No. 18-1317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WEST VIRGINIA CWP FUND, as carrier for
MOUNTAIN LAUREL RESOURCES COMPANY

Petitioner

v.

DONALD BELL, SR.
and
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

BRIEF FOR THE FEDERAL RESPONDENT

KATE S. O'SCANNLAIN
Solicitor of Labor

KEVIN LYSKOWSKI
Acting Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation
U.S. Department of Labor
Office of the Solicitor, Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5770
stearman.gary@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

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BRIEF FOR THE FEDERAL RESPONDENT

This case involves a claim for lifetime disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Donald Bell, Sr., a former coal miner (Claimant or the miner). Paul C. Johnson, Jr., a Department of Labor (DOL) administrative law judge, awarded the claim, and the Benefits Review Board affirmed that decision. The West Virginia CWP Fund, as carrier for the miner's former employer, Mountain Laurel Resources Company (collectively

"the Fund" or Employer) has petitioned the Court to review the Board's decision.[1] The Director, Office of Workers' Compensation Programs, hereby responds.

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over this appeal under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The Fund petitioned for review of the Board's November 29, 2016, decision on January 23, 2018, within the sixty-day limit prescribed by § 921(c). Moreover, the "injury" as contemplated by § 921(c)—Mr. Bell's exposure to coal-mine dust—occurred in West Virginia, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ decision under 33 U.S.C. § 921(b)(3), as incorporated. The Fund appealed the ALJ's November 29, 2016, award of benefits on December 28, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated.

STATEMENT OF THE ISSUE

The regulatory definition of legal pneumoconiosis "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). The Fund's medical expert, Dr. Castle, opined that the miner's disabling obstructive impairment was not legal

[1] The Fund does not dispute that Mountain Laurel is the coal mine operator liable for the payment of benefits on this claim (the "responsible operator").

pneumoconiosis because "w]hen coal workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect." ALJ Johnson ruled that the doctor's opinion was inconsistent with the regulatory definition and accorded it little weight. The question presented is whether this ruling is supported by substantial evidence and in accordance with law.[2]

STATEMENT OF THE CASE

A. Procedural History

The miner filed his claim for BLBA benefits in August 2010. Joint Appendix (JA) 1. Following a denial of the claim by the district director of the Office of Workers' Compensation Programs, Claimant requested an administrative hearing, which was held before Administrative Law Judge Kenneth A. Krantz in June 2012. JA 123. ALJ Krantz then issued a decision on January 10, 2013, denying the claim. JA 140. Claimant appealed, and on December 23, 2013, the Board vacated ALJ Krantz's denial and remanded the claim for further proceedings. JA 176.

[2] ALJ Johnson's decision awarding benefits was the third ALJ decision in this case. In the first two, a different ALJ denied the miner's claim. The Fund argues at length that the Board erred in not affirming these earlier denials. Opening Brief (OB) 14-28. This brief does not address those arguments.

On remand, ALJ Krantz denied benefits on September 22, 2014. JA 181. Claimant appealed. On November 20, 2015, the Board vacated the denial and remanded the claim for a second time. JA 194.

In the interim, ALJ Krantz retired from federal service, and the claim was reassigned to ALJ Paul C. Johnson. JA 207. ALJ Johnson awarded benefits on November 29, 2016. JA 206. The Fund appealed, and the Board affirmed the award on January 23, 2018. The Fund's petition to this Court followed on March 22, 2018. JA 237.

B. Statutory and Regulatory Background

1. The Black Lung Benefits Act

The BLBA provides disability compensation and certain medical benefits to former coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment.[3] 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998). Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); s*ee Harman Mining Co. v. Dir., Off. of Workers' Comp. Programs*, 678 F.3d 305, 308 (4th Cir. 2012) (explaining clinical and legal pneumoconiosis).

Clinical (or "medical") pneumoconiosis refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the

[3] *Pneumoconiosis* is commonly referred to as "black lung disease."

"permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP," *id.*, and is typically diagnosed by chest x-ray, biopsy, or autopsy, 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

Legal pneumoconiosis, in contrast, is a broader category including "*any* chronic lung disease or impairment . . . *arising out of coal mine employment*." 20 C.F.R. § 718.201(a)(2) (emphasis added). Legal pneumoconiosis "includes, but is not limited to, any chronic *restrictive or obstructive* pulmonary disease arising out of coal mine employment." *Id*. (emphasis added). A disease arises out of coal mine employment when it is "significantly related to, or substantially aggravated by" exposure to coal-mine dust. 20 C.F.R. § 718.201(b). Coal-mine dust need not be the sole or even primary cause of a respiratory disease or impairment to satisfy this definition. *Id.*; *Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2016). And the fact that the miner does not suffer from *clinical* pneumoconiosis does not preclude a finding of *legal* pneumoconiosis. 20 C.F.R. § 718.202(a)(4).

2. Section 921(c)(3)'s irrebutable presumption of complicated pneumoconiosis

A miner with complicated pneumoconiosis, a particularly severe form of the disease, arising out of his coal mine employment is irrebuttably presumed to be totally disabled due to pneumoconiosis. *See* 30 U.S.C. § 921(c)(3), as

implemented by 20 C.F.R. § 718.304; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10-11 (1976); *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255 (4th Cir. 2000).

The presence of complicated pneumoconiosis may be established by x-ray evidence of at least one opacity greater than one centimeter in diameter and classified as Category A, B, or C under the ILO Classification system[4]; by biopsy or autopsy evidence of "massive lesions"; or by a diagnosis by other equivalent means. 30 U.S.C. § 921(c)(3)(A)-(C); *Scarbro*, 220 F.3d at 255. In considering whether a miner has complicated pneumoconiosis, an ALJ must weigh all relevant evidence together. *Scarbro*, 220 F.3d at 256 (requiring ALJ to review evidence under each prong and then weigh evidence from different prongs against each other).

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[4] The ILO Classification "provides a means for describing and recording systematically the radiographic abnormalities in the chest provoked by the inhalation of dusts. It is used to describe the radiographic abnormalities that occur in any type of pneumoconiosis." *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* (Rev. Ed. 2011) (hereafter "the *ILO Guidelines or ILO Classification*"), p. 1 (available at http://www.ilo.org/safework/ areasofwork/occupational-health/WCMS_108548/lang--en/index.htm) (checked August 3, 2018). Lung opacities are categorized by size, profusion, location and shape. *Id*. at 3-6. Opacities are described as either small or large in size, the latter exceeding 10 mm in longest dimension. *Id*. at 3, 6. Profusion "refers to the concentration of . . . opacities in affected zones of the lung." *Id*. at 3-4. For location, lung fields are divided into upper, middle and lower zones, each representing (from top to bottom) approximately one-third of a lung. *Id*. at 5. Pneumoconiotic opacities appear in two general shapes, rounded or irregular. *Id*.

3. Section 921(c)(4)'s rebuttable fifteen-year presumption

30 U.S.C. § 921(c)(4)'s "fifteen-year presumption" is invoked if the miner worked at least fifteen years in underground coal mines and has a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4). If invoked, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis," and is therefore entitled to benefits. *Id.*; *Mingo Logan Coal Co. v, Owens*, 724 F.3d 550, 554 (4th Cir. 2013). The BLBA provides that the fifteen-year presumption may be rebutted by proof that the miner does not suffer from pneumoconiosis or that the miner's respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. § 921(c)(4).

DOL's regulation, 20 C.F.R. § 718.305, implements the fifteen-year presumption and provides standards governing how the presumption can be invoked and rebutted. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134 (4th Cir. 2015). Notably, the regulation provides two alternate methods for rebutting the presumption. The first and most straightforward prong requires the liable party to establish that the miner has neither clinical pneumoconiosis arising out of coal mine employment nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i). *See supra* at 4-5 (discussing clinical and legal pneumoconiosis). The second method (or prong) requires the liable party to prove that "no part of the miner's respiratory

or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. § 718.305(d)(2)(ii). This is frequently called the "rule-out standard."

C. Facts

1. General background facts

Claimant was employed in underground coal mine work for fifteen and one-half years, ending in 1984. JA 153, 157. He smoked two packs of cigarettes a day for approximately fifty years. JA 153-54.

2. Chest x-ray readings

An x-ray was taken on October 4, 2010 that was read three times. The results are as follows:

JA Page	Doctor	Narrative Findings
11	Dr. Forehand B reader[5]	• Parenchymal abnormalities consistent with pneumoconiosis • Small opacities: q,s in five zones, 1/1 profusion[6] • Size A large opacities consistent with pneumoconiosis • No pleural abnormalities consistent with pneumoconiosis • Bilateral large conglomerate masses; previous workup negative for malignancy, negative PET scan
15-16	Dr. Shipley B reader, Board-certified radiologist	• No parenchymal or pleural abnormalities consistent with pneumoconiosis • No upper zone predominant small rounded opacities that are typical of coal workers' pneumoconiosis (CWP) • Probably not CWP • Bilateral irregular nodules, possibly malignancy (consider CT scan to rule out); unlikely to represent large opacities of pneumoconiosis because background small rounded opacities absent

[5] A *B-reader* "means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis. . . ." 20 C.F.R. § 718.202(a)(1)(ii)(E).

[6] An x-ray showing an opacity profusion of 1/0 or greater constitutes evidence of pneumoconiosis. *See* 20 C.F.R. § 718.102(c)(3); *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 982 n.6 (11th Cir. 2004).

JA Page	Doctor	Narrative Findings
17	Dr. Castle B reader	• Parenchymal abnormalities consistent with pneumoconiosis • Small opacities: q,q in two lower zones, 0/1 profusion • No large opacities • No pleural abnormalities consistent with pneumoconiosis • Bilateral mid lung zone pleural-based nodules vs. pleural thickening of questionable etiology. This does not look like CWP • Borderline cardiomegaly

3. Pulmonary function tests (PFT) and arterial blood gas tests (ABG)[7]

[7] *Pulmonary function tests*, also called spirometry, "measure the degree to which breathing is obstructed." *See Yauk v. Dir., Off. of Workers' Comp. Programs*, 912 F.2d 192, 196 n.2 (8th Cir. 1989). Pulmonary function tests resulting in certain values established in the regulations are evidence of total disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B. These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two points. *See* Occupational Safety and Health Admin., U.S. Dep't of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), *available at* https://www.osha.gov/publications/OSHA3637.pdf (checked August 6, 2018).

Arterial blood gas studies "are performed to detect an impairment in the process of alveolar gas exchange." 20 C.F.R. § 718.105(a). Alveolar gas exchange involves the transfer of oxygen from the lungs into the bloodstream, and the removal of carbon dioxide from the bloodstream into the lungs. *See The Merck Manual, Consumer Version*, http://www.merckmanuals.com/home/SearchResults?query=removal+of+carbon+dioxide+from+the+bloodstream+into+the+lungs (checked August 6, 2018).

The results of the pulmonary function tests and blood gas studies were mixed with some producing "qualifying" values, i.e., were sufficient to establish total respiratory disability by regulation at 20 C.F.R. § 718.204(b)(2)(i), (ii); 20 C.F.R. Part 718 Appendix B and C.

JA Page	Physician	**PFT** Date	Age/ Height	Pre (Post) FEV1	Pre (Post) FVC	Pre (Post) FEV1/ FVC	MVV	Qualifying?
9, 13	Forehand	10/04/10	65/70	2.17 (2.17)	3.21 (3.14)	68 (69)		No
EX 1-10	Castle	09/20/11	66/69	1.48 (1.42)	2.23 (2.07)	70 (69)	46	Yes
EX 3-13	Ghio	04/04/12	66/70	1.66 (1.74)	2.46 (2.54)	67 (69)		Yes

JA Page	Physician	**ABG** Date	Altitude	Resting (Exercise) pCO_2	Resting (Exercise) pO_2	Qualifying
12	Forehand	10/4/10	0 to 2999	44.6 (41.7)	72.7 (83.0)	No
160	Castle	9/20/11	0 to 2999	47.6	58.2	Yes

4. Treatment Records

A chest CT scan was performed on April 27, 2011 at Northern Hospital. It showed in the left lobe of the lung a "persisting dense focal opacity extending to the adjacent pleural surface with estimated dimensions 2.8 x 2.6 cm" and an "ovoid peripheral opacity in the right upper lobe, which was "stable at about 4.7 x 1.6 cm." JA 26.

5. Relevant medical opinions

It is unchallenged on appeal that Claimant suffers from a totally disabling respiratory impairment and worked for more than fifteen years in underground coal mine employment. The ALJ thus properly invoked the fifteen-year presumption that Claimant is totally disabled due to pneumoconiosis. JA 163, 177, 233 n.5. The primary medical issue that this brief addresses (*see supra* at 2-3, statement of the issue) is whether Employer rebutted the presumption by disproving the existence of legal pneumoconiosis. At this stage of the proceedings, the only medical opinion relevant to that issue is Dr. Castle's.[8]

Dr. Castle conducted a pulmonary examination of the Claimant, reviewed various medical records including Dr. Forehand's report and Dr. Shipley's x-ray reading, and issued a report in October 2011. He interpreted the PFT results as showing "a mild to moderate airway obstruction without restriction or significant diffusing abnormality." JA 24. He further observed that the results of the PFT he conducted were lower than Dr. Forehand's, and asserted that pneumoconiosis would not likely cause such a rapid reduction. *Id*. He further explained, "[w]hen

[8] There are two other medical reports of record, Dr. Forehand's (JA 5) and Dr. Ghio's (JA 61, 100). Dr. Forehand's opinion does not assist the Fund since he determined that Claimant suffers from complicated and legal pneumoconiosis and reported that coal dust exposure and cigarette smoking "severely damaged" Claimant's lungs. JA8. Although Dr. Ghio opined that Claimant has neither pneumoconiosis nor a respiratory impairment, JA 64, the latter finding conflicts with the undisputed medical fact that Claimant is totally disabled. ALJ Johnson accordingly rejected Dr. Ghio's diagnosis of no legal pneumoconiosis, JA 225, and the Fund has accepted this ruling. JA 234 n.8.

coal workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect," and he emphasized that "[t]here was no evidence of any restriction in this case." *Id*. He accordingly attributed Claimant's impairment to cigarette smoking. *Id*. Dr. Castle then reviewed the ABG results. They showed mild hypoxemia and hypercapnia, which according to Dr. Castle, indicated "significant tobacco smoke induced disease" when paired together. Dr. Castle concluded that he was unable to "discern . . . whether or not Mr. Bell has radiographic evidence of coal workers' pneumoconiosis" (because Dr. Forehand and Shipley's x-ray readings conflicted). JA 25. Nonetheless, he asserted Claimant was "totally disabled by tobacco smoke induced chronic airway obstruction." *Id*.

Dr. Castle subsequently interpreted the October 4, 2010, x-ray as negative for pneumoconiosis, *supra* at 10, and then provided deposition testimony in which he largely reiterated his prior conclusions. JA 69.

D. Decisions Below

1. ALJ Krantz denies the claim.

On January 10, 2013, ALJ Krantz issued a decision and order denying the miner's claim. JA 140. He invoked the fifteen year presumption of entitlement based on the miner's fifteen years of coal mine employment and total respiratory disability, JA 163, but denied benefits after finding the evidence established the

absence of both clinical and legal pneumoconiosis. JA 164-171.

In particular, ALJ Krantz determined that the x-ray evidence was negative for clinical pneumoconiosis based on Dr. Shipley's negative interpretation because he was the best-credentialed reader. JA 165. Significantly, however, ALJ Krantz omitted portions of Dr. Shipley's reading, noting only the doctor's conclusions (of no parenchymal or pleural abnormalities) without considering his underlying explanations. *Compare* JA 165 with *supra* at 9 (describing the entirety of Dr. Shipley's findings). ALJ Krantz employed this same reasoning to find complicated pneumoconiosis not established. JA 159.

ALJ Krantz likewise found the medical opinions negative for legal pneumoconiosis. He discredited as unreasoned Dr. Forehand's opinion that coal dust exposure and smoking together caused the miner's respiratory impairment, while according controlling weight to Dr. Ghio's opinion of no respiratory impairment, and Dr. Castle's opinion of a smoking-induced respiratory impairment. JA 170.

2. The Board remands.

On December 23, 2013, the Board remanded for reconsideration of Dr. Shipley's x-ray reading, and Drs. Ghio and Castle's medical reports. JA 176. It ruled that the ALJ had erred by not considering all of Dr. Shipley's opinion and the qualified nature of his findings. JA 179. In particular, it observed that the doctor

had noted abnormalities in the lung mid-zone, which he believed were "probably not" or "unlikely" to be pneumoconiosis, and had recommended further evaluation to rule out a malignancy, which a PET scan had previously eliminated. *Id*. The Board accordingly instructed the ALJ to reconsider Dr. Shipley's no complicated and clinical pneumoconiosis findings. It further directed the ALJ to reweigh the conflicting medical opinions regarding legal pneumoconiosis because his prior finding (of no legal pneumoconiosis) may have been influenced by his erroneous consideration of the x-ray evidence. JA 180.

3. ALJ Krantz denies the claim again.

On September 22, 2014, ALJ Krantz issued a second decision and order denying benefits. JA 181. Addressing the Board's concerns, he found Dr. Shipley's x-ray interpretation neither "speculative" nor "unsupported." JA 189. ALJ Krantz believed the qualifying language in the report did not represent "equivocation or doubt," but rather reflected "the actions of a prudent doctor," the "limitations of making a definitive diagnosis" based on a single x-ray, and "the inherent uncertainty in medical treatment." *Id*. ALJ Krantz accordingly reiterated his finding that complicated and clinical pneumoconiosis were absent. JA 189-190. Similarly, his reweighing of the conflicting medical reports came to the same conclusion—Drs. Ghio and Castle's opinions were more persuasive than Dr. Forehand's, and legal pneumoconiosis was lacking. JA 190-92.

4. The Board remands for a second time.

On November 20, 2015, the Board remanded the claim for a second time. JA 194. Regarding the existence of complicated pneumoconiosis, it determined that ALJ Krantz had again failed to evaluate all the relevant x-ray evidence. It noted that ALJ Krantz had not considered qualifying language in Dr. Castle's x-ray interpretation and deposition testimony regarding the mid-lung zone abnormalities, and had ignored treatment records that included a CT scan of left lung lobe. JA 199-200; *see supra* at 10-11 (describing Dr. Castle's x-ray interpretation and treatment x-ray).

It also ruled that the ALJ had failed to consider all relevant evidence regarding the existence of legal pneumoconiosis. It found that ALJ Krantz had erred in not addressing whether Dr. Castle's opinion of no legal pneumoconiosis derived from his belief that "coal dust-related disease cannot cause a purely obstructive impairment," a view that conflicts with the regulatory definition of pneumoconiosis (20 C.F.R. § 718.201(a)(2)). JA 203. Moreover, the Board found that ALJ Krantz had "failed to rationally explain his reliance on Dr. Ghio's opinion" in light of the discrepancy between the doctor's diagnosis of no respiratory impairment and the ALJ's finding of total respiratory disability. *Id*.

In so finding, the Board declined to rule that the Director had waived her right to present certain arguments addressing ALJ Krantz's rebuttal findings on

remand. JA 201 n.7. It explained that she was not so precluded because of the Director's "standing to ensure proper enforcement and lawful administration of the Black Lung program." *Id*.

5. ALJ Johnson awards benefits.

Because ALJ Krantz had retired from federal service, the case was reassigned to ALJ Paul Johnson. JA 207. ALJ Johnson issued a decision and order awarding benefits on November 29, 2016. JA 206.

Like ALJ Krantz, ALJ Johnson focused on whether the evidence established complicated pneumoconiosis and whether the Fund had rebutted the fifteen year presumption. JA 207. As to the former, ALJ Johnson determined that the x-ray (and the hospital CT scan) revealed the existence of a large mass (or masses) in the miner's lungs. JA 218. He then found Dr. Forehand's x-ray interpretation diagnosing complicated pneumoconiosis more persuasive than Drs. Shipley and Castle's. JA 219. According to ALJ Johnson, Dr. Shipley equivocated and failed to explain the basis for his belief that "small rounded opacities in the upper lung zones [are] a prerequisite for finding complicated pneumoconiosis," and Dr. Castle's deposition testimony was inconsistent—testifying that no large opacities were present, but then elaborating that "'those opacities' were 'most likely' due to scarring from a previous infection." JA 218-219. ALJ Johnson thus concluded that the miner suffered from complicated pneumoconiosis and was entitled to the

irrebuttable presumption of total disability due to pneumoconiosis. JA 220.

ALJ Johnson then turned to the first rebuttal prong of the fifteen year presumption (disproving clinical and legal pneumoconiosis). He found that although Employer established the absence of simple clinical pneumoconiosis (because Drs. Shipley and Castle did not equivocate on the existence of small opacities), JA 222, it did not prove the absence of legal pneumoconiosis. JA 226. He accorded little weight to Dr. Castle's opinion because the doctor's belief that "coal dust causes impairment by causing a mixed, irreversible obstructive and restrictive ventilatory defect" was inconsistent with the regulatory definition of pneumoconiosis, which includes both restrictive and obstructive defects. JA 224. In addition, ALJ Johnson found the doctor's opinion inconsistent with the preamble to the Department's regulations and lacked an explanation as to why the reduction in the miner's PFTs "was too rapid" to be pneumoconiosis. JA 225.

ALJ Johnson also discredited Dr. Ghio's opinion because the doctor's diagnosis of no respiratory impairment conflicted with the qualifying PFTs and ABGs and the prior finding of total respiratory disability, which was the law of the case. JA 225.

The ALJ then addressed the second rebuttal prong (disability causation) and determined that neither Dr. Castle nor Dr. Ghio had credibly ruled out pneumoconiosis as a cause of the miner's disability. With rebuttal not established,

ALJ Johnson awarded benefits.

6. The Board affirms the award of benefits.

On January 23, 2018, the Board affirmed the award of benefits by upholding ALJ Johnson's determination that the Fund had not rebutted the fifteen-year presumption. JA 235. (Because it affirmed the award on this basis, the Board declined to address the ALJ's findings on complicated pneumoconiosis. JA 235 n.10). Specifically, it affirmed the ALJ's finding that the Fund had not proved the absence of legal pneumoconiosis. The Board observed that ALJ Johnson had "permissibly accorded less weight to Dr. Castle's opinion because he found the doctor's reasoning inconsistent with the Department's definition of legal pneumoconiosis, which recognizes that legal pneumoconiosis may be purely obstructive in nature." JA 234. Moreover, it affirmed the ALJ's discrediting of Dr. Ghio's opinion because the Employer had not challenged it on appeal. JA 234 n.8. Finally, the Board affirmed as unchallenged on appeal ALJ Johnson's determination that Employer had not ruled out pneumoconiosis as a cause of the miner's disability under the second rebuttal method. JA 235. Accordingly, the Board affirmed the award of benefits.

SUMMARY OF THE ARGUMENT

The Court should uphold ALJ Johnson's determination, as affirmed by the Board, that the Fund failed to rebut the fifteen year presumption. Regarding the

first rebuttal prong (absence of clinical and legal pneumoconiosis), ALJ Johnson reasonably found that the Fund failed to prove the absence of legal pneumoconiosis. He permissibly determined that Dr. Castle's opinion was inconsistent with the regulatory definition of legal pneumoconiosis, and his discrediting of Dr. Ghio's opinion is unchallenged on appeal. Similarly, the Fund does not dispute that it failed to rule out pneumoconiosis as a cause of the miner's disability (the second rebuttal prong). Accordingly, the Court should affirm ALJ Johnson's finding that the Fund failed to rebut the fifteen year presumption.

ARGUMENT

I. Standard of Review

The issues addressed in this brief are procedural and factual in nature. In reviewing an ALJ's factual findings, the Court's review is "limited," and it "ask[s] only whether substantial evidence supports the factual findings . . . ." *Hobet Mining, LLC, v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015) (internal quotation and citation omitted). The Court defers to the ALJ's judgment about the credibility of witnesses and his weighing of evidence. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). Procedural rulings of the Board are reviewed for an abuse of discretion. *See Eggers v. Clinchfield Coal Co.*, 29 Fed. Appx. 144, 150 (4th 2002).

II. ALJ Johnson permissibly determined that Dr. Castle's opinion is inconsistent with the regulatory definition of legal pneumoconiosis.

Among other reasons, ALJ Johnson accorded little weight to Dr. Castle's opinion that the miner did not have legal pneumoconiosis because the doctor's underlying assumption that coal dust "caus[es] mixed irreversible obstructive and restrictive ventilator defect" was "not consistent with the regulatory definition of legal pneumoconiosis," which includes stand-alone obstructive defects.[9] JA 224-25. The Board ruled that ALJ Johnson permissibly discounted Dr. Castle's opinion on this basis. JA 234. Notwithstanding the Fund's counter-arguments, the ALJ's finding is supported by substantial evidence and in accordance with law. The Court should affirm it.

The Fund first complains that the Board erred in even considering the Director's contention that ALJ Krantz's evaluation of Dr. Castle's legal

[9] As described more fully in the summary of the decisions below, *supra* at 18, ALJ Johnson gave various other reasons for according little weight to Dr. Castle's opinion. The Board, however, declined to address them. JA 234 n.9. These additional justifications, therefore, are not before the Court. *See e.g. E. Assoc. Coal Corp. v. Director, OWCP*, 805 F.3d 502, 510 (4th Cir. 2015) (limiting review to the grounds upon which the BRB relied in it is decision). The Fund's lengthy challenge to them (OB 37-41) must first await Board review in the event the Court grants its petition and remands the case. *Trump v. Eastern Assoc. Coal Corp.*, __ Fed. Appx __, 2018 WL 3006102, *5 (4th Cir. 2018) ("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.").

pneumoconiosis opinion was inadequate. OB 27. The Board rejected the Fund's waiver argument, JA 201 n.7, and this Court should as well.

As an initial matter, because the Board gave the Director's arguments "plenary consideration," the Court must now consider the Board's findings. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 717 (4th Cir. 1993). In *Thorn*, the coal company renewed a waiver argument that the Board had previously rejected. This Court followed suit, explaining "with the BRB's full consideration of the issue, the policy reasons behind administrative waiver—preserving the requirement of exhaustion of remedies and respect for the agency's expertise—are simply not present." *Id.*; *see Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707-08 (D.C. Cir. 2009) (holding court of appeals review appropriate where district court "passed upon" issue not raised by appellants, citing *United States v. Williams*, 504 U.S. 36 (1992)).

Moreover, the Fund confuses *issues*, which are forfeitable, with *arguments*, which are not. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (explaining "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"). Here, ALJ Kravantz's rebuttal findings have been a

contentious issue throughout the agency proceedings;[10] the Director's particular concerns regarding his evaluation of Dr. Castle's report clearly fall within that ambit, and were properly raised while they were being challenged in the second Board appeal. *See U.S. v. Robinson*, 744 U.S. 293, 300 n.6 (4th Cir. 2014) (appellant's general challenge to criminal history score permitted appellate court to consider specific objection to marijuana sentence, which was not raised below).

Finally, even assuming the Board applied a more lenient waiver standard to the Director's arguments, it was correct to do so. As the Board observed (JA 201 n.7), the Director's role is "to ensure the proper enforcement and lawful administration of the Black Lung program," which is why Congress specifically included her as a party at every stage in every black lung proceeding. 30 U.S.C. 932(k); *see* H.R.Conf.Rep. No. 95–864, pp. 22–23 (1978) ("[I]t was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case."). As the Board understands, permitting the Director to

[10] In his initial appeal to the Board, Claimant listed the first issue as "[w]hether the Administrative Law Judge erred in finding that the Employer had successfully carried its burden of rebuttal of the presumption of 20 C.F.R. 718.305 that the claimant's totally disabling respiratory impairment arose from his coal mine employment." Claimant's Brief in Support of Petition for Review, dated March 7, 2013, at 5. His brief then attacks the credibility of Drs. Castle and Ghio's medical opinions for various reasons.

voice these programmatic interests helps it come to the right decision, a result Congress surely intended.

In any event, the choice to invoke waiver was for the Board to make. If it had done so, the Court may have been "face[d] with a difficult question." *Thorn*, 3 F.3d at 717. But it did not, and the issue whether the ALJ reasonably accorded little weight to Dr. Castle's opinion because it is contrary to the definition of legal pneumoconiosis is properly before the Court.

The Fund argues that ALJ Johnson's reasoning is "errant" because he overlooked "Dr. Castle's proviso" that coal dust "*generally* (not always)" causes an impairment "in a mixed obstructive/restrictive pattern." OB 35. However, the doctor's use of the qualifying term "generally" is too slim a reed to overturn the ALJ's finding.

The Fund's heavy reliance on *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996) is misguided. There, the ALJ was persuaded by medical opinions concluding that Stiltner's chronic obstructive lung disease was due to cigarette smoking rather than coal dust exposure, "after reviewing a vast amount of conflicting medical evidence." 86 F.3d at 339. Stiltner challenged the ALJ's finding, "claim[ing] that these medical opinions are not credible as a matter of law and thus cannot constitute substantial evidence supporting the denial of benefits." 86 F.3d at 340. Rejecting Stiltner's legal insufficiency contention, the Court

explained that the doctors' belief that "Stiltner *likely* would have exhibited a restrictive impairment in addition to COPD" did not necessarily invalidate their opinions because the doctors "based their opinions on their review of Stiltner's entire medical history including his PF[Ts], blood gas tests, and x-ray readings." *Id*. at 341. The Court thus distinguished the doctors' *qualified* beliefs from a physician's *categorical* rejection of coal dust-induced COPD, which it found impermissible in *Warth v. Southern Coal Co.*, 60 F.3d 173, 174-75 (4th Cir. 1995).[11] *Id*. The Court therefore held that "in view of these thorough and amply supported medical opinions, we cannot conclude that the ALJ's finding of [ ] rebuttal was not well reasoned." *Id*.

At most, *Stiltner* simply confirms the well-established discretionary factfinding authority of ALJs. It stands for the unexceptional proposition that the Court will not upset an otherwise supported ALJ factfinding simply because the doctor's opinion under review includes qualified, not categorical, language. What *Stiltner* does not establish is the proposition the Fund asserts, namely, that an ALJ is not empowered to interpret a doctor's opinion as inconsistent with the BLBA or the program regulations simply because the doctor uses one or more well-placed

[11] *Accord Harman Mining*, 678 F.3d at 311 (upholding ALJ's rejection of medical opinion that *categorically* denied that obstructive lung disease can be legal pneumoconiosis; observing that "[a] robust body of case law holds that an ALJ should not credit expert opinions of doctors who rely on facts or premises that conflict with the Act").

qualifiers. Fundamentally, the Fund's argument is the flip-side of the argument the Court rejected in *Stiltner*: whereas Stiltner contended that qualified opinions as necessarily inconsistent as a matter of law, the Fund says they are necessarily consistent as a matter of law.

Stepping back, the Court cannot lose sight of the fact that *Stiltner* was published over twenty years ago, and a broader reading of the case is problematic. Neither science nor the law has stood still. The decision was issued years before the current regulation defining legal pneumoconiosis was promulgated. That definition sets out the broad parameters of legal pneumoconiosis and makes crystal clear that it encompasses stand-alone chronic obstructive diseases and defects. 20 C.F.R. § 718.201(a)(2) (legal pneumoconiosis "includes *any* restrictive *or* obstructive disease") And the regulatory definition is not qualified in any way. *See Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, (7th Cir. 2008) (rejecting coal company's argument that its doctor's opinion—that coal dust "rarely" causes COPD—comports with the regulation, explaining that there is no indication from DOL that such causality is "merely rare").

Moreover, the preamble to the regulation repeatedly recognizes a connection between coal dust exposure and obstructive disease (with no restrictive component). 65 Fed. Reg. at 79938-41 (December 20, 2000) ("Airflow limitation and shortness of breath are features of COPD. . . epidemiological studies have

shown that coal miners had an increased risk of developing COPD."; "Simply stated, there is a clear relationship between coal mine dust and COPD and lung dysfunction."); *see also Harman Mining*, 678 F.3d at 314 ("The preamble to the regulations simply sets forth the medical and scientific premises relied on by the Department in coming to these conclusions in its regulations."). Indeed, the preamble specifically refutes the view that "clinically significant obstruction as a result of coal mine dust inhalation" occurs only when a "combined obstructive and restrictive defect is present." *Compare* 65 Fed. Reg. 79938 (describing the belief) *with* 79939 (concluding this view is "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature"). Thus, while before the preamble stand-alone obstructive lung diseases were viewed as potentially compensable as a matter of statutory interpretation, *Warth*, 60 F.3d at 173, after the preamble, they were also seen as compensable as a matter of medical and scientific fact.[12] 65 Fed. Reg. at 79938

[12] Dr. Castle diagnosed a "mild to moderate obstruction without restriction," based on below normal FVC, FEV1, and FEV1/FVC results. JA 24; *see supra* at 10 n.7 (explaining these particular pulmonary function tests). Scientific studies cited in the preamble similarly noted *coal dust related* airway obstruction (with no restriction) based on reduced FEV1 values. 65 Fed. Reg. at 79940-41 ("[T]he incidence of nonsmoking coal miners with intermediate dust exposure (FEV1 of less than 80%) is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure (15.5% v. 17.1%). Similarly, the incidence of non-smoking miners with intermediate exposure developing severe airways obstruction (FEV1 of less than 65% is roughly equal to the incidence of severe

("Whether coal mine dust exposure can cause chronic obstructive pulmonary disease is a question of medical and scientific fact that will not vary from case to case; thus, it is an appropriate question for the Department to answer by regulation.").

Furthermore, since the regulation was promulgated, this Court has not interpreted *Stiltner* as the Fund reads it. The *post-Stiltner* decision, *Dante Coal Co. v. Director, OWCP*, 164 Fed. Appx. 338 (4th Cir. 2006) is directly on point. *Dante Mining* not only applied the current regulatory definition of legal pneumoconiosis, it also considered an *identical* opinion by Dr. Castle, namely that the Claimant "does not suffer from a coal-induced impairment because he did not have a 'mixed, irreversible obstructive and restrictive ventilatory impairment.'" 164 Fed. Appx. At 347; JA 24. After observing that the ALJ "had carefully considered" Dr. Castle's reasoning, the Court concluded that "the ALJ properly accorded Dr. Castle less weight because his opinion was counter to the case law, which holds that an 'obstructive impairment without a restrictive impairment may be considered legal pneumoconiosis." *Id*. Notably, the panel majority was unpersuaded by the dissent's contention (the same one the Fund makes) that Dr.

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obstruction in non-mining smokers (5% for both groups)."; "Well-designed investigations have now documented that coal dust exposure can cause reductions in FEV1 that are independent of age and cigarette smoking."; "[I]ncreasing coal dust exposure is associated with airflow obstruction in both smokers and nonsmokers.").

Castle's opinion passed muster "under *Stiltner*" because he used the qualifying term "*generally*." 164 Fed. Appx. At 353-54 (emphasis in original); *accord Bloomer v. Westmoreland Coal Co.*, 2013 WL 587637 (Ben. Rev. Bd.) (unpub.) (upholding ALJ's rejection of identical Dr. Castle opinion); *Richardson v. Jewell Ridge Mining Corp.*, 2013 WL 4407015 (Ben. Rev. Bd.)(unpub.) (same). In short, this Court, as the ALJ did here, cannot simply take at face value linguistic gamesmanship to excuse a medical opinion that is otherwise inconsistent with the regulations. *Cf. Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (taking a hard look at and criticizing expert's alternative opinion as a "superficial hyptothetical").[13]

Finally, the Fund simply overlooks the Court's "limited review" of the Board's decision and its "defer[ence] to the ALJ's evaluation of the proper weight to accord conflicting medical opinions." *Harman Mining*, 678 F.3d at 310. Although the Fund believes Dr. Castle's opinion is consistent with the definition of legal pneumoconiosis, it has not demonstrated why the ALJ's interpretation is

[13] For instance, Dr. Castle makes no attempt to explain the medical or scientific basis for his belief that legal pneumoconiosis (even generally) causes a mixed obstructive and restrictive impairment. Apparently, it is the Fund's position that the ALJ must simply take the doctor at his word. Precedent instructs otherwise: "[A]s trier of fact, the ALJ is not bound to accept the opinion or theory of any medical expert," but instead "must evaluate the evidence, weigh it, and draw his own conclusions." *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 951 (4th Cir.1997), *superseded on other grounds as stated in Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs*, 480 F.3d 278, 287 (4th Cir.2007).

plainly wrong. Addressing this very situation where an expert's report can be variously interpreted, the Seventh Circuit explained that "[w]e agree with [the coal company] that it is possible to understand [its expert's] statement in a different way, namely, simply as support for his conclusion that it was [the miner's] smoking history, and not pneumoconiosis, that was causing his obstructive impairment. Nevertheless, on substantial evidence review we would have to find that the latter interpretation was the only permissible one, not that it was one of several. In that light, the ALJ's inference of hostility to the Act was permissible." *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004). Consequently, ALJ Johnson's determination that Dr. Castle did not provide a credible opinion sufficient to rebut the presumption that the miner's disabling obstructive respiratory impairment was legal pneumoconiosis, *i.e.*, significantly related to coal dust exposure, is supported by substantial evidence.[14]

[14] It is of course no answer to the deference owed ALJ Johnson's finding of an impermissible inconsistency with the regulation that ALJ Krantz found otherwise in his initial decision. OB 28. The Board vacated this decision on other grounds, JA 176, and ALJ Krantz's decision on remand completely failed to address the possible conflict. JA 191.

CONCLUSION

The Director requests that the Court affirm ALJ Johnson's determination that the Fund failed to rebut the presumption that the miner suffered from legal pneumoconiosis.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

KEVIN LYSKOWSKI
Acting Associate Solicitor

s/Gary K. Stearman
GARY K. STEARMAN
Counsel for Appellate Litigation, Black Lung Benefits and Longshore Legal Services Division
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5770
stearman.gary@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and 2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

s/Gary K. Stearman
GARY K. STEARMAN
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, 2018, an electronic copy of this brief was served on counsel of record through the CM/ECF system.

s/Gary K. Stearman
GARY K. STEARMAN
Attorney
U.S. Department of Labor