No. 17-3858

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND CREEK COAL COMPANY,

Petitioner

v.

ROBERT E. HILL

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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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 Robert E. Hill. A Department of Labor (DOL) administrative law judge (ALJ) awarded his claim, and the Benefits Review Board affirmed. Island Creek Coal Company, Mr. Hill's former employer, has petitioned the Court

to review the Board's decision.[1] The Director, Office of Workers' Compensation Programs, responds in support of the Board's decision.

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over Island Creek'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). Island Creek petitioned for review of the Board's June 28, 2017, decision on August 21, 2017, within the sixty-day limit prescribed by Section 21(c). Moreover, the "injury" as contemplated by Section 21(c)—Mr. Hill's exposure to coal-mine dust—occurred in Kentucky, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ's decision on Mr. Hill's claim 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 decision on May 24, 2016. Island Creek filed a notice of appeal

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[1] Island Creek's status as the "responsible operator"—the party responsible for paying any benefits due to Mr. Hill—is not at issue in this appeal.

with the Board on June 20, 2016, within the thirty-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).

STATEMENT OF THE ISSUES

It is uncontested that Mr. Hill suffers from chronic obstructive pulmonary disease (COPD), and that he is totally disabled as result. But Island Creek continues to contest the ALJ's finding that Mr. Hill's COPD was caused, in part, by coal-dust exposure (*i.e.*, whether the COPD is "legal pneumoconiosis") and is therefore compensable. The ALJ credited the medical opinions of Drs. Houser, Rasmussen, Simpao and James, who all found that Mr. Hill's COPD was caused, in part, by dust exposure, and discounted the contrary opinions offered by Island Creek—those of Drs. Hippensteel, Tuteur, Selby and Culbertson (who all excluded coal dust as a cause of Mr. Hill's COPD). The questions before the Court are:

1. Did the ALJ permissibly credit the opinions linking Mr. Hill's COPD to dust exposure, given that they were supported by the evidence and in accord with premises underlying DOL's regulations?

2. Did the ALJ properly discount the opinions excluding dust as a factor in his disease, as they were—without any credible explanation—at odds with the premises underlying the regulations?

STATEMENT OF THE CASE

A. Legal Background

The BLBA provides benefits to coal miners who are totally disabled due to pneumoconiosis. 30 U.S.C. § 901(a). To obtain benefits, Mr. Hill must prove that 1) he has pneumoconiosis; 2) the disease arose out of his dust exposure during coal-mine employment; 3) he has a totally disabling pulmonary impairment; and 4) his total disability is due to pneumoconiosis.[2] 20 C.F.R. §§ 718.202-.204; 725.202(d)(2); *see Navistar, Inc., v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014).

"Pneumoconiosis" includes both "clinical pneumoconiosis" (diseases commonly recognized as pneumoconiosis by the medical

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[2] Because Mr. Hill 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); *Vision Processing, LLC, v. Groves*, 705 F.3d 551, 554-55 (6th Cir. 2013) (discussing changes to BLBA made by Section 1556).

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); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014). Proof that a miner has legal pneumoconiosis (a disease that, by definition, arises out of coal-mine employment) satisfies both the first and second elements of a miner's claim. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-07 (10th Cir. 2006).

The definition of legal pneumoconiosis encompasses both obstructive and restrictive lung diseases arising out of exposure to coal-mine dust. 20 C.F.R. § 718.201(a)(2).[3] The issue in this case is whether Mr. Hill's COPD is "significantly related to, or

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[3] "Obstructive disorders are characterized by a reduction in airflow." *The Merck Manual* 1853 (19th ed. 2011). In contrast, "[r]estrictive disorders are characterized by a reduction in lung volume." *Id.* at 1855. In lay terms, restrictive disease makes it more difficult to inhale, while obstructive disease makes it more difficult to exhale. *See Gulf & Western Indus. v. Ling*, 176 F.3d 226, 229 n.6 (4th Cir. 1999).

substantially aggravated by, dust exposure in [his] coal mine employment."[4] 20 C.F.R. § 718.201(b). If so, it is legal pneumoconiosis.

The current regulation defining legal pneumoconiosis, 20 C.F.R. § 718.201(a)(2), was promulgated in 2000. 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). At that time, DOL published a regulatory preamble, which describes the development of, and bases for, Section 718.201(a)(2). 65 Fed. Reg. 79937-45. This portion of the preamble relies heavily on the *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/) published by the National Institute of Occupational Safety and Health (NIOSH)

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[4] COPD is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889. COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); *Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121, n. 2 (9th Cir. 2014). 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).

(hereafter referred to as "the *Criteria*" or "the NIOSH *Criteria*").[5] *See* 65 Fed. Reg. 79937-38. 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. With regard to emphysema (the form of COPD at issue here), the preamble indicates that it may arise from dust exposure, and thus be classified as legal pneumoconiosis. 65 Fed. Reg. 79939 (noting the "considerable body of literature documenting coal mine dust exposure's causal effect on the development of chronic bronchitis, emphysema, and associated airways obstruction" and the "clear relationship between coal mine dust and COPD").

B. Statement of the Facts

As noted above, it is now uncontested that Mr. Hill is totally disabled by COPD. The record indicates that there were both

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[5] Congress designated NIOSH as DOL's scientific consultant regarding the development of medical criteria for claims under the BLBA. 30 U.S.C. § 902(f)(1)(D). NIOSH is part of the Centers for Disease Control and Prevention in the Department of Health and Human Services.

occupational and non-occupational exposures that could have contributed to his COPD. Occupationally, the ALJ found that he worked as an underground miner for fourteen years. Joint Appendix (JA) 200. Mr. Hill's primary non-occupational exposure was a forty-pack-year cigarette-smoking history. *Id.* 201.[6] He was also reported to have been exposed to wood and coal smoke, and to have had asthma. *See* JA 96. There are eight medical opinions of record addressing the etiology of Mr. Hill's COPD—four linking the disease, at least in part, to dust exposure, and four wholly excluding dust as a cause.[7]

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[6] A "pack year" is one pack of cigarettes per day for one year. For example, people who smoked one pack a day for twenty years, two packs a day for ten years, and one-half pack a day for forty years can all be said to smoking histories of twenty pack-years. The ALJ found that Mr. Hill "smoked up to one pack per day for forty years, for about a forty pack-year smoking history." JA 201.

[7] The record contains medical opinions from other physicians, but Mr. Hill and Island Creek opted not to rely on those opinions, and they were not admitted or considered by the ALJ in her 2016 opinion. Thus, they are not at issue in this appeal, and we will not address them in this brief.

1. Reports Linking COPD to Dust Exposure

a. Dr. Simpao

Dr. Simpao examined Mr. Hill on behalf of DOL in 2004, and provided a written opinion. Director's Exhibit (DX) 13-22.[8] He also provided a follow-up report later that same year. DX 16. He ultimately concluded that Mr. Hill has legal pneumoconiosis, finding that the miner suffers from restrictive and obstructive lung conditions attributable to dust exposure. DX 16-2. Dr. Simpao also acknowledged Mr. Hill's extensive smoking history, but stated that he could not determine the extent that Hill's smoking "influenced" his pulmonary condition. DX 16-3. Dr. Simpao was subsequently deposed in 2005 and 2006. DX 65-165, 65-62. He reiterated his conclusion that Mr. Hill's lung disease resulted from his dust exposure, while acknowledging that his forty years of cigarette smoking also had an effect, although the doctor could not quantify the extent of the effect. DX 65-176-178, 65-76-80.

[8] Exhibit numbers refer to evidence in the record compiled before the ALJ. We cite these exhibit numbers only when the evidence is not included in the Joint Appendix.

b. Dr. James

Dr. James is one of Mr. Hill's treating doctors. JA 9. He initially diagnosed legal pneumoconiosis in the form of a restrictive and obstructive impairment caused by dust exposure in a 2004 report. DX 15. Dr. James testified on deposition in 2005 and 2006. JA 5, 16. His 2005 testimony dealt primarily with his separate finding that Mr. Hill also had clinical pneumoconiosis. *See* JA 12-13. In 2006, however, he addressed the cause of Mr. Hill's COPD. He stated that dust exposure is more likely to cause restrictive defects, while smoking is more likely to cause obstructive defects. JA 27. But he agreed that Mr. Hill's exposure to coal-mine dust aggravated the miner's COPD. *Id.* Dr. James noted that Mr. Hill had a significant smoking history (although he could not quantify its extent), and conceded that it was "possible" that smoking caused the entirety of Mr. Hill's respiratory impairment. JA 30-31, 34. He denied, however, that this was "likely." JA 35. Dr. James ultimately concluded that both smoking and dust exposure were causative factors. JA 29, 35, 37.

Dr. James provided another report in 2008. DX 83-77. This time, he stated that dust was responsible for eighty percent of Mr.

Hill's "severe" lung condition, and smoking for twenty percent. *Id.* Finally, Dr. James provided yet another report in 2015, wherein he found that Mr. Hill has chronic lung disease in the form of COPD, probably caused by a combination of dust exposure and cigarette smoking. JA 65.

c. Dr. Houser

Dr. Houser examined Mr. Hill at his request in 2009. DX 83-380. He diagnosed COPD in the form of emphysema, which he attributed to a combination of smoking and dust exposure in both coal mining (twelve to thirteen years) and fluorspar mining (six to seven years). DX 83-381. Dr. Houser testified at deposition later in 2009. DX 83-200. He reiterated the conclusions of his earlier report. DX 83-221-224. He explained that fluorspar dust was the least important factor in causing Mr. Hill's COPD because of the short duration and remoteness of the exposure. DX-83-225.

Dr. Houser acknowledged the possibility of a greater role or risk for smoking in Mr. Hill's case, *id.*, but stated that it was not possible to distinguish the effects of mining and smoking in an individual case, as they had additive and synergistic effects. DX 83-226-227 (Explaining that—because smoking inhibits miners'

ability to clear coal and rock dust from their lungs and because emphysema, even if initially caused by smoking, will result in a miner inhaling more dust than he otherwise would—"you reach a point where it really is not smoking or coal dust exposure. It's actually the combination of the two that results in the lung damage[.])" Dr. Houser cited medical literature substantiating the cumulative synergistic effects of smoking and coal dust, as well as indicating that coal dust is associated with emphysema even in non-smoking miners, in support of his conclusion. DX 83-232, 236. Finally, he stated (relying both on a pathology textbook and his own experience treating patients) that bullous emphysema can be caused by any factor that causes emphysema generally. DX 83-243.[9]

d. Dr. Rasmussen

Dr. Rasmussen reviewed Mr. Hill's medical records at his request, and prepared a report in 2009. DX 83-468. Based on his review, Dr. Rasmussen diagnosed COPD/emphysema, caused by a

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[9] Bullous emphysema is a form or stage of the disease characterized by one or more "large cystic dilatations of lung tissue." *Dorland's Illustrated Medical Dictionary* (32nd ed. 2012) 610.

combination of smoking and coal-dust exposure. DX 83-471-473. He explained that medical literature demonstrated that coal dust exposure is a "potent cause" of emphysema and that, while it might be reasonable to assume that smoking was a greater factor in this case, Mr. Hill's dust exposure was "sufficient to cause disabling lung disease in a susceptible individual" and "a significant co-contributor" to the miner's disabling emphysema. DX 83-473.

2. Reports Excluding Dust Exposure as Cause of COPD

a. Dr. Selby

Dr. Selby examined Mr. Hill on behalf of Island Creek in 2004. DX 18. He concluded that Mr. Hill had severe bullous emphysema caused by cigarette smoking, and also stated that any obstructive lung disease that Mr. Hill might have was caused by smoking and, possibly, non-occupational asthma. DX 18-6. Dr. Selby was deposed in 2007. DX 65-225. He testified that Mr. Hill's respiratory condition was entirely caused by smoking, averring that coal-dust exposure "virtually never" results in bullous emphysema. DX 65-235, 65-250. Finally, Dr. Selby reiterated his conclusions in a 2008 report. DX 83-743, 83-745.

b. Dr. Hippensteel

Dr. Hippensteel reviewed Mr. Hill's medical records for Island Creek in 2009. DX 83-889. He found that Mr. Hill had bullous emphysema, which he stated was not associated with pneumoconiosis, but was due to smoking. DX 83-896.
Dr. Hippensteel also found that Mr. Hill had chronic bronchitis, which he likewise attributed to smoking. DX 83-897.
Dr. Hippensteel was deposed later in 2009, DX 83-927, and opined that although Mr. Hill had bullous emphysema, it was due to smoking, as coal dust (or pneumoconiosis) will not cause that form of emphysema. DX 83-936, 83-943. He also stated that the "waxing and waning" of Mr. Hill's condition was not indicative of a dust disease, and concluded that the miner did not have legal pneumoconiosis. DX 83-944-945. Dr. Hippensteel affirmed his conclusions in a supplemental report still later in 2009, claiming that coal dust will not cause bullous emphysema except in the case of complicated pneumoconiosis.[10] DX 83-389, 83-391. He also

[10] Complicated pneumoconiosis is an advanced form of pneumoconiosis, often characterized by massive fibrosis of the (cont'd . . .)

indicated that Mr. Hill's dust exposure did not contribute to his bronchitis, as that condition continued after Mr. Hill left the mines. *Id*.

In 2015, Dr. Hippensteel was deposed again. JA 75. This time, he diagnosed both bullous emphysema and bronchiectasis.[11] JA 86-88. He attributed these conditions to smoking, noting with that "it would be a very unusual combination to see in a person that just had coal workers' pneumoconiosis." JA 88.

Dr. Hippensteel also provided another report for Island Creek later that year. JA 171. He again found that Mr. Hill's COPD is due to smoking, citing the "waxing and waning" of his condition. JA 175.

c. Dr. Tuteur

Dr. Tuteur reviewed Mr. Hill's medical records and examined him in 2015 at Island Creek's behest. JA 66, 94. He initially found that Mr. Hill had COPD (emphysema and bronchitis) caused by a

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(. . . cont'd)
lungs. *See* 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (discussing complicated pneumoconiosis). There is no evidence that Mr. Hill has complicated pneumoconiosis.

[11] Bronchiectasis is defined as "chronic dilation of the bronchi." *Dorland's Illustrated Medical Dictionary* 252.

combination of cigarette smoking, exposure to wood and coal smoke and asthma. JA 96. Later, in the same report, he relied on statistics showing that twenty percent of smokers who are not coal miners develop COPD, whereas only one to two percent of non-smoking miners develop the disease, to conclude that Mr. Hill's COPD is "uniquely due to the inhalation of tobacco smoke." JA 97. He further explained his reasoning thusly:

> [T]hough it is statistically possible for an individual miner to develop [COPD] as a result of the inhalation of coal mine dust, it occurs relatively infrequently and this attribution of coal mine dust etiology of COPD is not valid for an individual cigarette smoking miner such as Mr. Hill at the level of reasonable medical certainty. The [wood smoke] exposure during his youth adds to the robustness of this conclusion.

JA 98. Dr. Tuteur subsequently reiterated this reasoning on deposition. *See* JA 122-24.

d. Dr. Culbertson

Dr. Culbertson is Mr. Hill's treating pulmonologist. JA 182-83. He gave his opinion via deposition testimony in 2015. JA 177. He diagnosed COPD, which he attributed solely to Mr. Hill's smoking history. JA 184, 188-89. He also stated that Mr. Hill's

coal-mine dust exposure was not a cause of his COPD, JA 192, but offered no explanation for this conclusion.

C. Procedural History

1. Proceedings Before 2016

Mr. Hill filed his application for benefits in 2004. JA 1. A DOL district director awarded his claim in 2005. DX 36-5. Island Creek, however, requested an ALJ hearing, and the ALJ denied Mr. Hill's claim in 2007, finding that he had neither clinical nor legal pneumoconiosis. JA 40, 43-47.

Mr. Hill did not appeal this decision, but filed a request for modification of the denial of benefits later in 2007. DX 67; *see* 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.310; *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951 (6th Cir. 1999) (discussing modification process). The district director denied this request in 2008. DX 76. Mr. Hill then requested a hearing, but a new ALJ denied his claim in 2010. JA 49. This ALJ found that Mr. Hill failed to prove that he had a totally disabling pulmonary impairment, and did not address whether the miner had pneumoconiosis. JA 52-53. Mr. Hill appealed, and the Board vacated the ALJ's decision, and remanded

the case in 2011. JA 55. The Board concluded that the ALJ may have erroneously failed to consider all admissible evidence, and remanded the case for the reconsideration of both pneumoconiosis and total disability. JA 59-60.

The ALJ, in turn, remanded the case to the district director in 2012, to consider the new evidence submitted on remand. JA 63-64. The district director returned the case to the Office of ALJs for a new hearing later that year. DX 84-4. After several delays, a hearing was held before a third ALJ, Alice Craft, (hereafter, "the ALJ") in 2015, and she issued a decision awarding Mr. Hill's claim in 2016. JA. 130, 196.

2. The 2016 ALJ Decision

The ALJ credited Mr. Hill with fourteen years of coal-mine employment, and found that he had a smoking history of about forty pack-years. JA 200, 201. She also found, based on her review of the x-ray and CT-scan evidence, that Mr. Hill failed to prove that he has clinical pneumoconiosis. JA 223-25; *see* 20 C.F.R. §§ 718.201(a)(1), 718.202.

Turning to the question of legal pneumoconiosis (*see* 20 C.F.R. § 718.201(a)(2)), the ALJ noted that DOL found in the 2000

regulatory preamble that coal dust can cause obstructive lung disease. JA 226-27; *see* 65 Fed. Reg. 79938, 79943. She further noted that the preamble indicated that the risk of developing disabling COPD from coal-mine dust exposure was additive to the risk of developing it from smoking, and that dust-related and smoking-related obstruction develop through similar mechanisms. JA 227; *see* 65 Fed. Reg. 79940, 79943. She specifically explained, however, that the determination of the etiology of a miner's obstructive lung disease must be made on a case-by-case basis, and that the miner bears the burden of proof.[12] JA 227; *see* 65 Fed. Reg. 79941.

With these principles in mind, the ALJ evaluated the conflicting medical opinions. She found that the opinions of Drs. Houser and Rasmussen, who attributed Mr. Hill's COPD to a

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[12] For claims filed on or after January 1, 2005, miners with fifteen or more years of qualifying employment and a totally disabling pulmonary impairment are rebuttably presumed to have both clinical and legal pneumoconiosis. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305; *see Tennessee Consolidated Coal Co. v. Morrison*, 644 F.3d 473, 478-79 (6th Cir. 2011) (discussing operation of fifteen-year presumption). This presumption is not available to Mr. Hill, as he filed his claim in 2004, and stipulated that he worked in the mines for fourteen years. JA 200; *see* note 2, *supra*.

combination of dust exposure and smoking, were the most thoroughly explained and therefore entitled to the most weight. JA 231. She found that the opinions of Drs. James and Simpao were also entitled to some weight, and that they supported the conclusions of Drs. Houser and Rasmussen. *Id.* With respect to all four of these opinions, the ALJ noted that they were consistent with "the premises underlying the regulations." JA 228-29.

The ALJ also declined to credit the opinions of Drs. Culbertson, Selby, Hippensteel and Tuteur, all of which completely excluded coal dust as a cause of Mr. Hill's COPD. JA 230, 231. She explained that "[n]one offered any creditable explanation [of] how they excluded coal dust as a contributing factor to [Mr. Hill's] obstructive disease." JA 230; *see also* JA 229. Because their conclusions were at odds with those of the preamble—that dust can cause obstruction, and that its effects are additive and similar to those of smoking—and because they failed to explain this disparity, she found them unworthy of credit. JA 230. She also found that those doctors had failed "to explain why significant coal mine dust exposure was not a contributing or aggravating factor" in Mr. Hill's COPD. *Id.*; *see* 20 C.F.R. § 718.201(b) (disabling lung diseases that

are "significantly related to, *or substantially aggravated by*, dust exposure in coal mine employment" are compensable under the BLBA) (emphasis added). Thus, she found that Mr. Hill's COPD was legal pneumoconiosis. JA 231.

The ALJ also found that Mr. Hill was totally disabled from a pulmonary perspective, and that his pneumoconiosis was a substantial contributor to that disability. JA 231-36; *see* 20 C.F.R. § 718.204(b), (c). Accordingly, she awarded benefits. JA 238. Island Creek then appealed to the Board, challenging only the ALJ's legal-pneumoconiosis finding.

3. The 2017 Board Decision

The Board affirmed the ALJ's award in a 2-1 decision. JA 240. The majority rejected Island Creek's argument that the ALJ had treated the preamble as a presumption that Mr. Hill's COPD is legal pneumoconiosis, and held that she only used it as a guide in evaluating the medical-opinion evidence. JA 244. The majority affirmed the ALJ's crediting of the opinions of Drs. Houser and Rasmussen, as supported by the reports of Drs. Simpao and James, which attributed Mr. Hill's COPD, in part, to dust exposure. JA 245-46, 248 & n.6.

Relying on both the ALJ's findings, and the arguments advanced on appeal by the Director, the majority also affirmed the ALJ's rejection of the contrary reports of Drs. Hippensteel, Tuteur and Culbertson, as they failed to adequately explain how they completely excluded coal dust as a cause of Mr. Hill's lung disease.[13] JA 247-49 & n.9. One judge dissented, believing that the ALJ had not sufficiently explained her conclusion that the Hippensteel and Tuteur opinions were inconsistent with the preamble, and would have remanded for reconsideration. JA 251-53. Island Creek then petitioned this Court for review. JA 254.

SUMMARY OF THE ARGUMENT

The Court should affirm the ALJ's finding of legal pneumoconiosis, and her resulting award of benefits. The ALJ acted within her discretion in crediting the opinions of Drs. Houser, Rasmussen, Simpao and James—all of which found that Mr. Hill's COPD was caused, in part, by his fourteen years of coal-dust exposure, as well as by his lengthy history of cigarette smoking.

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[13] The Board affirmed the ALJ's discounting of Dr. Selby's opinion as unchallenged on appeal. JA 246, n.7.

These opinions are consistent with the findings of DOL's regulatory preamble, which concluded that coal dust can cause disabling obstruction, and that the effects of dust and smoking on COPD are similar and additive.

By the same token, the ALJ properly discounted the opinions of Drs. Hippensteel, Tuteur, Selby and Culbertson, who all wholly excluded coal dust as a possible cause of Mr. Hill's COPD. Their conclusions were contrary to the preamble and—most importantly—they failed to offer any credible explanation for this disparity. Drs. Hippensteel and Selby relied on the unfounded assumption that coal dust will not cause bullous emphysema (the type of COPD they diagnosed in Mr. Hill), and Dr. Culbertson provided no explanation at all for his conclusion. Finally, Dr. Tuteur based his conclusion on general statistics regarding the causes of COPD rather than on the facts of Mr. Hill's case.

Contrary to Island Creek's primary argument, the ALJ did not treat the preamble as a "rule of law" or presumption. Nor did she require the company to disprove the presence of legal pneumoconiosis. Rather, she found that Mr. Hill suffers from legal pneumoconiosis based on the opinions specifically linking the

miner's COPD to dust exposure, and she correctly used the preamble as a guide in evaluating and ultimately rejecting the unexplained and unfounded conclusions offered by Island Creek's experts.

Island Creek's remaining arguments amount to little more than an improper request for the Court to reweigh the evidence. Nothing in Island Creek's brief shows that the ALJ violated her broad discretion in analyzing the conflicting medical opinions presented in this case. Accordingly, the Court should affirm the decisions of the ALJ and the Board, and uphold the award of BLBA benefits to Mr. Hill.

ARGUMENT

A. Standard of Review

This case presents both factual and legal questions. On factual issues, the Court "reviews the ALJ's decision . . . to determine whether it was supported by substantial evidence," and her "findings are conclusive if they are supported by substantial evidence and accord with the applicable law." *Central Ohio Coal*, 762 F.3d at 488 (internal quotations and citations omitted). Moreover, "[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." *Big Branch Coal Co. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013). The Court, however, "review[s] . . . legal conclusions *de novo*." *Central Ohio Coal*, 762 F.3d at 488 (internal quotations and citations omitted).

B. The ALJ properly found that Mr. Hill has legal pneumoconiosis.

1. The ALJ, after consulting DOL's regulatory preamble, reasonably credited the medical opinions linking Mr. Hill's COPD to coal-dust exposure over the opinions wholly excluding dust as a causative factor.

The determinative issue in this case is whether Mr. Hill's COPD is legal pneumoconiosis—*i.e.*, whether it was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b); *see* 20 C.F.R. § 718.201(a)(2). The ALJ found that Mr. Hill met his burden of proving that coal dust was a significant cause of his COPD. Although the ALJ could have explained her findings more fully, the path of her reasoning is clear, and her finding is supported by substantial evidence. *See Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327 (7th Cir. 1983) ("we will uphold an [ALJ's] decision of less

than ideal clarity if [her] path may reasonably be discerned") (citation omitted). The Court should thus affirm the ALJ's legal-pneumoconiosis finding, and her resulting award of benefits.

As the ALJ plainly recognized, there are two primary exposures that could have caused or contributed to Mr. Hill's COPD—coal dust from a fourteen-year mining career and a forty-pack-year smoking history. Four physicians (Houser, Rasmussen, Simpao and James) concluded that *both* of these factors contributed to Mr. Hill's lung disease. Four different physicians (Culbertson, Selby, Hippensteel and Tuteur), on the other hand, stated that they could *wholly exclude* coal dust as a causative factor. The ALJ permissibly gave the first group greater weight, finding their reports to be better reasoned than the opinions in the second group, which failed to give a credible (or in Dr. Culbertson's case, any) explanation for their wholesale exclusion of dust exposure as a causative factor.

When presented with conflicting medical opinions, it is within an ALJ's discretion to weigh and evaluate the evidence, and her determination as to the credibility of the conflicting reports is not subject to second-guessing if her conclusions are supported by

substantial evidence and in accordance with law. *Central Ohio Coal*, 762 F.3d at 488; *Big Branch Coal*, 737 F.3d at 1069. In particular, the question of "whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact." *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989) (internal quotation and citation omitted).

Here, the ALJ gave the greatest weight to the opinions of Drs. Houser[14] and Rasmussen, as supported by the reports of Drs. James and Simpao.[15] In finding that Mr. Hill's COPD arose, in

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[14] The ALJ's decision references only Dr. Houser's written opinion, and not his subsequent deposition, although both were admitted into evidence. Dr. Houser's conclusions were the same in both, and the additional reasoning provided in his deposition testimony could only provide more support to the ALJ's finding on legal pneumoconiosis. *See* DX 83-221-227, 232, 236; 83-381. Thus, any error in her failure to more fully address his testimony is harmless. *See Dixie Fuel Co., LLC, v. Director, OWCP*, 820 F.3d 833, 842-43 (6th Cir. 2016) (applying harmless-error rule in black-lung litigation).

[15] The Board affirmed the ALJ's crediting of Dr. Simpao's opinion as unchallenged on appeal. JA 245, n.6. Likewise, Island Creek raises no specific arguments regarding that opinion in this appeal. Thus, the Court may affirm the ALJ's reliance on it for the same reason as the Board did. *See Brandywine Explosives & Supply v.*
(cont'd . . .)

part, from coal-dust exposure, Drs. Houser and Rasmussen considered Mr. Hill's dual exposures. DX 83-381, 83-471-473. Indeed, both indicated that his lengthy smoking history might reasonably be considered a larger factor in his COPD than his fourteen years of coal-dust exposure. DX 83-225, 83-473. But both pointed to scientific literature showing that coal dust and smoking operate via similar and additive mechanisms (or, in Dr. Houser's words, are "synergistic") in causing obstructive lung disease. DX 83-226-227, 83-232, 83-236, 83-473. The ALJ acted within her discretion in giving these opinions more weight, particularly because—as she found—their conclusions were consistent with "the premises underlying the regulations"—*i.e.*, DOL's evaluation of the scientific evidence in the 2000 regulatory preamble. JA 228-29, 231.

The preamble, based on and adopting the findings of the 1995 NIOSH *Criteria*, clearly indicates that both coal-dust exposure and

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(. . . cont'd)
Director, OWCP, 790 F.3d 657, 663 (6th Cir. 2015) (citations omitted) (Court will generally not consider issues not raised before Board); *Central Ohio Coal*, 762 F.3d at 490 (citation omitted) (issue not raised in brief forfeited).

smoking can cause COPD (including emphysema), and that they do so through similar and additive mechanisms.[16] 65 Fed. Reg. 79940, 79943; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (explaining that the regulations envision possibility of coal dust as one of several causes of respiratory condition). This Court has specifically held that, in considering *the cause of COPD*, an ALJ may consult the preamble "to assess the doctors' credibility." *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012). And it has subsequently reaffirmed that holding. *See, e.g.*, *Central Ohio Coal*, 762 F.3d at 491-92 ("The sole issue presented here is whether the ALJ was entitled to discredit [a] medical opinion because it was inconsistent with the DOL['s] . . . preamble, and the answer to that question is unequivocally yes.")

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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 NIOSH drew from its review of the more recent medical literature was that the "new findings strengthen [the] conclusions and recommendations" it had reached in the original 1995 *Criteria*. *Id*. at 5. Among other findings, the Bulletin confirms that coal-mine dust can cause or aggravate COPD (including emphysema), and that dust-exposure and smoking have similar effects. *Id*. at 23-24.

(citations omitted); *Arch on the Green, Inc., v. Groves*, 761 F.3d 594, 601 (6th Cir. 2014) ("The ALJ did not err when he referred to the preamble to the regulations [in evaluating a physician's opinion].").

Every other circuit court to consider the issue has reached the same conclusion: *Blue Mtn. Energy v. Director, OWCP*, 805 F.3d 1254, 1261 (10th Cir. 2015) (preamble is "a reasonable and useful tool for ALJs to use in evaluating the credibility of the science underlying expert reports that address the cause of pneumoconiosis."); *Peabody Coal*, 746 F.3d at 1125 ("the ALJ simply—and not improperly—considered the regulatory preamble to evaluate conflicting expert medical opinions [on the etiology of a miner's COPD]"; *Westmoreland Coal*, 718 F.3d at 323 (ALJ could consider preamble "in assessing medical expert opinions [on whether smoking-related COPD can be distinguished from dust-related COPD]"); *Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) (affirming ALJ's consideration of preamble which "unquestionably supports the reasonableness of his decision to assign less weight to [an] opinion."); *Consolidation Coal Co. v. Director, OWCP (Bailey)*, 521 F.3d 723, 726 (7th Cir. 2008) (ALJ's according less weight to opinion on cause of COPD that was in

conflict with preamble was "sensible").

Likewise, the ALJ permissibly consulted the preamble in discounting the opinions excluding coal dust as a cause of COPD as inadequately reasoned. *See Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 831 (10th Cir. 2017) (affirming ALJ's reliance on preamble in discounting medical opinion that was based on "unsupported assumptions that conflicted with the preamble") (citation omitted). She also reasonably found that the medical opinions relied upon by Island Creek, which were based on similar unsupported assumptions, were not adequately explained. *See Crisp*, 866 F.2d at 185 (ALJ may discount physician's opinion that is inadequately explained); *see also West Virginia CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015) (ALJ may reject opinion where causation conclusions lack explanation).

Dr. Hippensteel diagnosed COPD in the form of bullous emphysema, and possibly in the form of bronchitis. DX 83-896-897. He excluded coal dust as a cause of the bullous emphysema (which he attributed to smoking or possibly a genetic condition) on the basis that coal dust will not cause bullous emphysema in the absence of complicated pneumoconiosis. *Id.*; DX 83-391; JA 88;

see note 9, *supra*. But the preamble makes clear that "emphysema" (without qualification as to a particular form) may be legal pneumoconiosis if it arises from coal-mine employment.[17] 65 Fed. Reg. 79939. Dr. Hippensteel offered no explanation or basis for his contrary opinion. *Cf. Blue Mtn. Energy*, 805 F.3d at 1261 ("[A party] always ha[s] the ability to counter . . . the medical literature cited in the preamble.").

Dr. Hippensteel also offered that Mr. Hill's condition could not be due to coal dust (which causes a permanent impairment) because the extent of his impairment "waxed and waned" over time. DX 83-944-945; JA 175. He offered no explanation, however, for why Mr. Hill (as measured on objective studies) consistently suffered some degree of impairment (and is now conceded to be totally disabled). *Cf. Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming ALJ's rejection of opinion ruling out dust exposure based on partial reversibility of impairment on certain tests); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227,

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[17] Indeed, Dr. Houser testified that emphysema from *any* exposure may develop into bullous emphysema. DX 83-243.

237 (4th Cir. May 11, 2004) (affirming ALJ's reliance on medical opinions attributing miner's impairment to coal-mine dust based on continuing residual impairment). Lastly, Dr. Hippensteel's assertion that Mr. Hill's possible bronchitis could not be due to coal dust because the condition persisted after he left the mines, DX 83-391, is invalid, as it contradicts the regulation providing that pneumoconiosis may be latent and progressive. *See* 20 C.F.R. § 718.201(c); *Sunny Ridge Mining Co., Inc., v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014). Thus, the ALJ had ample ground to find that Dr. Hippensteel's conclusions were inadequately explained.

Similarly, the ALJ properly discounted Dr. Selby's opinion.[18] That doctor testified that Mr. Hill's respiratory condition was entirely caused by smoking because coal-dust exposure "virtually never" results in bullous emphysema. DX 65-235, 65-250. As with

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[18] The Board affirmed the ALJ's evaluation of Dr. Selby's opinion as unchallenged on appeal. JA 246, n.7. Island Creek raises no specific arguments regarding Dr. Selby before the Court. Thus, the Court may affirm the ALJ's rejection of his opinion, as well. *See Brandywine Explosives*, 790 F.3d at 663; *Central Ohio Coal*, 762 F.3d at 490.

Dr. Hippensteel, Dr. Selby's opinion runs contrary to the medical science summarized in the preamble, which indicates that coal dust can cause disabling obstruction, and does so in a manner similar to, and additive of, the damage caused by smoking. 65 Fed. Reg. 79940, 79943. Because Dr. Selby gave no basis or support for his sweeping conclusion that dust exposure "virtually never" causes bullous emphysema, DX 65-235, 65-250, the ALJ rightly found his report lacking in explanation. *See Crisp*, 866 F.2d at 185.

Dr. Tuteur's opinion is even more deeply flawed. He diagnosed Mr. Hill with COPD, but ultimately attributed it "uniquely due to the inhalation of tobacco smoke," citing only general statistics purportedly showing that twenty percent of smokers who are not coal miners develop COPD, whereas only one to two percent of non-smoking miners develop the disease.[19] JA 97. And he specifically stated that, based on these statistics, "th[e] attribution of coal mine dust etiology of COPD is not valid for an individual cigarette smoking miner such as Mr. Hill at the level of reasonable medical

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[19] Dr. Tuteur did not cite any studies focusing on subjects who, like Mr. Hill, were exposed to both coal mine dust and cigarette smoke.

certainty." JA 98. The logical end of this reasoning is that he would *never* attribute COPD to coal dust in a particular miner who smoked. It is precisely this sort of categorical exclusion of coal-mine dust as a possible cause of COPD that Section 718.201 now "render[s] invalid." *See* 65 Fed. Reg. 79938; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012).

Dr. Tuteur's reasoning is plainly at odds with the preamble's findings that coal dust causes disabling obstruction and that smoking and dust are additive in their influence on COPD. *See Energy West Mining*, 857 F.3d at 828-29 (affirming ALJ's rejection of report that "fail[ed] to consider the additive risk created by exposure to [both] coal-mine dust and smoking").[20] And his conclusion is also untenable because he failed to explain how the specific facts of

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[20] Island Creek's suggestion that it is also possible to construe Dr. Tuteur's opinion as consistent with the preamble is irrelevant. Reviewing courts defer to an ALJ's interpretation of a medical expert's testimony so long as the ALJ's reading is supported by substantial evidence, "even if there are other ways of interpreting the testimony." *Sunny Ridge Mining Co.*, 773 F.3d at 739; *see also Midland Coal Co. v. Director, OWCP,* 358 F.3d 486, 492 (7th Cir. 2004).

Mr. Hill's case (as opposed to general statistics) supported his conclusion. *See id*. at 829-30 (affirming rejection of Dr. Tuteur's opinion on cause of emphysema, where that opinion was characterized by "the overreliance on statistics and lack of individualized application"); *Consolidation Coal Co. v. Director, OWCP (Burris)*, 732 F.3d 723, 735 (7th Cir. 2013) (affirming ALJ's rejection of report based on generalities). Since Dr. Tuteur, thus, offered no valid explanation for his unfounded assumptions, the ALJ correctly discounted his opinion. *See Crisp*, 866 F.2d at 185.

Finally, the ALJ's evaluation of Dr. Culbertson's opinion is the most easily affirmed, and does not even require discussion of the preamble. Dr. Culbertson found that Mr. Hill had COPD, caused solely by smoking, and flatly stated that the miner's fourteen years of dust exposure was not a cause of his disease. JA 184, 188-89, 192. But he gave no explanation for these conclusory findings. Even a treating doctor, such as Dr. Culbertson, however, must provide some explanation for his conclusions. *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997). As this Court has stated, "in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade. . . . ALJs

must evaluate treating physicians just as they consider other experts." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (citation omitted).[21] When a treating physician provides only conclusory findings without any explanation for them, a fact finder is well-justified in discounting the doctor's opinion. *Lango*, 104 F.3d at 577; *Crisp*, 866 F.2d at 185.

In sum, the ALJ correctly credited the opinions of Drs. Houser and Rasmussen (as supported by the conclusions of Drs. Simpao and James)[22] over the opinions of Island Creek's doctors, who based their causation conclusions on unfounded assumptions at odds with the medical science summarized in DOL's regulatory preamble.

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[21] Oddly, Island Creek, citing both *Eastover Mining* and 20 C.F.R. § 718.104(d), argues that the ALJ should have given greater weight to Dr. Culbertson based on his credentials and his status as one of Mr. Hill's treating physicians. Pet. Br. at 34-41. But the company fails to come to grips with the fatal defect in Culbertson's opinion—his utter lack of explanation. As shown above, this deficit justified the ALJ's rejection of his conclusion.

[22] Island Creek casts aspersions on Dr. James's disability and disability causation diagnoses (Pet. Br. 40-41; *see* 20 C.F.R. § 718.204(b), (c)), but—as before the Board—it does not challenge the ALJ's findings on those issues. Thus, the Court need not address these points. *See Brandywine Explosives*, 790 F.3d at 663; *Central Ohio Coal*, 762 F.3d at 490.

On this basis, the Court should affirm the ALJ's legal-pneumoconiosis finding, and her resulting award of benefits.

2. The ALJ did not improperly treat the preamble as a rule of law or a presumption.

Island Creek does not directly challenge DOL's conclusions in the preamble regarding the effects of coal dust and smoking on COPD. Nor, on the record here, could it do so. The Court would consider such a challenge "only after [the operator] submitted the type and quality of medical evidence that would invalidate the DOL's position," *Central Ohio Coal*, 762 F.3d at 492, and Island Creek presents no such evidence. Rather, it ventures a more oblique argument.

Echoing the views of the dissenting Board judge, the company spills much ink trying to show the ALJ treated the preamble as a "rule of law" and presumed that all COPD in coal miners (and particularly Mr. Hill's COPD) is legal pneumoconiosis. Pet. Br. at 14-24. In other words, according to Island Creek, the ALJ (based on the preamble) wrongly required the company to disprove a connection between Mr. Hill's COPD and his coal-dust exposure, and categorically rejected any opinion linking his condition to

smoking alone.

Even the most cursory review of the preamble and the ALJ's application of it belies this contention. The preamble presents DOL's assessment of a substantial amount of medical and scientific literature related to the impact of smoking and coal-mine-dust exposure on obstructive lung disease. 65 Fed. Reg. at 79937-45. And that assessment concludes that coal-mine dust can cause COPD, and that the effects of dust and smoking on COPD are similar and additive. *Id.* The preamble, like the regulation, 20 C.F.R. § 718.201, however, makes no global pronouncement regarding the cause of COPD in all cases. It neither requires nor forbids a physician to attribute COPD to a particular cause in any individual case. 65 Fed. Reg. 79938, 79941 (miner has the right, but bears the burden, to prove his obstructive lung disease arose out of coal mine employment).

As the District of Columbia Circuit held in rejecting a coal-industry challenge to both Section 718.201 and the preamble, neither "create[s] a presumption that all or most obstructive diseases are caused by exposure to coal dust." *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002). Similarly, this

Court has rejected the contention that the preamble creates a binding rule of law. *A & E Coal*, 694 F.3d at 801. Nor does it allow an ALJ to categorically reject medical opinions attributing obstructive lung disease solely to smoking. *Nat'l Mining Ass'n*, 292 F.3d at 863 (describing as "entirely meritless" industry's contention that the preamble permits an adjudicator to ignore such opinions). ALJs, however, are plainly permitted to consult the preamble to evaluate medical opinions. And they can discredit those opinions which, *without adequate explanation for doing so*, conflict with the preamble's conclusions. *Big Branch Resources*, 737 F.3d at 1073, n.6; *A & E Coal*, 694 F.3d at 801.

As the Board majority clearly explained, the ALJ did not treat the preamble as a rule of law or a presumption, and did not place the burden of proof on Island Creek. JA 244. Rather, she clearly understood that she had to determine the cause of Mr. Hill's COPD based on the particular facts of his case, and that the miner had to prove that his coal-dust exposure contributed to his COPD. JA 227.

The ALJ did not find legal pneumoconiosis based on the application of any sort of "preamble presumption." Instead, she

found legal pneumoconiosis based on four medical opinions (by Drs. Houser, Rasmussen, Simpao and James) that specifically and credibly linked Mr. Hill's COPD to his fourteen years of coal-dust exposure. JA 228-29, 231. Conversely, she did not discount the opinions of Drs. Hippensteel, Tuteur, Selby and Culbertson simply because they found that Mr. Hill's COPD was solely the result of cigarette smoking. Rather, she found that they failed to offer any credible explanation for their wholesale exclusion of coal dust as a causative factor—an especially relevant defect, given the preamble's findings that coal dust can cause COPD and that the effects of dust are similar and additive. JA 229-31. In short, Island Creek lost not because the ALJ applied an impermissible presumption or categorically rejected its evidence, but because the ALJ permissibly found that the company's medical opinions lacked credible explanations for their conclusions. *See Energy West Mining*, 857 F.3d at 831; *A & E Coal*, 694 F.3d at 801-802.

3. Island's Creek's other arguments lack merit.

While Island Creek's brief focuses on the ALJ's consideration of the preamble, the company also complains about several specific aspects of the ALJ's consideration of four of the medical opinions.

These complaints have no merit.

a. Houser and Rasmussen

Island Creek raises various challenges to the ALJ's reliance on the reports of Drs. Houser and Rasmussen. Pet. Br. at 29-34. Much of this effort is simply another iteration of the company's argument regarding the ALJ's use of the preamble, and fails for the reasons stated above.

Island Creek also cites several reasons—such as the fact that Houser and Rasmussen had not reviewed the 2015 reports and depositions of Drs. Hippensteel and Tuteur—why it thinks the ALJ should not have relied on their opinions. In doing so, they are merely (and improperly) asking the Court to reweigh the opinions and substitute its evaluation for that of the ALJ. The Court must reject this plea, as the evaluation of medical evidence and the determination of its reasonableness and credibility is left to the fact-finder. *Central Ohio Coal*, 762 F.3d at 488; *Big Branch Coal*, 737 F.3d at 1069; *Crisp*, 866 F.2d at 185.

One point, however, deserves further comment. Island Creek claims that the Houser and Rasmussen opinions are not well-reasoned because the doctors could not differentiate and apportion

the effects of the two assaults on Mr. Hill's lungs. Pet. Br. 31-34. To make its case, however, the company simply mischaracterizes the doctors' opinions and relies on inapposite case law.

First, Island Creek's assertion that the doctors' opinions are uncertain is plainly wrong. Neither doctor equivocated in diagnosing both coal dust exposure and smoking as the twin causes of Mr. Hill's respiratory disease. *See* DX 83-381, 83-471-473. The doctors' inability to differentiate or apportion the effects of coal dust and smoking-induced emphysema does not make their opinions speculative, as Island Creek suggests. Rather, it makes them (as the ALJ found) consistent with the preamble and the state of medical and scientific knowledge. *See* 65 Fed. Reg. 79943 ("These observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms…"). This Court has affirmed BLBA awards crediting similar medical opinions in the past. *See, e.g., Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1060 (6th Cir. 2013) (rejecting employer's argument that ALJ erred in relying on a medical opinion stating that "[t]he only rational conclusion is that both smoking and mine dust are important contributing causes" of the miner's COPD

because it is impossible to distinguish "between the identical forms of COPD caused by smoking and coal mine dust").

Moreover, Island Creek's reliance on *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665 (6th Cir. 2010), in support of its argument is wholly misplaced. *Tamraz* was a products liability case that turned on the cause of a welder's Parkinson's disease. The Court held the district court erred in allowing a neurologist to present a purely speculative opinion that manganese exposure could have caused the welder's disease: the neurologist speculated that the welder was exposed to fumes presumably containing manganese, that manganese exposure theoretically could trigger Parkinson's disease, that this welder may have had genes predisposing him to Parkinson's and, therefore, manganese exposure induced Parkinson's by triggering the welder's genetic pre-disposition. 620 F.3d at 670. The Court rejected the doctor's speculation as based on multiple "leaps of faith."

In contrast, the preamble shows that the scientific and medical evidence demonstrates a link between coal-dust exposure and the development of COPD independent of cigarette smoking. 65 Fed. Reg. 79939. Likewise, the preamble shows that the effects

of those exposures are additive. 65 Fed. Reg. 79939, 79941. The Houser and Rasmussen opinions are based on, and consistent with, this scientific foundation. They are in no way based on "leaps of faith," as was the neurologist's opinion that the Court rightly criticized in *Tamraz*. Hence, the Court should reject Island Creek's arguments, and affirm the ALJ's reliance on the Houser and Rasmussen opinions.

b. Hippensteel and Tuteur

Finally, Island Creek makes various arguments challenging the ALJ's evaluation of the Hippensteel and Tuteur opinions. Pet. Br. 24-29. The company primarily focuses on a single line in the ALJ's decision: her restatement of the well-established principle that "a physician's opinion that focuses on the absence of clinical pneumoconiosis, and fails to explain why significant coal mine dust exposure was not a contributing or aggravating factor in a miner's obstructive disease, is entitled to less weight." JA 230 (citations omitted), *quoted in* Pet. Br. at 24. According to the company, this statement shows that the ALJ erroneously downgraded the legal-pneumoconiosis conclusions in the Hippensteel and Tuteur reports because they were based on those doctors' findings of no clinical

pneumoconiosis. This is not so.

The ALJ, of course, found that Mr. Hill did not suffer from clinical pneumoconiosis, JA 223-25, and specifically credited Drs. Hippensteel and Tuteur on this point. JA 230. But, read in context, her decision makes clear that she faulted Hippensteel and Tuteur on legal pneumoconiosis because they failed to offer any credible explanation as to how they were able to exclude coal dust as a causative factor in Mr. Hill's COPD. *See, e.g.*, JA 230 (declining to credit those doctors on the question of legal pneumoconiosis because "[n]one offered any creditable explanation how they were able to exclude[] coal dust as a contributing factor to the Claimant's obstructive disease"), 231 (finding the reasoning and explanations of Drs. Houser and Rasmussen to be "more complete and thorough than was provided by the physicians who concluded that the Claimant does not have pneumoconiosis" and noting that none of Island Creek's testifying doctors "adequately explained why 14 years of coal dust exposure was not a factor in the Claimant's obstructive disease"). Thus, the ALJ's conclusion that Dr. Hippensteel's and Dr. Tuteur's COPD-etiology conclusions were inadequately unexplained was not based on their finding that the

miner did not have clinical pneumoconiosis.[23]

The remainder of Island Creeks arguments are little more than an improper request for the Court to reweigh the Hippensteel and Tuteur opinion—a request the Court must reject. *See Central Ohio Coal*, 762 F.3d at 488*; Big Branch Coal*, 737 F.3d at 1069*; Crisp,* 866 F.2d at 185. Indeed, as argued herein, the ALJ had more than sufficient ground for discounting those opinions.

In sum, the Court should affirm the decisions of the ALJ and the Board finding that Mr. Hill has legal pneumoconiosis. Based on that finding, the Court should also affirm the award of federal black lung benefits to Mr. Hill.

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[23] An ALJ can discount a physician's opinion finding no *legal* pneumoconiosis where that finding is based on the absence of *clinical* pneumoconiosis. *Helen Mining*, 650 F.3d at 256-57 (pointing out that "this position is at odds with 20 C.F.R. § 718.202(a)(4) ([permitting finding of pneumoconiosis even when x-ray evidence is negative])"). But that was not the basis for the ALJ's rejection of the Hippensteel and Tuteur opinions here.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contain contains 9,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief 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 Word 2010 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

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