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

WESTMORELAND COAL COMPANY,

Petitioner

v.

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

and

GERALD W. MABE,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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

No. 16-1210

WESTMORELAND COAL COMPANY,
Petitioner

v.

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

and

GERALD W. MABE,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

JURISDICTIONAL STATEMENT

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Gerald W. Mabe, an underground coal miner for nineteen years. On October 7, 2014, Administrative Law Judge Daniel F. Solomon issued a decision denying benefits. The miner appealed this decision to the United States Department of Labor (DOL) Benefits

Review Board on November 5, 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 reversed and awarded benefits on December 29, 2015, and Westmoreland Coal Company, the liable employer, petitioned this Court for review of that decision on February 26, 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 Coal’s petition for review.

STATEMENT OF THE ISSUES¹

There is a rebuttable presumption that every claim for federal black lung benefits has been timely filed. A miner’s claim is timely if filed within three years of the miner’s being informed of a “medical determination of total disability due to pneumoconiosis.” Here, the ALJ found the miner’s claim untimely, but the

¹ This brief addresses only those issues that have programmatic significance or involve questions of law. Notably, this brief does not address Westmoreland Coal’s challenge to the ALJ’s weighing of the medical evidence regarding the existence of pneumoconiosis, Opening Brief at (OB) 15-19.

Benefits Review Board reversed, finding that Westmoreland Coal, as a matter of law, had failed to adduce sufficient evidence to rebut the presumption of timeliness.

The first question presented is whether the Benefits Review Board properly found that Westmoreland Coal, as a matter of law, failed to rebut the presumption that the miner's claim was timely filed.

There is also a presumption of entitlement for totally disabled miners with fifteen or more years of qualifying coal mine employment. This presumption may be rebutted by establishing that the miner does not have pneumoconiosis (clinical and legal) or that pneumoconiosis played no part in the miner's respiratory disability. Westmoreland Coal concedes that the presumption was properly invoked, but challenges the ALJ's determination, as affirmed by the Board, that it failed to rebut it. The ALJ found the presumption of pneumoconiosis unrebutted because the evidence regarding clinical pneumoconiosis was inconclusive, and Westmoreland Coal had therefore failed to meet its burden of disproving the existence of the disease. Turning to the second method of rebuttal, the ALJ discredited the opinions of Westmoreland Coal's two doctors—who reported that the miner's pneumoconiosis was not a contributing factor to his disability—because the doctors based their opinions on the mistaken diagnosis that the miner did not suffer from pneumoconiosis.

The second question presented is whether an ALJ can, as a matter of law, discredit doctors' opinions regarding the cause of a miner's respiratory disability when the doctors fail to diagnose pneumoconiosis, a condition established by operation of law.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Section 932(f)'s statute of limitations

The BLBA provides in relevant part that “[a]ny claim for benefits by a miner under this section shall be filed within three years . . . [of] a medical determination of total disability due to pneumoconiosis.” 30 U.S.C. § 932(f).

Section 725.308 of the black lung regulations implements section 932(f). It establishes a rebuttable presumption that “every claim for benefits is timely filed,” and requires that the medical determination of total disability due to pneumoconiosis be “communicated to the miner or a person responsible for the care of the miner.” 20 C.F.R. § 725.308(a), (c).

Thus, Westmoreland Coal bears the burden of proving that a medical determination of total disability due to pneumoconiosis was communicated to the miner before July 8, 2007 (three years prior to filing his claim on July 8, 2010).

See Arch of Kentucky, Inc. v. Director, OWCP, 556 F.3d 472, 479 (6th Cir. 2009)

(“The employer has the burden to show that the miner’s claim was outside the statute of limitations period.”).

2. Section 921(c)(4)’s fifteen-year presumption

A miner who has worked at least fifteen years in underground coal mines and has a totally disabling respiratory or pulmonary condition is presumed to be “totally disabled due to pneumoconiosis,” and thus entitled to benefits. 30 U.S.C. § 921(c)(4); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013). The fifteen-year presumption may be rebutted by proof that the miner does not suffer from pneumoconiosis or that the miner’s pneumoconiosis played no part in his total respiratory disability. *Id.*

Section 718.305 of the black lung regulations implements section 921(c)(4). 20 C.F.R. § 718.305. It sets forth two alternate ways of rebutting the presumption.² The first and most straightforward is to establish that the miner has neither clinical pneumoconiosis arising out of coal mine employment nor legal pneumoconiosis.³ 20 C.F.R. § 718.305(d)(1)(i). The second method requires

² Westmoreland does not dispute that the ALJ properly invoked the fifteen-year presumption.

³ *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). 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,

proof that “no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis.” 20 C.F.R. § 718.305(d)(2)(ii). This is commonly referred to as the “rule-out” standard.

B. Proceedings Below

After an administrative hearing, where the miner appeared without benefit of counsel, Appendix, p. (A.) 226, the ALJ awarded benefits, payable by Westmoreland Coal, his former employer. A.274. The ALJ found that the miner’s claim was timely, A.269; that the medical evidence invoked the fifteen-year presumption of entitlement at 30 U.S.C. § 921(c)(4), A.276; and that Westmoreland Coal’s evidence failed to rebut the presumption, A.278.

Westmoreland Coal appealed these decisions to the Board. A.282. It argued that the claim was untimely, A.284-86; and that, while the ALJ properly invoked the fifteen-year presumption of entitlement, he erred in finding the presumption un rebutted, A.283. The Board affirmed the ALJ’s decision concerning rebuttal, A.288-91, but agreed that the ALJ’s rationale for finding the claim timely could not be substantiated. A.287-88. It accordingly remanded the case to the ALJ to reconsider the timeliness issue. A.288.

718.202(a)(1)-(2). *Legal pneumoconiosis*, in contrast, is a broader category including “any chronic lung disease or impairment . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2) (emphasis added).

On remand, the ALJ found that the company had rebutted the presumption of timeliness and denied benefits. A.299-300. On the miner's appeal, the Board in a 2-1 decision ruled that the company had failed to rebut the timeliness of the miner's claim as a matter of law. A.332. In light of the Board's previous affirmance of the ALJ's weighing of the medical evidence, the Board reversed and awarded benefits. *Id.* Westmoreland Coal thereupon petitioned this Court for review. A.320.

C. **Facts**

1. General facts

The miner was sixty-six years old at the time of the 2012 ALJ hearing. A.241. He was employed in underground coal mine work for more than nineteen years, ending in 1988. A.275, 242. He filed his claim for benefits on July 8, 2010.⁴ A.163.

2. Facts concerning timeliness

In a report prepared in 2010, the miner's family physician, Dr. Lawrence Fleenor, stated he diagnosed the miner with pneumoconiosis in 1994: "The first diagnosis in my record of chronic obstructive lung disease was in June 1994. He has carried the diagnosis of Black Lung since." A.206. The report, however, does

⁴ The miner filed an earlier claim in August 2009, but withdrew it in 2010. DX 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. § 725.308(b).

not indicate when the doctor diagnosed total respiratory disability or if and when he communicated either diagnosis to the miner.

At the ALJ hearing, A.226, the company questioned the miner about when he was told about his black lung disease and his resultant total respiratory disability:

Q Was there any doctor that told you that you had black lung?

A Oh, yeah, Dr. Fleenor, Dr. Smiddy.

Q Who was the first doctor to tell you that you had black lung?

A Dr. Fleenor, I guess.

Q Okay.

A I've been going to Dr. Fleenor for a long time. He told me that. He said, "Your lungs are getting worse and worse".

Q Did ---

A Dr. Smiddy told me I was disabled and I would never be able to go back to work.

Q Did Dr. Fleenor tell you that you were disabled from going back to work from your black lung?

A Yeah.

Q And I was just looking at Dr. Fleenor's report. [A.251.] It looks to me like he says he's been your doctor since 1993. Is that correct?

A Yeah. I know it was a long time. I don't know exactly how long.

Q Okay and do you recall when it was that [Dr. Fleenor] told you that you had black lung and that you were totally disabled from going back to work because of your black lung?

A I couldn't tell you the exact date, no, I couldn't.

Q Okay. Was it back in the 1990's when you first started seeing him?

A No, I don't think it was then. I had a stroke. . . . [A]nd after I got out of the hospital and had therapy and stuff, I went back to Dr. Fleenor and that's when he started telling me. He said, "Your lungs are getting worse and worse," which I already knew, but that's the first time he ever told me that I had black lung and stuff.

Q And when did you have the stroke?

A I don't remember to tell you the truth.

Q Was it ten years ago? [A.252.]

A Probably.

Q Okay and ten years ago was when Dr. Fleenor told you that you had black lung?

A It probably was.

Q And was that also when he told you that you were totally disabled from going back to work because of your breathing?

A Yeah.

Q And to the best of your recollection, that was about ten years ago?

A Yeah, something like that. I can't tell you the exact date or nothing. [A.253.]

A.251-53.

Although the miner could not recall during the hearing when he suffered the stroke that preceded Dr. Fleenor's communication, he previously had informed Dr. Glen Baker in 2009 and 2010 that the stroke occurred in 2007. A.170; documents preceding Director's Exhibit No. (DX) 1. In addition, the January 2011 medical opinion of Dr. Kirk Hippensteel reports that the miner's stroke occurred "about" four years earlier. A.60. And a 2010 medical health center report notes in history: "Status post CVA [cerebrovascular accident] in 2007." A.38.

3. Facts concerning rebuttal of the fifteen-year presumption

As noted earlier at footnote 2, Westmoreland Coal does not dispute that the ALJ properly invoked the fifteen-year presumption of entitlement. Instead, the company argues that the ALJ erred in discrediting its doctors as to the cause of the miner's total respiratory disability, which is relevant to the second method of rebuttal. The doctors in question are Dr. Kirk Hippensteel, A.59, and Dr. Stephen Basheda, A.85. Both of these doctors stated that the miner did not suffer from pneumoconiosis, and therefore concluded that condition did not contribute to the miner's total respiratory disability. A.64, 104.

D. Decisions Below

1. The ALJ finds the claim timely and awards benefits. A.269, 274.

Before deciding the case on the merits, the ALJ issued an interim order rejecting Westmoreland Coal's contention that the miner's claim was barred by the

BLBA's three-year statute of limitations. A.269-271. He noted the miner's testimony that Dr. Fleenor had informed him "around ten years ago" that he was totally disabled by "black lung." Relying on Board precedent, the ALJ nonetheless found Dr. Fleenor's report insufficient to trigger the running of the statute of limitations because it was unreasoned and undocumented. A.270-71. He thus found the claim timely filed.

In his decision and order awarding benefits, the ALJ invoked the fifteen-year presumption of total disability due to pneumoconiosis based on the parties' stipulation that the miner had more than fifteen years of qualifying coal mine employment and was totally disabled. A.275-76. He then considered whether Westmoreland Coal had established rebuttal by showing either the absence of pneumoconiosis or that pneumoconiosis did not contribute in any way to the miner's total respiratory disability. A.278. The ALJ found that the company had failed to prove the absence of pneumoconiosis because the evidence of clinical pneumoconiosis was in equipoise and inconclusive. *Id.* He likewise found that the company had not ruled out the presumed connection between the pneumoconiosis and the miner's respiratory disability: its medical opinions were flawed because they "assumed that the x-ray evidence was negative, [] rely heavily on unreliable facts," and "did not diagnose pneumoconiosis, contrary to the

determination that the existence of pneumoconiosis was established.” *Id.* Having found the fifteen-year presumption un rebutted, the ALJ awarded benefits. *Id.*

2. The Board remands on timeliness while affirming the ALJ’s discrediting of Westmoreland Coal’s doctors. A.282.

On appeal, Westmoreland Coal argued that the ALJ erred in finding Dr. Fleenor’s report insufficient to trigger the statute of limitations because it was unreasoned and undocumented. The Board agreed. A. 287. It observed that the Sixth Circuit had held (after the ALJ’s decision) that a medical determination of total disability due to pneumoconiosis did not have to be reasoned and documented in order to start the three-year limitations period under BLBA section 932(f). A.286-87 (citing *Peabody Coal Co. v. Director, OWCP*, 718 F.3d 590, 594 (6th Cir. 2013)). Because this Sixth Circuit decision reversed Board precedent, the Board felt compelled to vacate the ALJ’s discounting of Dr. Fleenor’s report and remand for reconsideration of the timeliness issue. A.287.

In remanding the case, however, the Board observed that Dr. Fleenor’s report, standing alone, could not trigger the limitations period because it did not state that the miner was totally disabled. A.287. The Board then instructed the ALJ to make credibility and reliability determinations regarding the miner’s own testimony, which it described as “crucial to the resolution of the issue of when claimant understood that he was totally disabled due to pneumoconiosis.” *Id.*

Regarding the underlying merits of the claim, Westmoreland Coal also challenged the ALJ's discrediting of its medical opinions, claiming that its failure to rebut the presumption of pneumoconiosis could not be used to discredit its doctors' opinions on disability causation. A.290. The Board rejected this argument, explaining that this Court, as well as the Sixth Circuit, has affirmed decisions where the ALJ rejected medical opinions concerning causation because the doctors mistakenly assumed the miner did not suffer from pneumoconiosis. *Id.*, citing, *inter alia*, *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), and *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013). Because the Board found that the ALJ had properly weighed the medical evidence, it affirmed his finding that Westmoreland Coal had failed to rebut the fifteen-year presumption of entitlement. A.291.

**3. The ALJ finds the miner's claim untimely and denies benefits.
A.295.**

On remand, the ALJ found the miner's claim untimely and denied benefits. A.299. In arriving at this determination, he cited the relevant law, described the arguments made to the Board by the employer and the Director, noted the arguments made on remand by the employer, and explained that the Board had found that Dr. Fleenor's medical report, "standing alone," was not sufficient to trigger the time limitation because it did not report total respiratory disability. A.298-99. The ALJ also observed that, while there were no records concerning the

miner's stroke, he "accepted that the [miner] may have had a stroke," but determined "there [wa]s no evidence that it in any way affected his memory."

A.299.

Without specifically addressing the arguments of the Director and the company, or the Board's instructions on remand, the ALJ concluded that the claim was untimely based upon Dr. Fleenor's medical report:

The Act's statute of limitations provides in relevant part that a "claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis" has been made. 30 U.S.C. § 932(f). After a review of the evidence, I find that DX 13 [medical report], from Dr. Fleenor, substantiates that Claimant was provided a medical determination [of total disability due to pneumoconiosis] more than three years before he filed a claim.

Id.

4. The Board reverses the ALJ's finding of untimeliness and awards benefits. A.323.

In a 2-1 decision, the Board determined that Westmoreland Coal had failed as a matter of law to rebut the presumption that the miner's 2010 claim was timely filed. A.330. As a threshold matter, the majority explained that the ALJ erred in using Dr. Fleenor's report to trigger the time limitation since that report—as the Board had concluded in its prior decision—did not state that the miner was totally disabled beginning in 1994 or indicate whether (or when) the doctor's diagnosis was even communicated to the miner. A.309. The majority also observed that the ALJ completely missed the significance of the miner's 2007 stroke: the ALJ

believed the stroke was referenced to suggest the miner's memory had been affected; but in fact, the date of the stroke was important because the miner clearly testified that he did not receive a medical determination of total disability due to pneumoconiosis until *after* his stroke; and if his stroke occurred in 2007, it fatally undermined the company's attempt to set the triggering date as 1994. A.310.

The majority next observed that, while Westmoreland Coal relied on the miner's testimony to rebut the presumption of timeliness, that testimony was equivocal and uncertain. The majority also found convincing the Director's assertion that the only time the miner's testimony was unhesitant was when he stated that he received information about his pneumoconiosis and respiratory disability only *after* he had suffered a stroke. A.311. Because "the only rational inference to be drawn from claimant's testimony, in consideration with the medical record, is that his stroke occurred in 2007," the majority concluded that the medical evidence did not support Westmoreland Coal's attempt to rebut the presumption of timeliness. A.312. In this regard, the majority acknowledged that factual decisions were the province of the ALJ, but explained that, here, "no factual issues remain[ed] to be determined." A.310 n.10 (internal quotation marks omitted).

Finally, the majority observed that Westmoreland Coal had more than sufficient opportunities to develop evidence concerning when the miner suffered his stroke, but failed to do so. A.312. And the majority cited a number of Board

decisions where timeliness was not rebutted because the proffered triggering medical determination was not specific or clear enough, either because it was too difficult for the miner to understand the doctor's terminology or because the miner was merely told to "get out of the mines," which the miner mistakenly assumed was a diagnosis of total disability A.323 n.12. The majority therefore concluded that Westmoreland Coal, as a matter of law, failed to rebut the presumption of timeliness. A.312.

The only argument offered by the dissenting Board member was that the Board should have remanded the case to the ALJ to allow him to again weigh the evidence on the issue. A.314-16.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's determination that the miner timely filed his claim. The Black Lung Benefits Act has a three-year time limitation on miner's claims. It starts to run when a medical determination of total respiratory disability due to pneumoconiosis is communicated to the miner. Because a miner's claim is presumed timely, Westmoreland Coal in this case was required to prove that the miner received the triggering medical determination more than three years prior to his July 2010 claim-filing date.

The Board correctly ruled that the company failed in this burden as a matter of law. Westmoreland Coal relies on a 2010 report from Dr. Fleenor, but the

report only shows a 1994 diagnosis of pneumoconiosis and not the required determination of total disability due to pneumoconiosis. Nor does the report indicate if and when the doctor advised the miner of his diagnosis. Moreover, while Westmoreland Coal tried to get the miner to agree to the 1994 medical determination, the miner's testimony was tentative and qualifying with one exception: he stated with conviction that he received the required medical determination *after* his stroke, and the uncontradicted medical evidence establishes that the stroke occurred in 2007. Because Westmoreland Coal cannot establish that the required diagnosis was communicated to the miner more than three years before his July 8, 2010 claim, the claim must be deemed timely filed.

Westmoreland Coal's argument concerning the ALJ's discrediting of its medical opinions is similarly without merit. Its doctors found no connection between the miner's total respiratory disability and his pneumoconiosis, but their diagnoses were undermined by the fact that the doctors mistakenly assumed the miner did not suffer from pneumoconiosis. The company asserts there was no undermining because pneumoconiosis was established only after the company failed to rebut its presumed existence. Westmoreland Coal's argument, however, does not explain why establishing pneumoconiosis by presumption is any less a "finding" of pneumoconiosis than an affirmative finding of the disease by the ALJ.

Neither the law nor common sense supports the company's argument. It must be rejected.

ARGUMENT

A. Standard of Review

This brief addresses questions of law. 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. The Board properly found the miner's claim timely as a matter of law.

The Benefits Review Board determined that, as a matter of law, the evidence of record was insufficient to rebut the presumption that the miner's claim was timely filed. To meet its burden, the coal company was required to establish that a medical determination of total disability due to pneumoconiosis had been communicated to the miner at least three years before his July 8, 2010 claim filing. There are three reasons why the Board correctly found this burden not met.

First, while the ALJ found that Dr. Fleenor's 2010 report contained a medical determination of total disability due to pneumoconiosis that was communicated to the miner sometime in 1994, the report shows no such thing. It indicates that a diagnosis of pneumoconiosis was made in 1994, but says nothing about whether the miner's respiratory condition was totally disabling at that time or whether the pneumoconiosis contributed to the respiratory disability. Nor does the report suggest that the doctor in fact communicated these diagnoses to the miner.

Second, while Westmoreland Coal stresses the miner's hearing testimony, in which the coal company repeatedly tried to get the unrepresented miner to admit he knew about his diagnosis in 1994, the Board correctly described the miner's testimony as equivocal and uncertain. Notably his testimony, as set forth *supra* at 8-9, is rife with qualifying language: "I guess"; "I don't know exactly"; "I don't remember to tell you the truth"; "probably"; "probably was"; and "something like that."

And third, the only time the miner testified with certainty about being informed of the seriousness of his condition is when he stated it was "after" his stroke:

Q Okay and do you recall when it was that [Dr. Fleenor] told you that you had black lung and that you were totally disabled from going back to work because of your black lung?

A I couldn't tell you the exact date, no, I couldn't.

Q Okay. Was it back in the 1990's when you first started seeing him?

A No, I don't think it was then. I had a stroke. . . . [A]nd after I got out of the hospital and had therapy and stuff, I went back to Dr. Fleenor and that's when he started telling me. He said, "Your lungs are getting worse and worse," which I already knew, but that's the first time he ever told me that I had black lung and stuff.⁵

A.251.

Notably, the record reveals that the miner's stroke occurred in 2007: the miner reported that date twice to Dr. Baker (in 2009 and 2010); the 2007 date was included in a medical health center report; and Dr. Hippensteel's 2011 report also notes in history that the miner's stroke occurred four years earlier (making it 2007). This strong, consistent evidence not only demonstrates that Dr. Fleenor informed the miner of his respiratory condition only after the miner's 2007 stroke, but also renders even more uncertain the miner's already equivocal responses concerning any earlier communication.⁶

⁵ The miner's testimony here does not contradict Dr. Fleenor's report because the doctor did not state when he communicated his diagnosis of pneumoconiosis to the miner.

⁶ Had Westmoreland Coal developed evidence concerning the exact date of the miner's stroke, and it turned out that date was in 2007 but more than three years before the miner's July 8, 2010 claim; and had the company asked the miner how long after his stroke Dr. Fleenor discussed disability due to pneumoconiosis with him, the company arguably could have proved the claim untimely. The company, however, failed to develop that evidence. Given that it was Westmoreland Coal's

Despite the weakness of the underlying facts, the company argues that the Board should have left the decision-making to the ALJ, and that the miner's testimony, as supported by Dr. Fleenor's report, establishes a 1994 triggering date. OB 11-14. But Westmoreland Coal makes its argument with blinders on: it fails to acknowledge any hesitation or equivocation in the miner's testimony, and, perhaps more telling, the company completely ignores the miner's testimony about receiving the medical determination *after* his 2007 stroke.

Consequently, the Board did the only thing allowed on these legally-insufficient facts: it reversed the ALJ's decision and found that Westmoreland Coal failed to rebut the presumption of timeliness. The Court should affirm the Board's decision.

C. The ALJ properly discredited the medical opinions of Westmoreland Coal's doctors because they mistakenly assumed the miner did not suffer from pneumoconiosis.

To be entitled to benefits, a miner must show (1) that he suffers from pneumoconiosis arising out of coal mine employment; (2) that he has a totally disabling respiratory condition; and (3) that his pneumoconiosis contributed to his 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). If the fifteen-year presumption of

burden to rebut the presumption of timeliness, the company's failure to sufficiently develop the required evidence is its own fault.

entitlement is invoked, the first and third criteria are rebuttably presumed, and the second criterion is met by the simple fact that the miner had to prove total respiratory disability to invoke the fifteen-year presumption in the first place. To rebut the presumption, the liable party must either prove that the miner does not suffer from clinical and legal pneumoconiosis, or that the miner's pneumoconiosis played no part in his total respiratory disability. 30 U.S.C. § 921(c)(4); 20 C.F.R. 718.305(a); *see generally West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015).

This Court's "longstanding precedent" holds that, if the ALJ finds the existence of pneumoconiosis, then, when considering a doctor's opinion concerning the cause of the miner's respiratory condition, the ALJ may discredit a doctor who mistakenly assumes the miner did not suffer from pneumoconiosis. *Hobet Mining LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (reaffirming the "common-sense rule" that "opinions that erroneously fail to diagnose pneumoconiosis may 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).

While conceding the correctness of this precedent when an ALJ "affirmatively" finds pneumoconiosis present, the company nonetheless contends

an ALJ cannot similarly discredit a doctor when the disease is established by presumption. OB 24-25. The Sixth Circuit, however, has expressly rejected this precise argument. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). In *Big Branch*, the court explained that, “[w]hile the fifteen-year presumption did at first allow the ALJ to presume pneumoconiosis, the [coal mine operator] . . . fought vigorously to rebut the presumption, while [the miner] strived to buttress it.” *Id.* The coal mine operator, however, failed in meeting its burden of disproving the existence of legal pneumoconiosis, and thus, the “ALJ determined that it was at least as likely as not that [the miner] suffered from legal pneumoconiosis.” *Id.* The court thus concluded that “the ALJ did not err in using this determination to discredit the opinions of [the operators’ physicians], neither of whom diagnosed legal pneumoconiosis.”⁷ *Id.*

In the instant case, as in *Big Branch*, Westmoreland Coal has “fought vigorously” to dispute the presumption of pneumoconiosis. Indeed, it still claims

⁷ The suggestion in the court’s analysis (which it attributes to the ALJ) that the unrebutted presumed fact of pneumoconiosis merely means that the miner is “as likely as not” to suffer from the disease is fundamentally incorrect. It is contrary to the very definition of the term “rebuttable presumption”: (“[A]n 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* . . .”). Black’s Law Dictionary 1306 (deluxe 9th ed. 2009). And an unrebutted BLBA presumption that establishes only a fifty percent likelihood would not satisfy a claimant’s burden of proof under the Administrative Procedure Act, and thus could not sustain an award of benefits. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (holding the claimant loses when the evidence is equally balanced).

that the ALJ erred in finding the presumption of pneumoconiosis un rebutted. OB 15-19. And here, as in *Big Branch*, the company failed to meet its burden of disproving the existence of the disease. It makes no difference that the company came close to disproving the disease (the ALJ found the evidence in equipoise and inconclusive); the presumed fact was un rebutted and thus establishes the presence of the disease. *See supra* n.7. Indeed, allowing an ALJ to simply disregard a doctor’s failure to diagnose (or take into account) the un rebutted presumed fact of pneumoconiosis in the disability causation analysis vitiates the very operation of the presumption: it would let in through the back door of disability causation a no-pneumoconiosis diagnosis that had previously been turned away at the front door.⁸

Ultimately, the company’s argument understates the role of presumptions under the Act. *See generally Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1 (1976). The regulation at 20 C.F.R. § 718.202, headed “[d]etermining the existence of pneumoconiosis,” specifically provides that “[a] *finding of* the existence of pneumoconiosis made be made” by invocation of the fifteen-year presumption, 20 C.F.R. § 718.202(a)(3) (emphasis added). While Westmoreland Coal would prefer

⁸ The company’s reliance on *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002); and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995) is misplaced. *See* OB 24-25. *Scott* supports the proposition that an ALJ may not credit doctors’ opinions on disability causation when they conflict with the ALJ’s finding regarding the presence of the disease, and *Hobbs* is distinguishable because there was no direct conflict between the ALJ’s findings regarding the presence of the disease and the doctors’ opinions he credited on disability causation. Here, there is a direct conflict.

to relegate presumed facts to a lesser category, neither the Act, nor the regulations, nor common sense allow it.

CONCLUSION

In view of the foregoing, the Court should affirm the Board's finding that the miner's claim was timely, and the ALJ's discrediting of those doctors who mistakenly assumed the miner did not suffer from pneumoconiosis.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 5533 words, as counted by Microsoft Office Word 2010. A virus detection program (VirusScan Enterprise and AntiSpyware Enterprise, 8.8, upgraded Jan. 19, 2015), has been run on the file containing the electronic version of the brief, and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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