**No. 17-3994**

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

**ISLAND CREEK COAL COMPANY,**
**Petitioner**

**v.**

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

**Respondents**

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

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# BRIEF FOR THE FEDERAL RESPONDENT

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**KATE O'SCANNLAIN**
Solicitor of Labor

**MAIA S. FISHER**
Associate Solicitor

**GARY K. STEARMAN**
Counsel for Appellate Litigation

**ANN MARIE SCARPINO**
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2119, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5651

Attorneys for the Director, OWCP

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## STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is unnecessary in this case, because "the facts and legal arguments are adequately presented in the briefs and record." Fed. R. App. P. 34(a)(2)(C).

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

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**BRIEF FOR THE FEDERAL RESPONDENT**

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## STATEMENT OF JURISDICTION

This case involves a claim by Linda Hunt (the claimant), widow of Cecal Hunt (the miner), for survivor's benefits pursuant to the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944. On June 10, 2016, Administrative Law Judge Steven D. Bell (the ALJ) issued a Decision and Order awarding benefits. Joint Appendix (JA) 223-256. Island Creek Coal Company (Island Creek or employer) timely appealed this decision to the Benefits Review Board (the Board) on July 6, 2016, 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 26, 2017, the Board affirmed the award. JA 257-265. Island Creek timely petitioned this Court for review of the Board's decision on September 20, 2017. JA 266-270. The Court has jurisdiction over the 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 the appeals in which the injury occurred. The injury – the miner's occupational exposure to coal-mine dust – occurred in Kentucky, within this Court's territorial jurisdiction.

## STATEMENT OF THE ISSUE

The surviving spouse of a totally disabled miner who worked for at least fifteen years in underground mines is entitled to invoke the 30 U.S.C. § 921(c)(4) presumption that the miner's death was due to pneumoconiosis. The employer may rebut the presumption by establishing that (1) the miner did not suffer from pneumoconiosis, or (2) pneumoconiosis played no part in causing the miner's death ("the rule-out standard").

Island Creek concedes that the claimant is entitled to the Section 921(c)(4) presumption that the miner's death was due to pneumoconiosis. It also concedes

that the miner suffered from both clinical and legal pneumoconiosis, thereby precluding rebuttal under prong one.

Island Creek challenges only the ALJ's finding that it failed to rule out pneumoconiosis as a cause of the miner's death. It argues that the ALJ erred in discrediting its expert medical opinions, which it claims establish that the miner's death was due solely to lung cancer.

The issue on appeal is whether substantial evidence supports the ALJ's discrediting of Island Creek's medical opinions.

## STATEMENT OF FACTS

### A. Statutory and regulatory background

#### 1. The Black Lung Benefits Act

The BLBA provides for an award of benefits to the surviving spouse of a miner whose death was due to pneumoconiosis. 20 C.F.R. §§ 718.205; 725.212. 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); 20 C.F.R. § 718.201(a). 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). It includes the disease medical

professionals refer to as "coal workers' pneumoconiosis" or "CWP," and is typically diagnosed by chest x-ray, biopsy, or autopsy, 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). In contrast, *legal pneumoconiosis* 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). *See e.g. Sunny Ridge Min. Co., Inc. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014).

**2. The Section 921(c)(4) presumption**

One way for a surviving spouse to obtain benefits under the BLBA is to prove that (1) the miner suffered from pneumoconiosis, and (2) pneumoconiosis caused or hastened the miner's death.[1] 20 C.F.R. § 718.205. A claimant bears the ultimate burden of proof on both issues, 20 C.F.R. § 725.102, but may be aided by certain statutory presumptions.

One such presumption, 30 U.S.C. § 921(c)(4), is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in aboveground mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from "a totally disabling respiratory or

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[1] A surviving spouse may also be entitled to automatic derivative benefits under 30 U.S.C. § 932(*l*) when the miner has been awarded benefits on a claim filed during his lifetime. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013).

To be eligible to receive benefits under either method, the surviving spouse must demonstrate that she has not remarried and was dependent upon the miner at the time of his death. 20 C.F.R. § 725.212(a). Island Creek does not dispute that Mrs. Hunt satisfies those requirements.

pulmonary impairment[.]" 30 U.S.C. § 921(c)(4); *see also* 20 C.F.R. § 718.305(b). If those criteria are met, it is presumed that the miner suffered from pneumoconiosis and that his death was due to the disease. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(c)(2).

An operator can rebut the presumption by demonstrating that the miner did not have pneumoconiosis (both clinical and legal) or that "no part of the miner's death was caused by pneumoconiosis [ ]. " 20 C.F.R. § 718.305(d)(2). This second rebuttal prong requires the operator to "rule out" pneumoconiosis as a cause of the miner's death. *Big Branch Res. Inc. v. Ogle,* 737 F.3d 1063, 1070-71 (6th Cir. 2013) (to disprove presumption, employer must rule out coal mine employment as cause of disability); *see Consolidation Coal Co. v. Director, OWCP,* 864 F.3d 1142 (10th Cir. 2017) (rule out standard applies to second method of rebutting death due to pneumoconiosis).

**B. Summary of relevant evidence**

Summarized below are the autopsy and medical reports relevant to whether pneumoconiosis played a part in causing the miner's death.

<u>Autopsy Reports</u>

<u>Dr. Dennis</u>

Dr. Dennis conducted the autopsy of the miner and issued a report on March 11, 2010. JA 17-19. His gross examination of the left lung revealed black pigment

deposition, emphysematous changes, including "prevalent" panlobular and panacinar emphysema, fibrosis, and macules greater than one centimeter.[2] JA 17. The right lung showed a "similar composition," along with portions of a tumor scattered throughout the entire lung." He estimated the tumor as occupying 2/3 of the right lung. *Id*.

The microscopic examination confirmed these findings. The left lung showed a "severe destructive emphysematous process" (section A), bullous emphysema (section B), "severe emphysema" and emphysematous changes moderate to severe (sections C, E, F). JA 18. Coal dust macules ranging from .5-1.5 centimeters were also found. *Id*. The right lung variously demonstrated small cell carcinoma (sections G-J).

Among other findings, Dr. Dennis reported coal workers pneumoconiosis with moderate degrees of progressive massive fibrosis and "emphysema change[s] moderate to severe with congestion and severe emphysema." JA 19. The doctor

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[2] *Emphysema* is 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. . . The small airways (bronchioles) of the lungs contain smooth muscles and are normally held open by their attachments to alveolar walls. In emphysema, the destruction of alveolar wall attachments results in collapse of the bronchioles when a person exhales, causing airflow obstruction that is permanent and irreversible." Merck Manual, Consumer Version, located at: https://www.merckmanuals.com/home/lung-and-airway-disorders/chronic-obstructive-pulmonary-disease-copd/chronic-obstructive-pulmonary-disease-chronic-bronchitis-emphysema#v725240.

also noted the presence of small cell carcinoma comprising approximately 30% of the lungs. *Id*. (Only 2/3 of one lung – the right – showed cancer.)

Dr. Oesterling

Dr. Oesterling issued a written report on June 25, 2012 after reviewing Dr. Dennis' slides and autopsy report, the miner's death certificate and employment history, and the initial claim filing. JA 86-90. He concluded that the slides showed "very aggressive small cell carcinoma," and that this was the "primary process" that caused the miner's death. JA 89. Dr. Oesterling also found evidence of "moderate macular, predominantly pleural based coal workers' pneumoconiosis," and smoking-related "respiratory bronchiolitis with associated interstitial lung disease." *Id.*

Dr. Oesterling agreed with Dr. Dennis that the miner suffered from "prominent" emphysema, including panlobular emphysema. Dr. Oesterling stated that the emphysema was "the primary cause of any lifetime respiratory distress" and observed that the emphysema along with respiratory bronchiolitis caused "marked destruction" of the miner's lung. JA 88-89. Referring to the Surgeon General's "web page," Dr. Oesterling asserted cigarette smoke was the cause of the miner's emphysema. JA 88-89. Dr. Oesterling concluded that the miner's death was due to cancer, that his death was "unrelated to the relatively modest changes

due to coal dust," and that the miner "did not die due to coal dust inhalation." JA 89-90.

Dr. Bush

Like Dr. Oesterling, Dr. Bush reviewed Dr. Dennis' slides and autopsy report, the miner's death certificate and employment history, and the initial claim filing. He issued a written report dated July 19, 2012. JA 91-93. He diagnosed a "mild degree of simple coal worker's pneumoconiosis," possible interstitial lung disease, and "small cell carcinoma of the lung with tumor necrosis" that was not associated with dust pigment. JA 92. He also noted severe lung disease consisting of "fibrotic changes with distortion of the architecture including remodeling of the airways and scar emphysema." *Id.*

Dr. Bush acknowledged that the miner "appears to have been totally disabled due to severe lung disease." JA 92. But he was unwilling without more information to formulate a definitive diagnosis of this lung disease, even though he also observed "mild to moderate dust deposits" in the region where the disease was present. *Id*. Notwithstanding his uncertainty, Dr. Bush claimed "coal worker's pneumoconiosis or coal dust exposure did not contribute to pulmonary or respiratory impairment or disability" or to the miner's death. JA 92-93. Dr. Bush concluded that lung cancer "undoubtedly" played a "significant role" in "causing

death and disability," but that "the diagnosis of metastatic disease [was] beyond the scope of limited autopsy and clinical information. JA 93.

Medical Reports

Dr. Jarboe

Dr. Jarboe reviewed the miner's employment history, treatment records, Dr. Dennis' autopsy report and a pathology review by Dr. Caffrey, and issued a written report on March 27, 2011.[3] JA 51-65. He opined that the miner did not suffer from clinical pneumoconiosis because the x-rays and CT-scans were negative and Dr. Caffrey did not diagnose it. JA 60-61. Regarding legal pneumoconiosis, he acknowledged the presence of a respiratory impairment "in the form of a moderate degree of airflow obstruction" and "significant emphysema." JA 63. But he believed the emphysema was due to cigarette smoking, not coal dust exposure. JA 61-62. He reasoned that the miner's FEV1/FVC ratio was reduced (the "hallmark" of a cigarette smoking abnormality), and second, that coal-dust related emphysema is associated with clinical pneumoconiosis, which was absent here. JA 61-62. Dr. Jarboe accordingly found no disabling pulmonary condition by coal mine dust exposure. Oddly, the report did not address the cause of the miner's death.

Dr. Jarboe was deposed on March 10, 2016. JA 139-170. Based on Drs. Oesterling's and Bush's autopsy reports, he now believed the miner suffered from

[3] Island Creek did not submit Dr. Caffrey's report into evidence.

clinical pneumoconiosis. JA 153, 159-60. He also conceded that the miner's lung disease was "severe" (not just moderate). JA 163. He continued to maintain, however, that the miner's emphysema was due to smoking, and therefore, the miner did not have legal pneumoconiosis. JA 158-59. With regard to death causation, Dr. Jarboe testified that the miner's lung cancer was "100 percent the cause of his death" and that "pneumoconiosis didn't kill him or contribute to his death." JA 160-161.

Dr. Castle

Dr. Castle reviewed the miner's employment history, treatment records, and the autopsy reports of Drs. Dennis, Oesterling and Bush, and issued a written report on August 15, 2013. JA 93-114. He diagnosed clinical pneumoconiosis based on the pathology evidence, JA 114, and a non-disabling, "moderate obstructive airways disease" (chronic bronchitis /emphysema). JA 112. Like Dr. Jarboe, he thought the miner's reduced FEV1/FVC ratio proved that the obstructive airway disease was caused by tobacco smoking. JA 112-13. He further blamed tobacco smoke on causing the "pulmonary disease" of "small cell lung cancer," whose complications and metastases led to the miner's death. JA 111, 114. He concluded that the miner would have died regardless of whether he had pneumoconiosis. *Id.*

Dr. Castle was deposed on November 12, 2014. JA 115-138. He testified that in order to address whether pneumoconiosis was a factor in causing death, "you have to look at all the information . . . [including] the historical information, as well as the physical examination, the X-rays, the physiologic testing, blood gases, and then biopsy material and/or autopsy material if indeed you have that." [4] JA 123-24. He reiterated his prior opinion that the miner's minimal clinical pneumoconiosis played no role in causing or hastening his death. JA 134-135. Dr. Castle did not revisit the issue of legal pneumoconiosis in his deposition.

### C. Procedural history

The miner passed away on March 10, 2010. JA 14. Mrs. Hunt filed a claim for survivor's benefits on October 6, 2010. JA 1-2. The district director issued a proposed decision awarding benefits, and Island Creek requested a hearing before an administrative law judge. JA 224-25.

#### 1. The ALJ awards benefits.

After invoking the Section 921(c)(4) presumption, the ALJ considered whether Island Creek established rebuttal by showing that the miner did not suffer from pneumoconiosis or that no part of his death was due to pneumoconiosis. JA 249-250. He concluded that Island Creek failed to establish either rebuttal method.

[4] Drs. Oesterling and Bush did not review the miner's medical records.

Based on the parties' stipulation and medical evidence, the ALJ found clinical pneumoconiosis present. JA 250.

As for legal pneumoconiosis, he recognized that emphysema and chronic obstructive pulmonary disease "may fall under the regulatory definition of pneumoconiosis, if they are related to coal dust exposure," JA 250, and that Dr. Castle diagnosed "moderate airway obstruction," *id.*, while Dr. Jarboe found emphysema. JA 251-52. Neither doctor diagnosed legal pneumoconiosis, the ALJ observed, because each attributed the lung disease to cigarette smoke, not coal mine dust. JA 250-51.

The ALJ, however, found the doctors' reasons for discounting coal mine dust not credible. Both doctors relied on the miner's reduced FEV1/FVC ratio as evidence of a smoking-related impairment, but the ALJ noted this view was contrary to "the official DOL position, as stated in the preamble," and the Board had upheld an ALJ rejection of expert opinions on this basis.[5] JA 250-52. The ALJ further discredited Dr. Jarboe's inconsistent positions: his original report "relied heavily on the absence of clinical pneumoconiosis" to assert "coal mine dust did not contribute to the [m]iner's emphysema," but the doctor's position did not change at deposition even though he now conceded that the miner suffered from clinical pneumoconiosis. JA 252. The ALJ concluded that Island Creek

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[5] *Accord Cent. Ohio Coal Co. v. Director, OWCP,* 762 F.3d 483, 491-92(6th Cir. 2014); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 672 (4th Cir. 2017).

failed to prove the miner's emphysema was due to smoking, and thus had failed to disprove the presumed existence of legal pneumoconiosis. JA 253.

The ALJ then found that Island Creek failed to rule out pneumoconiosis as a cause of the miner's death. Citing among other cases, *Big Branch Res. Inc. v. Ogle,* 737 F.3d 1063 (6th Cir. 2013) and *Island Creek Ky. Mining v. Ramage,* 737 F.3d 1050 (6th Cir. 2013), the ALJ rejected the opinions of Drs. Castle and Jarboe that pneumoconiosis did not cause the miner's death because they failed to diagnose legal pneumoconiosis contrary to his own determination. JA 253. The ALJ observed that their "proffered rationales focus exclusively on [the] contribution from *clinical* pneumoconiosis, to the exclusion of the [m]iner's legal pneumoconiosis," as evidenced by their reliance on the "minimal nature of the pathological changes of clinical pneumoconiosis" and their neglect of the miner's emphysema. JA 254. He also found the doctors' opinions deficient because both physicians relied primarily on the "mere existence of lung cancer" to eliminate pneumoconiosis as a cause of the miner's death, and did not consider that cancer and pneumoconiosis are not necessarily "mutually exclusive" processes. JA 253-54.

The ALJ similarly concluded that although the pathology evidence established lung cancer as the primary cause of death (JA 254), the reports failed to demonstrate that pneumoconiosis played no part whatsoever. In particular, the

ALJ stressed that Drs. Oesterling and Bush acknowledged the presence of emphysema, *i.e.* legal pneumoconiosis, and clinical pneumoconiosis, but neither adequately explained a "specific physiological process" by which lung cancer caused the miner's death exclusive of any contribution by clinical or legal pneumoconiosis. JA 254-255. He found the lack of such an explanation "noticeably absent," particularly where the miner died a "pulmonary death" and "suffered a totally disabling respiratory impairment during his lifetime." JA 255.

Having found that Island Creek failed to satisfy its rebuttal burden, the ALJ awarded benefits to the claimant.

**2. The Board affirms the award of benefits.**

In a 2-1 decision, the Board affirmed the ALJ's decision. JA 257-263. It determined that the ALJ "rationally discounted" the opinions of Drs. Castle and Jarboe on death causation due to their failure to diagnose legal pneumoconiosis. JA 262 (citing *Big Branch Resources* and *Island Creek v. Ramage*). It further ruled that the ALJ permissibly found their opinions unpersuasive because both physicians seemed to assume that the mere existence of lung cancer excluded any contribution to death by pneumoconiosis. *Id.* Finally, the Board found that the ALJ "permissibly determined that neither [Dr. Oesterling nor Dr. Bush] adequately explained why pneumoconiosis did not contribute in some way to the miner's

death" because neither identified a specific cancer-related physiological process that excluded pneumoconiosis . JA 263.

The partial dissent agreed with the majority that the ALJ properly discredited the opinions of Drs. Castle and Jarboe. JA 264. It diverged, however, in the ALJ's treatment of the pathology reports, arguing the ALJ should have considered two comments that "arguably explain" how the doctors ruled out a coal dust contribution in death. JA 264-65.

## SUMMARY OF THE ARGUMENT

The Court should affirm the decision below. Although lung cancer was the primary cause of the miner's death, Island Creek's medical experts failed to adequately explain how lung cancer caused the miner's death without any contribution from the miner's severe emphysema, which was determined to be legal pneumoconiosis. Because they believed (incorrectly) that the emphysema was due to tobacco smoke, employer's experts did not directly address whether legal pneumoconiosis played a part in death. Rather, as the ALJ found, employer's experts merely relied on the existence of cancer and minimal *clinical* pneumoconiosis to exclude pneumoconiosis as a contributing cause.

In his role as fact finder, the ALJ made a credibility determination and permissibly discredited Island Creek's expert opinions as inadequately explained and reasoned. Accordingly, Island Creek failed to rebut the presumption that the

miner's death was due to pneumoconiosis. The award of BLBA survivor benefits to Mrs. Hunt must stand.

## ARGUMENT

### A. Standard of review

This Court reviews the ALJ's decision, despite the fact that the appeal comes from the Benefits Review Board. *Cornett v. Benham Coal, Inc.* 227 F.3d 569, 575 (6th Cir. 2000); *Zimmerman v. Director, OWCP,* 871 F.2d 564, 567 (6th Cir. 1989). The Court will affirm the ALJ's decision so long as it is "supported by substantial evidence and is consistent with applicable law." *Youghiogheny & Ohio Coal Co. v. Webb,* 49 F.3d 244, 246 (6th Cir. 1995). "Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Cumberland River Coal Co. v Banks,* 690 F.3d 477, 483 (6th Cir. 2012) (internal quotation marks and citations omitted). If the ALJ's decision is supported by substantial evidence, the Court will not reverse, "even if the facts permit an alternative conclusion." *Youghiogheny & Ohio Coal,* 49 F.3d at 246; *see also Morrison v. Tennessee Coal Co.,* 644 F.3d 473, 478 (6th Cir. 2011).

The Court defers to an ALJ's determinations as to the credibility and weight to be afforded various medical opinions. *Big Branch Res.*, 737 F.3d at 1072. This deference extends to whether a medical opinion is sufficiently reasoned or explained. *Id.; Risher v. OWCP,* 940 F.2d 327, 331 (8th Cir.1991) ("An ALJ may

disregard a medical opinion that does not adequately explain the basis for its conclusion.").

**B. Substantial evidence supports the ALJ's finding that Island Creek did not credibly rule out pneumoconiosis as a cause of the miner's death.**

The ALJ found that Island Creek did not meet its rebuttal burden because none of its experts adequately explained why pneumoconiosis did not contribute to the miner's death. Its doctors did not recognize the existence of legal pneumoconiosis in the first instance. And they failed to identify a specific physiological process in which lung cancer caused death with no contribution whatsoever from the miner's severe, coal-dust related, emphysema.[6] The ALJ's credibility finding was entirely reasonable, supported by substantial evidence, and should be affirmed.

By establishing that the miner had a total respiratory disability and worked for more than fifteen years underground, the claimant invoked the Section

[6] There can be no question that the miner's emphysema constituted a serious pulmonary condition. He was regularly treated for "moderately severe obstruction disease" for at least ten years before he died. JA 54. Dr. Dennis reported "emphysema change[s] moderate to severe with congestion and severe emphysema." JA 19. Dr. Oesterling described the emphysema as "prominent" and stated it would have been "the primary cause of any lifetime respiratory distress." JA 89. Dr. Bush noted severe lung disease consisting of "fibrotic changes with distortion of the architecture including remodeling of the airways and scar emphysema." JA 92. Dr. Jarboe found "significant emphysema," JA 63, and conceded at deposition that the miner's lung disease was "severe" (not just moderate). JA 163. Finally, Dr. Castle diagnosed "moderate obstructive airways disease" (chronic bronchitis /emphysema). JA 112.

921(c)(4) presumption that the miner suffered from pneumoconiosis, and that his death was due to the disease. Death due to pneumoconiosis can be established in three separate ways: when pneumoconiosis (1) causes the miner's death; (2) is a substantially contributing cause or factor leading to death by hastening death; or (3) causes complications leading to death. 20 C.F.R. § 718.205. Each method is presumed following invocation of the Section 921(c)(4) presumption. Thus, "when the burden is on the employer to disprove [the] presumption," it must convincingly establish, at a minimum, that none of these presumed facts exist. *See Big Branch Resources,* 737 F.3d at 1071 (the "rule out" standard applicable to employers in disproving presumption of total disability and the "contributing cause" standard applicable to claimants in establishing disability due to pneumoconiosis are "two sides of the same coin").

Requiring a reasoned medical opinion explicitly ruling out any impact from pneumoconiosis is particularly warranted where, as here, the "primary illness" (lung cancer) and legal pneumoconiosis (severe emphysema) are both pulmonary diseases and bear a close relationship.[7] *See Conley v. Nat'l Mines Corp.*, 595 F.3d

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[7] Island Creek complains that the ALJ erred in characterizing the miner's death as a "pulmonary death." OB 23. It is undisputed that the primary cause of death was *lung* cancer, and *pulmonary* means "[o]f, pertaining to, situated in, or connected with the lungs." *The New Shorter Oxford English Dictionary* (Thumb Index Ed.) at 2411. Moreover, Island Creek's own expert identified the miner's lung cancer as a "pulmonary disease." JA 111. And finally, Island Creek retained two

297, 304 (6th Cir. 2010) (explaining that "[m]ore precision may legitimately be expected when it comes to the relationship of legal pneumoconiosis to some primary illnesses than to others"); *see also* id. at 303-04 (stating that the hastening death standard in a legal pneumoconiosis case requires proof of a "specifically defined process that reduces the miner's life by an estimable time"); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 518 (6th Cir. 2003) (same).

The Fourth Circuit has likewise required, in the *disability* causation context, a complete explanation that specifically refutes any possible role or contribution from pneumoconiosis to establish the rule-out standard:

> an operator opposing an award of black lung benefits affirmatively must establish that the miner's disability is attributable exclusively to a cause or causes other than pneumoconiosis. Thus, to make the required showing when a miner has qualified for the statutory presumption, a medical expert testifying in opposition to an award of benefits must consider pneumoconiosis together with all other possible causes, and adequately explain *why* pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability.

*West Virginia CWP Fund v. Bender* [*Bender*], 782 F.3d 129, 144 (4th Cir. 2015) (internal citation and parenthetical omitted).

The ALJ undertook the analysis called for not only by the rule-out standard but also by his duty, as fact finder, to evaluate the credibility of the medical evidence. He carefully examined the medical reports to determine if they

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*pulmonologists* (Drs. Castle and Jarboe) to provide expert opinions. The ALJ's description of the miner's death as "pulmonary" is accurate.

adequately explained why the miner's legal pneumoconiosis, in the form of coal-dust related emphysema, played no part in death. His determination that they came up short, given the severity of the miner's emphysema and the fact that his death was pulmonary in nature, was entirely reasonable.

The ALJ correctly found Drs. Jarboe and Castle's failure to diagnose legal pneumoconiosis in the first instance "significantly discrediting." JA 253; *see Adams v. Director, OWCP*, 886 F.2d 818, 826 (1989) (upholding ALJ's discrediting of doctor's disability causation opinion that was "rendered under mistaken belief that [miner] was not suffering from pneumoconiosis"); *Big Branch Res.,* 737 F.3d at 1069 (evidence that did not rebut presumption that miner's pulmonary disease was due to coal dust exposure could not rebut presumption that pulmonary disability was due to pneumoconiosis). Because neither doctor believed the emphysema was caused by coal mine dust, they did not explain why the lung cancer and emphysema did not, or could not, work in concert.[8] JA 254; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017) (ALJ properly discredited doctors' opinions that failed to address why coal dust

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[8] Island Creek complains that the ALJ "reached his own medical finding that the processes of legal pneumoconiosis and lung cancer are not mutually exclusive." OB 24. Island Creek, however, ignores the force of invocation of the Section 921(c)(4) presumption. Until disproved, it is presumed that the legal pneumoconiosis contributed to death and thus worked with the lung cancer to cause death here. It was Island Creek's burden to prove the processes were "mutually exclusive."

exposure could not have been an *additional* cause of disability) (emphasis in original). Instead, the doctors improperly focused on the one disease they attributed to coal mine employment – clinical pneumoconiosis. JA 254. The ALJ thus reasonably found Drs. Jarboe's and Castle's opinions inadequately explained and reasoned, and he permissibly discredited them. *See Big Branch Res.*, 737 F.3d at 1074 (upholding ALJ's rejection of doctor's opinion for lacking adequate explanation); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989) (ALJ may discount physician's opinion that is inadequately explained); *see also Helen Mining Co. v. Elliott*, 859 F.3d 226, 239 (3d Cir. 2017) (ALJ may reject medical expert opinions that are inadequately explained or insufficiently reasoned); *Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015) (ALJ may reject opinion where causation conclusions lack explanation).

Island Creek faces the same difficulties with Drs. Oesterling's and Bush's pathology reports.[9] The ALJ faulted the pathologists for failing to find legal pneumoconiosis (despite diagnosing severe emphysema), and for not "outlin[ing] a specific physiological process" caused by the lung cancer that would exclude any

[9] Dr. Castle – Island Creek's own expert – undermined its pathologists' death causation opinions. He testified that it was necessary to review the miner's lifetime medical records (among other information) to render an accurate determination on the cause of death. JA 123-24. The pathologists, however, were presented with very limited information (the autopsy slides and report, the miner's death certificate and employment history, and the initial claim filing).

contribution from legal pneumoconiosis." A.255. The absence of such an explanation was glaring, particularly because the miner suffered a pulmonary death. *Id*. The ALJ thus permissibly rejected the pathologists' opinions as inadequately reasoned and explained.[10] *Id*.; *see supra* 20-21 (case cites).

Island Creek attempts to "cobble[] together various statements by the physicians to argue they have" adequately explained their views. *Big Branch Res.*, 737 F.3d at 1074. But "'[d]eterminations of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of the fact.'" *Id*. quoting *Moseley v. Peabody Coal Co.,* 737 F.2d 357, 360 (6th Cir.1985). This Court will not second guess or disturb reasonable findings, and it is certainly the case here that the ALJ provided valid reasons for being unpersuaded by Island Creek's experts.[11]

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[10] In calling for reconsideration of the pathologists' opinions, the Board dissenter did not recognize that the doctors, because they did not find legal pneumoconiosis, addressed the impact of clinical pneumoconiosis only. Even if their opinions could be read more broadly, they were deficient in not explaining *why* the pneumoconiosis was too limited to have an impact. A.263 n.12 (Board majority decision).

[11] Island Creek appears to take the position that the ALJ was required to find the presumption rebutted because all its experts agreed that lung cancer caused the miner's death, and there was no contrary evidence. OB 17-18 (citing *Jericol Mining Inc. v. Napier,* 301 F.3d 703 (6th Cir. 2002). But this position misconstrues *Jericol Mining* and ignores the ALJ's role as the fact-finder to determine the credibility of the medical opinion evidence based on the validity of its reasoning and supporting documentation. *Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983) ("the mere fact that an opinion is asserted to be based

Finally, Island Creek spills much ink emphasizing the certainty of its doctors' conclusions that the miner's lung cancer caused his death. OB 24-27. But Island Creek misses the point. The ALJ found the doctors' underlying explanations inadequate.

**CONCLUSION**

The Court should affirm the decision below.

Respectfully submitted,

KATE O'SCANNLAIN
Solicitor of Labor

MAIA FISHER
Associate Solicitor

GARY STEARMAN
Counsel for Appellate Litigation

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5651

Attorneys for the Director, Office
of Workers' Compensation Programs

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upon medical studies cannot by itself establish as a matter of law that it is documented and reasoned"). Moreover, Island Creek bore the burden of proffering credible evidence to disprove the presumption. The ALJ found it simply failed to do that.

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 5,307 words as counted by Microsoft Office Word 2010.

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
scarpino.ann@dol.gov

## CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, the Director's brief was served electronically using the Court's CM/ECF system on

William S. Mattingly, Esq.
Jackson Kelly PLLC
175 E. Main Street, Suite 500
Lexington, KY 40507
W.MATTINGLY@Jacksonkelly.com

Evan B. Smith, Esq.
Appalachian Citizens' Law Center, Inc.
317 Main Street
Whitesburg, KY 41858
evan@appalachinalawcenter.org

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
scarpino.ann@dol.gov