No. 14-1371

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARPENTERTOWN COAL AND COKE COMPANY

and

BIRMINGHAM FIRE INSURANCE COMPANY/BROADSPIRE,

Petitioners

v.

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

and

PATRICK JENKINS,

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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v.

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

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PATRICK JENKINS,

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

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal involves a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Patrick Jenkins,

a former coal miner.[1] A Department of Labor (DOL) administrative law judge (ALJ) awarded his claim, and the Benefits Review Board affirmed. Carpentertown Coal and Coke Company, Mr. Jenkins's former employer, has petitioned the Court to review the Board's decision. The Director, Office of Workers' Compensation Programs (OWCP), responds in support of the Board's decision.[2]

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over Carpentertown's petition for review under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated into the BLBA by 30 U.S.C. § 932(a). Carpentertown petitioned for review of the Board's December 19,

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[1] Because Mr. Jenkins filed his claim before 2005, the amendments to the BLBA contained in Section 1556 of the Affordable Care Act do not apply to this case. *See* Pub. L. No. 111-148, § 1556(c) (2010); *B & G Constr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 243-44 & n. 10 (3d Cir. 2011) (discussing changes to BLBA made by Section 1556).

[2] The Black Lung Disability Trust Fund has paid benefits to Mr. Jenkins on an interim basis. *See* 20 C.F.R. § 725.522(a). If the Court affirms his award, Carpentertown will have to reimburse the Trust Fund for the payments made, *see* 20 C.F.R. § 725.602, in addition to paying continuing benefits to Mr. Jenkins.

2013, decision on February 18, 2014, within the 60-day limit prescribed by Section 21(c).[3] Moreover, the "injury" as contemplated by Section 21(c)—Mr. Jenkins's exposure to coal-mine dust—occurred in Pennsylvania, within this Court's territorial jurisdiction.

The Board had jurisdiction to review both the ALJ's original decision on Mr. Jenkins's claim and her decision on remand under Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The ALJ issued her original decision on July 26, 2007. Carpentertown filed a notice of appeal with the Board on August 22, 2007, within the 30-day period prescribed by Section 21(a) of the Longshore Act, 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a). After the Board remanded the case, the ALJ issued a decision on remand on October 19, 2012. Carpentertown filed a notice of appeal on

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[3] February 17, 2014, the 60th day after December 19, was a holiday. Thus, the 60-day appeal period extended to February 18, the next business day. *See* Fed. R. App. P. 26(a)(1).

November 19, 2012, within the 30-day period prescribed under Section 21(a).[4]

STATEMENT OF THE ISSUES

It is uncontested that Mr. Jenkins suffers from chronic obstructive pulmonary disease (COPD),[5] and that he is totally disabled as result. The parties still dispute whether his COPD arose, in part, out of coal-mine employment (*i.e.*, whether his COPD is legal pneumoconiosis) and, relatedly, whether his total disability is due to legal pneumoconiosis. The particular questions at issue in this appeal are:

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[4] The 30-day appeal period from the ALJ's 2012 decision did not commence to run until the ALJ's decision was filed with OWCP on November 1, 2012. *See* 20 C.F.R. § 725.479(a); *Trent Coal, Inc., v. Day*, 739 F.2d 116, 117-18 (3d Cir. 1984). Carpentertown's notice of appeal was filed within 30 days of that date.

[5] COPD is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011). It encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000). Both cigarette smoking and dust exposure during coal-mine employment can cause COPD. *See* 65 Fed. Reg. 79939-43 (Dec. 20, 2000) (summarizing medical and scientific evidence of link between COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as cause of COPD).

1. Did the ALJ err in consulting the preamble to DOL's 2001 regulations (65. Fed. Reg. 79920-80107 (Dec. 20, 2000)) in evaluating the medical-opinion evidence with respect to legal pneumoconiosis and disability causation?

2. Apart from the preamble issue, are the ALJ's findings that Mr. Jenkins established both legal pneumoconiosis and disability causation supported by substantial evidence?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The BLBA provides benefits to coal miners who are totally disabled due to pneumoconiosis. 30 U.S.C. § 901(a). To obtain benefits, a miner must prove that he has pneumoconiosis arising out of his coal-mine employment, and that he has a totally disabling pulmonary impairment due, at least in part, to pneumoconiosis. 20 C.F.R. §§ 718.202-.204; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23 (3d Cir. 1997).

"Pneumoconiosis" includes both "clinical pneumoconiosis" (diseases commonly recognized as pneumoconiosis by the medical community) and the broader category of "legal pneumoconiosis" (any chronic lung disease caused by coal-mine-dust inhalation,

including "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment"). 20 C.F.R. § 718.201(a)(1), (2); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 312 (3d Cir. 1995). The central issue in this case is whether Mr. Jenkins's COPD arose, at least in part, out of his coal-mine employment—*i.e.*, whether his COPD falls within the definition of legal pneumoconiosis.[6]

The current regulation defining legal pneumoconiosis, 20 C.F.R. § 718.201(a)(2), was promulgated on December 20, 2000. 65 Fed. Reg. 79920 (Dec. 20, 2000). When the regulation was promulgated, DOL also published a regulatory preamble, which describes the development of, and bases for, the rule. 65 Fed. Reg. 79937-45. The preamble indicates that legal pneumoconiosis may exist even when a miner's x-rays do not show the presence of

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[6] There is no question that Mr. Jenkins has disabling COPD. *See* Appendix at 115 (Carpentertown conceding total disability at ALJ hearing), 74, n. 3 (Board affirming total-disability finding as unchallenged). This case turns on whether his COPD arose out of coal-mine employment. That inquiry will resolve both whether he has legal pneumoconiosis under 20 C.F.R. § 718.202(a)(4) and whether his disability is due to pneumoconiosis under 20 C.F.R. § 718.204(c).

clinical pneumoconiosis. 65 Fed. Reg. 79943. Moreover, summarizing numerous scientific studies, the preamble states that coal-mine dust inhalation may cause COPD and that the effects and contributions of cigarette smoking and coal-mine dust exposure to COPD are similar and "additive." 65 Fed. Reg. 79939-41.

B. Statement of the Facts

1. Mr. Jenkins's Smoking History

Carpentertown argues that the ALJ erroneously calculated the length of Mr. Jenkins's cigarette-smoking history. The evidence on this issue consists of the histories recorded by various physicians, along with Mr. Jenkins's testimony describing his smoking history.

a. Recorded Histories

Dr. Shockey recorded an 86-pack-year history (two packs per day from 1958 to 2001). Appendix (A) at 260. Similarly, Dr. Goodman recorded a 90-pack-year history (two packs per day for 45 years; no dates provided). A at 169. Likewise, various x-ray readings and a pulmonary-function test list a 90-pack-year history, again with no dates provided. A at 225, 227, 248. Dr. Farney noted that Mr. Jenkins smoked one to two packs per day for 40

years, ending in 2000 or 2001, a total history of 40 to 80 pack years. A at 181.

Dr. Gagon's treatment records and medical report include several different assessments of Mr. Jenkins's smoking history. A 2002 pulmonary-function test lists a 135-pack-year history (three packs per day for 45 years, no dates specified). A at 235. Two office notes from January 2005 list an 80-pack-year history (without dates). Claimant's Exhibit (CX) 1.[7] Finally, Dr. Gagon's August 2005 medical report states that Mr. Jenkins smoked two packs per day from 1958 to 2001, a total of 86 pack-years. A at 229.

In addition, Dr. Gagon's records contain various inconsistent notes regarding Mr. Jenkins's smoking status in 2000 and 2001: he was currently smoking two to three packs per day (September 15, 2000); he was still smoking (September 16, 2000); he was currently smoking one to three cigarettes per day, but had previously smoked three packs per day (September 19, 2000); he

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[7] Exhibit numbers refer to the record created before the ALJ, and are cited where a document is not included in the appendix.

had stopped smoking (February 2001); and he was a "light smoker" (December 2001). A at 240-43; CX 1.

b. Mr. Jenkins's Testimony

Mr. Jenkins testified in detail at the hearing before the ALJ regarding his smoking history. A at 135-35. He stated that he began smoking at age 16, but only smoked one cigarette per week until he was 18. He then smoked one pack per week from age 18 to 25, followed by one pack per day from age 25 to 45. From age 45 to 59, he smoked one pack per day during the work week, but two to three pack per day on weekends. Mr. Jenkins further testified that he ceased smoking in 2000 at age 59, specifically disagreeing with the notation in Dr. Gagon's records that he was still smoking as late as December of 2001. Based on this testimony, the ALJ calculated a total history of 42.94 pack-years. A at 47.

2. Relevant Medical Opinions

There are four physicians' opinions relevant to whether Mr. Jenkins has legal pneumoconiosis (and is disabled thereby):

a. Shockey. Dr. Shockey, a board-certified pulmonologist, examined Mr. Jenkins on behalf of DOL. A at 259-62. He diagnosed chronic bronchitis based on Mr. Jenkins's smoking

history, pulmonary-function and arterial-blood-gas studies, and chest x-ray, and attributed the bronchitis to smoking. He also diagnosed "CWP" (coal workers' pneumoconiosis) based on Mr. Jenkins's work history, objective testing (which revealed a severe pulmonary obstruction) and x-ray. Dr. Shockey attributed this condition to coal mining. He also concluded that Mr. Jenkins is "100% disabled" on account of his pulmonary condition, with chronic bronchitis responsible for 75% of his impairment and "CWP" responsible for 25%.

b. Gagon. Dr. Gagon, who is board-certified in family practice, has been Mr. Jenkins's treating physician since 2000. *See* A at 229-45. Based on his treatment of Mr. Jenkins, the doctor authored an opinion diagnosing both "coal miners pneumoconiosis" and COPD. A at 229. He found that Mr. Jenkins was "clearly disabled" on account of his pulmonary condition, that "[h]is lung disease is . . . about 75% caused by smoking and 25% caused by coal dust with the coal dust exacerbating his COPD." *Id.* Dr. Gagon's records document the course of Mr. Jenkins's treatment, but do not shed any additional light on the etiology of his pulmonary condition. *See* A at 230-43.

c. Farney. Dr. Farney, a board-certified pulmonologist, examined Mr. Jenkins on behalf of Carpentertown, and also reviewed a portion of his medical records. A at 180-83. He diagnosed severe COPD (both emphysema and chronic bronchitis), which disables Mr. Jenkins from working as a miner. Dr. Farney attributed the COPD solely to cigarette smoking on the ground that Mr. Jenkins's coal-mine dust exposure history "is insufficient to account for the degree of respiratory impairment and symptoms noted." Dr. Farney also noted the absence of evidence of "nodular or fibrotic lung disease that could be associated with coal dust exposure."

d. Goodman. Dr. Goodman, also a board-certified pulmonologist, reviewed Mr. Jenkins medical records on behalf of Carpentertown. A at 168-70. He found that Mr. Jenkins has a severe pulmonary impairment caused by his COPD. In assessing the etiology of the COPD, Dr. Goodman stated that

> [t]he evidence for this diagnosis rests in his history of heavy tobacco smoking over many years; the history of repeated episodes of exacerbations of cough and sputum production with aggravated dyspnea and wheezing . . .; the typical findings of severe obstructive impairment on multiple pulmonary functions studies; and the typical radiologic findings of COPD . . . .

He also opined that there was no evidence of pneumoconiosis or disability caused by pneumoconiosis.

C. Procedural History

Mr. Jenkins filed his claim in 2004. A at 277. A DOL district director awarded his claim, and Carpentertown requested an ALJ hearing, which was held in 2005. Director's Exhibits 33, 34; A at 103.

1. First ALJ Decision. The ALJ issued her original decision in 2007.[8] A at 83-102. She initially found that Mr. Jenkins worked as a miner for 10.75 years, and that he had a 40-86 pack-year smoking history. At 90-91, 95-96. She concluded that Mr. Jenkins does not have clinical pneumoconiosis, and that no presumptions were available to him to aid in proving that he has pneumoconiosis. A at 93-95, 96-97; *see* 20 C.F.R. § 718.202(a)(1)-(3).

With respect to legal pneumoconiosis, where all four physicians agreed that Mr. Jenkins has disabling COPD, but

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[8] Carpentertown did not contest before the ALJ (and does not contest now before this Court) that Mr. Jenkins has a totally disabling pulmonary impairment. *See* 20 C.F.R. § 718.204(b); A at 115.

disagreed as to its origins, the ALJ gave greater weight to Dr. Gagon's opinion that the COPD is due to both smoking and coal-mine dust than to the opinions of the other doctors.[9] A at 97-99; *see* 20 C.F.R. § 718.202(a)(4). She also found disability causation based on Gagon's opinion. A at 99-100; *see* 20 C.F.R. § 718.204(c).

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[9] After finding that Mr. Jenkins has legal pneumoconiosis (*i.e.*, a chronic lung disease arising out of coal-mine employment), the ALJ also found that Mr. Jenkins was entitled to the presumption that his disease arose out of coal-mine employment, as he had ten or more years of such employment. A at 99; *see* 20 C.F.R. § 718.203. She repeated this finding in her decision on remand, A at 66, and Mr. Jenkins picks up on the theme in his brief before this Court. Jenkins Br. at 10-12. The 10-year presumption of Section 718.203, however, applies only to determining the origin of *clinical* pneumoconiosis (a condition that may or may not arise out of coal-mine employment). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1106. (10th Cir. 2006). It has no application to *legal* pneumoconiosis (which, by definition, arises out of coal-mine employment). 455 F.3d at 1106-07. Rather, a miner suffering from a disease such as COPD must affirmatively prove that his condition arose out of coal-mine employment in order to show that he has pneumoconiosis. 455 F.3d at 1105. Because the ALJ found that the medical-opinion evidence established that Mr. Jenkins's COPD was caused, at least in part, by his coal-mine employment, her reference to the presumption at Section 718.203 was harmless error. *See Ispat/Inland, Inc. v. Director, OWCP*, 422 Fed. Appx. 149, 151 n. 2 (3d Cir. Apr. 6, 2011). In any event, Carpentertown does not challenge the award on this ground.

2. First Board Decision. Carpentertown appealed, and the Board vacated the ALJ's decision and remanded the case in 2008. A at 72-82. The Board determined that the ALJ had failed to address all the relevant evidence (particularly Dr. Gagon's treatment records) in assessing the length of Mr. Jenkins's smoking history, and vacated her finding on that point.[10] A at 77. The Board also found that the ALJ failed to address aspects of Dr. Gagon's treatment records regarding the etiology of Mr. Jenkins's COPD. *Id.* As a result, the Board vacated the ALJ's findings on both legal pneumoconiosis and disability causation, and remanded the case for the ALJ to reconsider those issues. A at 77-78.

The Board specifically directed the ALJ to "determine the length of [Mr. Jenkins's] smoking history, [and] then reassess the medical opinion evidence in light of her determination . . . ." A at 77. It also directed the ALJ to "reconsider the documentation and reasoning of the medical opinions and the weight to be accorded to the opinions of Drs. Gagon, Farney, Goodman and Shockey." *Id.*

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[10] The Board affirmed the ALJ's finding that Mr. Jenkins worked as a miner for 10.75 years. A at 74, n.3.

3. Second ALJ Decision. In her 2012 decision on remand, the ALJ again awarded benefits.[11] A at 45-71. Initially, she reviewed the evidence regarding Mr. Jenkins's smoking history in detail, and concluded that he had a smoking history of 42.94 pack-years. A at 47. In so doing, she relied on Mr. Jenkins's "credible" and "detailed" testimony regarding the dates and variations in extent of his cigarette smoking. A at 49-50. She also rejected the single notation of a 135-pack-year history as an anomaly, noting that no physician relied on such an extensive history. A at 49.

Per the Board's instructions, the ALJ also reconsidered all of the medical reports. A at 56-65. She stated that she would assess the conflicting reports in light of the plain language of the regulations and of DOL's 2000 regulatory preamble. A at 57. She noted, however, that because Mr. Jenkins bore the burden to prove that his COPD arose out of coal-mine employment, she would consult the preamble only to assess specific premises relied on the by the doctors. A at 57.

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[11] The ALJ did not address the reason for the delay between the Board's first decision and her decision on remand.

The ALJ ultimately discounted the negative opinions of Drs. Farney and Goodman. A at 57-59, 65. She noted that Farney and Goodman declined to find legal pneumoconiosis, in part, based on the absence x-ray evidence of clinical pneumoconiosis. A at 57. She found these views contrary to both the plain language of the regulations (specifically, Section 718.202), as well as DOL's preamble, which both provide that legal pneumoconiosis can exist in the absence of positive x-ray evidence. A at 57-58. Similarly, the ALJ rejected Dr. Farney's explanation that Mr. Jenkins's coal-mine-dust exposure was insufficient to account for the totality of his COPD. A at 58. She explained that under the plain language of Section 718.201, dust exposure need not be "the only, or even the main, cause of respiratory disease; rather, [the disease] need only be significantly related to, or significantly aggravated by dust exposure . . . ." *Id.* (internal quotation and citation omitted).

Finally, the ALJ discounted Farney and Goodman because they failed to explain why coal-mine dust could not have been a contributing cause of Mr. Jenkins's COPD (which all the physicians agreed was primarily caused by smoking). A at 60, 65. She cited the preamble for the proposition that smoking and coal-mine dust

have similar and additive effects on COPD, and pointed out that Farney and Goodman offered no explanation of why they ruled out coal-mine employment as even a partial cause of Mr. Jenkins's COPD. A at 59.

On the other side of the ledger, the ALJ gave the most weight to Dr. Shockey's opinion—an opinion she read as diagnosing legal pneumoconiosis—as it was adequately documented and reasoned. A at 61. She also gave diminished weight to the positive opinion of Dr. Gagon, noting that his conclusions "lose[] probative value" because he relied on inaccurate smoking and employment histories. A at 63. She, thus, declined to give his report "controlling weight" despite his status as Mr. Jenkins's treating physician. *Id.* She nonetheless gave his report partial weight, as it was supportive of Dr. Shockey's conclusions. *Id.* Finally, the ALJ found that Mr. Jenkins's disability was due to pneumoconiosis, again relying on Shockey's opinion (as supported by Gagon). A at 66. Accordingly, she again awarded benefits.

4. Second Board Decision. Carpentertown once more appealed, but the Board (with one judge dissenting) affirmed the ALJ's decision. A at 7-20. Initially, the Board affirmed the ALJ's

finding of a 42.94 pack-year smoking history, holding that the ALJ had discretion to rely on Mr. Jenkins's "credible and detailed" testimony. A at 11. The Board then affirmed the ALJ's finding of legal pneumoconiosis. A at 13-15. It rejected Carpentertown's contention that the ALJ erred in crediting Dr. Shockey's finding of legal pneumoconiosis on remand when she had discounted his opinion in her original decision.[12] A at 13. The Board pointed out that it had directed the ALJ to fully reconsider the issues of legal pneumoconiosis and disability causation, and had "specifically instructed the [ALJ] to reconsider the documentation and reasoning of the medical opinions . . . ." *Id.*

The Board also rejected the operator's contention that the ALJ improperly relied on Dr. Gagon's opinion. A at 14. It noted that the ALJ, in fact, declined to give Gagon greater weight as the treating physician, and accorded his views only "limited weight." *Id.* And the Board declined Carpentertown's request to reweigh the opinions of Dr. Farney and Goodman, noting that it was in the ALJ's

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[12] The Board specifically affirmed the ALJ's interpretation of Dr. Shockey's opinion as finding legal pneumoconiosis (A at 13)—a finding that Carpentertown does not now challenge.

discretion to consult the regulatory preamble in evaluating those opinions. A at 14-15.

Finally, the Board affirmed the ALJ's finding that Mr. Jenkins's disability was due to pneumoconiosis.[13] A at 15. Carpentertown then petitioned this Court for review. A at 1.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. Several cases raising regulatory-preamble arguments similar to those raised by Carpentertown remain pending before the Board. The Director is unaware, however, of any other case involving similar issues that is currently pending before this or any other Court.

STANDARD OF REVIEW

This case presents both a legal question (whether the ALJ permissibly consulted the regulatory preamble), and a factual question (whether the ALJ correctly found that Mr. Jenkins established the elements of his claim). The Court "exercise[s]

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[13] The dissenting judge concurred in most of the Board's decision, but would have remanded for the ALJ to consider whether there was a significant discrepancy between the coal-employment history relied on by Dr. Shockey and that found by the ALJ. A at 16-17.

plenary review over all questions of law." *B & G Constr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 247 (3d Cir. 2011) (citation omitted). On factual issues, "[the Court] must independently review the record and decide whether the ALJ's findings are supported by substantial evidence." *Helen Min. Co. v. Director, OWCP*, 650 F.3d 248, 254 (3d Cir. 2012) (citations and internal quotations omitted).

SUMMARY OF THE ARGUMENT

The Court should affirm the award of Mr. Jenkins's claim. Carpentertown's argument that the ALJ erred in consulting DOL's regulatory preamble in evaluating the medical-opinion evidence on legal pneumoconiosis fails for two reasons. First, the principles for which the ALJ cited the preamble—legal pneumoconiosis can exist in the absence of positive x-ray; dust exposure need not be the sole cause of COPD for it to be compensable; a medical report that rejects dust exposure as a partial cause of COPD without explanation is unreasoned—derive from the regulations and general evidentiary-weighing principles. Thus, the ALJ's findings are sustainable even without reference to the preamble. Second, the ALJ properly consulted the preamble in assessing the medical opinions. This Court already affirmed as much in *Helen Mining*,

and four other courts have agreed. None of Carpentertown's generalized objections to consulting the preamble has any merit. Its arguments have either been rejected by the courts or are refuted by the preamble itself.

Apart from the preamble, the operator's challenges to the ALJ's findings of legal pneumoconiosis and disability causation should be rejected. Contrary to Carpentertown's contentions, the ALJ acted within her discretion in relying on Mr. Jenkins's credible and detailed testimony in finding that he had a smoking history of almost 43 pack-years. Moreover, the ALJ was not bound by her evaluation of Dr. Shockey's opinion in her original decision, as the Board vacated that finding and told her to reconsider his opinion or remand. Thus, she properly relied on that report on remand to award benefits.

In addition, the ALJ did not (as Carpentertown alleges) mechanically give Dr. Gagon's opinion controlling weight because he was the treating physician, but—in fact—found that his opinion lost some probative value because it was based on inaccurate histories. Finally, the operator's contention that the opinions of Drs. Farney and Goodman should have been given greater weight is

simply an improper request for the Court to reweigh the evidence. The Court, thus, should affirm the ALJ's award of benefits, as it is supported by substantial evidence.

ARGUMENT

A. The ALJ did not err in consulting DOL's regulatory preamble in her evaluation of the Farney and Goodman opinions.

Carpentertown alleges that the ALJ erred in consulting DOL's regulatory preamble in weighing the medical reports with respect to the issues of legal pneumoconiosis and disability causation, particularly in discounting the opinions of Drs. Farney and Goodman. Pet. Br. at 45. As an initial matter, although the ALJ referenced the preamble (or case law discussing it) in her evaluation of the Farney and Goodman opinions, the principles for which she cites it are based on the regulations themselves, or on general principles of evidentiary weighing. Thus, her evaluation of the reports can be affirmed without reference to the preamble. In any event, however, the ALJ was permitted to consult the preamble.

1. The ALJ properly discounted Farney and Goodman even without reference to the preamble.

The ALJ discounted Farney and Goodman, in part, because they both indicated that Mr. Jenkins's COPD could not be

attributed to coal-mine dust in the absence of positive x-ray evidence. A at 57. This weighing was correct, even without consideration of the preamble. The regulations plainly state that pneumoconiosis may be established even if the x-ray evidence is negative. 20 C.F.R. § 718.202(a)(4); *see also* 30 U.S.C. § 923(b) (BLBA claim cannot be denied based solely on a negative x-ray); 20 C.F.R. § 718.202(b) (same). Thus, an ALJ may reject a medical opinion which attributes COPD solely to smoking because the physician believes positive x-ray evidence "is a prerequisite to a determination of legal pneumoconiosis." *Helen Min.*, 650 F.3d at 256-57. The reason for this is evident: a physician who requires positive x-ray evidence essentially rejects any possibility that the miner suffers from legal pneumoconiosis. Because she found that Farney and Goodman would not diagnose pneumoconiosis in the absence of positive x-rays, the ALJ rightly downgraded their opinions.

Similarly, the ALJ criticized Dr. Farney because he declined to attribute Mr. Jenkins's COPD to coal-mine-dust exposure because his exposure was insufficient to account for the entirety of his COPD. A at 58. But coal-mine dust need not be the sole or even

primary cause of COPD to make the condition compensable. Indeed, "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease . . . *significantly related to, or substantially aggravated by* dust exposure . . . ." 20 C.F.R. § 718.201(b) (emphasis added). Thus, for example, COPD caused in part by dust exposure in the mines is compensable under the BLBA. *Stomps v. Director, OWCP*, 816 F.2d 1533, 1536 (11th Cir. 1987); *see also Freeman United Coal Min. Co. v. OWCP*, 957 F.2d 302, 303 (7th Cir. 1992) (recognizing that obstructive lung disease arising either in whole or in part from dust exposure is compensable); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124 (4th Cir. 1984) (recognizing that emphysema can be aggravated by dust exposure). Thus, to the extent that Farney believed that Mr. Jenkins's COPD was not legal pneumoconiosis because it did not arise solely from his coal-mine employment, the ALJ properly discounted his opinion without regard to the preamble.

Finally, the ALJ gave less weight to Farney and Goodman because both physicians failed to explain why coal-mine employment was not at least a partial cause of Mr. Jenkins's COPD. A at 60-65. While this finding is more closely tied to the preamble

than the prior two (the ALJ cited DOL's conclusion in the preamble that the effect of smoking and dust exposure on COPD were similar and additive), even here the ALJ did not reject Farney and Goodman because their opinions were contrary to the preamble. Rather, she found that they failed to explain why coal-mine-dust exposure was not a partial cause of Mr. Jenkins's COPD. While DOL's finding in the preamble regarding the additive effects of smoking and coal-mine dust certainly highlights the significance of the defects in the Farney and Goodman opinions, the ALJ's finding would stand even without the preamble. Farney and Goodman were aware that Mr. Jenkins had significant smoking and dust-exposure histories. But—apart from the illegitimate factors discussed above (absence of positive x-rays; dust-exposure history insufficient to account for full extent of COPD)—neither physician offered any explanation why the COPD was due solely to smoking, with no contribution from coal-mine employment. Based on this omission, the ALJ properly discounted their opinions. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990) (fact-finder must examine reasoning in medical report to determine whether conclusions are supported); *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (ALJ may

discount unexplained opinion).

2. The ALJ properly consulted the preamble.

In any event, however, the ALJ did not err in consulting the preamble. This Court has already upheld the principle that an ALJ may consult the preamble when evaluating whether a miner's lung disease constitutes legal pneumoconiosis. *Helen Min. Co.*, 650 F.3d at 257 ("The ALJ's reference to the preamble . . . unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."). And four other circuits have reached the same conclusion. *See Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1125 (9th Cir. 2014) ("the ALJ simply—and not improperly—considered the regulatory preamble to evaluate conflicting expert medical opinions [on the etiology of a miner's COPD]"); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012) (ALJ properly consulted preamble in evaluating medical opinions on causation of COPD, as "the preamble merely explains why the regulations were amended[, but] does not expand their reach"); *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 316 (4th Cir. 2012) ("Because the ALJ found Dr. Fino's views conflicted with [the preamble on whether dust exposure can cause disabling COPD], it was well within her

discretion to find his opinion less persuasive."); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (giving less weight to medical opinion on cause of COPD that was in conflict with preamble was "sensible").[14] No circuit has held otherwise.

In short, the courts have unanimously endorsed the sort of consideration of the preamble that the ALJ here employed. The regulatory preamble presents and assesses the medical and scientific literature supporting the DOL's conclusion that coal-mine dust can cause COPD, and that the effects of dust and smoking on

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[14] These cases plainly belie Carpentertown's contention that there is no case law permitting an ALJ to consult the preamble, and the operator's attempts to distinguish the cases amount to little more than disagreement with the results. Moreover, Carpentertown's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), for the proposition that the preamble is off limits is misplaced. The preamble in question in *Wyeth* addressed a legal issue—the preemptive effect of Food and Drug Administration (FDA) regulations on state law remedies—rather than a scientific or technical one. *Id.* at 577 ("agencies have no special authority to pronounce on pre-emption absent delegation by Congress"). It was also "at odds with what evidence we have of Congress' purposes" and, to top it off, "revers[ed] the FDA's own longstanding position without providing a reasoned explanation[.]" *Id.* None of these facts are true of the regulatory preamble at issue in this case. *See Peabody Coal*, 746 F.3d at 1126 (distinguishing *Wyeth* preamble from DOL's regulatory preamble).

COPD are similar and additive. 65 Fed. Reg. at 79937-45. The preamble neither requires nor forbids a physician from attributing COPD to a particular cause. Rather, it simply assists the ALJ in determining whether a physician's etiology determination makes sense. Thus, as this and other Courts have held, it is perfectly reasonable for an ALJ to consult the preamble as an authoritative statement of DOL's evaluation of the medical and scientific literature. And it is similarly reasonable for an ALJ to give less weight to the opinions of medical experts who—without explanation—ignore or disregard that evaluation. And that is all the ALJ did in this case.

Nothing in Carpentertown's brief brings this unanimous line of authority into question. In fact, every argument it raises in support of the notion that it is impermissible for an ALJ to consult the preamble, Pet. Br. at 45-52, has been considered and properly rejected by other courts, or is refuted by the preamble itself.

Carpentertown argues that consulting the preamble is impermissible because it was not issued pursuant to notice-and-comment rulemaking as required under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553; 30 U.S.C. § 936(a).

Because the preamble itself, however, is not itself a legally binding rule, it is not subject to the notice-and-comment requirement. *Peabody Coal*, 746 F.3d at 1125; *A & E Coal*, 694 F.3d at 801; *Harman Min.*, 678 F.3d at 315.

Similarly, the operator contends that consulting the preamble violates the APA because the preamble itself is not part of the record in this case (or other cases). *See* 5 U.S.C. §§ 554, 556. But there is no requirement that public law documents, such as statutes, regulations or preambles, be placed in the record before an ALJ may consult them. Thus, this argument fails. *See A & E Coal*, 694 F.3d at 802; *Harman Min.*, 678 F.3d at 316.

Carpentertown further asserts that that there is case law holding that an operator may prove that a miner's lung disease arose out of some condition other than coal-mine employment. This is correct—(*see Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002)), but irrelevant. The ALJ did not discount Farney and Goodman because they attributed Mr. Jenkins's COPD solely to cigarette smoking. Rather, she faulted them because they failed to explain *why* they believed smoking was the only cause—a particularly glaring omission in light of Mr. Jenkins's significant

history of coal-mine-dust exposure and of the preamble's conclusion that the effects of smoking and coal-mine dust on COPD are similar and additive. *See Peabody Coal*, 746 F.3d at 1119 ("A preamble may be used to give an ALJ understanding of a scientific or medical issue.").

Carpentertown further argues that because the National Institute of Occupational Safety and Health (NIOSH)[15] "did not write, review or approve the [p]reamble," an ALJ cannot consult it. But the preamble itself refutes this contention. DOL explained in detail that it relied on NIOSH's *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust* § 4.2.2. *et seq*. (1995) (available on the Internet at http://www.cdc.gov/niosh/docs/95-106/) in concluding that dust exposure can cause COPD and that the effects of smoking and coal dust are additive; that NIOSH reviewed DOL's original regulatory proposal and concluded that "[our] scientific analysis supports the

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[15] NIOSH serves as DOL's scientific consultant regarding the medical criteria for claims under the BLBA. *See* 30 U.S.C. § 902(f)(1)(D).

proposed definitional changes;" and that DOL engaged in additional consultation with NIOSH before promulgating the final rule.[16] 65 Fed. Reg. 79937-38.

Finally, the operator raises a pair of seemingly contradictory contentions that are plainly wrong—that consulting the preamble results in the substitution of the ALJ's opinion for that of the doctors, and that the preamble creates an improper irrebuttable presumption that all cases of COPD arise out of coal-mine employment. Consulting the preamble does substitute an ALJ's views for those of a physician. Rather, it simply aids her in "understanding [] a scientific or medical issue." *Peabody Coal Co.*, 746 F.3d at 1125. By the same token, nothing in the preamble creates any sort of presumption regarding the etiology of COPD.

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[16] In 2011, NIOSH released Current Intelligence Bulletin 64, *Coal Mine Dust Exposure and Associated Health Outcomes, A Review of Information Published Since 1995* (2011) (available on the Internet at http://www.cdc.gov/niosh/docs/2011-172/) . One of the main conclusions drawn from the review of new information was that the "new findings strengthen [the] conclusions and recommendations [reached in the original 1995 publication]." *Id.* at 5. Among other findings, the Bulletin confirms that coal-mine dust can cause or aggravate COPD, and that dust and smoking have similar effects. *Id.* at 23-24.

Nat'l Min. Ass'n, 292 F.3d at 862-63. Instead, it simply provides ALJs with another tool to aid in assessing the credibility of the medical evidence before them.[17]

B. The ALJ's findings that Mr. Jenkins has legal pneumoconiosis and that he is totally disabled due to pneumoconiosis are supported by substantial evidence.

The ALJ found that Mr. Jenkins established all of the elements of his claim. Carpentertown raises a series of arguments regarding the ALJ's finding of legal pneumoconiosis (and, by extension, her finding of disability causation), but none of these contentions has any merit. Accordingly, the Court should affirm the decisions of the ALJ and the Board awarding benefits.

1. Smoking History

The ALJ found that Mr. Jenkins had a smoking history of 42.94 pack-years. A at 47. Carpentertown, repeating arguments it made before the Board, contends that this finding was erroneous,

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[17] DOL took pains in the preamble to reiterate that the burden is on a miner to show that his lung disease arose out coal-mine employment in order to establish that he has legal pneumoconiosis, 65 Fed. Reg. 79937, and the ALJ here specifically placed the burden on Mr. Jenkins to prove that *his* COPD arose, at least in part, out of his coal-mine employment. A at 57.

but does not state what it believes the correct figure to be. Pet. Br. at 26-30. The gravamen of the operator's argument is that the ALJ's evaluation of the medical reports was inextricably linked to her smoking-history finding, and her evaluation of the reports cannot stand if her smoking-history finding falls. The Court, however, should affirm the ALJ's finding (as the Board did) because it is supported by substantial evidence.

The ALJ based her finding on Mr. Jenkins's testimonial recitation of his smoking history. *See* A at 49-50. She found that he was a credible witness, and provided greater detail on his smoking history than any of the medical opinions. *Id.* The ALJ specifically credited Mr. Jenkins's testimony that he began as a very light smoker (one cigarette per week) in 1957, gradually smoked more over time (up to two or three pack per day on weekends), but later reduced his smoking and quit entirely in 2000. A at 49. She also found that his testimony as to the beginning and ending dates of his smoking was consistent with that reported by the physicians (c. 1957/58-c. 2000/01). A at 49.

The evaluation of witness credibility, of course, is a matter particularly within a fact-finder's discretion. *See Consolidation Coal*

Co. v. Director, OWCP, 721 F.3d 789, 795 (7th Cir. 2013) ("[The Court] owe[s] the ALJ considerable deference in determinations of witness credibility.") (citation omitted); *Cross Mtn. Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996) ("Since the ALJ has the opportunity to observe the demeanor of a witness, his conclusions with respect to credibility should not be discarded lightly and should be accorded deference.") (quoting *Hardaway v. Sec'y of Health and Human Servs.*, 823 F.2d 922, 928 (6th Cir. 1987)). Notably, Carpentertown does not now argue that Mr. Jenkins was not a credible witness. Given that the ALJ found him credible, and that his testimony clearly supports her finding of 42.94 pack-years of smoking, the Court should affirm that finding. *See Helen Min.*, 650 F.3d at 254. While Carpentertown points to a single anomalous notation of a 135-pack-year history, along with some minor inconsistencies in Dr. Gagon's records regarding the end-date of Mr. Jenkins's smoking (and the extent of his smoking at that time), the ALJ specifically addressed these issues and resolved them by relying on Mr. Jenkins's "credible" and "detailed" testimony. *See* A at 49-50. Thus, Carpentertown has presented no basis for overturning the ALJ's finding.

2. Weighing of Medical Reports

Carpentertown also raises various challenges to the ALJ's weighing of the medical reports on legal pneumoconiosis and disability causation. Pet. Br. at 21-26, 30-45. The ALJ relied on Dr. Shockey's opinion in finding both elements established, and also gave partial weight to Dr. Gagon's opinion, to the extent that it supports Shockey. She discounted the negative opinions of Drs. Farney and Goodman, as she found them not credible. These findings are supported by substantial evidence, and Carpentertown's attacks on them lack merit. Hence, the Court should affirm the decisions below awarding benefits.

a. Shockey. In her decision on remand, the ALJ interpreted Dr. Shockey's report as diagnosing legal pneumoconiosis, and gave his opinion the greatest weight. A at 61. Carpentertown contends that the ALJ's evaluation of Shockey was flawed, primarily because she had discounted Shockey in her original decision, and did not explain why she reached a different conclusion on remand. Pet. Br. at 21-26.

In short, the operator believes that the ALJ was bound by her original evaluation of Shockey's opinion. This argument, however,

ignores the Board's instructions to the ALJ in its 2008 remand order. The Board vacated both the ALJ's legal pneumoconiosis finding and her disability causation finding *in toto*. A at 77-78; *see* A at 13. Moreover, as the Board noted in its 2013 decision following remand, "we specifically instructed the [ALJ in 2008] to reconsider the documentation and reasoning of the medical opinions." A at 13; *see* A at 77. The Board's instruction was without qualification, and the ALJ was duty-bound to follow it. *See Muscar v. Director, OWCP*, 18 Black Lung Rep. (MB) 1-7, 1-8; 1993 WL 404300, *1 (BRB 1993). Thus, her *de novo* review of Dr. Shockey's opinion was proper.[18]

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[18] Carpentertown also argues that the ALJ should not have credited Shockey because he relied on a coal-mine employment history of 18-20 years, whereas she had found 10.75 years. Pet. Br. at 25-26. Dr. Shockey did not discuss Shockey's coal-mine employment history in detail (he relied on the history form completed by Mr. Jenkins (A at 275)). The form Shockey relied on lists only calendar-year beginning and end dates for Mr. Jenkins's various jobs, and does not address any gaps in his employment. Thus, the precise history that Shockey relied on is somewhat unclear. The ALJ stated that the doctor relied on a history "similar" to the one she found, A at 61, and the Board held that Shockey's history and that found by the ALJ were "similarly significant." A at 13-14. (It is clear that Dr. Shockey relied on an exaggerated smoking history, 86 pack-years (cont'd . . .)

b. Gagon. Carpentertown also spills much ink arguing that "Dr. Gagon's findings cannot be credited as "determinative for this case's disputed issues." Pet. Br. at 30-43. This argument is easily dispensed with. As the Board noted, the ALJ did not give Gagon's report "determinative" weight. A at 14. Indeed, the ALJ specifically stated that "his opinion as a treating physician *cannot* be given controlling weight." A at 63 (emphasis added). She further noted

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(. . . cont'd)
vs. the 43 found by the ALJ, and thus may have overemphasized the contribution of smoking to Mr. Jenkins's condition.)

In our view, the ALJ's consideration of Shockey's opinion with respect to Mr. Jenkins's employment history, while perhaps inartfully phrased, was ultimately correct. *See Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327 (7th Cir. 1983) (court will affirm ALJ's decision where an affirmable rationale is discernable). Both the ALJ and Dr. Shockey relied on coal-mine employment histories of over 10 years, which was plainly a significant amount of dust exposure. *Cf*. 20 C.F.R. § 718.203 (*clinical* pneumoconiosis presumed due to dust exposure if miner worked 10 or more years in the mines). Moreover, Carpentertown, despite the opportunity to do so, did not cross-examine Dr. Shockey to ascertain whether his opinion would change if Mr. Jenkins had a shorter dust-exposure history than the physician believed. In these circumstances, we agree with the Board that the history found by the ALJ and that relied on by Shockey were "similarly significant." If the Court believes, however, that the ALJ should resolve any inconsistency between the employment history Shockey relied on and the one she found, it can remand the case for her to do so (although we note that this claim already has been pending for over 10 years).

that Gagon's opinion "loses probative value" because of his reliance on incorrect smoking and employment histories, and she gave it partial credit only because it was supportive of Dr. Shockey's conclusions. *Id.*

Indeed, much of Carpentertown's argument regarding Gagon reads as is if it were based on some alternative version of the ALJ's decision available only to the operator. For instance, the operator attacks the ALJ for giving greater weight to Gagon based on a "mechanical" application of the treating-physician rule.[19] As the language quoted in the preceding paragraph plainly shows, however, the ALJ explicitly declined to give Gagon greater weight despite his treating-physician status.

Likewise, Carpentertown complains that the ALJ should not have credited Gagon's opinion because he relied on inaccurate smoking and employment histories. But the ALJ specifically

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[19] Under DOL's regulations, an ALJ *may* give a miner's treating physician's opinion additional weight based on consideration of certain enumerated factors. 20 C.F.R. § 718.104(d); *see also Soubik v. Director, OWCP*, 366 F.3d 226, 235 (3d Cir. 2004) ("It is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians.") (citation omitted).

downgraded his opinion because "he relied on smoking and coal mine employment histories that are significantly higher than the histories established on this record." A at 63.

In addition to these contentions, Carpentertown raises various make-weight arguments regarding Gagon's documentation and reasoning. Pet. Br. at 31, 34-35, 38-39. These are simply a plea for the Court to invade the province of the fact-finder—a plea the Court should refuse. *See Big Branch Coal Co. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013) ("[The Court] does not reweigh the evidence or substitute [its] judgment for that of the ALJ, . . . even though [it] would have taken a different view of the evidence were [it] the trier of facts.") (internal quotations and citations omitted).

c. Farney and Goodman. Finally, Carpentertown generally asserts that "[t]he etiologic findings of Drs. Farney and Goodman are more compelling, competent, reliable and persuasive than those offered by Drs. Gagon or Shockey." Pet. Br. 43. This argument is another bald request for the Court to reweigh the medical opinions and substitute its evaluation of the evidence for that of the ALJ. As such, it should be rejected. *See Big Branch Coal Co.*, 737 F.3d at 1069. Moreover, as discussed above (*supra* at 22-32), the ALJ gave

proper reasons for discounting the opinions of Drs. Farney and Goodman.

In sum, all of Carpentertown's contentions lack merit. As the ALJ's decision is supported by substantial evidence, the Court should affirm the award of Mr. Jenkins's claim. *See Helen Min. Co.*, 650 F.3d at 254.

CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and Board awarding Mr. Jenkins's claim.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,943 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Bookman Old Style.

2) On August 8, 2014, paper copies of the Director's brief were served by mail, postage prepaid, and an electronic copy of the brief in portable document format was served, via the CM/ECF system, on the following:

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3) That the texts of the electronic and paper versions of this brief are identical.

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