No. 15-2491

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WESTMORELAND COAL COMPANY, INC.,

Petitioner

v.

JOHNNY FORTNER 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

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of
Workers' Compensation Programs

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This case involves a 2008 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Johnny Fortner, an underground coal miner for twenty-eight years. On July 22, 2014, Administrative Law Judge Richard T. Stansell-Gamm issued a decision awarding benefits and ordering Westmoreland Coal Company, Inc. (Westmoreland or the

coal company), Mr. Fortner's former employer, to pay them. Westmoreland appealed this decision to the United States Department of Labor (DOL) Benefits Review Board on August 21, 2014, 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 September 30, 2015, and Westmoreland petitioned this Court for review on November 30, 2015. 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 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 the Commonwealth of Virginia, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Westmoreland's petition for review.

STATEMENT OF THE ISSUES

In order to be entitled to BLBA benefits, former miners must prove that they are totally disabled by pneumoconiosis arising out of coal mine employment. They are rebuttably presumed to have satisfied this standard if, *inter alia*, they worked

for at least fifteen years in underground coal mines and have a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4).

The ALJ first awarded benefits in this case in 2011, finding the "fifteen-year presumption" invoked and unrebutted. Notably, the ALJ found the required total respiratory disability based in part upon a "consensus" of the medical opinion evidence: of the three specialists who produced well-documented and well-reasoned opinions on the issue, two diagnosed respiratory disability and only one—Dr. Hippensteel—found it absent. The Benefits Review Board affirmed, but this Court vacated the award and remanded the case to the ALJ to more fully explain his weighing of the medical opinions.

On remand, the ALJ again found that the miner established a totally disabling respiratory impairment: his blood gas tests were sufficient to prove total respiratory disability by regulation, and Dr. Agarwal (solicited by the DOL) and Dr. McSharry (Westmoreland's own doctor) diagnosed that condition. Only Dr. Hippensteel (Westmoreland's other doctor) reported to the contrary. He refused to diagnose a respiratory condition because he believed the miner's problems were due to obesity rather than a defect in the respiratory system itself. The ALJ found Dr. Hippensteel's explanation not well-reasoned and accorded it less weight than the evidence positive for total respiratory disability.

Finding the fifteen-year presumption invoked and unrebutted by Westmoreland, the ALJ awarded benefits. On appeal to the Board, Westmoreland argued that the ALJ (1) did not have the authority to find Dr. Hippensteel's opinion unreasoned when he had credited it in his prior decision; (2) erred in finding Dr. Hippensteel's opinion unreasoned; and (3) erred in finding the medical evidence insufficient to rebut the presumption of entitlement. The Board rejected all three arguments, and the coal company now presents them to the Court. The issues, therefore, are

1. Whether the Court's order of remand allowed the ALJ to reevaluate Dr. Hippensteel's opinion;
2. Whether the ALJ's discrediting of Dr. Hippensteel's disability opinion is supported by substantial evidence; and
3. Whether the ALJ's finding the medical evidence insufficient to rebut the fifteen-year presumption is supported by substantial evidence.

STATEMENT OF THE CASE

A. Relevant Statutory and Regulatory Background

1. Entitlement

In order to be entitled to BLBA benefits, a miner "must prove that (1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4)

pneumoconiosis is a contributing cause to his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998); *see also* 30 U.S.C. §§ 901(a), 902(b).

Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 308 (4th Cir. 2012). *Clinical (or "medical") 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). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP." *Id.* Clinical pneumoconiosis 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, by contrast, is a broader category, including "any chronic lung disease or impairment . . . includ[ing], but [ ] not limited to, any chronic restrictive or obstructive disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease or impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust is considered to have "arise[n] out of coal mine employment," and is therefore considered to be legal pneumoconiosis. 20 C.F.R. §§ 718.201(b), 718.202(a)(4);

Harman Min. Co, 678 F.2d at 308-09, 313; *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 577 (4th Cir. 2004).

Finally, the regulation at 20 C.F.R. § 718.201(c) provides that, "[f]or purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."

2. Establishing total respiratory disability

The regulation at 20 C.F.R. § 718.204 provides four methods by which a miner can prove a totally disabling respiratory condition: (1) results of pulmonary function studies meeting the table criteria set forth at section 718.204(b)(2)(i), Appendix B [1]; (2) results of blood gas studies meeting the table criteria set forth at

[1] Tests that meet the regulatory values are called "qualifying," those that do not are "nonqualifying." Pulmonary function studies, also called spirometry, are tests that show how well miners move air in and out of their lungs, and "measure the degree to which breathing is obstructed." *See Yauk v. Director, OWCP,* 912 F.2d 192, 196 n.2 (8th Cir. 1989). 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 FEV_1), 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.

section 718.204(b)(2)(ii), Appendix C[2]; (3) proof of pneumoconiosis and "cor pulmonale with right-sided congestive heart failure," 20. C.F.R. § 718.204(b)(2)(iii); and (4) medical opinion evidence "based upon medically acceptable clinical and laboratory diagnostic techniques, conclud[ing] that a miner's respiratory or pulmonary condition prevents . . . the miner from engaging in," *inter alia*, "his or her usual coal mine work," 20 C.F.R. § 718.204(b)(2)(iv), referencing subsection (b)(1).

"The miner can establish total disability upon a mere showing of evidence that satisfies any of the four alternative methods, but only '[i]n the absence of contrary probative evidence.'" *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171 (4th Cir. 1997) (quoting 20 C.F.R. § 718.204(b)(2)); *see also* this Court's 2013 remand order in this case in the Federal Respondent's Supplemental Appendix at (SA.) 4. While all relevant evidence, including the results of pulmonary function studies and blood gas studies, must be weighed together in considering total respiratory disability, nonqualifying pulmonary function study results are not

[2] "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* Noah Lechtrin, MD, MHS, Exchanging Oxygen and Carbon Dioxide, *Merck Manuals Consumer Version* (2015), *available at* http://www.merckmanuals.com/home/lung-and-airway-disorders/biology-of-the-lungs-and-airways/exchanging-oxygen-and-carbondioxide. The test is initially administered "at rest," but if the results are not qualifying, the test will be administered while the patient is *exercising*, if not "medically contraindicated." 20 C.F.R. § 718.105(b).

considered "contrary" to qualifying blood gas study results, and vice versa, because the two studies "measure different types of impairment." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) (internal quotations omitted); *see supra* nn.1& 2 (describing respective impairments measured by the different tests).

Finally, section 718.204(a) explicitly addresses the effect of a non-pulmonary disability. If a miner has a non-pulmonary disability "which causes an independent disability unrelated to the miner's pulmonary or respiratory disability," that non-pulmonary disability is not a factor "in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. § 718.204(a). However, non-pulmonary conditions that cause respiratory problems are considered: "If, however, a nonpulmonary or nonrespiratory condition or disease *causes* a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." *Id*. (emphasis added).

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

The Act contains several presumptions designed to aid miners in establishing that they are totally disabled by pneumoconiosis arising out of coal mine employment. *See generally Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 10 (1976). One such presumption, 30 U.S.C. § 921(c)(4)'s "fifteen-year

presumption," is invoked if the miner worked for 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*; *see generally West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *see also 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 respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. § 921(c)(4).

Section 718.305 of the regulations implements the fifteen-year presumption and provides standards governing how the presumption can be invoked and rebutted.[3] 20 C.F.R. § 718.305 (applicable to all claims "filed after January 1, 2005, and pending on or after March 23, 2010," 20 C.F.R. § 718.305(a)); *West Virginia CWP Fund*, 782 F.3d at 134-35.

Notably, the regulation provides two alternate methods for rebutting the presumption. The first method 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* pp.5-6 discussing

[3] Westmoreland does not dispute that § 718.305 governs Mr. Fortner's claim.

clinical and legal pneumoconiosis. The second method 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 second method is frequently called the "rule-out standard." *See West Virginia CWP Fund*, 782. F.3d at 131.

B. Procedural History

Mr. Fortner originally filed a claim for BLBA benefits in 1995. Petitioner's Appendix at (A.) 216. This claim was finally denied in 2002 because the evidence failed to prove that he suffered from pneumoconiosis or a totally disabling respiratory condition. *Id.* Mr. Fortner filed his present claim in 2008.[4] A.217. A DOL district director determined that Mr. Fortner was entitled to benefits and ordered his prior employer, Westmoreland, to pay them. Dissatisfied with this decision, the coal company requested a hearing, which was held before Administrative Law Judge Richard T. Stansell-Gamm. *Id.*

On December 6, 2011, the ALJ issued a decision awarding benefits. A.215. He found that Mr. Fortner suffered from a totally disabling respiratory condition, which established an element of entitlement previously decided against him, and

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[4] A claim filed more than a year after the final denial of a prior claim is known as a "subsequent claim." 20 C.F.R. § 725.309(c). As a prerequisite to establishing entitlement under such a claim, the miner must prove a change in "one of the applicable conditions of entitlement" since the final denial of the prior claim. *Id.*; *see Eastern Assoc. Coal Corp. v. Director,* OWCP, 805 F.3d 502, 506 (4th Cir. 2015); SA.3-4.

therefore satisfied the prerequisite for a subsequent claim. *See supra* n.4. The ALJ then concluded that this finding, together with Mr. Fortner's twenty-eight years of underground coal mining, invoked the fifteen-year presumption of entitlement. A.240-50. Finding that Westmoreland failed to rebut this presumption, the ALJ awarded benefits. A.253-54.

Westmoreland appealed this award to the Board, which affirmed the decision in 2012. A.263. The coal company then petitioned this Court for review. In an unpublished decision issued on August 14, 2013, the Court vacated the award and remanded the case for further review because the ALJ, in finding total respiratory disability established, merely "counted heads": two doctors diagnosed the condition; one did not. SA.1, 4-7.

On remand, the ALJ again awarded benefits (decision described in detail *infra* p.18). A.357-71. He found that the evidence proved Mr. Fortner had a totally disabling respiratory condition: the miner's blood gas study results were qualifying, and both Dr. Agarwal and Dr. McSharry diagnosed total respiratory disability; and Dr. Hippensteel's contrary diagnosis of no respiratory disability was not sufficiently reasoned. A.359-69. In light of this disability finding, the ALJ concluded that Mr. Fortner proved a change in "one of the applicable conditions" previously decided against him, as required by 20 C.F.R. § 725.309(c). A.360. And based upon this disability finding, together with Mr. Fortner's twenty-eight

years of underground coal mine employment, the ALJ again invoked the fifteen-year presumption. *Id.* Finally, after reviewing the medical evidence relevant to rebuttal, the ALJ again found that Westmoreland had failed to rebut the presumption. A.369-70.

Westmoreland sought Board review, but the Board affirmed the ALJ's award on September 30, 2015 (decision described in detail *infra* p.22). A.374-84. The coal company's petition for review to this Court followed. A.386.

C. <u>Factual Background</u>

1. General facts

Mr. Fortner, sixty-three years old at the 2010 hearing, A.324, worked in underground coal mining for twenty-eight years, ending in 1994. A.218. His last job, as section foreman, involved heavy manual labor. *Id.* He smoked 1/2 packs of cigarettes a day for eight or nine years, ending around 1996. *Id.* Finally, he is approximately sixty-eight inches in height; weighed 219 in 2008 and 251 in 2009; and has been on oxygen for twenty-four hours a day since 2007. *Id.*

2. Relevant medical evidence

Pulmonary tests. Two types of pulmonary tests can establish total respiratory disability by regulation: pulmonary function studies and blood gas studies. 20 C.F.R. § 718.204(b)(2)(i), (ii). Mr. Fortner's pulmonary function studies produced mixed results: some were "qualifying," and some were not.

A.231. In contrast, it is undisputed that the results of the two most recent blood gas studies were qualifying:

Exhibit No.	Date/ Doctor	pCO_2 value	pO_2 value	Qualifying pO_2 value
DX[5] 13	May 2008/ Agarwal	38	59.3	if pCO_2 is 38, pO2 must be 62 or less
EX 8	April 2009/ McSharry	45	57	if pCO_2 is 45, pO2 must be 60 or less

A.230.[6]

Medical opinions. Drs. Antl Agawal and Robert McSharry examined Mr. Fortner; and Dr. Kirk Hippensteel reviewed various medical reports but did not examine the miner. A.65, 102, 162. All three doctors are Board-certified internists and specialists in pulmonary medicine and critical care, A.119, 186, 360; all three noted Mr. Fortner's health and work histories and the results of pulmonary function and blood gas studies; and all three addressed the issues of disability and disability-causation.

Dr. Agarwal examined Mr. Fortner in 2008 at DOL's request, pursuant to the Director's obligation to provide each miner/claimant with a complete pulmonary evaluation. A.157. *See* 30 U.S.C. § 923(b). Dr. Agarwal reported that

[5] "DX" refers to Director's Exhibit No., and "EX" refers to Westmoreland's Exhibit No.

[6] As explained earlier, *supra* pp.7-8, nonqualifying pulmonary function study results are not considered "contrary" to qualifying blood gas study results.

the miner's pulmonary function study results showed moderately severe restriction, and that the results of his blood gas study revealed severe hypoxemia.[7] A.189. He concluded that Mr. Fortner did not "retain [the] pulmonary capacity to work as a coal miner"; that the miner's respiratory disability was due to his pneumoconiosis, as shown on x-ray; and that it was possible the miner also suffered from progressive massive fibrosis.[8] *Id.*

Dr. McSharry examined Mr. Fortner in 2009 at Westmoreland's request. A.65. He also reviewed Dr. Agarwal's report as well as a 2007 hospital report, and noted that the miner's last coal mine job involved heavy manual labor. A.69-70. While acknowledging that there was some dispute among the radiologists as to the existence of clinical pneumoconiosis, Dr. McSharry reported that the miner's condition was "compatible with a diagnosis of pneumoconiosis" because the miner's pulmonary function study results revealed a non-reversible, mixed obstructive and restrictive lung disease of a progressive nature,[9] and the miner's

[7] "Hypoxemia" is "deficient oxygenation of the blood." Dorland's Illustrated Medical Dictionary at 908 (32nd ed. 2012).

[8] "Progressive massive fibrosis," known as "complicated pneumoconiosis," is the more serious form of the disease. It is "a complication of silicosis or coal workers' pneumoconiosis in which there is at least one dense lung lesion more than 1 cm in diameter." Dorland's at 704. Ultimately, the weight of the evidence was negative for this condition, and is not a factor in this case. A.226.

[9] "Reversibility" refers to an improvement in lung function. "*Restrictive* disorders are characterized by a reduction in lung volume." The Merck Manual 1855 (19th

blood gas results revealed marked hypoxemia. A.66. The doctor concluded that Mr. Fortner's respiratory condition was permanent and prevented him from performing coal mine work, and that he would attribute the disability to coal workers' pneumoconiosis if that condition were diagnosed by x-ray.[10] *Id.*

Finally, at Westmoreland's request, **Dr. Hippensteel** reviewed various medical reports, including those of Drs. Agarwal and McSharry. A.112-13. Dr. Hippensteel acknowledged that the blood gas study results obtained by Dr. Agarwal were qualifying, A.111, but indicated his disagreement with Dr. McSharry's conclusion that Mr. Fortner suffered from a totally disabling

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ed. 2011) (emphasis added). "*Obstructive* disorders are characterized by a reduction in airflow." *Id.* at 1853 (emphasis added). In lay terms, restrictive disease makes it more difficult to inhale while obstructive disease makes it more difficult to exhale. *See Gulf & Western Indus. v. Ling*, 176 F.3d 226, 229 n.6 (4th Cir. 1999). Clinical pneumoconiosis is generally restrictive while legal pneumoconiosis can be either restrictive or obstructive, or both. 20 C.F.R. § 718.201(a)(2).

[10] In discussing the blood gas and pulmonary function study results, Dr. McSharry reported that they were "very close" to qualifying as evidence of total respiratory disability under the regulations. A.66. In fact, as noted *supra* p.13, the blood gas results were qualifying. *See* 20 C.F.R. Part 718 Appendix C, Table (1), listing results for tests sites up to 2,999 feet above sea level, where Dr. McSharry's testing site (Bristol, TN) is 1660 feet ((*see* http://www.roadonmap.com/us/where-is/City_of_Bristol-Sullivan_TN,civil). As to the pulmonary function study results, the results obtained before administration of a bronchodilator were, in fact, qualifying, and the post-bronchodilator study results were off by 1/100th: the miner's FVC value was 2.42, whereas the qualifying value was 2.41 or less. A *bronchodilator* is a drug used to treat chronic obstructive pulmonary disease (COPD). The Merck Manual at 1894. It expands the "air passages of the lung." Dorland's at 253.

respiratory condition. A.113. Dr. Hippensteel explained that Mr. Fortner's disability was of the whole man, and was due to "severe obesity, deconditioning, deep vein thrombosis with a vera cava filter and some ongoing chronic bronchitis that developed long after he has left work in the mines."[11] A.113-14. Concerning the chronic bronchitis, Dr. Hippensteel stated that "industrial" bronchitis "should subside within a period of several months after leaving work in the mines," and that the chronic bronchitis the miner presently had was "a disease of the general public and not just related to smoking or coal mine dust exposure." A.113-14. He added that chronic bronchitis's variability was not typical of coal workers' pneumoconiosis. A.114.

Dr. Hippensteel was deposed in 2009. A.115. He stated that Mr. Fortner had neither clinical nor legal pneumoconiosis. A.134. While again admitting that the miner's blood gas studies were qualifying, A.124, the doctor reported that the miner, at most, had a mild restrictive impairment, which was not significant enough to prevent Mr. Fortner from performing the heavy manual labor of his last coal mine work. A.132-33.

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[11] "Deep vein thrombosis" is a blood clot "of one or more of the deep veins, usually of the lower limb." Dorland's at 1923. "Vera cava filter" is "a filter used . . . for the prevention of pulmonary embolism." Dorland's at 707. "Chronic bronchitis" is "a type of chronic obstructive pulmonary disease in which there is bronchial irritation with increased secretions and a productive cough for at least three months, two years in succession. . . . The most common cause is long-term inhalation of irritants." Dorland's at 252.

According to Dr. Hippensteel, the miner's breathing problems were not caused by an "intrinsic" lung condition, but rather, by an "extrinsic" cause, namely, the miner's obesity.[12] A.133. Consequently the doctor reported that Mr. Fortner had no respiratory impairment. A.132-33. He explained: "[M]arked obesity can have significant impact on the ability of the diaphragms to expand the lungs because they have such a large abdomen to push against . . . that it makes extra work for them to push against those abdominal contents that contain this extra fat and weight of such a person. . . ." A.126. Dr. Hippensteel admitted that not everyone who is obese has a respiratory condition, but stated obesity made respiratory problems more likely. A.140. He explained that an obese individual's hypoxemia, as shown by blood gas results, often reverses upon exercise.[13] A.127. He then added another extrinsic cause of the miner's breathing problems: diastolic heart dysfunction.[14] A.145.

Dr. Hippensteel went on to explain that Mr. Fortner's respiratory problems were restrictive in nature—which he said was typical of obesity—whereas coal

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[12] "Intrinsic" means "situated entirely within or pertaining exclusively to a part." Dorland's at 954. "Extrinsic," by contrast, means "coming from or originating outside; having relation to parts outside the organ or limb in which found." Dorland's at 665.

[13] Because Mr. Fortner's resting studies were qualifying, the record contains no exercise studies. *See supra* n.1.

[14] "Diastolic heart dysfunction" refers to malfunction of the heart's dilation. Dorland's at 511.

mine dust exposure most commonly caused a mixed obstructive and restrictive impairment. A.141-42. He stated:

> Well, because obstructive disease is also a part of what can happen with coal mining and that that [sic] combination tied in with the development of coal macules in the lung, and especially with the development of complicated pneumoconiosis creates a combination effect, and there are other diseases that do that same thing, but coal workers' pneumoconiosis is one that commonly produces that combination.

A.142.

The doctor also discussed Mr. Fortner's chronic bronchitis. A.143-44. When asked the cause of the bronchitis, Dr. Hippensteel responded that "[i]t [did] not have to have a cause, since it is a disease of the general public." A.143-44.

3. ALJ's 2014 decision awarding benefits on remand, A.357

On remand, the ALJ again reviewed and discussed the opinions of Drs. Agarwal, McSharry, and Hippensteel. A.359-64. He observed that all three doctors were similarly qualified and provided well-documented opinions; nonetheless, he found only the opinions of Drs. Agarwal and McSharry to be well-reasoned. A.368. The ALJ found Dr. Hippensteel's opinion deficient in three respects.

First, the ALJ criticized Dr. Hippensteel's explanation that, the more obese an individual is, the more likely he/she will have respiratory problems; and the doctor's acknowledgement that not every obese individual has respiratory

problems. The ALJ concluded that "[t]his acknowledgement and explanation inject[ed] a speculative component to [the doctor's] analysis." *Id.*

Second, the ALJ was critical of Dr. Hippensteel's assertion that an obese individual's hypoxemia as shown by blood gas testing often reversed upon exercise. The ALJ found this undermined by the fact that, while an "exercise" blood gas study was not done, the miner often had difficulty with exercise: "Dr. Agarwal noted Mr. Fortner remained dyspneic [short of breath] with minimal exertion and Dr. McSharry observed that Mr. Fortner appeared severely hypoxic upon ambulation." A.368.

Third, the ALJ observed that Dr. Hippensteel failed to explain why Mr. Fortner did not have a respiratory impairment based upon his chronic bronchitis, an intrinsic pulmonary impairment. A.368-69. The ALJ also suggested in a footnote that Dr. Hippensteel's diagnosis of diastolic heart dysfunction as a cause of the miner's breathing problems was undermined by a 2008 echocardiogram reporting that condition only as a possibility. A.369 n.11.

In view of the well-reasoned opinions of Drs. Agarwal and McSharry diagnosing total respiratory disability—the ALJ described it as a "consensus"—the qualifying blood gas study results, and the defects in Dr. Hippensteel's opinion, the ALJ again concluded that Mr. Fortner suffered from a totally disabling respiratory

condition, and again invoked the fifteen-year presumption of entitlement. A.365, 369.

The ALJ then turned to rebuttal of the presumption. A.370. He found rebuttal not established by the first method because, while Mr. Fortner did not suffer from clinical pneumoconiosis, the evidence failed to disprove legal pneumoconiosis, i.e., to disprove a respiratory condition arising out of coal mine employment. A.370. The ALJ then concluded that rebuttal was not met by the second method because Westmoreland's evidence failed to prove that the miner's respiratory disability was in no part related to his unrebutted legal pneumoconiosis. *Id.*

In considering rebuttal, the ALJ did not elaborate on the bases for his conclusions—possibly because this Court's remand order only instructed him to reconsider the issue of total respiratory disability. *See* SA.6. The ALJ's 2011 decision, however, sets out his reasons. *See* A.250-53; *see* Opening Brief at (OB.) 21-29 (discussing the ALJ's 2011 decision when alleging error concerning rebuttal). Turning to the first rebuttal method—disproving legal pneumoconiosis—the ALJ found the opinions of Drs. Agarwal and McSharry insufficient because the former doctor mistakenly assumed the miner suffered from clinical pneumoconiosis, and the latter doctor refused to diagnose pneumoconiosis

without a positive x-ray. A.252. The ALJ then found Dr. Hippensteel's opinion insufficient to rebut the existence of legal pneumoconiosis for two reasons.

First, the doctor diagnosed a respiratory condition, bronchitis, but explained it was unrelated to coal mine dust exposure because industrial bronchitis, in the doctor's view, usually ended within a few months of leaving coal mine work. A.113-14. The ALJ was not persuaded by this reasoning because the regulation at 20 C.F.R. § 718.201(c) identified pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." And second, the doctor concluded that Mr. Fortner's restrictive lung condition was unrelated to coal mine dust exposure because such exposure "commonly" caused a mixed obstructive and restrictive lung impairment. A.252. The ALJ was unpersuaded by this because the regulation at 20 C.F.R. §718.201(a)(2) defined legal pneumoconiosis as a restrictive *or* obstructive disease. A.252-53. Consequently, the ALJ ruled that Westmoreland had failed to rebut the fifteen-year presumption by the first method.

The ALJ then turned to the second method of rebuttal—proof that no part of the miner's respiratory impairment was due to his presumed pneumoconiosis. A.253. He found this criterion not met because Dr. Hippensteel's opinion was undermined by his failure to diagnose total respiratory disability and legal

pneumoconiosis in the first instance. *Id.* Accordingly, the ALJ awarded benefits. A.370-71.

3. **Benefits Review Board's 2015 affirmance of the ALJ's award, A.374.**

Westmoreland argued first to the Board that the ALJ could not simply change his mind concerning the quality of Dr. Hippensteel's opinion in light of the fact that Mr. Fortner did not cross appeal or otherwise challenge the ALJ's original crediting of Dr. Hippensteel's opinion. The coal company asserted that the ALJ's initial positive impression of the doctor's opinion was the law of the case. A.376 n.3. The Board rejected this argument. It explained that the Court vacated the Board's decision affirming the ALJ's original weighing of the medical opinion evidence, such that "the issue was no longer resolved, the [ALJ] was not bound by his prior finding, and the issue of whether [Mr. Fortner] was required to file a cross-appeal was rendered moot." *Id.*

The Board next considered Westmoreland's argument that the ALJ erred in discrediting Dr. Hippensteel's diagnosis of no total respiratory disability. A.376-78. The Board rejected this argument as well, concluding that the ALJ accurately described the opinion, and that it was within the ALJ's discretion to discredit a

speculative and insufficiently explained opinion.[15] A.378.

Having found that the ALJ properly invoked the fifteen year presumption, the Board turned to the issue of rebuttal. It observed first that it was Westmoreland's burden to establish rebuttal. A.378. The Board then concluded that the ALJ properly discredited Dr. Hippensteel's diagnosis of no legal pneumoconiosis as contrary to the definition of pneumoconiosis: the doctor's assumption—that the miner's bronchitis was unrelated to coal mine employment because it would have subsided within months of his leaving the mines—was undermined by the fact that pneumoconiosis is known as a latent and progressive disease, A.379-80; and the doctor's observation —that coal mine dust exposure usually causes only a restrictive impairment—was undermined by the fact that pneumoconiosis can cause both obstructive and restrictive impairments, A.380-81.

[15] While discussing the ALJ's bases for discrediting Dr. Hippensteel's diagnosis of no respiratory disability, the Board observed in a footnote that the regulation at 20 C.F.R. § 718.204 establishes one inquiry regarding the existence of a respiratory impairment and a separate inquiry pertaining to its cause. A.377 n.5. The Board noted, however, that the ALJ failed to separate the issues: "When weighing Dr. Hippensteel's opinion on remand, however, the administrative law judge determined that the physician's conclusion, that claimant is totally disabled by extrinsic factors, was equivalent to a determination that claimant does not have a totally disabling respiratory or pulmonary impairment. . . ." *Id.* To mitigate this mistake, the Board decided to review the ALJ's decision from the ALJ's disability perspective "[f]or the sake of clarity." *Id.*

Next, the Board determined that the ALJ properly found that Dr. McSharry's opinion did not disprove legal pneumoconiosis since the doctor had mixed views concerning the existence of the disease. A.381-82.

Finally, the Board considered Westmoreland's burden, under the second rebuttal method, to prove that no part of Mr. Fortner's respiratory disability was due to pneumoconiosis. A.383. Based on well-established precedent, the Board found Dr. Hippensteel's causation opinion insufficient because it was premised on an incorrect understanding of the miner's health, namely that Mr. Fortner did not have total respiratory disability or suffer from legal pneumoconiosis. *Id.*

Accordingly, the Board found the fifteen-year presumption unrebutted, and therefore affirmed the ALJ's award of benefits. A.383.

SUMMARY OF THE ARGUMENT

The Court should affirm the decision below. On remand, the ALJ followed this Court's instructions and reevaluated the medical opinion evidence on total respiratory disability. In finding total respiratory disability and invoking the fifteen year presumption, he permissibly found well-reasoned the opinions of Dr. Agarwal, the DOL-sponsored doctor, and Dr. McSharry, Westmoreland's own doctor, who both diagnosed total respiratory disability. Conversely, the ALJ reasonably discredited as speculative the opinion of Dr. Hippensteel, Westmoreland's other doctor, who while acknowledging breathing problems and

qualifying blood gas studies, insisted these problems were entirely due to Mr. Fortner's obesity and therefore could not be considered respiratory in nature. In addition, the ALJ found Dr. Hippensteel's opinion undermined by the fact that the doctor reported obesity as the sole cause, yet begrudgingly diagnosed chronic bronchitis—an intrinsic pulmonary condition—and then failed to credibly explain why the miner's chronic bronchitis was neither disabling nor related in some way to coal mine dust exposure.

The ALJ's rebuttal findings are likewise reasonable and supported by substantial evidence. Again, Dr. Hippensteel's opinion was the only evidence that could aid Westmoreland. But the ALJ properly determined that Dr. Hippensteel's reasons for finding no connection between the miner's respiratory disability and his coal mine employment were not persuasive. The doctor reported that Mr. Fortner's bronchitis, if work-related, should have resolved soon after ending his coal mine work, and that Mr. Fortner suffered from a restrictive impairment whereas coal mine dust exposure typically causes a mixed obstructive and restrictive impairment. The ALJ properly found the doctor's explanation undermined by the regulatory definition of pneumoconiosis, which provides that pneumoconiosis is known as a latent and progressive disease, and that it can result in obstruction or restriction or both, but a mix is not required.

Accordingly, the ALJ correctly determined that Westmoreland failed to rebut the presumption of entitlement, and thus properly awarded benefits.

ARGUMENT

A. Standard of Review

This case presents issues of fact and law. 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.* (quoting *Richardson v. Perales*, 402 U.S. 389 (1971)).

The Court exercises *de novo* review over the ALJ's and Board's legal conclusions. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's interpretation of the BLBA, as expressed in that Act's implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 292 (4th Cir. 2007); *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987); *see also Auer v. Robbins,* 519 U.S. 452, 461-62 (1997).

B. <u>The ALJ followed the Court's instructions when he reevaluated Dr. Hippensteel's opinion on remand</u>.

In his first decision, the ALJ observed that Drs. Agarwal and McSharry diagnosed total respiratory disability while Dr. Hippensteel did not. After taking into consideration that all three doctors were specialists and had provided well-documented and well-reasoned opinions, he concluded that the "consensus" of the opinions demonstrated total respiratory disability.

Although the Board affirmed this finding, the Court disagreed, finding that the ALJ's weighing of the medical opinions amounted to impermissible head-counting. SA.5. Accordingly, the Court vacated the award and remanded the case to the ALJ for further review. In doing so, the Court explained that "[o]n remand, the ALJ certainly may reach the same conclusion after properly weighing the evidence; however, he must fully explain the decision in accordance with the substantial evidence standard." SA.6-7. On remand, the ALJ again reviewed the doctors' opinions, and this time found fault with Dr. Hippensteel's opinion and refused to credit it.

In its opening brief, Westmoreland argues that the ALJ's initial crediting of Dr. Hippensteel's opinion is the "law of the case," and therefore the ALJ erred in reevaluating and discrediting his opinion. OB.11-12. This argument is without merit.

The Court's remand order specifically directed the ALJ to reconsider his weighing of the medical opinion evidence, while also affording him the option of reaching the same or a different conclusion. On remand, the ALJ reweighed the medical opinions as directed: he took a closer look at them and permissibly reached a different conclusion regarding Dr. Hippensteel's opinion.

Even if the Court had not directed him to reweigh the medical opinions, its vacating of his finding of total respiratory disability would have authorized him to do so. Clearly, there would have been no "law of the case" on that issue. *See Johnson v. Board of Educ. of City of Chicago*, 457 U.S. 52, 53 (1982) ("Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court, or, should an appeal subsequently be taken, the Court of Appeals."); *see also Gitter v. Cardiac & Thoracic Surgical Associates, LTD*, 419 Fed.Appx. 365, 369 (4th Cir. 2011) (finding district court erred in applying law of the case where the appellate court vacated a finding "that is the very issue for which the case was remanded"); *Richards v. Director, OWCP*, 160 Fed.Appx. 203, 207, n.6 (4th Cir. 2005) (rejecting argument that ALJ's credibility findings concerning medical opinion evidence in first decision were law of the case where Board had "vacated the [first] decision and [remanded] for reconsideration of the relevant evidence, which by nature includes the medical reports at issue).

In short, the ALJ did exactly as instructed. On remand, he more critically examined the support for the doctors' conclusions, and specifically explained why Dr. Hippensteel's opinion was unreasoned and therefore not credible. This Court should therefore reject Westmoreland's argument that he was not permitted to engage in this basic exercise in fact finding.[16] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th 2000) (as trier of fact, it is the ALJ's province to evaluate physicians' opinions).

C. <u>The ALJ properly found that Mr. Fortner suffers from a totally disabling respiratory impairment</u>.

As discussed above, the ALJ again found on remand that Mr. Fortner suffered from a totally disabling respiratory condition. This finding was crucial to the award of benefits. It allowed Mr. Fortner to prove that he suffered from a condition—total respiratory disability—that had been found against him in his prior claim, as required by 20 C.F.R. § 725.309(c). And—along with Mr. Fortner's twenty-eight years of underground coal mining— it allowed him to invoke the fifteen-year presumption, thus shifting the burden of proof to Westmoreland to rebut the presumption.

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[16] Westmoreland also contends that the ALJ could not address the underlying reasonableness of Dr. Hippensteel's opinion because claimant did not previously cross-appeal. OB.13. A cross-appeal, however, was unnecessary since Mr. Fortner sought only to defend his award of benefits, not to expand his rights. And, as discussed above, the Court's remand necessarily placed the validity of Dr. Hippensteel's opinion at issue.

The ALJ did not err in finding total respiratory disability. The blood gas studies were qualifying, and both Dr. Agarwal and Dr. McSharry—Westmoreland's own doctor—diagnosed the condition. While Dr. Hippensteel found to the contrary, the ALJ discredited that doctor's opinion because it was not well-reasoned. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015) (explaining that a medical opinion is not persuasive if it is "inadequately supported").

The ALJ's rejection of Dr. Hippensteel's diagnosis of no respiratory disability is supported by substantial evidence. As an initial matter, it should be stressed that Dr. Hippensteel never explicitly stated that Mr. Fortner did not have breathing problems. Indeed, he acknowledged that Mr. Fortner suffered from a "restrictive impairment" and "hypoxemia," both of which are respiratory conditions. And he detailed Fortner's mechanical difficulties in breathing: "[M]arked obesity can have significant impact on the ability of the diaphragms to expand the lungs because they have such a large abdomen to push against. . . ." A.126. But instead of admitting that Mr. Fortner had a respiratory condition, the doctor focused solely on the fact that the miner was obese and obese people often have breathing problems. The ALJ, understandably, was not persuaded that it was this simple.

First, the ALJ correctly characterized the doctor's opinion as speculative.[17] Just because obese individuals often have breathing problems, does not mean that Mr. Fortner's problems were similarly related. Notably, this Court in *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 312 (4th Cir. 2012), affirmed an ALJ's discrediting of a doctor who "relied heavily on general statistics rather than particularized facts about [the miner]." The instant case is no different.

Second, the ALJ discredited Dr. Hippensteel's opinion of no respiratory disability because the doctor diagnosed chronic bronchitis, a respiratory condition. Yet, as the ALJ recognized, the doctor gave short shrift to this fact and failed to explain why the chronic bronchitis did not result in, or contribute to, a respiratory impairment. A.369. Absent such an explanation, the existence of chronic bronchitis, an intrinsic respiratory condition, actually supports a finding of respiratory disability.

Despite these valid bases for discrediting Dr. Hippensteel's opinion, Westmoreland still champions the doctor's opinion. The coal company trumpets the ALJ's observation that the doctor "thoroughly reviewed" the medical evidence and provided a "detailed analysis." OB.14-15, quoting the ALJ's decision at A.368. But a "thorough review" or "detailed analysis," standing alone, does not mean that the doctor's ultimate conclusion is correct or persuasive. The doctor

[17] Speculation is defined as "theorizing about matters over which there is no certain knowledge." Black Law Dictionary 1407 (7th ed. 1999).

simply could be wrong about what the evidence means. This is especially true here, where the doctor's opinion is at odds with qualifying blood gas studies (which, by regulation, are prima facie evidence of total respiratory disability) and with the contrary opinions of two doctors, both of whom possess credentials the equal of Dr. Hippensteel's.

Moreover, Westmoreland insists that, in finding Dr. Hippensteel's opinion speculative, the ALJ placed undue reliance on the doctor's admission that some obese individuals have no breathing problems at all. OB.16-17. Not true. Since the doctor made that admission, it was incumbent upon him to meaningfully refute that possibility here. He did not do so. And the possibility that obesity played no role here lends additional credence to the proposition that the record evidence demonstrates a respiratory disability—the qualifying arterial blood gas tests, contrary medical opinions, and even Mr. Fortner's twenty-eight years of underground coal dust exposure.

Finally, Westmoreland argues at length that Dr. Hippensteel sufficiently explained why the miner's chronic bronchitis was not related to his coal mine dust exposure. OB.16-21. The supposed cause of the chronic bronchitis, however, is irrelevant to whether Mr. Fortner has a respiratory condition. Chronic bronchitis is indisputably a respiratory condition, and his diagnosis of it undermines his conclusion that any breathing problems were not respiratory in nature.

In sum, Westmoreland has failed to prove that the ALJ erred in discrediting Dr. Hippensteel's opinion and finding that Mr. Fortner suffered from total respiratory disability.

D. Dr. Hippensteel's diagnosis of no respiratory disability is contrary to the black lung regulations.

Before leaving the issue of disability, it is important to emphasize that Dr. Hippensteel's diagnosis of no respiratory disability is contrary to the black lung regulations. Dr. Hippensteel declined to diagnose a "respiratory" disability because, in his view, an impairment is not "respiratory" if it is extrinsic, *i.e.*, if the breathing problems are due to a cause unrelated to some defect in the respiratory system. *Supra* pp.15-17 (detailing Dr. Hippensteel's opinion); *see also* OB.16 ("Dr. Hippensteel concluded that 'Mr. Fortner had an obesity related restrictive impairment' and that he '. . . did not have a totally disabling respiratory impairment due to any intrinsic lung disease.'"). In contrast, the doctor apparently would diagnose a respiratory impairment (or condition) if the problems were "intrinsic," *i.e.*, if the problems related to some defect in the respiratory system itself.

The black lung regulations, however, do not differentiate between intrinsic and extrinsic causes of respiratory impairments when determining the existence of a respiratory disability. In other words, if there is a breathing problem, it must be considered when determining the existence of respiratory disability, even if the

problem is due to an extrinsic source. Section 718.204(a) specifically provides that "[if] . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. § 718.204(a).[18] The regulatory history of this section details the Secretary's reasons for when and how non-respiratory causes of respiratory impairments are considered:

> The proposed paragraph (a) does recognize one exception to the irrelevancy of disabling nonrespiratory conditions in determining whether the miner is totally disabled by pneumoconiosis. Such conditions or diseases are relevant if they produce a chronic respiratory or pulmonary impairment. Some cardiac and neurological diseases, for example, may affect the respiratory musculature in such a way as to impair the individual's ability to breathe without actually affecting the lungs. *See, e.g., Panco v. Jeddo-Highland Coal Co.*, 5 Black Lung Rep. 1-37 (1982) (concerning respiratory impairment from amyotrophic lateral sclerosis, a neurological disease); *Maynard v. Central Coal Co.,* 2 Black Lung Rep. 1-985 (1980) (concerning respiratory impairment from heart disease); *Skursha v. U.S. Steel Corp.*, 2 Black Lung Rep. 1-518 (1980) (same). Similarly, a traumatic accident such as an injury to the spinal column may affect breathing but not the lungs. The effect of the disease or trauma, its relationship to the miner's ability to breathe, and the interplay with the miner's pneumoconiosis, all determine the contributing causes of the miner's disability.

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[18] Conversely, section 718.204(a) excludes consideration of nonpulmonary or nonrespiratory conditions that cause disabilities unrelated to the miner's respiratory system. Disabilities unrelated to the respiratory system involve a claimant's ability to function as a "whole person," and are not compensable. 62 Fed. Reg. 3344-45 (Jan. 22, 1997) (citing *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994) and *Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993 (3d Cir. 1995)).

62 Fed. Reg. 3344-45. Thus, pursuant to § 718.204(a), if a miner has a breathing problem, or other respiratory or pulmonary defect, then the miner has a respiratory impairment, regardless of the cause. As the Board explained in *Caudill v. Lance Coal Corp.*, 2014 WL 4492042 at *3 (BRB No. 13-0558 BLA) (Aug. 27, 2014), "[t]he issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant inquiry at 20 C.F.R. § 718.204(b)(2) ["*Total disability defined"*] is solely whether a totally disabling respiratory or pulmonary impairment is, or was, present."

This is not to say that an extrinsic or non-respiratory cause—such as obesity—has no significance in a black lung claim. It is relevant when addressing the *cause* of the respiratory impairment. That question arises under section 718.201(a)(2) (existence of legal pneumoconiosis), section 718.204(c) (disability causation), or and section 718.305(d) (rebuttal of the fifteen year presumption). But make no mistake, the *cause* of a respiratory disability is a distinct question from the *existence* of a respiratory disability.

This Court should defer to the Director's view, as set forth in his duly promulgated regulation. *Elm Grove Coal*, 480 F.3d at 292. The regulation represents a reasonable middle ground in addressing the impact of "extrinsic" conditions. Those that do not affect the respiratory system will not be considered, but those that do will be and should be: It can hardly be disputed that the effects of

black lung may be exacerbated by an already-compromised respiratory system. *Collins v. Pond Creek Min. Co.*, 751 F.3d 180, 187 (4th 2014) ("[T]he relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole.").

In conclusion, Westmoreland is entirely misguided when it claims that the ALJ wrongly discounted Dr. Hippensteel's opinion on total disability. His opinion that the miner's impairment is not "respiratory" because of an extrinsic source is inconsistent with section 718.204(a), and as such, cannot refute the existence of total respiratory disability or preclude invocation of the fifteen year presumption. *Harman Mining*, 678 F.3d at 312; *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 804-05 (4th Cir. 1998) ("Disputing the clinical accuracy of the [BLBA] is not rebuttal. . . . [T]he presumption must be rebutted with *proof* rather than disagreement.") (emphasis added) (citation omitted). But because the ALJ permissibly found total respiratory disability here without giving Mr. Fortner the benefit of section 718.204(a)—although the Board recognized the applicability of that section, *see supra* n.15 —the Court need not address the intrinsic/extrinsic issue. Should the Court decide to remand or reverse, however, it should.[19]

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[19] Westmoreland's other objections to the ALJ's rejection of Dr. Hippensteel's opinion require no further response. This Court has made clear that a decision may be affirmed if "the ALJ provided independent reasons . . . for dismissing [the] opinion." *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013), quoting *Harman*, 678 F.3d at 313.

E. **<u>The ALJ properly found that the evidence failed to rebut the fifteen-year presumption of entitlement</u>.**

Westmoreland also contends, assuming the fifteen year presumption was properly invoked, that the ALJ erred in finding no rebuttal. Westmoreland is incorrect. The two rebuttal methods are addressed in turn.

First method of rebuttal, 20 C.F.R. 718.305(d)(1)(i). To rebut the presumption by the first method, Westmoreland was required to disprove the existence of both clinical and legal pneumoconiosis. While the coal company was successful in disproving clinical pneumoconiosis, A.251, the ALJ concluded the company failed to disprove legal pneumoconiosis (*i.e.*, failed to disprove the existence of "any chronic lung disease or impairment . . . arising out of coal mine employment," 20 C.F.R. § 718.201(a)(2)).[20] The ALJ was correct.

As previously shown, the ALJ determined—accurately—that Mr. Fortner had a totally disabling respiratory condition. Consequently, to disprove legal pneumoconiosis, Westmoreland had to show that coal mine employment did not contribute to the miner's proven total respiratory disability.

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[20] Any chronic lung disease or impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust is considered to have "arise[n] out of coal mine employment," and is therefore considered to be legal pneumoconiosis. 20 C.F.R. §§ 718.201(b). The preamble to the regulation discussing total disability due to pneumoconiosis, explains that, to prove a "substantial contribution," the contribution need only be more than "a negligible, inconsequential, or insignificant contribution. . . ." 65 Fed. Reg. 79946 (Dec. 20, 2000).

The ALJ determined that Dr. McSharry's opinion did not disprove legal pneumoconiosis because the doctor reported that he would diagnose pneumoconiosis only with positive x-ray evidence of pneumoconiosis. The ALJ termed the doctor's opinion equivocal. A.252. That was an accurate call.

The ALJ then considered whether Dr. Hippensteel's opinion disproved legal pneumoconiosis. The only intrinsic pulmonary condition that the doctor half-heartedly admitted to was bronchitis: "industrial" bronchitis and "chronic" bronchitis. The doctor stated that the miner's bronchitis was unrelated to coal mine employment because industrial bronchitis ends within a few months of leaving coal mine work (the miner ceased such work in 1994). He further asserted that because the bronchitis did not "have to have a precipitating cause from some other problem," like smoking or coal mine employment, it was a disease of the general public. A.143-44. The doctor also suggested that the miner had a restrictive impairment that was related to obesity rather than coal mine employment because such employment "commonly" resulted in a mixed obstructive and restrictive impairment.

1. Latent and progressive

The ALJ was not persuaded by Dr. Hippensteel's conclusions. In particular, the ALJ questioned the doctor's belief that work-related bronchitis must cease within a few months of leaving coal mine work. The ALJ correctly found this

explanation undermined by the fact that the definition of pneumoconiosis at 20 C.F.R. § 718.201(c) provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *See Hobet Min. LLC v. Epling*, 783 F.3d 498, 503 (4th Cir. 2015) (affirming ALJ's finding that doctor's opinion—"that it would be unusual for [the miner] to have pneumoconiosis ten years after he ended his coal mine employment"—was "not in accord with the accepted view that [coal workers' pneumoconiosis] is both latent and progressive") (internal quotation marks omitted); *see also Sunny Ridge Min. Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (holding the ALJ properly discredited the doctor's opinion—that the miner's bronchitis "usually ceases with cessation of exposure"—was inconsistent with section 718.201(c)'s "latent and progressive" provision); *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 999 (7th Cir. 2005) (affirming ALJ's discrediting of doctor's opinion—that the miner's pulmonary condition could not be due to coal mine dust exposure since he was no longer working in the mines—as contrary to the regulation finding that pneumoconiosis may be latent and progressive).

Westmoreland claims that the ALJ improperly used the "latent and progressive" provision of the regulation because the ALJ assumed—according to the coal company—that *all* respiratory conditions related to coal mine dust

exposure are latent and progressive, whereas the regulation provides only that pneumoconiosis "*may* first become detectable" after coal mine employment ends. OB.22-23. The coal company, however, fails to show the ALJ's belief that pneumoconiosis is always latent and progressive. And perhaps even more to the point, Westmoreland fails to recognize that the courts have affirmed an ALJ's use of the regulation's latent and progressive language based on the regulation's plain text. *See supra* p.38.

Westmoreland makes two more attempts to entice the Court to find error in the ALJ's use of the provision. The coal company argues that, because section 718.201(c) does not explicitly state that *legal* pneumoconiosis generally, or chronic bronchitis in particular, can be latent and progressive, the provision applies only to *clinical* pneumoconiosis. OB.23-24. This argument, however, is undermined by the plain language of the regulation. Section 718.201(a) defines "pneumoconiosis" as "includ[ing] both medical or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." *See Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995). And the word "pneumoconiosis" in subsection (c) of the same regulation is not specifically limited to either species of the disease. It is therefore applicable to both. *Sunny Ridge Min. Co.*, 773 F.3d at 738-39; *see also Eastern Assoc. Coal Corp. v. Director, OWCP*, 805 F.3d 502, 512 (4th Cir. 2015) (rejecting coal company's argument that simple, clinical pneumoconiosis and legal

pneumoconiosis are not latent or progressive, and explaining it "[was] not empowered to substitute [its] judgment for that of the [Secretary] on matters within the Secretary's area of expertise." (internal quotation marks omitted).

Westmoreland's last volley involves Dr. Hippensteel's observation that Mr. Fortner's pulmonary condition was variable, which the coal company alleges is not consistent with a progressive condition. OB.23. Besides providing no support for this medical claim, Westmoreland's allegation is contrary to this Court's precedent. In *Greer v. Director, OWCP*, 940 F.3d 88, 90-91 (4th Cir. 1991), the Court observed that pneumoconiosis is a progressive and chronic condition that can produce variable test results. In any event, Dr. Hippensteel attributed the variability in Mr. Fortner's pulmonary function studies to a lack of effort, not to his underlying condition. *See* A.144.

2. Obstructive and restrictive impairments

The ALJ also discredited Dr. Hippensteel's opinion of no legal pneumoconiosis because the doctor reported that coal mine dust exposure usually causes a mixed obstructive and restrictive impairment, and Mr. Fortner suffered from only a restrictive impairment. The ALJ found this rationale unpersuasive because the definition of pneumoconiosis at section 718.201(a)(2) includes both "chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment." A.252-53 (emphasis added).

Westmoreland asserts that the doctor's understanding is not inconsistent with section 718.201(a)(2), and that, in any event, Dr. Hippensteel did not actually state that he found no connection between the miner's impairment and his coal mine employment simply because such employment usually causes mixed impairments. OB.25-26. The coal company, however, misses the point. It is not so much a matter of inconsistency as it is a matter of persuasion. Since coal mine employment can cause either type of impairment, or both, it adds no weight for a doctor to suggest one type is more prevalent. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012) (affirming ALJ's decision to give less weight to doctor's opinion that relies on type of respiratory impairment since the definition of legal pneumoconiosis includes both restrictive and obstructive impairments); *cf. Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (affirming ALJ's discrediting of doctor's opinion that coal dust exposure "rarely" causes an obstructive impairment); *see also Underwood v. Elkay Mining, Inc.,* 105 F.3d 946, 949 (4th Cir.1997) ("[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.").

Because it is Westmoreland's burden to disprove legal pneumoconiosis, and the ALJ found Dr. Hippensteel's unpersuasive, the coal company cannot establish rebuttal under the first method.

Second method of rebuttal, 20 C.F.R. 718.305(d)(1)(ii). To establish rebuttal by the second method Westmoreland was required to show that no part of the miner's total respiratory impairment was due to his pneumoconiosis. *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015). The ALJ found this criterion not met because Dr. Hippensteel's opinion was undermined by his failure to diagnose total respiratory disability and legal pneumoconiosis, facts found by the ALJ directly or by presumption. This is a proper method of weighing evidence on causation. *Collins v. Pond Creek Min. Co.*, 468 F.3d 213, 223-24 (4th Cir. 2006) (finding ALJ may discredit doctor on the cause of the miner's impairment where the doctor mistakenly believes the miner does not suffer from pneumoconiosis); *see also Hobet*, 783 F.3d at 505-06 (affirming ALJ's discrediting of Hippensteel's disability causation opinion where the doctor initially diagnosed no pneumoconiosis, and then failed to assess its impact after finding the disease).

Moreover, the valid reasons the ALJ gave for finding Dr. Hippensteel's opinion insufficient to disprove legal pneumoconiosis are also valid reasons for discrediting the doctor's opinion on disability-causation. *See Westmoreland Coal Co. v. Stidham*, 561 Fed.Appx. 280, 286 (4th Cir. 2014) (affirming decision where ALJ used same reasons for discrediting doctor on legal pneumoconiosis as he did for discrediting doctor on the cause of the miner's disability).

Westmoreland addresses neither of these points. Instead, the coal company reprises its prior, unavailing arguments regarding legal pneumoconiosis and other issues. Because the Director has already addressed these contentions, he will not do so again.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's decision awarding BLBA benefits to the miner.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660 - telephone
(202) 693-5687 - facsimile
BLLS-SOL@dol.gov
roppolo.rita@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

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 9865 words, as counted by Microsoft Office Word 2010.

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, the Director's brief was served electronically on the Court and the following using the Court's CM/ECF system:

Paul E. Frampton, Esq.
Michael J. Schessler, Esq.
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25301

Joseph E. Wolfe, Esq.
Wolfe Williams Rutherford and Reynolds
P.O. Box 625
Norton, VA 24273

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov