No. 15-1322

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

McELROY COAL COMPANY,

Petitioner

v.

ROGER D. KENNEDY, 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

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BRIEF FOR THE FEDERAL RESPONDENT

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JURISDICTIONAL STATEMENT

This case involves a 2009 claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Roger D. Kennedy, who worked in underground coal mine employment for at least twenty-six years. On August 26, 2013, Administrative Law Judge Larry S. Merck (the ALJ) issued a decision awarding Kennedy benefits and ordering his former employer, McElroy Coal Company (McElroy), to pay them. Joint Appendix (JA) 77-119. McElroy

appealed this decision to the United States Department of Labor Benefits Review Board on September 23, 2013, 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).

On July 29, 2014, the Board affirmed the award, JA 120-30, and on January 28, 2015, denied McElroy's motion for reconsideration. JA 131-33. McElroy petitioned this Court for review on March 27, 2015. JA 134-38. 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. Kennedy's exposure to coal dust – the injury contemplated by 33 U.S.C. § 921(c) – occurred in West Virginia, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

McElroy does not challenge the ALJ's invocation of the rebuttable fifteen-year presumption of total respiratory disability due to pneumoconiosis, 30 U.S.C. § 921(c)(4). To rebut the presumption, McElroy must demonstrate either that Kennedy does not have clinical and legal pneumoconiosis, or that no part of his total respiratory disability is caused by pneumoconiosis. The ALJ determined, and the Benefits Review Board affirmed, that McElroy failed to rebut the presumption

because the opinions of the company's medical experts -- that Kennedy's disabling respiratory condition was caused solely by smoking – were not credible. The question presented is whether substantial evidence supports that decision.

STATEMENT OF FACTS

A. Statutory and regulatory background

The BLBA provides for the award of disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, colloquially known as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

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

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

Coal miners seeking federal black lung benefits must prove that (1) they suffer from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) they are totally disabled by a respiratory or pulmonary impairment; and (4) the pneumoconiosis contributes to the totally disabling impairment. 20 C.F.R. § 725.202(d); *see Lane v. Union Carbide Corp*., 105 F.3d 166, 170 (4th Cir. 1997). These elements are generally referred to as "disease," "disease causation," "disability," and "disability causation."

The four elements of entitlement can be established in two basic ways. The first is through medical evidence.[1] For example, the disability element can be proved by, *inter alia*, a physician's "reasoned medical judgment" that a miner is incapable of performing his or her most recent coal-mine work due to a respiratory or pulmonary impairment or by pulmonary function test (PFT) results meeting the qualifying values prescribed by regulation. 20 C.F.R. § 718.204(b)(2)(i), (iv).[2]

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[1] Medical evidence can include chest x-rays, autopsies, biopsies, medical opinion reports, arterial blood gas studies, pulmonary function tests, and other medically acceptable tests and procedures. *See* 20 C.F.R. §§ 718.102-718.107.

[2] PFTs, also called spirometry, "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 (con't…)

The elements of entitlement can also be established by presumption. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act . . . prescribes several "presumptions" for use in determining compensable disability."). One such presumption is 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," which the ALJ applied here. The fifteen-year presumption is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from a "totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If those criteria are met, then it is presumed that the miner is totally disabled by pneumoconiosis, and therefore entitled to benefits. *Id.; Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013).

Once a miner invokes the fifteen-year presumption, the burden shifts to the employer to rebut it by demonstrating (1) that the miner does not have legal and clinical pneumoconiosis or (2) that "no part" of the miner's disability was caused by pneumoconiosis. 20 C.F.R. § 718.305(d); *see West Virginia CWP Fund v.*

(…con't)
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.

Bender [*Bender*], 782 F.3d 129, 134 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013).

B. Summary of relevant medical evidence

The parties do not dispute that Kennedy is entitled to invoke the fifteen-year presumption based on at least twenty-six years of underground coal mine employment and the existence of a totally disabling respiratory impairment. The parties further agree that Kennedy does not have clinical pneumoconiosis. The dispute centers on the credibility of Drs. Zaldivar and Crisalli's view that Kennedy's totally disability respiratory impairment is due solely to smoking. Accordingly, only their opinions are summarized below.[3]

1. Dr. Crisalli's opinion

Dr. Crisalli conducted a pulmonary evaluation of Kennedy on February 8, 2010. JA 195. The evaluation included physical examination, a PFT, and a resting arterial blood gas study.[4] JA 84. Dr. Crisalli also reviewed some of Kennedy's

[3] The record also contains the opinions of Drs. Knight, Mavi, Saludes, and Conibear. These doctors variously opined that smoking and coal dust exposure together caused Kennedy's pulmonary problems. Because these opinions do not assist McElroy in rebutting the fifteen-year presumption, this brief does not describe them.

[4] 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* Noah (con't…)

medical records. JA 197-99. Dr. Crisalli diagnosed Kennedy with asthma, and "tobacco smoke-induced emphysema," and determined that he is totally disabled as a result of these conditions.[5] JA 199-200.

Dr. Crisalli eliminated pneumoconiosis as a cause of Kennedy's emphysema and total pulmonary impairment based on the PFT results.[6] He categorically opined that coal dust exposure "does not produce a reversible pulmonary functional impairment." JA 199. He then characterized Kennedy's pulmonary

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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. Arterial blood gas studies resulting in certain values established in the regulations (referred to as "qualifying" results) are evidence of total disability. *See* 20 C.F.R. § 718.204(b)(2)(ii); 20 C.F.R. Part 718 Appendix C.

[5] Emphysema is one of the diseases comprising chronic obstructive pulmonary disease process (COPD). Employment Standards Admin., U.S. Dep't of Labor, Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). Emphysema is characterized by the "widespread and irreversible destruction of the alveolar walls (the cells that support the air sacs, or alveoli, that make up the lungs) and enlargement of many of the alveoli. Robert A. Wise, MD, Chronic Obstructive Pulmonary Disease (COPD), *Merck Manuals Consumer Version* (2015), *available at* http://www.merckmanuals.com/home/lung-and-airway-disorders/chronic-obstructive-pulmonary -disease-chronic-bronchitis-emphysema. COPD is a lung disease characterized by "airway dysfunction" often resulting in "[a]irflow limitations and shortness of breath[.]" 65 Fed. Reg. at 79939.

[6] Dr. Crisalli reviewed two x-ray reports (not the x-rays themselves). One report was positive for pneumoconiosis, and the other positive for emphysema. He noted, but did not resolve, this conflict. JA 199.

impairment as reversible because it improved following administration of bronchodilators – the FVC score improved by 12% and the FEV1 by 4% – and because Kennedy's overall PFT results had improved since the previous PFT conducted seven months earlier. *Id*; JA 202. Because these PFT results were, in Dr. Crisalli's view, consistent with tobacco smoke exposure, and not coal dust exposure, the doctor concluded that coal dust exposure did not cause Kennedy's pulmonary condition. JA 199-200.

2. Dr. Zaldivar's opinion

Dr. Zaldivar examined Kennedy on April 20, 2011, reviewed his medical records, and prepared an opinion on April 26, 2011. JA 309-24. He was later deposed on May 25, 2011. JA 325-437.

Dr. Zaldivar disagreed with Dr. Crisalli's reasoning but reached the same conclusion. He disagreed about the nature of Kennedy's pulmonary impairment, describing it as "*irreversible*" (not reversible), and he believed Kennedy's breathing tests showed a deterioration in lung function over time (not an improvement). JA 314, 349-50. He nonetheless agreed with Dr. Crisalli's bottom line – that Kennedy suffers from emphysema, that the pulmonary impairment is totally disabling, and due solely to smoking. JA 317.

Dr. Zaldivar gave two reasons for attributing Kennedy's emphysema and total respiratory disability to smoking. First, Kennedy's smoking history was

"more than sufficient to fully explain" his condition. JA 317; JA 367-68 ("[H]is presentation is typical of that of an individual who was a lifelong smoker who began smoking early on in the teenage years. . . . So number one, we have a full explanation for it."). Second, Dr. Zaldivar found no evidence of "dust deposit in the lungs." JA 368, 394. By "dust deposit," he meant that the chest x-ray and CT scan evidence was negative for clinical pneumoconiosis. JA 314, 315; 394-99.

Dr. Zaldivar's understanding of the term "legal pneumoconiosis" informed his smoking-only causation diagnosis. He explained that a miner with a respiratory impairment and no radiographic evidence of pneumoconiosis may have legal pneumoconiosis "under the right circumstances." JA 401. For Dr. Zaldivar, however, the "right circumstances" exist only when coal dust exposure is the last and only possible explanation:

> If the individual had never smoked in his life and he had centrilobular emphysema and the *only risk factor was being a coal miner*, then that individual by definition would have legal pneumoconiosis.
>
> *Legal pneumoconiosis*, the way I read . . . the Federal Register is that *it's a diagnosis of exclusion* which is not different from what we do in medicine.
>
> We look for the most likely causes. Then if cannot find the most likely explanations or reasonable explanations, then we go by default to a possible explanation that's been reported, such as . . . *someone who'd never had any other problems, who'd never had any other risk factor and he was a coal miner*. Well, then we'd have to say, yes, this person truly has legal pneumoconiosis.

JA 403-04 (emphasis added).

Because Dr. Zaldivar believed that Kennedy's presentation was typical of a lifelong smoker, he deliberately ignored recent medical literature regarding the effects of coal dust exposure and considered only those studies describing the effects of smoking. JA 410-14. He elaborated on his position at deposition:

> Q. [T]his article, the Framington Offspring article, does not involve[] coal miners.
>
> A. That's exactly the point. . . . This article has nothing to do with coal mining which is exactly why it's important, because it doesn't have any coal miners. We're talking about smokers.
>
> Q. If we look at all of the articles that you cite, none of those articles address the incidence of COPD or emphysema among miners. Correct?
>
> A. Right, because that data is already well known. . . . My focus on [Kennedy's] report is to say that smokers do develop COPD in high percentage . . . and that this individual with this history has a very high chance of developing COPD according to current literature. . . . *So I left the current mining issue out completely because it is so well-known, and I did not want to compare it.*

Id. (emphasis added).

Finally, Dr. Zaldivar claimed that smoking and coal mine dust exposure have different biological effects on the lungs with smoking causing chemical destruction and coal dust exposure leaving particulate deposition. JA 316. At deposition, he explained:

> A. Does the inhalation of coal mine dust cause obstructive changes. . . . in the same way as cigarette smoke does?
>
> Q. The answer is no . . . . [T]hey're not similar in the least.

JA 417-18. Paradoxically, Dr. Zaldivar made this sweeping assertion while also claiming that there have been *no studies regarding the biological effects of legal pneumoconiosis*. JA 416.

C. Decisions below

1. The ALJ's decision and order awarding benefits

In a forty-three page, single-spaced, decision, ALJ Larry S. Merck awarded benefits to Kennedy on August 26, 2013. JA 77-119. He concluded, based primarily on the medical opinions of Drs. Crisalli, Zaldivar, Knight, and Conibear, that Kennedy is totally disabled. JA 46-47. He further found that Kennedy worked in underground coal mine employment for "at least" twenty-six years. JA 87. Accordingly, the ALJ invoked the fifteen-year presumption that Kennedy's total respiratory disability is due to pneumoconiosis. JA 107.

The ALJ then shifted the burden to McElroy to establish that Kennedy does not suffer from clinical and legal pneumoconiosis, JA 108, or that his pulmonary impairment "did not arise out of, or in connection with, employment in a coal

mine." JA 116 (*citing* 20 C.F.R. § 718.305(a) (2013)).[7] To establish the latter, the ALJ required McElroy to prove that pneumoconiosis is not a "substantially contributing cause" of Kennedy's respiratory disability.[8] JA 117.

The ALJ determined that McElroy proved the absence of clinical pneumoconiosis but not legal pneumoconiosis. Regarding the existence of legal pneumoconiosis, the ALJ found both Dr. Crisalli and Dr. Zaldivar's opinions "neither well-reasoned nor well-documented" and thus "unpersuasive." JA 116.

The ALJ gave three reasons for rejecting Dr. Crisalli's smoking-only causation theory. First, Dr. Crisalli impermissibly premised his theory on scientific views that conflicted with the DOL's evaluation of the relevant medical science in the preamble to the 2000 regulations. JA 114. Second, Dr. Crisalli relied heavily on Kennedy's impairment being reversible, but this rationale, the ALJ reasoned, was incomplete and overstated because it failed to "address the

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[7] To account for amendments to the BLBA made by the Affordable Care Act, the Department revised the fifteen-year presumption regulation, among others, one month after the ALJ's decision here. 78 Fed. Reg. 59102-59119 (Sept. 25, 2013); *Bender*, 782 F.3d at 133-35 (detailing history of the fifteen-year presumption and implementing regulations). To establish disability causation rebuttal, a party must establish that "no part" of the miner's disability was caused by pneumoconiosis. 20 C.F.R. § 718.305(d).

[8] *Bender* rejected a "substantially contributing cause" rebuttal standard, explaining it would "effectively would negate" the fifteen-year presumption. 782 F.3d at 141. The Court need not address the ALJ's incorrect articulation of the disability causation rebuttal standard because his finding that McElroy failed to meet this more lenient standard is supported by substantial evidence.

etiology of the fixed portion of [Kennedy's] impairment that does not benefit from bronchodilator treatment." JA 114-15. Third, Dr. Crisalli failed "to adequately explain[] why he believe[d] that coal dust exposure did not exacerbate [Kennedy's] allegedly smoking-related impairment." JA 115.

As with Dr. Crisalli, the ALJ found "Dr. Zaldivar's comments that emphysema caused by coal dust exposure will manifest itself differently than emphysema caused by smoking" inconsistent with DOL's views in the preamble. JA 115. In addition, the ALJ found inadequate Dr. Zaldivar's apparent satisfaction with tobacco smoke as the causative agent because smoking provided a "sufficient" explanation for Kennedy's pulmonary condition. *Id.* The ALJ observed that "[a] finding of legal pneumoconiosis does not require that miner's lung disease be caused by coal dust alone," rather, it need only be significantly related to or substantially aggravated by coal dust exposure. *Id.*

Having determined that McElroy's expert opinions were not credible, the ALJ found the presumption of legal pneumoconiosis and disability causation unrebutted, and he accordingly awarded benefits. JA 117.

2. The Board's decision affirming the award

The Board issued a decision affirming the ALJ's award of benefits on July 14, 2014. JA 120-33. The Board disagreed with McElroy's argument that the ALJ had turned the preamble into an irrebuttable presumption of legal pneumoconiosis;

rather, it found that the ALJ had permissibly consulted the preamble in evaluating the credibility of the medical opinions. JA 124. It then determined that the ALJ had reasonably found that McElroy's experts had premised their opinions on views contrary to the preamble, and had properly accorded them little weight as a result. JA 124-25.

The Board further upheld the ALJ's according little weight to Dr. Crisalli's opinion because it was impermissibly based on Kennedy's "improved respiratory response after treatment with bronchodilators." JA 125 (*citing Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008)). The Board explained that "neither a miner's improved response to bronchodilator treatment, nor the variability of his respiratory impairment, preclude the existence of a coal mine dust-related impairment." *Id*.

Last, the Board affirmed the ALJ's discrediting of Dr. Zaldivar's opinion because the doctor did not consider whether Kennedy's impairment was *significantly related to or substantially aggravated by* coal mine dust exposure. JA 126-27.

Having found that the ALJ provided valid reasons for discrediting the opinions of Drs. Crisalli and Zaldivar, the Board affirmed the award of benefits.

SUMMARY OF THE ARGUMENT

This case is remarkably similar to *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013), and should be affirmed for the same reasons. There, as here, the coal company claimed the ALJ used the preamble to create an irrebuttable presumption and failed to consider the "new science" offered by Dr. Zaldivar. This Court responded to these contentions by criticizing the company for "overstat[ing] the ALJ's reliance on the preamble" and Dr. Zaldivar for relying on medical literature that does not "appear[] to even discuss the effects of coal mine dust exposure on the lungs." 718 F.3d at 324.

That critique equally applies here. The ALJ correctly treated the fifteen-year presumption as rebuttable. He permissibly used the preamble to the revised black lung regulations for the limited purpose of evaluating the credibility of Dr. Crisalli and Dr. Zaldivar's medical opinions.[9] And preamble aside, the ALJ here provided additional, entirely reasonable, bases for discrediting the company's expert opinions (just as the ALJ did in *Westmoreland Coal*). The ALJ thus properly concluded that McElroy failed to disprove the existence of legal pneumoconiosis

[9] In 2000, the black lung regulations underwent significant revision. Employment Standards Admin., U.S. Dep't of Labor, Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended; Final Rule, 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). The preamble to the final rule "sets forth the medical and scientific premises relied on by the Department [of Labor] in coming to the[ ] conclusions in the regulations." *Harman Mining Co. v. Director OWCP*, 678 F.3d 305, 314 (4th Cir. 2012).

and therefore failed to establish the first rebuttal method (the absence of pneumoconiosis).

Finally, there is no merit to McElroy's argument that the ALJ erred in summarily finding that McElroy failed to establish the second rebuttal method (disability causation). This case has always been about one medical issue – the cause or causes of Kennedy's total respiratory disability. Once the ALJ rejected McElroy's theory that it was due solely to smoking, there was no rational basis on this record for him to rule out pneumoconiosis as a cause of Kenney's total respiratory disability. Although McElroy poses several theoretical arguments concerning the interplay of the two rebuttal methods, conspicuously absent in its discussion are the medical facts of this case and simple common sense.

The Court should affirm the award of black lung benefits to Mr. Kennedy.

ARGUMENT

THE ALJ ACTED WITHIN HIS DISCRETION IN REJECTING THE OPINIONS OF DR. CRISALLI AND DR. ZALDIVAR.

A. Standard of Review

This Court will uphold an ALJ's decision if it is supported by substantial evidence in the record. *Smith v. Chater*, 99 F.3d 635, 637 (4th Cir. 1996). Substantial evidence means evidence "of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999). The Court

will sustain an ALJ's decision if it is supported by substantial evidence, even if it would have reached a different conclusion. *See Harman Mining Co. v. Director OWCP*, 678 F.3d 305, 310 (4th Cir. 2012).

B. The ALJ reasonably and permissibly relied on the preamble to evaluate and discredit the opinions of Dr. Crisalli and Dr. Zaldivar.

McElroy concedes, as it must, that an ALJ may permissibly rely on the preamble as a basis for discrediting a physician's medical opinion. *Harman Mining Co.*, 678 F.3d at 314 (ALJ may consider DOL's preamble is assessing credibility of physicians' opinions); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (same); A*&E Coal Co. v. Adams*, 694 F.3d 798 (6th Cir. 2012) (ALJ is entitled to consider preamble, even though not required to do so).[10]

McElroy nonetheless argues that the ALJ's reference here to the preamble effectively made the rebuttable fifteen-year presumption irrebuttable. Pet. Br. 15-25. That simply did not happen.

As an initial matter, the ALJ's opinion itself demonstrates that he treated the fifteen year presumption as rebuttable. He repeatedly describes it that way, JA 107, 108, 109, 114, 117, and he finds the presumption rebutted in regards to clinical pneumoconiosis. JA 114. In like fashion, he considered the presumption of legal pneumoconiosis rebuttable. JA 108. He found it unrebutted, however,

[10] An ALJ may also reject an opinion that is inconsistent with the black lung regulations themselves. *Harman Mining Co.*, 678 F.3d at 312.

because McElroy's experts simply were not believable. JA 114-17. The fifteen-year presumption never became irrebuttable in the ALJ's hands.

Among other the reasons for discrediting McElroy's experts, the ALJ found their views inconsistent with those in the preamble. JA 114-17. McElroy does not challenge this factual determination in its opening brief, and so it stands on appeal.[11] *E.g.*, *Yousefi v. INS*, 260 F.3d 318 (4th Cir. 2001). Instead, it complains that by finding their opinions inconsistent with the preamble, the ALJ made the presumption irrebuttable. McElroy, however, is conflating the issues. The ALJ referred to the preamble only to evaluate the credibility of McElroy's expert opinions. This consultation did not affect the legal standard on rebuttal. In rejecting the same argument in *Westmoreland Coal*, this Court emphasized that

> the ALJ did not state that he would not consider Dr. Zaldivar's and Dr. Hippensteel's opinions, nor did he suggest that he was obligated to accept the scientific studies in the Preamble over any other evidence.

718 F.3d at 324. In short, the ALJ's use of the preamble here fell within his discretion as factfinder.

[11] McElroy complains that the Board impermissibly identified additional conflicts between its experts and the preamble, Pet. Br. 16 n.6, 24, citing, *inter alia*, *S.E.C. v. Chener*y Corp., 332 U.S.194, 196 (1947). Broadly speaking, *Chenery* concerns judicial interference with agency decision-making, and thus does not apply to decisions of the Board, which is itself part of the agency (DOL). *See* 20 C.F.R. Part 801. In any event, the important point is that McElroy has not challenged *the ALJ's* factual finding of a conflict.

Nor was the ALJ required to consider Dr. Zaldivar's citation of post-preamble studies in evaluating the conflict between his opinion and the preamble, as McElroy asserts. Pet. Br. 25-29. These post-preamble studies, just like the ones in *Westmoreland Coal*, address the effects of smoking, not coal dust exposure. JA 410-11. Their relevance is thus problematic at best. *Westmoreland Coal*, 718 F.3d at 324 ("[N]one [of the post-preamble studies cited by Dr. Zaldivar] appears to even discuss the effects of coal mine dust exposure on the lungs.") Indeed, Dr. Zaldivar seems to concede their ineffectuality: "What I am saying is that the literature continues to change, and *we have to keep an open mind* about what legal pneumoconiosis really means in view of the current literature." JA 420-21 (emphasis added). This is hardly a claim that the later studies have "archaized or invalidated the science underlying the Preamble."[12] *Westmoreland Coal*, 718 F.3d at 324.

[12] Dr. Zaldivar intentionally chose to ignore the most recent science on the effects of coal dust exposure. JA 411, 414. That science, as reviewed by the National Institute for Occupational Safety and Health, confirms the medical and scientific findings that DOL relied on in the preamble. *See* Current Intelligence Bulletin 64, *Coal Mine Dust Exposure and Associated Health Outcomes, A Review of Information Published Since 1995* (2011), *available at* http://www.cdc.gov/niosh/docs/2011-172/pdfs/2011-172.pdf. *See also* Mine Safety and Health Admin., U.S. Dep't of Labor, Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Personal Dust Monitors; Final Rule, 79 Fed. Reg. 24814, 24819-35 (May 1, 2014) (describing adverse health effects of coal dust exposure, including severe emphysema).

C. The ALJ permissibly discredited the opinions of Dr. Crisalli and Dr. Zaldivar for reasons independent of the preamble.

Even if the ALJ's reliance on the preamble was misplaced (which it was not), he provided independent reasons for discrediting the opinions of Drs. Crisalli and Zaldivar. These findings are reasonable and supported by substantial evidence, and the Court should accordingly uphold them. *Westmoreland Coal*, 718 F.3d at 324; *Harman Mining*, 678 F.3d at 313; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000) (where there is a sufficient factual basis for one reason discrediting medical opinion, court need not consider whether ALJ's other reasons for discrediting opinion were proper), *aff'd on remand*, 99 Fed. Appx. 463 (4th Cir. 2004) (unpublished).

1. Dr. Crisalli's opinion

Dr. Crisalli opined that coal mine dust exposure does not cause a reversible pulmonary impairment, and because Kennedy's impairment is reversible, he does not have legal pneumoconiosis. The ALJ rejected Dr. Crisalli's opinion because it failed to adequately address "the etiology of the *fixed* portion of [Kennedy's] impairment" or the possibility that coal dust exposure exacerbated Kennedy's "allegedly smoking-related impairment."[13] JA 114-15 (emphasis added).

[13] Dr. Crisalli's tests showed a post-bronchodilator improvement of 12% in the FVC and only 4% in the FEV1, JA 202, suggesting an irreversible component. Dr. Zaldivar similarly described the impairment as irreversible. JA 314.

McElroy does not confront the ALJ's actual findings. Instead, it argues at length that "bronchodilator responsiveness" can be a relevant consideration and the ALJ was wrong to "suggest" it was not. Pet. Br. 33-36. But the ALJ made no such suggestion. The ALJ rejected Dr. Crisalli's opinion for not explaining the etiology of the fixed, non-reversible portion of Kennedy's totally disabling impairment. That finding was entirely permissible. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Brandywine Explosives & Supply v. Director, OWCP*, __ F.3d __, 2015 WL 3649540, at *8 (6th Cir. 2015); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. 2004) (unpublished); *Badger Coal Co. v. Director, OWCP*, 83 F.3d 414 (4th Cir. 1996) (unpublished); *Hodges v. W-P Coal Co.*, 2000 WL 35927586, at *3 n.3 (Ben. Rev. Bd. 2000) (unpublished).[14]

The ALJ further faulted Dr. Crisalli for not adequately explaining why coal dust exposure did not exacerbate Kennedy's smoking-related impairment. JA 115. McElroy does not address this basis for discrediting Dr. Crisalli's opinion, and so has waived any objection to it. *See Yousefi, supra*. In any event, the ALJ's reasoning is well-taken. Because legal pneumoconiosis includes any chronic lung

[14] McElroy attempts to distinguish *Swiger* by arguing that Kennedy's PFTs were not qualifying in contrast to Swiger's. Pet. Br. 35. Because the doctors here, including Dr. Crisalli, agreed that Kennedy's pulmonary impairment is totally disabling, this is a distinction without a difference. *See supra* at 4. It is also irrelevant because it is the *nature* of the impairment (*i.e.*, fixed, reversible, or both) that is at issue, not its *extent* (*i.e.*, total or partial).

disease that is "significantly related to, or substantially aggravated by" coal dust exposure, 20 C.F.R. § 718.201(b), Dr. Crisalli was required to consider (and dismiss) the possibility of exacerbation by coal dust exposure in order to rebut the presumption of legal pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (company's "failure to disprove aggravation of [miner's respiratory] conditions by dust exposure was fatal" to establishing rebuttal of fifteen year presumption).

Although the doctor concludes that Kennedy's impairment is not related (or secondary) to coal dust exposure, JA 200, he provides no specific discussion or rationale dismissing the possibility that coal dust exposure made Kennedy's impairment worse. The ALJ thus permissibly found his opinion unpersuasive. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly rejected doctor's opinion for not adequately explaining why coal dust exposure did not exacerbate allegedly smoking-related impairment); *Kanawha Coal Co. v. Director, OWCP*, 539 Fed. Appx. 215, 218 (4th Cir. 2013) (unpublished) (ALJ permissibly discredited Dr. Zaldivar's opinion for not adequately explaining why miner's coal dust exposure did not contribute to respiratory disability); *Clutter v. Roblee Coal Co.*, 2013 WL 4858251, at *3 (Ben. Rev. Bd. 2013) (unpublished) (ALJ permissibly rejected doctor's opinion for not adequately explaining why coal dust exposure did not exacerbate allegedly

smoking-related impairment same); *see generally Island Creek Coal Co.*, 211 F.3d at 211-12 (recognizing that "it is the province of the ALJ to evaluate physicians' opinion," and that an ALJ "may choose to discredit an opinion that lacks a thorough explanation").

2. Dr. Zaldivar's opinion

Dr. Zaldivar declined to attribute Kennedy's pulmonary impairment to coal dust exposure for the simple reason that his smoking history was "more than sufficient to fully explain" it. JA 115. The ALJ found this approach misguided for the same reason he found Dr. Crisalli's opinion deficient – it failed to adequately address the possibility that coal dust exposure significantly contributed to or aggravated Kennedy's impairment. *Id*. Substantial evidence supports the ALJ's decision.

At deposition, Dr. Zaldivar explained that, for him, a diagnosis of legal pneumoconiosis is one of exclusion – he arrives at it when no other explanation suffices. JA 403-04. This one-cause scenario is inconsistent with the regulations, which require a diagnosis of legal pneumoconiosis when coal dust exposure merely contributes to or aggravates a respiratory impairment (due to other causes). 20 C.F.R. § 718.201(b). The regulations envision the possibility of coal dust exposure as one of several causes of a respiratory impairment. *Westmoreland Coal*, 718 F.3d at 323. Dr. Zaldivar, however, disregards that possibility. The ALJ thus

properly found the basis for Dr. Zaldivar's "no legal pneumoconiosis" diagnosis to be inadequately explained and not well-reasoned.

His medical reasoning also conflicts with the BLBA, in particular the fifteen-year presumption. By refusing to diagnose legal pneumoconiosis when other explanations exist, he presumes its absence. Or at most impermissibly presumes that it rarely occurs. *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008). But the fifteen-year presumption does just the opposite – presuming the existence of legal pneumoconiosis *in all cases* in which it is invoked (as here). Dr. Zaldivar cannot rebut the fifteen-year presumption simply by disagreeing with its premise. *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). The ALJ properly rejected Dr. Zaldivar's opinion as neither well-reasoned nor well-documented.[15]

[15] Dr. Zaldivar also based his diagnosis of no legal pneumoconiosis on "the absence of any kind of dust deposit in the lungs." JA 368, 394. By "dust deposit," he meant that the chest x-ray and CT scan evidence was negative for pneumoconiosis. JA 314, 315; 394-99. This reasoning was also impermissible. *Harman Mining*, 678 F.3d at 312-13 (observing that similar opinion "finds no support in the Department's regulations, which separate clinical and legal pneumoconiosis" and preclude the denial of benefits based solely on a negative chest x-ray).

D. The ALJ committed no error in concluding that McElroy failed to establish disability causation rebuttal.

McElroy last argues that the ALJ conflated the two rebuttal methods, confusing disease presence with disability causation, and as a result, improperly negated disability causation as a rebuttal method. Pet. Br. 36-40. McElroy simply misunderstands the facts and the ALJ's findings in this case.

As discussed above, in addressing the presence of legal pneumoconiosis, the ALJ permissibly discredited Drs. Crisalli and Zaldivar's opinions that Kennedy's respiratory impairment was due solely to smoking. Given this credibility finding, his conclusion of no disability causation rebuttal was the only rational one he could reach. This is so because both doctors *agreed* that Kennedy's emphysema was totally disabling – they disputed only whether the emphysema and resulting impairment were non-compensable, *i.e.*, solely due to smoking, or legal pneumoconiosis, *i.e.*, significantly related to or aggravated by coal dust exposure. Under these circumstances, their opinions regarding the cause of Kennedy's disability duplicated, or reiterated, their opinions regarding the presence of legal pneumoconiosis. Thus, their failure to credibly disprove legal pneumoconiosis (that the impairment was due solely to smoking) necessarily rendered their opinions inadequate to disprove disability causation (the disability was due solely to smoking).

Contrary to McElroy's parade of horribles, it will not always be the case that an ALJ's findings regarding legal pneumoconiosis will have the dual impact that they had here.[16] It merely means that, where the only seriously disputed medical issue is whether the claimant's disabling lung disease was caused by coal dust exposure, the employer can only establish rebuttal by proving that it was not. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). This is hardly a "drastic result" that "overrides the statutory framework[.]" Pet. Br. 39. It is simple common sense.

Finally, McElroy tries to avoid this application of basic common sense by making a highly theoretical argument regarding the underlying nature of factual findings by presumption. Pet. Br. 38 n.18. It concedes, as it must, that "an ALJ may discredit a physician's opinion as contrary to the ALJ's factual findings." *Id*. (*citing Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002)); *see also Hobet Mining LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (reaffirming "common-sense rule" that "opinions that erroneously fail to diagnose pneumoconiosis may

[16] It is not difficult to imagine scenarios in which a doctor's discussion of a miner's alleged pneumoconiosis is entirely distinct from his disability-causation analysis. Consider a case where the miner has very mild emphysema and severe lung cancer. The operator's medical expert testifies that both diseases were caused solely by smoking and that the miner's disability is entirely due to the cancer. The ALJ finds (via presumption or otherwise) that the miner's emphysema was caused, in part, by coal dust exposure, and is therefore legal pneumoconiosis. This finding would not undercut the expert's opinion that the cancer was the sole cause of the miner's disability.

not be credited at all, unless an ALJ is able to identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon the predicate[ ] misdiagnosis") (internal quotation marks omitted).[17]

McElroy nonetheless claims that in the rebuttal context, it is improper to discredit an expert's opinion on disability causation when it merely conflicts with a *presumed* rather than an affirmatively-found fact. Pet. Br. 38 n.18. The Sixth Circuit has expressly rejected this argument, *Big Branch Res., Inc.*, 737 F.3d at 1074, and McElroy cites no authority in support of it. Nor can it. McElroy's contention (Pet. Br. 38) that an unrebutted presumed fact is merely "an equivocal 50/50 conclusion" is contrary to the very definition of the term "rebuttable presumption." Black's Law Dictionary 1306 (deluxe 9th ed. 2009) ("an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence – Also termed *prima facie presumption*…."). Moreover, an unrebutted BLBA presumption that establishes only a 50% likelihood would be nugatory because it could not sustain an award of

[17] The private respondent, Mr. Kennedy, relies heavily on *Hobet Mining* in support of the ALJ's disability causation analysis. Kennedy Res. Br. 36-40. Although we agree with his analysis of *Hobet Mining* and related decisions from this Court, we think this legal argument is unnecessary because, as discussed above, the ALJ's credibility findings regarding McElroy's expert opinions necessarily extend to both rebuttal methods.

benefits. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (claimant loses when the evidence is equally balanced).

In short, the role of presumptions under the BLBA is well-established. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976). One way to "determin[e] the existence of pneumoconiosis" is for the fifteen-year presumption to be invoked and not rebutted. 20 C.F.R. § 718.202(a)(3). The ALJ's determination that McElroy had failed to disprove Kennedy's presumed legal pneumoconiosis is a finding that Kennedy had pneumoconiosis.

CONCLUSION

For reasons discussed above, the Court should affirm the award of benefits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 6362 words as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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