported that Shipley suffers from tobacco-induced COPD with a component of asthma, manifesting as chronic airways obstruction with partial reversibility, hyperinflation, and radiographic findings of upper lobe emphysematous changes in chest CT scan. JA 123,124. The doctor noted that Shipley was a miner for forty years, but that “[h]is mining career was not terminated at a young age due to respiratory symptoms.” JA 120.

Dr. Basheda posited that tobacco-induced COPD and asthma “can explain [Shipley’s] clinical, pulmonary function, and radiographic findings. They are not the findings of coal dust-induced COPD.” JA 123. The doctor also stated that Shipley’s permanently reduced FEV<sub>1</sub>/FVC ratio (less than 0.7) is indicative of persistent asthma, probably the result of the lack of anti-inflammatory therapy which “most likely resulted in a remodeling of Shipley’s airways with fixed airway obstruction, that is, persistent asthma”<sup>5</sup> JA 122. The doctor also noted that Shipley was being treated with particular bronchodilators and anti-inflammatory agents

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<sup>5</sup> The results of Shipley’s five pulmonary function studies yielded FEV<sub>1</sub>/FVC ratios below 55%. The ratios range from a high of 49% (pre-bronchodilator) obtained by Dr. Begley on September 28, 2012 (Claimant’s Exhibit 7), to a low of 34% (pre-bronchodilator) obtained by Dr. Bellotte on March 27, 2012 (Director’s Exhibit 27). A bronchodilator is a drug used to treat COPD. *The Merck Manual* 1894 (19th ed. 2011). It expands the “air passages of the lung.” *Dorland’s Illustrated Medical Dictionary* 253 (32nd ed. 2012).

which would not, in Dr. Basheda's view, be effective in the treatment of coal dust-induced COPD, but were effective in the treatment of tobacco-induced COPD.

JA 121-122.

### **C. Decisions Below**

#### **1. The ALJ's first decision (January 3, 2014 denial of benefits (JA 356))**

In his first decision, the ALJ invoked the fifteen-year presumption based on Shipley's forty years of coal mine work and undisputed total respiratory disability. JA 368. He initially stated that the burden of persuasion therefore switched to Consolidation to disprove Shipley's entitlement to benefits. JA 368. Later in the decision, however, he appeared to place the burden of proof on Shipley and denied the claim because "Claimant has not proven" that pneumoconiosis "was a 'substantially contributing cause' of the miner's total disability." JA 374 (quoting 20 C.F.R. § 718.204(c)(1)).

The ALJ found that the opinions of Drs. Bellotte and Basheda "extremely persuasive" because "both demonstrate how the various diagnostic tests indicate that claimant's respiratory impairment was not caused by coal-mine dust but rather attributable to smoking and asthma." *Id.* The ALJ dismissed the diagnoses of Drs. Jaworski, Schaaf, and Begley as unpersuasive and inconsistent because they simply asserted that Shipley's obstructive impairment must be related to smoking and coal dust exposure because he was exposed to both, although they admitted

that not all individuals are susceptible to developing an impairment from exposure to these agents. *Id.*

## **2. The Board's first decision (August 13, 2014 remand (JA 376))**

Shipley appealed to the Board and pointed out that the ALJ's rebuttal analysis was flawed because he improperly placed the burden of proof on Shipley instead of Consolidation. Shipley also argued that the opinions of Drs. Bellotte and Basheda were contrary to the preamble, "which recognizes that coal mine dust-induced obstructive disease can be shown by decreased FEV1/FVC ratio." *See* JA 380.

Agreeing that the ALJ had incorrectly allocated the burden of proof on rebuttal, the Board remanded the case. JA 379. The Board also noted that the ALJ had misstated the "disability causation" rebuttal standard and reminded the ALJ that Consolidation was required to establish that "no part" of the miner's respiratory disability was due to pneumoconiosis to disprove disability causation. 20 C.F.R. § 718.305(d)(1)(ii). *Id.*

The Board also instructed the ALJ on remand to reconsider the credibility of Drs. Bellotte and Basheda, regardless of the weight he assigned to claimant's experts' opinions, "because employer bears the burden of proof on rebuttal." JA 380. In a footnote, the Board acknowledged Shipley's argument that Consolidation's

experts' opinions were contrary to the preamble, but stated that "we leave these arguments for the ALJ to reconsider on remand." JA 380 n.5.

### **3. The ALJ's second decision (May 28, 2015 denial (JA 382))**

On remand, despite the Board's instruction to consider Shipley's argument that Consolidation's evidence was based on assumptions inconsistent with DOL's evaluation of the medical science in the preamble, the ALJ ignored the issue.<sup>6</sup> The ALJ simply reviewed both opinions and pronounced them worthy of substantial weight given the doctors' qualifications and the fact that their conclusions were supported by the diagnostic studies they conducted. Notably, the ALJ approved of Dr. Bellotte's reliance on the miner's reduced FEV<sub>1</sub>/FVC ratio as indicating a smoking-induced impairment without addressing Shipley's arguments to the contrary. JA 387-388. The ALJ again accorded reduced weight to Drs. Jaworski, Schaaf and Begley because these doctors did not adequately explain why coal dust played a role in claimant's impairment, especially Dr. Schaaf who admitted that coal dust does not cause an impairment in most miners. JA 391. Thus, the ALJ concluded that Consolidation had rebutted the presumption by demonstrating "by a preponderance of the evidence that no part of Claimant's respiratory or pulmonary

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<sup>6</sup> The ALJ also ignored Shipley's argument that Dr. Basheda's opinion ran afoul of 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis may be a progressive and latent disease.

total disability was caused by pneumoconiosis.” JA 392. Shipley again appealed to the Board.

#### **4. The Board’s second decision (June 30, 2016 remand (JA 395))**

On appeal, the Board again remanded, noting that the ALJ had ignored its previous instruction, explaining:

the Board instructed the administrative law judge on remand to consider claimant’s argument that the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the medical science accepted by the Department in the preamble with respect to the significance of the FEV1/FVC ratio. On remand, the administrative law judge did not comply with the Board’s instruction with respect to either physician. Instead, without considering claimant’s argument, the administrative law judge credited Dr. Bellotte’s explanation that it is possible to distinguish between impairments caused by smoking and coal dust exposure based on the FEV1/FVC ratio. We therefore vacate the administrative law judge’s finding that employer rebutted the presumed fact that claimant’s total disability is due to pneumoconiosis.

JA 401 (footnote omitted).

The Board then directed the ALJ to consider whether other aspects of employer’s experts’ opinions were contrary to the regulations and the medical science accepted by the Department in the preamble, namely: Dr. Bellotte’s requirement that emphysema is related to coal dust exposure only if the miner’s chest x-ray reveals a heavy dust burden, and Dr. Basheda’s opinion that Shipley’s impairment was not coal mine-related because it did not manifest itself when he worked in the mining industry. JA 402.

The Board summarily denied Consolidation's motion for reconsideration on February 22, 2017. JA 405.

### **5. The ALJ's third decision (September 15, 2017 award (JA 406))**

On remand, the ALJ found the opinions of Drs. Bellotte and Basheda to be worthy of little weight on the issue of legal pneumoconiosis for three reasons. First, the ALJ found that the doctors' opinions that they can distinguish a coal dust-induced lung disease from a smoking-induced lung disease based on the FEV<sub>1</sub>/FVC ratio to be "entirely at odds with the preamble and its cited medical literature." JA 415.

The ALJ also found that neither doctor provided citations to medical literature to support their FEV<sub>1</sub>/FVC ratio theory, and that Dr. Basheda did not provide the calculations to support his assertion that Shipley's FEV<sub>1</sub> loss due to smoking was greater than his FEV<sub>1</sub> loss due to coal dust exposure. Second, the ALJ faulted both doctors for not explaining why Shipley's forty years of coal mine employment was not also a causal factor in Shipley's lung disease, especially in view of the preamble's explanation that coal-mine dust exposure is clearly associated with clinically significant airways obstruction and presents an additive risk with cigarette smoking. *Id.* (citing *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, Final Rule*, 65 Fed. Reg. 79919, 79940 (Dec. 20, 2000)). Third, the ALJ found that the doctors did not adequately explain why the

partial reversibility and variability of Shipley's impairment was indicative of asthma and not COPD caused by coal-mine dust. JA 415-416.

With regard to the other medical opinions, the ALJ found Dr. Jaworski's opinion worth little weight because the doctor failed to adequately explain his diagnoses. JA 417. He found the opinions of Drs. Begley and Schaaf "somewhat conclusory," but gave them some credit because these doctors considered "all possible risk factors" and explained why Consolidation's experts' opinions were inconsistent with current medical literature and with Shipley's symptoms. JA 420. Thus, the ALJ found Consolidation did not rebut the presumption that Shipley suffers from legal pneumoconiosis. Then, primarily because Drs. Bellotte and Begley did not diagnose pneumoconiosis, the ALJ found their opinions insufficient to prove that no part of Shipley's disability was caused by pneumoconiosis. JA 423.

Consolidation appealed to the Board.

#### **6. The Board's third decision (May 14, 2019 affirmance (JA 428))**

On appeal, Consolidation argued that the Board had exceeded its authority in its previous decision by instructing the ALJ to consider the Bellotte and Basheda opinions in light of the regulatory preamble. JA 430. The Board rejected that argument, emphasizing that the case had been remanded for the ALJ to consider Shipley's *argument* that those opinions are based on views contrary to the preamble. JA 430.

The Board also affirmed the ALJ's finding that the Bellotte and Basheda opinions were entitled to little weight. The Board held that the ALJ had permissibly accorded little weight to Consolidation's experts because neither physician adequately explained why claimant's more than forty years of coal-mine dust exposure did not significantly contribute, along with cigarette smoking and asthma, to his totally disabling respiratory impairment, especially "in light of the medical science found credible in the preamble finding the effects of smoking and coal dust exposure are additive." JA 432.

Thus, it upheld the ALJ's conclusion that Consolidation had failed to rebut the presumption by proving that Shipley's COPD was not legal pneumoconiosis. In reaching that conclusion, the Board did not address the other two reasons the ALJ gave for giving the Bellotte and Basheda opinions little weight (that they were based on the FEV<sub>1</sub>/FVC ratio theory that was inconsistent with the preamble and that they did not adequately explain why the partial reversibility and variability of Shipley's impairment was indicative of asthma and not coal-mine dust induced COPD).

Finally, the Board agreed with the ALJ's conclusion that, because neither of Consolidation's experts diagnosed pneumoconiosis, their opinions were insufficient to prove that pneumoconiosis played no part in Shipley's disability. JA 433. Having affirmed the ALJ's findings that the company failed to rebut the



fifteen-presumption under either of the two available methods, the Board affirmed the award. This appeal followed.

### **SUMMARY OF THE ARGUMENT**

In its opening brief, Consolidation challenges (1) the Board's 2016 decision vacating the ALJ's second decision denying benefits and (2) the ALJ's 2017 decision awarding BLBA benefits to Shipley. Both decisions should be affirmed.

The Board remanded the case in 2016 because the ALJ had simply failed to consider Shipley's arguments that the Bellotte and Basheda opinions should be discredited because they were based on premises inconsistent with DOL's evaluation of the relevant medical science as expressed in the preamble to the BLBA's implementing regulations. Consolidation argues that this effectively imbued the preamble with the force of binding law in violation of the Administrative Procedure Act. Not so. The Board merely instructed the ALJ to acknowledge and address a material argument raised by a party—an argument that has been accepted by this Court, the Sixth Circuit, and the Board in a number of other cases. It did not instruct the ALJ to find that the Bellotte and Basheda were inconsistent with the preamble or to reject those opinions *in toto* even if they were. It merely ordered the ALJ to fulfill his duty under the APA to issue a reasoned decision addressing all the material factual and legal issues presented in the case. That decision should be affirmed.

The ALJ's 2017 decision awarding benefits on remand should also be affirmed. Because Shipley worked in coal mines for forty years and suffers from a totally disabling respiratory condition, the burden was on Consolidation to prove either that Shipley did not have pneumoconiosis or that pneumoconiosis played no part in his disability. Consolidation attempted to meet this burden with the testimony of Drs. Bellotte and Basheda, who attributed Shipley's lung condition solely to tobacco use (thus denying the existence of pneumoconiosis). The ALJ ruled that those opinions were not credible for several reasons, one of which is that the doctors failed to adequately explain why Shipley's extensive exposure to coal-mine dust was not also a factor in the miner's lung disease, particularly in light of the fact that the preamble explains that smoking and dust exposure present additive risks for the development of COPD. The ALJ's interpretation of the Bellotte and Basheda opinions is supported by substantial evidence and should be affirmed.

Finally, Consolidation devotes much of its brief to attacking the alternate justifications that the ALJ gave for discrediting Drs. Bellotte and Basheda. These arguments are not properly before this Court because the Board affirmed the award only on the ground that those doctors failed to explain why Shipley's extensive exposure to coal-mine dust was not a causative factor in his COPD.

## **ARGUMENT**

### **A. Standard of Review**

This case presents issues of law and fact. The Court reviews an ALJ's findings of fact to determine whether they are supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Substantial evidence is of "sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review." *Id.* (citation and internal quotation marks omitted). The Court must "defer to the ALJ's determination regarding the proper weight to be accorded competing medical evidence, and . . . must be careful not to substitute [its] judgment for that of the ALJ." *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015) (internal quotation marks omitted). The Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). Finally, the Court confines its review of an order of the Board awarding benefits under the BLBA to "the grounds actually invoked by the Board" in affirming the ALJ's decision. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006).

**B. The Board's second (2016) decision remanding the case for further consideration by the ALJ should be affirmed.**

Consolidation's lead argument is that the Board exceeded its legitimate scope of review in vacating the ALJ's second decision denying Shipley's claim for BLBA

benefits.<sup>7</sup> Pet. br. 14-22. The Board held that the ALJ had failed to consider whether “the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the regulations and the medical science accepted by the Department in the preamble.” JA 402. Consolidation takes particular umbrage at the Board for instructing the ALJ to consider Shipley’s argument that the Bellotte and Basheda opinions were based on the discredited theory that a decreased FEV<sub>1</sub>/FVC ratio indicates that a miner’s COPD is not caused by coal-mine dust.

This Court, the Sixth Circuit, and the Board have agreed that medical opinions based on this FEV<sub>1</sub>/FVC ratio theory are contrary to the preamble and can be discredited on that ground. *See, e.g., Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir.), *as amended* (Dec. 21, 2017) (explaining that the FEV<sub>1</sub>/FVC ratio theory is contrary to both the preamble and the regulation itself) (collecting cases) (affirming Board decision); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 491 (6th Cir. 2014) (“The ALJ appropriately declined to credit Dr. Rosenberg’s medical opinion because it was inconsistent with the DOL’s position that “coal mine dust exposure may cause COPD, with associated decrements in FEV<sub>1</sub>/FVC [ratio].”) (affirming Board decision). No court has reached the opposite conclusion.

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<sup>7</sup> Consolidation does not defend the ALJ’s initial 2014 denial.

Consolidation nevertheless argues that the ALJ was free to simply ignore Shipley's argument and the Board's previous instruction to consider the issue. Pet. br. 14-15. In the company's view, the Board's remand is inconsistent with the rule that ALJs are not generally required to consider the preamble in evaluating the credibility of medical experts. *See, e.g., Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 314-15 (4th Cir. 2012) ("Although the ALJ did not need to look to the preamble in assessing the credibility of [a medical expert's] views, we conclude that the ALJ was entitled to do so and the Board did not err in affirming her opinion."). By requiring the ALJ to consider the preamble, the argument goes, the Board "embodies the preamble with the force of law, which is impermissible since the preamble did not go through the notice-and-comment required by the Administrative Procedure Act ('APA')." Pet. br. 16.

The problem with this argument is that the Board in no way imbued the preamble with the force of law. The Board did not instruct the ALJ to consider the preamble *sua sponte*, but only to respond to a legitimate argument properly raised by the claimant. It did not instruct the ALJ to find that the Bellotte and Basheda testimony actually was contrary to the preamble. It did not instruct the ALJ to necessarily discredit those experts if their testimony was contrary to the preamble. It did not forbid the ALJ from finding that Consolidation had offered post-preamble medical evidence sufficient to undermine that particular section of the preamble, or from

finding that other elements of Dr. Bellotte’s or Dr. Basheda’s opinions were sufficiently compelling to outweigh their reliance on the invalid FEV<sub>1</sub>/FVC ratio theory. Had the Board done any of these things, it might have run afoul of this Court’s admonition that ALJs are not required to consider the preamble, “imbue it with the force of law[,] or . . . transform it into a legislative rule[.]” *Harman Mining*, 678 F.3d at 314-315.

But the Board did not do any of those things. It merely instructed the ALJ to consider Shipley’s argument that the FEV<sub>1</sub>/FVC ratio theory offered by Drs. Bellotte and Basheda should be discredited as contrary to the preamble. JA 401. In so doing, the Board was not treating the preamble as a source of binding law, but rather ensuring that the ALJ satisfied his statutory obligation to issue “findings and conclusions . . . on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. § 557(c)(3)(A).<sup>8</sup> By failing to address, or even acknowledge, that argument in his first two decisions, the ALJ failed to satisfy that standard.

It is true that an ALJ is not required to explicitly address every argument a party makes, no matter how small. *See Doolin Security Savings Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1409 (4th Cir. 1995) (holding that the FDIC’s “failure to address every argument in detail does not render its decision arbitrary” because it “provided a

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<sup>8</sup> The APA’s adjudication rules are incorporated into section 19 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 919(d), which in turn is incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a).

reasoned discussion of the legal arguments the [agency] considered material”) (quoted in *West Virginia Coal Workers’ Pneumoconiosis Fund v. Bell*, 781 F. App’x 214, 229 (4th Cir. 2019)). But Shipley’s argument about Drs. Bellotte and Basheda’s reliance on the FEV<sub>1</sub>/FVC ratio theory was clearly material. Indeed, it was potentially dispositive, as evidenced by *Stallard*, *Central Ohio Coal*, and the other court of appeals and Board decisions affirming ALJ rulings discrediting medical opinions that relied on the FEV<sub>1</sub>/FVC theory.

Indeed, the theory advanced by Drs. Bellotte and Basheda—that a reduced FEV<sub>1</sub>/FVC ratio demonstrates that a claimant is *not* entitled to BLBA benefits—is not only contrary to the regulatory preamble, but to the regulation itself. As *Stallard* explains, the BLBA regulations “permit[] claimants to demonstrate entitlement to Black Lung Act benefits based on a reduced FEV<sub>1</sub>/FVC ratio.”

*Stallard*, 876 F.3d at 671 (citing 20 C.F.R. § 718.204(b)(2)(i)(C)).<sup>9</sup> This regulation would make no sense if a reduced FEV<sub>1</sub>/FVC ratio was proof that a claimant’s lung disease was not caused by coal-mine dust. And this Court has long recognized that “little weight can be given to medical findings that conflict with the BLBA’s implementing regulations[.]” *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 580 (4th Cir. 2004). Thus, the Bellotte and Basheda opinions were fatally flawed

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<sup>9</sup> In particular, 20 C.F.R. § 718.204(b)(2)(i)(C) allows miners to prove that they are totally disabled by establishing that they have an FEV<sub>1</sub>/FVC ratio lower than 55%.

for this reason, irrespective of the fact that they were also inconsistent with the regulatory preamble.

In sum, it is hard to see how the ALJ could have issued the kind of reasoned decision the APA requires without so much as acknowledging Shipley's argument. *Cf. BNP Paribas Energy Trading GP v. F.E.R.C.*, 743 F.3d 264, 270 (D.C. Cir. 2014) (explaining that an agency "may point to distinguishing facts or established policy, but it may not dismiss a material argument out-of-hand"). The Board's 2016 decision remanding the case for the ALJ to comply with his responsibilities under the APA should be affirmed.<sup>10</sup>

**C. The award of benefits to Shipley should be affirmed.**

***1. The ALJ permissibly discredited the opinions of Drs. Bellotte and Basheda, who testified that Shipley's COPD was caused solely by smoking.***

As the Board correctly concluded, the ALJ's 2017 award of benefits is supported by substantial evidence and should be affirmed. There is no dispute that Shipley worked as a coal miner for at least forty years or that he now suffers from a totally disabling respiratory impairment in the form of COPD. Pet. br. 30; JA 20, 123.

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<sup>10</sup> Consolidation also insists that, because the Board remanded for the ALJ to consider Shipley's overlooked preamble arguments relating to Drs. Bellotte and Basheda, fairness dictates that the case must be remanded for the ALJ to consider Consolidation's unaddressed preamble arguments related to Drs. Schaaf and Begley. Pet. br. 21. As the Board correctly observed, any error in this regard is harmless. JA 432 n.7. The problem for Consolidation is that it, by operation of the fifteen-year presumption, bears the burden of proving that Shipley was not totally disabled by pneumoconiosis. The ALJ awarded the claim because the evidence Consolidation submitted to meet that burden (the Bellotte and Basheda testimony) was not credible. A finding that Drs. Schaaf and Begley (who testified that Shipley was affirmatively entitled to benefits) were also not credible would do nothing to assist Consolidation in rebutting the fifteen-year presumption.



Accordingly, the ALJ correctly ruled that Shipley is entitled to 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption" of entitlement. JA 366. Thus, the burden of persuasion shifted to Consolidation to prove either (1) that Shipley does not have pneumoconiosis (in either its legal or clinical form) or (2) that his pneumoconiosis plays no part in his respiratory disability. 20 C.F.R. § 718.305(d). The key factual dispute below was whether Consolidation rebutted the presumption by proving that Shipley's COPD is not legal pneumoconiosis, *i.e.*, that it is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).<sup>11</sup> In an attempt to satisfy that burden, Consolidation offered the testimony of Drs. Bellotte and Basheda, who diagnosed COPD solely caused by smoking. JA 20, 144, 123.

The ALJ found the opinions of Drs. Bellotte and Basheda insufficient to disprove legal pneumoconiosis for three reasons. First, he found that both doctors relied on the FEV<sub>1</sub>/FVC ratio theory, which is contrary to the preamble, inadequately explained, and unsupported by medical literature. JA 415. Second, he found that the doctors failed to adequately consider Shipley's forty years of coal-mine dust exposure in their diagnosis of smoking-induced COPD, particularly in light of the preamble's conclusion that coal-mine dust can cause COPD and presents an

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<sup>11</sup> As the Board pointed out, the ALJ never made an explicit finding regarding whether Consolidation satisfied its burden to prove that Shipley does not suffer from clinical pneumoconiosis. JA 431 n.5. That error was harmless because the Board affirmed the ALJ's ruling that Consolidation had failed to prove the absence of legal pneumoconiosis.

additive risk with cigarette smoking. JA 415. Third, he found that both doctors attributed Shipley's COPD solely to smoking in part because the miner's pulmonary function test results showed some variability and reversibility with treatment without explaining why these factors show that Shipley's lung disease was caused solely by smoking. JA 415-16.

The Board affirmed the ALJ's rejection of these opinions on the second ground only: that Drs. Bellotte and Basheda failed to adequately account for Shipley's lengthy exposure to coal-mine dust as an additive risk in his COPD. JA 432; *see also* Pet. br. 39. Because the Board did not address the ALJ's first and third grounds, those issues are not properly before this Court. *Henline*, 456 F.3d at 426; *see infra* at 33-34.<sup>12</sup> That the Board did not address the ALJ's alternate justifications for discrediting the Bellotte and Basheda opinions does not matter because the justification the Board affirmed on is supported by substantial evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000) ("We need not address Island Creek's other arguments that the ALJ erred in discrediting Drs. Zaldivar's and Castle's opinions in light of our conclusion that

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<sup>12</sup> Should the Court agree with Consolidation that the Bellotte and Basheda opinions sufficiently addressed Shipley's lengthy occupational exposure to coal-mine dust, this case should be remanded for the Board to consider the other grounds identified by the ALJ. *See Trump v. Eastern Assoc. Coal Corp.*, 737 F. App'x 156, 161 (4th Cir. 2018) ("[W]e hold that the ALJ's conclusions that Dr. Houser did not adequately explain his death-causation opinion, and that the opinion is unduly speculative, are not supported by substantial evidence. Because the BRB declined to consider the ALJ's other reasons for discrediting Dr. Houser's opinion, we remand this case to the BRB to review in the first instance the remainder of the ALJ's decision.") (citation omitted).

there was a sufficient factual basis to support one reason for discrediting each opinion.”).

Consolidation insists that its experts did adequately account for Shipley’s lengthy coal-mine dust exposure in making their diagnoses because Dr. Bellotte “acknowledged” that coal dust could also cause Shipley’s symptoms and test results, and Dr. Basheda “noted” that Shipley’s dust exposure history and potential pulmonary loss that could come from such exposure. Pet. br. 30, 31. But simply “acknowledging” or “noting” Shipley’s lengthy mining history is not an explanation of why that history played no role in Shipley’s lung disease. The absence of such an explanation is particularly glaring in light of the regulatory preamble, which explains: “Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.” 65 Fed. Reg. 79940 (quoted in JA 415).

The ALJ rejected the testimony of Drs. Bellotte and Basheda because they failed to explain why Shipley’s more than forty years of coal mine employment did not significantly contribute, along with smoking, to his impairment in light of the preamble which explains that the effects of smoking and coal mine employment

are additive. This is a reasonable interpretation of their testimony.<sup>13</sup> *See, e.g.*, JA 158 (deposition of Dr. Bellotte (“Normally when I see emphysema that’s this diffuse as this gentleman has and with these kinds of changes, it’s almost always related to tobacco abuse, but like everything in medicine, there’s always exceptions.”)); JA 123 (opinion of Dr. Basheda (“I believe Mr. Shipley is afflicted with tobacco-induced COPD with a component of asthma. These two processes can explain his clinical, pulmonary function and radiographic findings.”)). Indeed, the fact that smoking could have caused Shipley’s COPD cannot be dispositive because coal-mine dust does not have to be the only, or even the primary, cause of a miner’s lung disease for that disease to meet the regulatory definition of legal pneumoconiosis. The condition need only be “significantly related to, or substantially aggravated by” coal-mine dust exposure. 20 C.F.R. § 718.201(b). Both physicians conceded that Shipley had sufficient dust exposure in his career (forty years) to cause pulmonary disease in a susceptible host (JA 118, 137), yet neither offered an explanation why Shipley is not a susceptible host. JA 180. The absence of such an explanation is particularly damning because

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<sup>13</sup> On substantial evidence review, the question is whether the ALJ’s interpretation of a witness’s testimony is reasonable, not whether it is the only or even the best possible interpretation of that testimony. *See, e.g., Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (“We agree with Midland that it is possible to understand Dr. Skillrud’s statement in a different way . . . Nevertheless, on substantial evidence review we would have to find that [Midland’s] interpretation was the only permissible one, not that it was one of several [to reverse the ALJ’s finding that the doctor’s opinion was hostile to the BLBA].”).

Consolidation bore the burden of persuasion on the issue under the fifteen-year presumption. *See* 20 C.F.R. § 718.305(d).

The ALJ's decision to discredit the Bellotte and Basheda opinions as insufficiently explained is also consistent with circuit precedent. As the Court explained in affirming another ALJ order awarding black lung benefits in *Westmoreland Coal Co. v. Stidham*, 561 F. App'x 280, 284 (4th Cir. 2014):

[A]lthough both physicians asserted that Stidham's symptoms were "related to" or "classic" for cigarette smoking disease, neither explained why, assuming that cigarette smoking played the main role in causing the Claimant's acknowledged pulmonary and respiratory disability, coal mine dust exposure could not have played some lesser, but nevertheless significant role, consistent with the discussion of the epidemiology in the Preamble to the regulations.<sup>14</sup>

The same reasoning applies here. The ALJ's finding that Consolidation failed to rebut the fifteen-year presumption by proving that Shipley does not suffer from pneumoconiosis should be affirmed.

Having found that Westmoreland failed to rebut the fifteen-year presumption by the first method (proving no pneumoconiosis), the ALJ turned to the second method of rebuttal (proving no disability-causation). *See* 20 C.F.R. § 718.305(d).

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<sup>14</sup> *Accord Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 829 (10th Cir. 2017) (noting that ALJ reasonably criticized doctor for failing to consider the additive risk created by exposure to coal-mine dust and smoking); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017) (holding ALJ could discount the opinions of doctors that were inconsistent with DOL's additive-risk determination); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 (4th Cir. 2000) (holding fact finder was not required to accept doctor's opinion because "it is conclusory and does not explain why coal dust exposure could not have caused or aggravated the emphysema"); *Consolidation Coal Co. v. Galusky*, 648 Fed. App'x 316, 321 (4th Cir. 2016) ("The problem, as both the ALJ and Board noted, is that neither expert explained why the asthma component of Galusky's condition was not aggravated by exposure to coal dust.").

He again found Drs. Bellotte and Basheda unpersuasive. The ALJ properly faulted their opinions on disability causation because they were based on the assumption that Shipley did not suffer from pneumoconiosis, an assumption rendered false by Consolidation's failure to disprove the existence of legal pneumoconiosis. JA 423. This reasoning is sound. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) (holding that an ALJ may discredit a doctor's opinion on disability causation if the doctor incorrectly diagnosed no pneumoconiosis); *Hobet Mining*, 783 F.3d 503-06 (same). The Board therefore properly affirmed the ALJ's finding that Consolidation did not disprove disability causation on this ground alone. JA 433. In sum, the ALJ permissibly determined that Consolidation failed to prove either that Shipley does not have pneumoconiosis or that no part of Shipley's respiratory disability is caused by pneumoconiosis. As a result, he correctly ruled that Shipley was entitled to BLBA benefits under the fifteen-year presumption. The Board properly affirmed that award, as should this Court.

***2. Consolidation's remaining arguments are not properly presented in this appeal.***

This Court confines its review of an order of the Board awarding benefits under the BLBA to "the grounds actually invoked by the Board" in reviewing an ALJ's decision. *Henline*, 456 F.3d at 426; *see also Eastern Assoc. Coal Co. v. Director, OWCP*, 578 F. App'x 165, 173-74 (2014). As explained *supra* at 28, the Board affirmed the ALJ's key ruling—that the Bellotte and Basheda opinions were

not credible—solely on the ground that they failed to adequately explain why Shipley’s extensive occupational exposure to coal-mine dust did not cause or contribute to the miner’s COPD. Therefore, that issue is the only one before this court (in addition to the propriety of the Board’s 2016 remand),

Consolidation nevertheless devotes much of its brief to the alternate grounds the ALJ gave for discrediting the Bellotte and Basheda opinions. On the FEV<sub>1</sub>/FVC ratio issue, the company variously argues that its medical experts did not actually rely on the FEV<sub>1</sub>/FVC ratio theory (Pet br. 23-27) and that they presented sufficient scientific evidence to trump the preamble on this issue (Pet. br. at 19-21, 28-29). It also defends its experts’ reliance on the reversibility and variability of Shipley’s disability as justification for attributing that condition to causes other than coal-mine dust. Pet. br. 34-36. Because the Board did not affirm the award on these grounds, they are not properly before this Court. If this Court does not affirm the award on the ground relied on by the Board, these other issues must be addressed by the Board on remand.

### **CONCLUSION**

For the foregoing reasons, the Benefits Review Board’s order affirming the ALJ’s award of benefits should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,992 words, as counted by Microsoft Office Word 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 9, 2020, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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