No. 18-2097

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONSOLIDATION COAL COMPANY,

Petitioner

v.

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

and

RALPH ROSS,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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Federal Register, Volume 65 (Dec. 20, 2000)

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STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a claim for lifetime disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Ralph Ross, a former coal miner. Stephen R. Henley, a Department of Labor (DOL) administrative law judge, denied the claim on September 8, 2014. Ross timely appealed to the

Benefits Review Board (Board) on October 7, 2014, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3), as incorporated. On October 20, 2015, the Board vacated the ALJ's denial of benefits and remanded the case to the ALJ for reconsideration.

On remand, ALJ Henley awarded benefits in a decision dated March 7, 2017. Petitioner Consolidation Coal Company (Consol), which formerly employed Ross and is responsible for paying any benefits awarded to him, timely appealed to the Board on March 31, 2017. The Board affirmed the ALJ's award on April 27, 2018.

Consol petitioned this Court for review on May 16, 2018. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated, 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 injury here – the miner's occupational exposure to coal-mine dust during his employment with Consol in Illinois – occurred within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

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

qualifying coal mine employment for at least 15 years and have a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4). The regulation implementing this "15-year presumption" provides that the party opposing entitlement can rebut the presumption by showing that (1) the miner does not have "clinical" and "legal" pneumoconiosis, or (2) no part of the miner's disability is due to pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i),(ii).

The ALJ awarded benefits because the miner's evidence invoked the 15-year presumption, and Consol's evidence failed to rebut it. The questions presented are: (1) whether the Board exceeded its scope of review by vacating the ALJ's first decision denying benefits and remanding the case for reconsideration, and (2) whether the ALJ's findings on remand, that the miner invoked the 15-year presumption and Consol failed to establish rebuttal, are supported by substantial evidence and in accordance with law.

STATEMENT OF THE CASE

I. Statutory and regulatory background

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as black lung disease. 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Miners seeking to recover under the Act must prove four elements: (1) that they suffer from pneumoconiosis; (2) that their pneumoconiosis arose out of coal mine

employment; (3) that they are totally disabled by a respiratory or pulmonary impairment; and (4) that their pneumoconiosis contributed to their total disability. 20 C.F.R. § 725.202(d).

Pneumoconiosis. Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368 (11th Cir. 1997) (explaining clinical and legal pneumoconiosis); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (same).

Clinical (or medical) pneumoconiosis refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP." *Id*. Clinical pneumoconiosis is typically diagnosed by chest x-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

Legal pneumoconiosis, by contrast, is a broader category including "any chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease or impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust is considered to have "arise[n] out of coal mine employment," and is therefore

considered to be legal pneumoconiosis. 20 C.F.R. §§ 718.201(b); 718.202(a)(4); *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 577 (4th Cir. 2004).

Total respiratory disability. The regulation at 20 C.F.R. § 718.204 provides four methods by which a miner can prove a totally disabling respiratory impairment: (1) results of pulmonary function studies meeting the table criteria set forth at Section 718.204(b)(2)(i), Appendix B [1]; (2) results of blood gas studies meeting the table criteria set forth at Section 718.204(b)(2)(ii), Appendix C[2]; (3) proof of pneumoconiosis and "cor pulmonale with right-sided congestive heart

[1] Tests that meet the regulatory values are called "qualifying," those that do not are "nonqualifying." Pulmonary function studies, also called spirometry, are tests that show how well miners move air in and out of their lungs, and "measure the degree to which breathing is obstructed." *See Yauk v. Director, OWCP,* 912 F.2d 192, 196 n.2 (8th Cir. 1989). These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV_1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two points. *See* Occupational Safety and Health Admin., U.S. Dep't of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), *available at* https://www.osha.gov/publications/OSHA3637.pdf.

[2] "Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange." 20 C.F.R. § 718.105(a). Alveolar gas exchange involves the transfer of oxygen from the lungs into the bloodstream, and the removal of carbon dioxide from the bloodstream into the lungs. *See* Noah Lechtrin, MD, MHS, Exchanging Oxygen and Carbon Dioxide, *Merck Manuals Consumer Version* (2015), *available at* http://www.merckmanuals.com/home/lung-and-airway-disorders/biology-of-the-lungs-and-airways/exchanging-oxygen-and-carbondioxide. The test is initially administered "at rest," but if the results are not qualifying, the test will be administered while the patient is *exercising*, if not "medically contraindicated." 20 C.F.R. § 718.105(b).

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

"The miner can establish total disability upon a mere showing of evidence that satisfies any of the four alternative methods, but only '[i]n the absence of contrary probative evidence.'" *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171 (4th Cir. 1997) (quoting 20 C.F.R. § 718.204(b)(2)). While all relevant evidence, including the results of pulmonary function studies and blood gas studies, must be weighed together in considering total respiratory disability, nonqualifying pulmonary function study results are not considered "contrary" to qualifying blood gas study results, and vice versa, because the two studies "measure different types of impairment." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) (internal quotations omitted); *see supra* nn.1& 2 (describing respective impairments measured by the different tests); 45 Fed. Reg. 13683 (Feb. 29, 1980) ("[A]rterial blood-gas studies sometimes demonstrate significant impairment when ventilatory functions are relatively normal. Likewise, ventilatory function studies may indicate several abnormalities when blood-gas studies show little impairment. The two tests measure different components of lung function.").

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

The 15-year presumption. The elements of entitlement can be established by the Act's various presumptions. *Hobet Min., LLC v. Epling*, 783 F.3d 498, 501 (4th Cir. 2015). 30 U.S.C. § 921(c)(4)'s "15-year presumption" is invoked if the miner worked at least fifteen years in underground coal mines and has a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4). If invoked, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis," and is therefore entitled to benefits. *Id.*; *Mingo Logan Coal Co. v, Owens,* 724 F.3d 550, 554 (4th Cir. 2013). The BLBA provides that the 15-year presumption may be rebutted by proof that the miner does not suffer from pneumoconiosis or that the

miner's respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. § 921(c)(4).

DOL's regulation, 20 C.F.R. § 718.305, implements the 15-year presumption and provides standards governing how the presumption can be invoked and rebutted. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134 (4th Cir. 2015). To invoke the presumption, a miner must have 15 years of qualifying coal mine employment, and "a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204." 20 C.F.R. §718.305(b)(1)(i), (iii).[3]

Rebuttal may be established in two ways. The first and most straightforward requires the liable party to establish that the miner has neither clinical pneumoconiosis arising out of coal mine employment nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i). *See supra* at 4-5 (discussing clinical and legal pneumoconiosis). The second method requires the liable party to prove that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. § 718.305(d)(2)(ii). This is frequently called the "rule-out standard." *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743

[3] The regulation also specifies that the presumption cannot be invoked if the chest x-ray evidence establishes that the miner suffers from complicated pneumoconiosis. 20 C.F.R. § 718.305(b)(1)(ii); 30 U.S.C. § 921(c)(4). Those miners have no need of the 15-year presumption for they are entitled to benefits under the irrebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C § 921(c)(3) of the BLBA.

F.3d 1331, 1336 (10th Cir. 2014); *Drummond Co. v. Director, OWCP*, 650 F.App'x 690, 693 (11th Cir. 2016).

II. Factual background

A. General facts

Ross worked in underground coal mines for 13 years, and in surface coal mines with substantially similar conditions to an underground mine for 17 years. Appendix ("A") 48.[4] His coal mine employment, which occurred in Illinois (DX 4), ended in 2000. A. 6. He smoked at least 1¾ packs of cigarettes per day for 29 years, ending in 1989.

B. Medical evidence

The summary of the relevant medical evidence below is broken down to correspond to the 15-year presumption. First discussed is evidence of total respiratory disability (invocation), then evidence of pneumoconiosis and disability causation (rebuttal).

1. Evidence on Total Disability (invocation of the presumption)

Pulmonary-function tests

[4] For the court's convenience, this brief will cite to the Petitioner's Short Appendix (A) and Supplemental Appendix (SA) where available, Director's Exhibits (DX), Claimant's Exhibits (CX) and Employer's Exhibits (EX).

The results of two pulmonary function studies were submitted into evidence. One was qualifying and one was not:

February 2012. This test was conducted by Dr. Tazbaz. DX 10. The FEV1 and FEV1/FVC ratio results were qualifying: an FEV1 value of 1.45 and an FEV1/FVC ratio of 54. The FVC result (2.67) was non-qualifying. The doctor stated that the results revealed a "moderately severe obstructive defect," and he could not rule out a restrictive defect. DX 10 at 3, 36.

June 2012. This test was administered by Dr. Tuteur. EX 4. It initially produced an FEV1 value of 2.01, an FVC value of 2.92, a MVV value of 68, and an FEV1/FVC ratio of 69. After administration of a bronchodilator, the study produced an FEV1 value of 1.97, an FVC value of 2.77, a MVV value of 62, and an FEV1/FVC ratio of 71.[5] He believed the test showed a minimal obstructive abnormality. EX 4 at 3.

Arterial Blood-Gas Studies

The results of two arterial blood-gas studies were submitted into evidence and considered by the ALJ:

February 2012. This test was conducted by Dr. Tazbaz. DX 10 at 12. The test yielded non-qualifying results before exercise: a pCO2 of 41 and a pO2 of 64.

[5] A bronchodilator is a drug that expands the "air passages of the lung." *Dorland's Illustrated Medical Dictionary* 253 (32nd ed. 2012).

After exercise, the results were qualifying: a pCO2 of 41.2 and pO2 of 52. The doctor stated that these results indicated hypoxemia with exercise that requires oxygen."[6] DX 10 at 3, 4, 17, 21.

June 2012. This test was conducted by Dr. Tuteur. EX 4 at 5. Before exercise, the test results were non-qualifying: a pCO2 of 39 and a pO2 of 73. After exercise, the results were qualifying: a pCO2 of 41 and a pO2 of 54. The doctor stated that the results after exercise were abnormal. EX 4 at 6. The doctor also conducted a blood gas "shunt" study, while the miner was breathing 100% oxygen, that produced an O2 value of 541, which the doctor stated exhibited "a less than appropriate PaO2 indicative of a right to left shunt."[7] SA. 163, 227.

Medical Opinions

The ALJ considered three medical opinions submitted into evidence that addressed the miner's disability:

Dr. Tazbaz. The doctor examined the miner in February 2012. DX 10. He conducted pulmonary function and blood gas studies, an EKG and a stress test.

[6] Hypoxemia is inadequate oxygenation of the blood. *Dorland's Illustrated Medical Dictionary* 908 (32nd ed. 2012).

[7] A right to left shunt is the "diversion of blood from the right side of the heart to the left side or from the pulmonary to the systemic circulation through an anomalous opening [such] as a septal defect or patent ductus arteriosus." *Dorland's Medical Dictionary* 1704 (32nd ed. 2012).

DX 10. He concluded that the miner had a totally disabling pulmonary impairment. In particular, the doctor focused on the decreased FEV1 and FEV1/FVC ratio exhibited on the pulmonary function test, the qualifying blood gas study results which revealed a "severe impairment with desaturation on exercise test," and the "suboptimal" stress test results, which revealed "pulmonary limitation to exercise with hypoxemia that requires oxygen" and prevented him from doing his activities in his last year of coal mine employment. DX 10 at 4, 21.

Dr. Tuteur. Dr. Tuteur examined the miner in June 2012. EX 4. He conducted pulmonary function and blood gas studies. The doctor stated that the miner's pulmonary function studies indicated a minimal obstructive abnormality that does not improve following the administration of bronchodilator, and that the blood gas study results were normal at rest, but during exercise exhibited a significant fall in the pO2 value. The miner's diffusing capacity indicted a moderate impairment of gas exchange.[8] EX 4 at 6. The doctor diagnosed hypoxemia and a minimal, non-disabling, obstructive pulmonary abnormality. EX 4 at 3.

[8] Diffusing capacity for carbon monoxide (often referred to by the acronym DLCO) "is a measure of the ability of gas to transfer from the [lungs to red blood cells]." *The Merck Manual* 1856 (19th ed. 2011). "Gas exchange" refers to the transfer of oxygen to the blood. *See id*. 1855-59. An impairment or abnormality in these exchanges generally leads to hypoxemia.

In a supplemental opinion, the doctor clarified that while the miner did not have clinically meaningful chronic obstructive pulmonary disease, the miner was "totally and permanently disabled demonstrating a significant impairment of oxygen gas exchange and alveolar hypoventilation, the former worsens during exercise." SA. 227.

Dr. Selby. Dr. Selby reviewed the miner's medical records in March, 2013. He stated that the miner had no pulmonary impairment. EX 5 at 55. The doctor noted that the miner had "essentially a normal pulmonary function test" and that any minor abnormalities present are not enough to cause hypoxemia. *Id*.

2. Evidence on the Existence of Pneumoconiosis and Disability Causation (rebuttal of the presumption).

X-ray readings

February 2012. The ALJ considered a total of four interpretations of a February, 2012 analog x-ray. All readers were dually qualified as B-readers and Board-certified radiologists.[9] Dr. Cheema and Dr. Ahmed read the x-ray as positive for simple pneumoconiosis, and Dr. Cheema also identified a size A large

[9] A "B-reader" is a "physician [who] has demonstrated ongoing proficiency . . . in the use of the [International Labour Organization Classification] for interpreting chest [x-rays] for pneumoconiosis . . . by . . . passing a specially designed proficiency examination . . .." 20 C.F.R. § 718.102(e)(2)(iii) (cross-referencing 42 C.F.R. § 37.51(b)(2)). Board-certified refers to certification in the practice or radiology by either the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.102(e)(2)(i).

opacity of complicated pneumoconiosis. DX 10, CX 3. Dr. Meyer and Dr. Seaman read the x-ray as negative for pneumoconiosis. EX 1, 3.

May 2012. The ALJ considered two interpretations by dually qualified readers of this digital x-ray. Dr. Seaman interpreted the x-ray as negative (EX 13), Dr. Groten as positive for simple pneumoconiosis. CX 1.

June 2012. The ALJ considered dually qualified Dr. Seaman's interpretation of this digital x-ray as negative for pneumoconiosis. EX 2.

CT scan

February 2012. The ALJ considered three interpretations by dually qualified readers of this CT scan of the miner's lungs. Dr. Cheema found the scan "unremarkable." DX 10 at 46. Dr. Meyer found mild to moderate emphysema, scattered nodules consistent with prior granulomatous infection, but no large opacities or pneumoconiosis. EX 6. Dr. Smith found the scan positive for simple pneumoconiosis. CX 5.

Medical Opinions

The same three doctors who opined on the existence of the miner's disability also offered opinions on whether the miner suffered from pneumoconiosis.

Dr. Tazbaz. Dr. Tazbaz, relying on the positive x-ray readings of Drs. Ahmed and Groton, as well as the positive CT scan reading by Dr. Smith, diagnosed clinical pneumoconiosis. SA. 175. Based on the results of the

pulmonary function studies, he also found that the miner had chronic obstructive pulmonary disease (COPD) caused, in part, to coal mine dust exposure – *i.e.*, legal pneumoconiosis.[10] SA. 176. He acknowledged that the miner had coronary artery disease and had had coronary bypass surgery, but he disagreed with the company's doctors that the miner's oxygen desaturation (hypoxemia) during exercise was related to heart disease. He pointed out that the miner's February 2012 echocardiogram (ECG) showed normal heart function and that the August 2013 stress test did not show cardiac ischemia, meaning that the miner's heart bypass was functioning well and that the miner's heart disease (coronary artery disease) was not causing any "major issues." SA. 175. He also noted that, although Dr. Tuteur recommended conducting an echocardiogram with a bubble study to confirm the existence of a right to left cardiac shunt (as Dr. Tuteur surmised), that "test of choice" was not done.[11] SA. 176.

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[10] COPD is an umbrella term describing certain airway dysfunctions and is defined by the Department of Labor to include "chronic bronchitis, emphysema and asthma." *See Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000).

[11] An ECG with "bubble study" (saline contrast echocardiogram) begins as any standard ECG. On completion of the standard ECG, a sterile salt solution is shaken until tiny bubbles form and then the solution is injected into a vein. The microbubbles reflect ultrasound and create an opacification of the right side of the heart. *See* http://www.cvs.net.au/Default.aspx?tabid=119; http://www.mayoclinic.org/diseases-conditions/patent-foramen-ovale/basics/tests-diagnosis/con-20028729.

Dr. Tuteur. Dr. Tuteur opined that the miner did not suffer from clinical pneumoconiosis. The x-ray conducted as part of his June 2012 examination of the miner was negative, as was a February 2012 CT scan and various x-ray interpretations contained in the miner's treatment records. EX 4 at 2-3.

With regard to legal pneumoconiosis, the doctor believed that the qualifying arterial blood gas test results were disproportionate to the degree of airflow obstruction exhibited on the miner's pulmonary function studies. He thus conducted another blood gas study with the miner "breathing 100% oxygen in a closed system" (EX 4 at 3), which showed, according to the doctor, an "impairment of gas exchange[ ] due to a circulatory deficit allowing for a right to left shunt bypassing gas exchanging surfaces of the lung." SA. 162. Initially, Dr. Tuteur opined that proof of such a cardiac shunt could be obtained by performing an ECG bubble study (EX 4 at 3), but later dismissed the confirmatory study as a "less sensitive technique" and admitted that it was never done. SA. 161.

Summarizing, the doctor acknowledged that the miner had been previously treated for both COPD and coronary artery disease. He thus posed the central issue as "what condition – pulmonary versus cardiac – is responsible for the physiologic impairment of oxygen gas exchange and resultant disability." SA. 162. The culprit, the doctor determined, was the miner's cardiac condition as "manifested by coronary artery disease, myocardial infarctions, episodes of congestive heart

failure, and the need for a coronary artery bypass graft." *Id*. The doctor then concluded that the miner's cardiac disease was "in no way related to, aggravated by, or caused by the inhalation of coal mine dust or . . . coal worker's pneumoconiosis." *Id*.

Dr. Selby. Dr. Selby denied that the miner suffered from clinical pneumoconiosis because the miner's chest x-rays "are persistently negative as read by the most qualified B-readers and as confirmed by CT scans as read by the most qualified radiologists. " EX 5 at 54. He agreed with Dr. Tuteur that "almost always a drop in pO2 is a cardiac problem unless a severe to very severe diffusion capacity abnormality is present." EX 5 at 55.

In a supplemental opinion, Dr. Selby explained that the results of Dr. Tuteur's shunt study was diagnostic of a cardiac shunt, and provided "incontrovertible" proof that the miner's hypoxemia (oxygen desaturation) was not due to lung disease, and that no further study was necessary. SA. 163, 165-166.

C. Decisions below

1. The district director awards benefits.

Ross filed this claim for benefits on January 19, 2012. DX 2. The district director awarded benefits on October 11, 2012. DX 27. 30 U.S.C. § 934(b)(1); 20 C.F.R. § 725.602(a). Employer disagreed with this determination and requested a

hearing before an ALJ. The district director instituted payment of interim benefits from the Trust Fund and forwarded the case to OALJ for hearing.[12] DX 30, 35.

2. ALJ Henley denies the claim.

The ALJ held a hearing on October 23, 2013 (SA. 3), and issued a decision denying benefits on September 8, 2014. SA. 42. After crediting the miner with 30 years of qualifying coal mine employment, the ALJ addressed whether claimant established the existence of a totally disabling respiratory or pulmonary impairment.[13] The ALJ found the pulmonary function studies unsupportive, but that the blood gas studies, which were non-qualifying at rest but qualifying after exercise, demonstrated total disability.

Turning to the medical opinions, the ALJ accorded the most weight to the opinions of Drs. Tuteur and Selby because he found their opinions "well-reasoned, documented and supported by the totality of the medical evidence." SA. 56. Conversely, the ALJ accorded less weight to Dr. Tazbaz's "very minimal report"

[12] Where the district director (or ALJ or Board) awards benefits and the responsible operator declines to pay, the Black Lung Disability Trust Fund pays benefits to the claimant on an interim basis. 26 U.S.C. § 9501(d)(1)(a)(i),(ii); 20 C.F.R. §§ 725.420(a), 725.522(a). Here, the Trust Fund has thus far paid $52,918.60 in interim benefits.

[13] Consol does not contest that Ross established at least 15 years of qualifying coal mine employment. Opening Brief (OB) at 50.

because the doctor did not consider "claimant's other testing and medical evidence or claimant's severe cardiac issues as potential causes of his impairment." *Id*.

Weighing together all relevant evidence (medical opinions, pulmonary function and blood gas studies), the ALJ concluded that the miner did not establish total respiratory disability because only Dr. Tazbaz diagnosed it, the more recent pulmonary function study was non-qualifying and more indicative of the miner's true health (SA. 51), and "two certified internists" did not diagnose total respiratory disability and "testified that claimant's abnormal blood gas study results were due to his serious heart condition." SA. 56. The ALJ therefore found total respiratory disability not established, declined to invoke the 15-year presumption, and denied benefits because the miner failed to establish a requisite element of entitlement (total respiratory disability).[14] SA. 64. The miner appealed the ALJ's decision to the Board.

3. The Board remands.

Before the Board, the miner challenged the denial of benefits based on the ALJ's "erroneous finding that claimant Ross's medical evidence was insufficient to show a totally disabling respiratory condition." SA. 68. The miner assigned error to the ALJ's discounting of the qualifying blood gas studies because they showed a

[14] The ALJ also found that the evidence did not establish complicated pneumoconiosis. This finding is not at issue in this appeal.

cardiovascular, not pulmonary, impairment. SA. 70-72. In particular, the miner alleged that the ALJ had improperly imported a *causation* analysis into the inquiry regarding the *existence* of a respiratory disability. SA. 71. The miner further argued that the ALJ's determination that the company's doctors supplied the best reasoned and documented medical opinions was erroneous. SA. 72.

The Director filed a response brief that supported the miner's arguments. SA. 94. The Director agreed that the ALJ had improperly conflated the existence of total respiratory disability with its cause, and that substantial evidence did not support his finding that Drs. Tuteur's and Selby's opinions were the best reasoned and documented.[15] SA. 97-99. The Director also objected to the ALJ's characterization of Dr. Tazbaz's opinion as "very minimal."[16]

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[15] For example, the Director pointed out that Dr. Tuteur did not include in his report (EX 4) the results of the supposedly determinative shunt study, that none of the many ECGs in the miner's treatment records mentions a shunt, that the doctor minimized the extent of the miner's reduced diffusing capacity without explanation, and that he disregarded Dr. Meyer's diagnosis of emphysema (based on the miner's CT scan) as well as the miner's treatment records, which documented continuous treatment for COPD from 2005-2012. With regard to Dr. Selby, the Director pointed out that the doctor pronounced the miner's pulmonary function "normal" (EX 5, EX 8 at 15), despite Dr. Tuteur's admission that test results revealed an obstructive abnormality and a moderately reduced diffusing capacity, and despite the miner's treatment records documenting years of treatment for COPD, sometimes noted as severe (*see, e.g.*, EX 10 at 113). SA. 97-98.

[16] In support, the Director pointed out that Dr. Tazbaz, contrary to the ALJ's assessment, had in fact considered the miner's history of cardiac problems, conducted an ECG (and was the only doctor of the three to do so), and his

The Board found merit in these arguments; it accordingly vacated the ALJ's denial of benefits and remanded the case to the ALJ for reconsideration. SA. 132, 139. The Board agreed that the ALJ "erred in combining his analysis of the issue of total disability with his analysis of the issue of disability causation." SA. 138. The Board also held that the ALJ erred in discrediting Dr. Tazbaz's opinion as "very minimal," observing that the doctor had noted the miner's cardiac history, taken an ECG, diagnosed coronary artery disease, and permissibly relied on his own testing and examination of the claimant. *Id*. (citing *inter alia Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893 (7th Cir. 1990). Moreover, the Board agreed that the ALJ had failed to explain why the opinions of Drs. Tuteur and Selby were better supported by the totality of the medical evidence, especially in light of the fact that the miner's treatment records did not reveal a shunt, Dr. Tuteur failed to submit the complete shunt test results, and neither doctor conducted an ECG. SA. 139.

The Board also denied Consol's motion to strike the Director's response brief, holding that the Director's brief "responded to the claimant's general allegations of error in the ALJ's failure to find the existence of a totally disabling respiratory or pulmonary impairment." SA. 134-135 (*citing* 20 C.F.R. §802.212(b)

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diagnosis of COPD was supported by the miner's treatment records and Dr. Meyer's CT scan reading. SA. 99.

(providing that arguments in response briefs before the Board are limited to those that respond to issues raised in the petitioner's brief)).

The company filed a motion for reconsideration in which it argued (among other things) that the Board had exceeded its scope of review by vacating the ALJ's denial of benefits. The Board summarily denied the motion. SA. 159.

4. ALJ Henley awards benefits.

On remand, the ALJ reopened the record for the admission of additional medical evidence to give the parties adequate opportunity to present their positions. A. 40. Consol submitted two supplemental opinions from Dr. Tuteur, and two supplemental opinions from Dr. Selby. The miner submitted a supplemental opinion from Dr. Tazbaz and additional treatment records.

In his March 7, 2017 decision, the ALJ concluded, "upon further reflection," that Dr. Tazbaz's diagnosis of total respiratory disability was well-reasoned and documented. A. 53. In addition, the ALJ noted that Dr. Tuteur had submitted on remand the complete results of the shunt study and supplemental opinions clarifying his previous opinion. The ALJ explained that the doctor now made it "unequivocally clear that [the miner] is totally disabled and permanently disabled and that is due to becoming hypoxemic with exercise. Physiologically, he is totally and permanently disabled, demonstrating significant impairment of oxygen gas exchange and alveolar hyperventilation, the former worsens during exercise." A.

54. The ALJ thus determined that Dr. Tuteur believed the miner suffered from a totally disabling respiratory and pulmonary impairment as indicated by the qualifying exercise blood gas study results. *Id*.

The ALJ then noted that Dr. Selby's diagnosis of no pulmonary disability whatsoever differed from Dr. Tuteur's assessment, and the doctor initially disagreed with Dr. Tuteur's assessment of a minimal obstructive defect. *Id*. The ALJ further discounted Dr. Selby's opinion because the doctor failed to discuss the significance of the qualifying blood gas study results or whether the miner could perform his usual coal mine employment despite the qualifying studies. *Id*.

Concluding that the preponderance of the evidence established total respiratory disability, the ALJ invoked the 15-year presumption. He then addressed rebuttal of the presumption.

The ALJ determined that Consol's experts' opinions on rebuttal were not credible, ruling first that they failed to prove the absence of legal pneumoconiosis. He found Dr. Tuteur's supplemental opinion that the miner did not suffer from COPD and had no "meaningful obstructive ventilatory impairment" was inconsistent with the doctor's initial diagnosis of chronic bronchitis and air trapping (due to smoking), which resulted in a minimal obstructive impairment. Further, he observed that the miner's treatment records, which documented long-term treatment for COPD and emphysema, contradicted the doctor's final

assessment of no COPD. A. 56. The ALJ similarly faulted Dr. Selby's diagnosis of no pulmonary disease for failing to account for these treatment records. A. 57. And the ALJ found that neither doctor adequately explained how he eliminated the miner's 30 years of coal dust exposure as a factor in any pulmonary disease that the miner might have had. A. 56, 57.

The ALJ then addressed whether Consol had established rebuttal under the second method, *i.e.*, by proving that no part of the miner's totally disabling pulmonary impairment was due to pneumoconiosis. He accorded little weight to the opinions of the company's experts that the miner's hypoxemia was cardiac in nature and explained by the presence of a shunt. The ALJ was troubled by Dr. Tuteur's reversal -- from initially stating that an ECG with bubble study would be "helpful" to confirm the presence of a shunt, to later stating that the study was a "less sensitive technique." A. 58-59. The ALJ also noted that neither Dr. Tuteur nor Selby performed an ECG or addressed the stress test and ECG conducted by Dr. Tazbaz, both of which failed to produce any cardiac abnormalities. Nor did either doctor refute Dr. Tazbaz's statement that a bubble study was the test of choice to prove the presence of a shunt. A. 59. Finally, the ALJ observed that no mention was made of a cardiac shunt in the "records documenting [the miner's] cardiac history, treatments, surgeries and testing, including testing which was done around the time of Dr. Tuteur's shunt study. . . as well as subsequent medical

records which do not reveal any cardiac issues." *Id*. He thus concluded that neither doctor "provided well documented opinions that [the miner's] arterial blood gas study results are due exclusively to a cardiac condition." *Id*. Finding the company's evidence insufficient to rebut the presumption of entitlement, the ALJ awarded benefits.

5. The Board affirms the award of benefits.

Citing its previous Order on Reconsideration as "the law of the case," the Board declined to consider the company's argument that the Board exceeded its scope of review in vacating the ALJ's first decision. The Board also rejected the company's due process argument that its previous decision had directed the ALJ to make particular factual findings. The Board explained that it had merely instructed the ALJ to reconsider the relevant evidence. Moreover, it also observed that on remand, the ALJ had independently evaluated newly-submitted, supplemental medical opinions from both the miner and the company. A. 68. The Board accordingly found no merit in the company's contention that its due process rights were violated, emphasizing that, on remand, the ALJ had permitted the parties to supplement their medical evidence and brief their positions, and thereby afforded the parties a meaningful opportunity to be heard. A. 69.

On the merits, the Board upheld the ALJ's finding that the medical evidence established total respiratory disability and invocation of the 15-year presumption It

ruled that the ALJ had permissibly found that "Dr. Tazbaz's opinion set forth a documented and reasoned diagnosis of total disability." A. 69. It pointed to the doctor's diagnosis of hypoxemia based on the qualifying blood gas studies, notation of the miner's home oxygen therapy, description of the miner's most recent coal mine employment, and conclusion that his "severe [respiratory or pulmonary] impairment with desaturation on exercise test" would prevent him from performing that coal mine work. *Id*.

The Board likewise upheld the ALJ's rejection of Dr. Selby's diagnosis of no pulmonary impairment as not well-reasoned. It explained that Dr. Selby had improperly focused on the cause of the disability, rather than its existence, and therefore, the ALJ had permissibly found that the doctor failed to "'discuss the significance of the [qualifying] exercise blood gas studies' or discuss whether claimant is able to perform his usual coal mine employment despite those blood gas study results." A. 70 (citing, *inter alia*, 20 C.F.R. § 718.204(a) as "providing that "if . . . a nonpulmonary . . . condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis").

The Board also disagreed with the company that the ALJ had mischaracterized Dr. Tuteur's opinion as supporting a finding of total respiratory disability. The Board noted that the ALJ had reasonably relied on the doctor's

determination that the miner was totally and permanently disabled from coal mine employment and that this disability was "due to the . . . pathophysiology where [claimant] becomes hypoxemic with exercise." A. 71 (citing excerpts from Dr. Tuteur's opinions, SA. 161 and 227). As with Dr. Selby, the Board recognized that Dr. Tuteur ultimately attributed the disability to a cardiac shunt, but explained that the cause of the respiratory disability was not relevant to the question of its existence. A. 71 (citing *inter alia* 20 C.F.R. § 718.204(a) and *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989)). It thus determined that "[b]ecause Dr. Tuteur opined that claimant is totally disabled by the impairment of gas exchange, a respiratory or pulmonary impairment," the ALJ relied on it to find total respiratory disability. *Id*.

The Board then affirmed the ALJ's determination that the company had failed to rebut the presumption. Regarding the first method under 20 C.F.R. § 718.305(d)(1)(i) (absence of pneumoconiosis), it found that "although Drs. Selby and Tuteur denied that claimant suffer[ed] from an obstructive respiratory impairment that could constitute legal pneumoconiosis," the ALJ permissibly accorded their opinions little weight because (1) they conflicted with the miner's treatment records (documenting COPD and an obstructive impairment), and (2) Dr. Tuteur rendered inconsistent findings (at first diagnosing an obstructive

impairment due to smoking then opining no "meaningful" impairment and no COPD). A. 73.

Regarding the second rebuttal method under 20 C.F.R. § 718.305(d)(1)(ii) (that pneumoconiosis played no part in the miner's disability), the Board held that the ALJ rationally discounted Drs. Tuteur's and Selby's opinions because the doctors failed to diagnose legal pneumoconiosis in the first instance, and thus could not credibly rule out pneumoconiosis as a potential cause of the respiratory disability. A. 74.

Having upheld the ALJ's invocation of the 15-year presumption, and his finding of no rebuttal, the Board affirmed the ALJ's decision awarding benefits. This appeal followed.

SUMMARY OF THE ARGUMENT

The Court should affirm the award of the benefits. The Board correctly vacated the ALJ's first decision denying benefits because it was not supported by substantial evidence. Among other problems, the ALJ's first decision mischaracterized the three medical opinions of record and failed to adequately consider the miner's extensive pulmonary and cardiac treatment records, which documented the presence of COPD but made no mention of a cardiac shunt (the supposed cause of the miner's qualifying blood gas tests according to the company doctors).

Conversely, the Board correctly affirmed the ALJ's second decision awarding benefits as supported by substantial evidence. The ALJ permissibly found that the qualifying blood gas tests and opinions of Drs. Tazbaz and Tuteur established total respiratory disability, and he therefore correctly invoked the 15-year presumption of entitlement. The ALJ then reasonably determined that neither Dr. Tuteur nor Dr. Selby credibly opined that a cardiac shunt was the cause of the disability, and thus properly found the presumption unrebutted and the miner entitled to benefits.

ARGUMENT

I. Standard of review

The issues addressed in this brief are legal, factual, and procedural in nature. The Court reviews legal questions *de novo*. *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005) (citations omitted), but the Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Ziegler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 901 (7th Cir. 2003) (*en banc*); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997) (*en banc*).

In reviewing an ALJ's factual findings, the Court cannot overturn the ALJ's decision if it is "rational, supported by substantial evidence and consistent with governing law." *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d

789, 793 (7th Cir. 2013) (citation omitted). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Zeigler Coal Co. v. Director, OWCP*, 490 F.3d 609, 614 (7th Cir. 2007) (internal citations omitted).

Finally, the Court reviews the Board's procedural rulings under an abuse-of-discretion standard. *See People of the State of Illinois v. ICC*, 698 F.2d 868, 872 (7th Cir. 1983) (holding that "the formulation of administrative procedures is a matter left to the discretion of the administrative agency") (internal quotation marks omitted); *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (same in black lung case); *see also Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 1101 (7th Cir. 1988) (explaining that reviewing courts are not free to "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.") (internal quotation marks omitted).

II. The Board did not err in declining to strike the Director's response brief, and in vacating the ALJ's initial denial of benefits and remanding for reconsideration.

A. The Director's response brief before the Board complied with the Board's rules of procedure.

Consol argues (Opening Brief (OB) 21-26) that the Board should have struck the Director's response brief because the arguments presented therein were not raised by the miner in his Petition for Review and supporting brief. The company argues that the Board in accepting the Director's brief ran afoul of its

own rules, the Administrative Procedure Act (APA) and due process.[17] These arguments are meritless.

The Board's Rules of Practice and Procedure are set forth in 20 C.F.R. Part 802. Section 802.212 provides that "[a]rguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below (see §802.205(b))." 20 C.F.R § 802.212(b). The Director's response brief complied with the regulation because the Director responded to two arguments made by the miner in his brief supporting the Petition for Review.

In that filing, the miner clearly raised the issue whether the ALJ had improperly focused on the cause of the qualifying blood gas study results in concluding that total respiratory disability was not shown. *See* SA. 70-71. The miner also challenged the ALJ's finding that the opinions of Drs. Tuteur and Selby were well-reasoned and documented in regards to the existence of total respiratory disability.[18] SA. 72.

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[17] The APA applies to black lung adjudications through the BLBA's incorporation of certain Longshore Act procedures. *See* 33 U.S.C. § 919(d), as incorporated by 30 U.S.C. § 932(a); *see also* 20 C.F.R. § 725.455(b).

[18] Employer concedes this second point. *See* OB 24 ("Miner's second argument claimed that Employer's expert medical opinions were not well rationalized because they fail to recognize the uncontradicted ABG testing results as evidence of pulmonary disability and Dr. Selby found that the evidence does not support any disability on the part of claimant Ross.").

The Director's response brief addressed these two arguments in detail, as well as the ultimate issue addressed by the miner, *i.e.*, whether the ALJ properly concluded that total respiratory disability was not established. While the Director explored the issues more fully than the miner, nothing in the regulation requires a response brief to be as succinct as, or merely parrot, an opening brief; instead, and unsurprisingly, a response brief need only "respond." 20 C.F.R. § 802.212(b). And a "response," the Board has long held, may indicate *agreement* with the arguments raised in the opening brief. *See Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254, 258 n.4 (1994). As the Director's response brief complied with Section 802.212(b); the Board correctly found no reason to strike it.

Nevertheless, Consol takes issue with the Board's *explanation* underlying its ruling. It stated that the Director's brief properly responded to "the general allegations of error" raised by the miner on appeal. SA. 134-135, citing *Barnes v. Director, OWCP*, 19 Black Lung Rep. (MB) 1-71 (Ben. Rev. Bd. 1995) (*en banc*). Consol charges (OB 25-26) that *Barnes* violates due process by permitting the Director (but not a claimant or employer) to ignore section 802.212(b)'s requirements and argue any issue the Director determines was erroneously decided below, even if not specifically raised in the petition for review and supporting brief.

The instant case, however, is distinguishable from *Barnes*. There, the claimant did not raise any argument with "sufficient specificity" to invoke the Board's scope of review, yet the Board permitted the Director to respond to the claimant's general allegations of error. *Barnes* at 1-74. Here by contrast, Ross's Petition for Review to the Board explicitly focused on the ALJ's evaluation of the blood gas studies and medical opinions in determining whether the miner was totally disabled. In fact, the Board recognized as much, stating that he "challenge[d] the weighing of the medical opinion evidence and all contrary probative evidence in finding that claimant does not have a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. § 718.204(b)." SA. 134. In short, the company's quibbling about *Barnes* is immaterial.

Consol also contends that the Director's participation must be limited to presenting only statutory and regulatory interpretations. OB 40. The company is mistaken. The BLBA explicitly authorizes, without qualification or limitation, the Director's participation in black lung cases. 30 U.S.C § 932(k).[19] Courts have

[19] Section 922(k) was added by the Senate Committee on Human Resources when it considered the Black Lung Benefits Reform Act of 1977. In explaining the addition, the Committee reported:

> [I]t was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest . . . should be deemed sufficient to confer standing on the Secretary . . . to actively participate in the adjudication of claims before the Administrative

accordingly recognized that the Director has a unique interest in ensuring proper and consistent administration of the BLBA. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1114 n.2 (6th Cir. 1984); *see also Director, OWCP v. Eastern Coal Corp.*, 561 F.2d 632, 645 (6th Cir. 1977) ("It would be strange, indeed, if the designated representative of a department of the United States Government authorized by Congress to disburse millions of dollars in benefits to citizens could not appear as a party to represent the government in important litigation concerning administration of the Act authorizing disbursement"). Limiting the Director to ungrounded, advisory legal opinions, as the company suggests, would clearly hamstring her ability to present her views: concrete application in a specific case provides greater clarity of the legal interpretation. In short, it was completely proper for the Director to respond to the miner's appeal here to ensure that the Board thoroughly addressed all aspects of the meritorious arguments raised by Ross.

> Law Judge, Benefits Review Board, and appropriate United States Courts. This participation is especially significant in black lung claims when, for example, the claimant has been unable to obtain legal representation or where significant issues relating to the interpretation of the Act are to be determined.

Senate Committee on Human Resources, S. Rep. No. 95-209, pp. 20-21, *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, 96th Cong. 624-25 (Comm. Print 1979).

B. The Board did not exceed its scope of review by vacating the ALJ's initial decision and remanding the case for reconsideration.

Consol claims that the Board blindly adopted the Director's interpretation of the evidence and forced the ALJ to do so as well on remand. OB 33. It thus argues that the Board exceeded its scope of review and usurped the ALJ's fact-finding function in contravention of the Administrative Procedure Act and employer's due process rights.[20] This charge is baseless.

The Board's scope of review is set out at 20 C.F.R. § 802.301. It states, in relevant part:

> The Benefits Review Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

20 C.F.R. § 802.301(a); *see* 33 U.S.C.§ 921(c) as incorporated by 30 U.S.C.§ 932. This standard of review thus demands that the Board remand a case to the ALJ (with appropriate instructions) where the ALJ's decision is *not* in accordance with law, or *not* supported by substantial evidence. If the ALJ fails to consider important evidence or incorrectly reviews and weighs the evidence, remand is

[20] The APA entrusts the ALJ to make "findings and conclusions, and the reasons for bases therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A).

necessary. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *cf. Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554, 558 (7th Cir. 1991) (remand not required where outcome is "foreordained").

Here, the Board did not exceed its scope of review in vacating the ALJ's initial decision and remanding the case. The Board correctly recognized that the ALJ's initial evaluation of the blood gas study evidence conflated the issues of total disability and cause of total disability, contrary to the directives of Sections 718.204(b)(2)(ii) and 718.305(b)(1)(iii). A. 33; *see infra* Argument at 38-43. Moreover, the Board properly ruled that the ALJ erred in weighing the medical opinions. On the one hand, he wrongly discounted Dr. Tazbaz's opinion for being "minimal" and not accounting for the miner's heart condition; on the other, he improperly found Drs. Selby's and Tuteur's opinions better supported by the totality of the medical evidence without critically examining their opinions or assessing their consistency with the miner's extensive treatment records. A 33. Accordingly, the Board correctly vacated the ALJ's decision and remanded for reconsideration on these issues. 20 C.F.R. § 802.301(a) (Board may set aside ALJ's findings of fact and conclusions of law that are not supported by substantial evidence or in accordance with law).

To these demonstrated errors in the ALJ's first decision, Consol offers no response. Instead, it falls back on the general principle that ALJs, not reviewing tribunals, make credibility determinations and weigh evidence. OB 34. But that is no answer at all: "Where an ALJ has incorrectly weighed the evidence or failed to account for relevant record evidence, deference is not warranted and remand is frequently required." *Sea "B" Mining*, 831 F.3d at 253. To make its case here on appeal, Consol was required to specifically address and sanitize these ALJ's errors. Its failure to do so is fatal to its contention that the Board's remand was erroneous.

Consol's additional contention (OB 34-35, 36) that the Board and Director coerced the ALJ to find total disability on remand is far-fetched. The Board instructed the ALJ on remand only to "further consider[]" the relevant evidence. A. 34, 35. It did not compel the ALJ to reach any particular result. And on remand, the ALJ reconsidered "all evidence," including supplemental evidence submitted on remand. A. 54. Significantly, it was the supplemental evidence that largely undermined employer's case; namely, Dr. Tuteur's admission that the miner's hypoxemia was totally disabling (EX 17) and the inability of both Drs. Selby and Tuteur to explain why the miner's 30 years of coal mine employment did not play a role in his totally disabling respiratory or pulmonary impairment.

Finally, Consol's due process rights were not violated here. The ALJ allowed it to submit supplemental evidence and file a brief on remand, and these

could have addressed the deficiencies detailed in the Director's initial Board response brief. Clearly, the company was afforded an opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 808 (4th Cir. 1998).

III. The ALJ correctly awarded benefits on remand under the 15-year presumption.

A. Invocation of the Presumption

Totally disabled miners with at least 15 years are rebuttably presumed to be entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b). Since Ross had 30 years of coal mine employment, he could invoke the Section 921(c)(4) presumption by establishing that he had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b). Consol challenges the ALJ's conclusion that Ross satisfied that burden. It argues that the ALJ improperly ignored the cause of the miner's total disability in invoking the presumption, and contends the ALJ improperly evaluated the medical evidence relevant to the disability question. Neither argument has merit.

1. The cause of a totally disabling respiratory or pulmonary impairment is not relevant to invocation of the 15-year presumption.

It has long been recognized that, in determining whether the 15-year presumption is invoked, the cause of the miner's totally disabling respiratory or

pulmonary impairment is not considered. *Bosco*, 892 F.2d at 1480 ("evidence relevant to whether pneumoconiosis is the *cause* of a claimant's total disability is *not relevant* at this qualifying stage under [Section 411(c)(4)]. Only evidence relevant to the *existence* of a totally disabling respiratory or pulmonary impairment is relevant at this stage") (emphasis in original); *Tussey*, 982 F.2d at 1042 (same); *see also Mitchell v. Director, OWCP*, 855 F.2d 485, 490-91 (7th Cir. 1988) (distinguishing proof of respiratory disability from proof of pneumoconiosis). The reason for this is clear. If a claimant is required to establish the cause of his totally disabling respiratory of pulmonary impairment at the invocation stage, he would effectively lose the benefit of the 15-year presumption. *See Bosco*, 892 F.2d at 1473 (noting that "a miner with the requisite number of years in the mines may satisfy the causal connections necessary to support a claim for benefits upon showing that he is totally disabled by a respiratory or pulmonary impairment.").

Consol nonetheless argues that establishing a totally disabling respiratory or pulmonary impairment prior to invoking the 15-year presumption (as the statute and regulations require) necessarily involves an inquiry into the cause of the respiratory and pulmonary disease. The company is mistaken. There are only two requirements for invoking the presumption: first, that the miner must have 15 years of qualifying coal mine employment, and second, that the miner have established a totally disabling respiratory or pulmonary impairment. And the regulation

implementing the 15-year presumption states that "a totally disabling respiratory or pulmonary impairment [is] established pursuant to § 718.204." 20 C.F.R. § 718.305(b)(1)(iii). Section 718.204, in turn, provides that "evidence which meets the standards of either (b)(2)(i), (ii), (iii) or (iv) of this Section shall establish a miner's disability" only "in the absence of contrary probative evidence."[21] "Contrary probative evidence," in turn, refers to all evidence, that is contrary and probative of total disability. *Fields v. Island Creek Coal Co.*, 10 Black Lung Rep. (MB) 1-19, 1-21 (Ben. Rev. Bd. 1987). "This in essence means that even after one of the subsections in § 718.204(c) has been satisfied, the other evidence as it pertains to the other subsections must be considered." *Tussey*, 982 F.2d at 1035. In short, Section 718.204(b)(2) requires the fact-finder to weigh all medical evidence relevant to total disability, but not causation, in deciding invocation of the 15-year presumption. *Bosco*, 892 F.2d at 1481. The causal link is presumed once a totally disabling respiratory or pulmonary impairment is shown.

Section 718.204(a) reinforces the notion that the existence of respiratory disability, not its cause, is the relevant inquiry. It does this by requiring consideration of *all* respiratory or pulmonary impairments even when a non-

[21] Paragraphs (b)(2)(i) through (b)(2)(iv) establish standards for measuring total disability by pulmonary function studies(b)(2)(i), arterial blood gas studies (b)(2)(ii), the presence of cor pulmonale (b)(2)(iii), and medical opinions (b)(2)(iv). *See supra* at 5-6.

pulmonary condition is the cause.[22] The regulatory history of Section 718.204(a) spells out the Secretary's reasons for including respiratory impairment resulting from non-respiratory:

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

62 Fed. Reg. 3344-45 (Jan. 22, 1997). Thus, pursuant to § 718.204(a), if a miner has a breathing problem, or other respiratory or pulmonary defect, then the miner has a respiratory impairment, regardless of the cause. As the Board explained in *Caudill v. Lance Coal Corp.*, 2014 WL 4492042 at *3 (BRB No. 13-0558 BLA) (Aug. 27, 2014), "[t]he issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant inquiry at 20 C.F.R.

[22] Section 718.204(a) provides in pertinent part "[if] . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."

§ 718.204(b)(2) ["*Total disability defined"*] is solely whether a totally disabling respiratory or pulmonary impairment is, or was, present."[23]

This is not to say that an extrinsic or non-respiratory cause - such as coronary artery disease - has no significance in a black lung claim. It is relevant when addressing the *cause* of the respiratory impairment. As discussed below, that question arises here under Section 718.305(d) (rebuttal of the fifteen year presumption), but is also explored under Section 718.201(a)(2) (existence of legal pneumoconiosis) and Section 718.204(c) (disability causation). But make no mistake, the *cause* of a respiratory disability is a distinct question from the *existence* of a respiratory disability.

To the extent that the company's argument rests on the premise that cardiac disease does not result in a pulmonary impairment (*see* OB 29), the company is simply mistaken. "Some cardiac and neurological diseases, for example, may affect the respiratory musculature in such as way as to impair the individual's ability to breathe without actually affecting the lungs." 62 Fed. Reg. 3345 (Jan. 22, 1997); *see also*; *Collins v. Pond Creek Min. Co.*, 751 F.3d 180, 187 (4th Cir. 2014)

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

("[T]he relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole."); *see also* N. L. Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W.Va. L. Rev. 721, 744 (1981) ("Since the heart and the lungs have relatively few, stereotyped ways of manifesting symptoms that are due to a wide variety of causes, diseases of diverse origins may be present with the same cardiac or pulmonary symptoms.")

2. The ALJ correctly weighed the medical opinions to find total disability established.

Consol argues (OB 37-50) that the ALJ incorrectly found that the medical evidence established a totally disabling respiratory or pulmonary impairment. First, the company alleges that Dr. Tazbaz's opinion is insufficient to establish total disability because the doctor did not explain how the miner's alleged COPD or coal workers' pneumoconiosis would cause the miner's desaturation with exercise. OB 42. But this contention again improperly implicates on invocation the question of causation. In fact, the qualifying blood gas studies along with Dr. Tazbaz's statement that Ross's "pulmonary limitation to exercise with hypoxemia that requires oxygen" prevents him from his usual coal mine employment (DX 10 at 4, 21) is *prima facie* evidence of a totally disabling respiratory or pulmonary impairment under the regulations. 20 C.F.R. § 718.204(b)(2)(ii), (iv).

More incisively, Consol disputes that Dr. Tuteur diagnosed a totally disabling respiratory impairment at all. The precise question in evaluating the doctor's opinion is whether he diagnosed a stand-alone disabling respiratory impairment or a disabling respiratory impairment caused by a cardiac condition, both of which under Sections 718.204(a) and (b) would support invocation, or whether he believed the miner had only a cardiac impairment with no pulmonary or respiratory effect. We believe the doctor diagnosed a combination of the former (stand-alone respiratory impairment, and a respiratory impairment caused by a cardiac condition). He stated that "[i]t is unequivocally clear that Mr. Ralph W. Ross is totally and permanently disabled form engaging in work as a coal miner or work requiring effort. It is further clearly identified that this disability is due to the demonstrated pathophysiology where Mr. Ross becomes hypoxemic with exercise." SA. 161. He similarly opined that the miner was "totally and permanently disabled demonstrating a significant impairment of oxygen gas exchange and alveolar hypoventilation, the former worsens during exercise." SA. 227. And the doctor diagnosed a reduced diffusing capacity, which is also a pulmonary impairment. SA. 161; *see supra* n. 8. The doctor's references to the miner's gas exchange problems, hypoxemia, and alveolar hypoventilation describe a pulmonary impairment, *see supra* n.2, which he clearly believes is totally

disabling. As discussed above, that is all the statute, regulations and case law require to invoke the presumption.[24]

Dr. Selby's opinion, by contrast, clearly diagnosed only a cardiac condition with no respiratory or pulmonary impairment. Consol thus charges that, contrary to the ALJ's criticism, the doctor adequately explained his opinion. OB 46. But the ALJ recognized that Dr. Selby disagreed with Dr. Tuteur's diagnosis of an obstructive defect (albeit minimal) and reduced diffusion capacity, and correctly concluded that Dr. Selby never discussed the "the significance of the [qualifying] exercise blood gas studies," or "whether [the miner] could perform his usual coal mine work" despite them, namely, whether the miner's hypoxemia was totally disabling. A. 54. In sum, Consol's allegations that the ALJ mischaracterized the relevant evidence in finding total disability are without merit.

B. Rebuttal of the presumption

Following invocation, Consol had to either 1) disprove the existence of both legal *and* clinical pneumoconiosis, or 2) rule out pneumoconiosis as even a partial cause of his disability. 20 C.F.R. § 718.305(d)(1); *Bender*, 782 F.3d at 134-35, 137-43. The ALJ found that the company failed to establish either method of

[24] In any event, the ALJ reasonably rejected Dr. Tuteur's (and Selby's) position that the miner's heart condition caused his disabling hypoxemia. A. 58-59; *see infra* at 53-54. Thus, the arcane distinction regarding the proper characterization of Dr. Tuteur's diagnosis is largely academic. His opinion was simply not credible.

rebuttal. Consol contends that, as a matter of law, legal pneumoconiosis is not properly presumed on invocation; it then argues that the ALJ incorrectly discounted its experts' opinions in finding no rebuttal. Once again, neither argument has merit.

1. The 15-year presumption applies to both clinical and legal pneumoconiosis.

Consol first claims that successful invocation of the 15-year presumption yields only a presumption of clinical pneumoconiosis. The company cites no authority for adopting its restrictive interpretation of Section 921(c)(4), and our research has uncovered none. While this Court has not addressed this precise argument previously, it has recognized that the 15-year presumption presumes both clinical and legal pneumoconiosis. *Bailey,* 721 F.3d at 795-96 (finding testimony by employer's medical expert that claimant's COPD was "of uncertain origin" insufficient to rebut the 15-year presumption). And the same is true of many other courts. *See, e.g.*, *Antelope Coal Co.* 743 F.3d at 1345 (affirming ALJ's "conclu[sion that] Antelope failed to rebut the presumption that Mr. Goodin suffered from legal pneumoconiosis); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) ("The Fund was able to disprove the existence of clinical pneumoconiosis, but it failed to disprove the existence of legal pneumoconiosis which was its burden."); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980) (holding that "[r]espondents' failure effectively to rule out" a causal

relationship "between the miner's cancer and pneumoconiosis or between his cancer and coal mine employment" precluded rebuttal.)

In any event, Consol's position is undermined by the plain text of the BLBA. Section 921(c)(4) contains no suggestion that the 15-year presumption applies only to clinical pneumoconiosis. Once invoked, it provides a presumption that the miner is disabled by or died due to "pneumoconiosis." "Pneumoconiosis" is defined "for purposes of this subchapter" – which includes Section 921(c)(4) - as "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). That definition includes both legal and clinical pneumoconiosis. *See, e.g.*, 20 C.F.R. § 718.201; *Antelope Coal Co.*, 743 F.3d at 1335.

The courts of appeal to directly address the issue have held that the plain language of Sections 902(b) and 921(c)(4) compels the conclusion that the 15-year presumption applies to legal pneumoconiosis. *Consolidation Coal Co. v. Director, OWCP [Noyes]*, 864 F.3d 1142 (10th Cir. 2017);[25] *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995). As the Fourth Circuit explained:

> If there is any lingering confusion on this point, let us dispel it now. The legal definition of "pneumoconiosis" is incorporated into every

[25] On the strength of *Noyes*, the Tenth Circuit rejected this same argument in *Consolidation Coal Co. v. Director, OWCP [Thompson]*, 719 F.App'x 819 (10th Cir. 2017). Consol then sought review in the Supreme Court, raising the same arguments made here. The Court denied certiorari. *Consolidation Coal Co. v. Dir., OWCP*, 2018 WL 4682983 (Mem.) (Oct. 1, 2018).

> instance the word is used in the statute and regulations. *See* 30 U.S.C. § 902 (definition applies "[f]or purposes of this subchapter"); 20 C.F.R. § 718.201 (definition applies "[f]or the purpose of the Act"). Neither authority nor logic supports the proposition that the legal definition can be ignored for selected purposes.

Id. at 901. Applying that general definition to Section 921(c)(4), *Barber* concluded that an operator seeking to rebut the 15-year presumption by proving that a miner does not have pneumoconiosis must demonstrate the absence of both clinical and legal pneumoconiosis. *Id.* at 901. *Barber's* reasoning is compelling and should be adopted by this Court, which also adheres to the consistent meaning canon. *See Kinney, for and on Behalf of N.L.R.B. v. International Union of Operating Engineers*, 994 F.2d 1271, 1276 (7th Cir. 1993) ("In general, we may logically assume that when Congress uses the same key phrase in two provisions of one statute, lawmakers intended the words to have the same meaning.")

The most that Consol can claim is that the term "pneumoconiosis" as used in Section 921(c)(4) is ambiguous, and could mean either "clinical pneumoconiosis" or "clinical and legal pneumoconiosis." But even a showing of ambiguity would do the company no good because the Department of Labor has the authority to resolve ambiguous BLBA provisions by regulation. *See, e.g.*, 30 U.S.C. § 936(a) ("The Secretary of Labor . . . [is] authorized to issue such regulations as [he] deems appropriate to carry out the provisions of this subchapter."). Section 718.305, a regulation promulgated after notice and comment, definitively states

that the 15-year presumption applies to both clinical and legal pneumoconiosis. To overcome the significant deference a federal agency's regulatory interpretation of an ambiguous statutory provision receives, Consol bears the heavy burden of proving that the Department's rule is unreasonable. *See Brumfield v. City of Chicago*, 735 F.3d 619, 626 (7th Cir. 2013).

The company has fallen short of that burden. In challenging the rationality of the regulation as it applies to legal pneumoconiosis, Consol cherry-picks one of the dozens of studies considered in the preamble to the 2000 regulations that, according to the company, shows that 7.7% -14.2% of miners with high exposure to coal dust develop severe obstructive respiratory dysfunction. OB 51 (citing 65 Fed. Reg. 79940).[26] The company's argument is misguided. As the Tenth Circuit recognized when faced with this identical argument, the company's reliance on this study suffers from a fatal conceptual flaw even if its argument is taken at face value. *See Noyes*, 864 F.3d 1149 n. 2. The pool of miners considered in the study is wildly different than the pool of miners who successfully invoke the presumption. The study examined miners with various exposure histories and

[26] Consol claims that the study showed that 7.7%-14.2% of miners with a high exposure to coal dust develop *legal pneumoconiosis*. OB 51. That is inaccurate. The study determined what proportion of miners in various exposure categories (and smoking histories) developed a respiratory impairment. 65 Fed. Reg. 79940 (Dec. 20, 2000). It did not address the cause of that impairment. It therefore did not identify miners with legal pneumoconiosis, which includes only diseases arising out of coal mine employment. *See* 20 C.F.R. § 718.201(a)(2).

reported what percentage in each category developed and intermediate or severe lung impairment. 65 Fed. Reg. 79940 (Dec. 20, 2000). While 7.7%-14.2% of the miners with heavy dust exposure had sever lung impairment, most of them (85.5%-92.3%) did not. In contrast, 100% of the miners who successfully invoke the fifteen-year presumption suffer from a totally disabling lung impairment, because invocation requires the claimant to prove total disability. 30 U.S.C. § 921(c)(4). Thus, miners who successfully invoke the presumption have effectively proven that they are part of the 7.7%-14.4% of miners with severe lung impairment. Section 921(c)(4) gives them a rebuttable presumption that the impairment is significantly related to, or substantially aggravated by, their 15-plus years of work in the coal mines. That presumption is entirely reasonable. *See* 78 Fed. Reg. 59105-07 (Sept. 25, 2013) (explaining rationale for regulatory rebuttal provisions); *Bender*, 782 F.3d at 142 (upholding 20 C.F.R. 718.305(d)(1)(ii) as "a reasonable exercise of agency authority."). This Court should reject Consol's argument that the 15-year presumption applies only to clinical pneumoconiosis.[27]

[27] In support of its argument that a presumption of a connection between COPD and coal mine employment would be irrational, Consol points to a statement in the response brief filed by the Director in *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006). OB 51. But that case concerned the ten-year presumption at 30 U.S.C. § 921(c)(1), not the 15-year presumption. Section 921(c)(1) provides that where a miner has at least ten years of coal mine employment, it is rebuttably presumed that his or her pneumoconiosis arose out of that employment. The Tenth Circuit held that the ten-year presumption is limited to cases in which the miner establishes the existence of clinical pneumoconiosis. *Andersen*, 455 F.3d at 1106-

2. Substantial evidence supports the ALJ's finding that Consol failed to rebut the 15-year presumption.

Consol last contests on substantial evidence grounds the ALJ's finding that it failed to rebut the presumption. OB 56-57. The ALJ's reasons for discrediting Consol's doctors' opinions, however, were entirely rational and supported by the evidence.

Legal pneumoconiosis.[28] To rebut the presumption of legal pneumoconiosis, the company relied on the opinions of Drs. Tuteur and Selby. The ALJ correctly found them inadequate to the task, primarily because the doctors did not explain how they eliminated the miner's 30 years of coal dust exposure as a potential cause of his pulmonary impairment. This oft-repeated criticism is fair. *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018) (upholding ALJ's rejection of doctors' opinions based on "their absolute failure to explain why coal

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07. The Court's holding is grounded in the recognition that the ten-year presumption is entirely redundant when it comes to legal pneumoconiosis. To invoke the ten-year presumption, the miner must prove that he has pneumoconiosis. In the context of legal pneumoconiosis, this means that the claimant must have already proved that his COPD arose out of coal mine employment." 20 C.F.R. § 718.201(a)(2). At that point, awarding the miner a presumption that his COPD arose out of coal mine employment is pointless. *See Andersen*, 455 F.3d at 1107. Indeed, the Tenth Circuit has rejected the argument that its decision in *Andersen* compels a finding that the fifteen-year presumption does not include legal pneumoconiosis. *Noyes*, 864 F.3d at 1147-49.

[28] Because the ALJ found that Consol failed to prove the absence of legal pneumoconiosis, he did not address the existence of clinical pneumoconiosis. A. 58.

dust exposure could not have contributed in some measure to [the miner's] COPD"); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017) (upholding ALJ's rejection of doctors' opinions that "solely focused on smoking [and] nowhere addressed why coal dust could not have been an *additional* cause") (emphasis in original); *Brandywine Explosives & Supply v. Dir, OWCP*, 790 F.3d 657, 668 (6th Cir. 2015) (upholding ALJ's rejection of doctor's opinion for "ignoring the possibility that [the miner's] COPD could have multiple causes – smoking and dust exposure"). Indeed, it is particularly reasonable for ALJs to insist on such an explanation where, as here, the miner has a long history of coal mine employment, is totally disabled, and is presumed to suffer from a respiratory impairment that is "significantly related to, or substantially aggravated by" coal mine dust exposure. 20 C.F.R. § 718.201(a)(2) (defining "legal pneumoconiosis").

The ALJ also properly questioned Drs. Tuteur's and Selby's conclusion that the miner does not have COPD in light of Dr. Meyer's CT scan reading of mild to moderate emphysema and the years of medical treatment records documenting the condition. A 56-57; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986) ("[An] ALJ should reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation."). Thus, Consol's assertion that the ALJ erred in according little weight to the

doctors' opinions because "no medical evidence or research was submitted controverting their opinions" (OB 55) is plainly wrong.[29]

Disability Causation. The ALJ gave two reasons for rejecting Drs. Tuteur's and Selby's opinion that a cardiac shunt was the sole cause of the miner's disability. First, he reasonably observed that their disability causation opinions were unpersuasive because they failed in the first instance to diagnose pneumoconiosis, "a fact that is presumed and unrebutted by the evidence." A. 58; *accord Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 735 (7th Cir. 2013) ("Having denied that Burris suffered from pneumoconiosis, the doctor was of course unable to opine on the cause of a disease that he denied the claimant had."); *Hobet Mining*, 783 F.3d at 505 (a medical opinion that erroneously fails to diagnose pneumoconiosis is entitled to little, if any, weight on the issue of disability causation unless it includes a "reasoned explanation . . . of why the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present.").

Second, and more important here, the ALJ permissibly found the cardiac shunt diagnosis simply not credible. A. 58-59. He faulted Dr. Tuteur for

[29] The company implies that the findings of COPD in the miner's treatment records are suspect because the most recent pulmonary function study from June 2012 revealed at most a minimal impairment. OB 53. But Dr. Tazbaz obtained pulmonary function study results that revealed a severe obstructive defect in February 2012 – just four months previously. DX 10 at 3.

vacillating on the need for an ECG bubble test to confirm the shunt, *see* *Brandywine Explosives*, 790 F.3d at 668 (upholding ALJ's rejection of inconsistent and equivocal doctors' opinions); he criticized both doctors for not conducting an ECG, *Rowe*, 710 F.2d at 255 (fact-finder is to examine validity of reasoning of medical opinion in light of studies conducted); and finally, the ALJ rejected their view for failing to address the contrary medical evidence of record, including Dr. Tazbaz's normal cardiac test result and the miner's extensive cardiac treatment records, which lacked any mention of a shunt. *Kertesz*, 788 F.2d at 163; *Rowe*, 710 F.2d at 255; *Risher v. OWCP*, 940 F.2d 327, 331 (8th Cir. 1991) ("An ALJ may discount a doctor's opinion where that opinion is based on an incorrect view of the claimant's medical history.").

In the final analysis, "[a]fter examining all of the medical evidence and testimony, the ALJ did exactly what he was supposed to do: give these varying opinions more or less weight based on his view of the credibility of the witnesses, the documented nature of the witnesses' conclusions, and the bases for these conclusions." *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321(7th Cir 1995). The ALJ's conclusion that Consol's experts failed to rebut the presumption is supported by substantial evidence and should be affirmed. *Burris*, 732 F.3d at 732; *Bailey*, 721 F.3d at 793; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 848 (7th Cir.

2011) (court will not overturn ALJ's decision if it is supported by substantial evidence, rational and consistent with governing law).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is not necessary in this case.

CERTIFICATE OF COMPLIANCE

This brief was produced using Microsoft Word, in Times New Roman font, 14-point typeface, 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). The brief also complies with the word limitation set forth in 7th Cir. R. 32(c) because it contains 13110 words.

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