No. 18-9537

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENERGY WEST MINING COMPANY
Petitioner

v.

JAMES E. LYLE, 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
(Oral Argument Not Requested)

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STATEMENT OF RELATED CASES

1. *Rockwood Casualty Ins. Co. v. Director, OWCP [Kourianos],* Docket no. 18-9520 (oral argument held on 1/22/19)

   The appellant in *Rockwood* raises an argument similar to that raised by the employer in this case – that the administrative law judge erred in rejecting the testimony of its medical experts that the miner's arterial blood gas was normal, even though the value was "qualifying" under the Department of Labor's regulations and could be used to establish that the miner suffers from a totally disabling pulmonary impairment.

2. *Energy West Min. Co. v. Bristow,* Docket No. 18-9585 (briefing schedule suspended)

   The docketing statement in this case raises a challenge under the Appointments Clause of the U.S Constitution.

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JAMES E. LYLE, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
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On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This appeal involves a June 1, 2010 claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944 by James E. Lyle (the miner or Claimant). CCR DX 3; JA 1-4.[1] On March 13, 2017, Administrative

[1] For the Court's convenience, the brief will cite to both the Certified Case Record (CCR) and Joint Appendix (JA), where available. The following abbreviations

Law Judge Lee J. Romero Jr. (the ALJ) issued a Decision and Order Awarding Benefits. CCR 118-163; JA 263-308. Energy West Mining Company (Energy West or Employer) timely appealed this decision to the Benefits Review Board (the Board) on March 31, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). CCR 108-118. The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on April 24, 2018. CCR 1-13; JA 309-320. Energy West filed a timely appeal with this Court on June 21, 2018. JA 321-325. The Court has jurisdiction over the petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury – the miner's occupational exposure to coal-mine dust – took place in Utah, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," or the "Heads of Departments."

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will be used in referencing the CCR: Director's Exhibit (DX); Claimant's Exhibit (CX); and Employer's Exhibit (EX).

Energy West argues in its opening brief that the ALJ's decision denying its claim should be vacated because he was not properly appointed.

Did Energy West forfeit its Appointments Clause claim by failing to raise it before the administrative agency?

2. A miner is considered to be totally disabled if he suffers from a pulmonary impairment that prevents him from performing his usual coal-mine work. 20 C.F.R. § 718.204(b)(1). One way to establish total respiratory disability is through evidence of arterial blood gas (ABG) studies that have produced "qualifying" values as set forth under the Department of Labor's (DOL) regulations. 20 C.F.R. § 718.204(b)(2)(ii). The ALJ found that the ABG studies here produced qualifying values under the regulations.

Various experts opined that these same qualifying ABG values were normal when taking into account the miner's age and the elevation where the tests were conducted. The Department regulations, however, already account for these factors. The ALJ discredited these expert opinions of no respiratory disability as inconsistent with the Department's regulations.

Was the ALJ's discrediting of these expert opinions rational and supported by substantial evidence?

3. The ALJ and Benefits Review Board rejected the opinions of Energy West's experts concluding that the miner was not totally disabled and did not suffer from legal pneumoconiosis, and provided numerous reasons for so holding.

Are these decisions rational and supported by substantial evidence?

STATEMENT OF THE CASE

The miner filed a claim for benefits under the BLBA in June 2010. CCR DX 3; JA 1-4. The district director issued a proposed decision and order awarding benefits on October 18, 2012. CCR DX 40. Energy West requested a formal hearing before an administrative law judge, CCR DX 43, which took place on May 11, 2016. CCR Hearing Transcript at 1; JA 237.

The ALJ issued a decision awarding benefits on March 9, 2017. CCR ALJ Decision and Order (ALJ Dec.) 117-163; JA 263-308. Energy West appealed to the Board, challenging the ALJ's credibility findings and weighing of the medical evidence. CCR Employer's petition for review and brief with attached cover letter 35-85. The Board affirmed the ALJ's decision on April 24, 2018. CCR Benefits Review Board Decision and Order (Board Dec.) 1-13; JA 309-320. Energy West did not challenge the ALJ's authority under the Appointments Clause before either the ALJ or the Board. Petitioner's Opening Brief (OB) at 50.

Energy West subsequently appealed to this Court, JA 321-327, where it raised an Appointments Clause challenge for the first time.

STATEMENT OF FACTS

A. Constitutional background

The Appointments Clause provides that inferior officers are to be appointed by "the President," "Courts of Law," or the "Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2.

B. 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); *Spring Creek Coal Co. v. McClean,* 881 F.3d 1211, 1217 (10th Cir. 2018).

Pneumoconiosis. Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal

mine employment." 30 U.S.C. § 902(b). There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201(a); *Spring Creek Coal Co.,* 881 F.3d at 1217.

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); *Spring Creek Coal Co.*, 881 F.3d at 1217. 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 is a broader category, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2); *see Blue Mt. Energy v. Director, OWCP,* 805 F.3d 1254, 1256 (10th Cir. 2015). Any chronic lung disease 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; coal mine dust need not be the disease's sole or even primary cause. 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 [2]; (2) results of blood gas studies meeting the table criteria set forth at Section 718.204(b)(2)(ii), Appendix C; (3) proof of pneumoconiosis and "cor pulmonale with right-sided congestive heart 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).

[2] 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.

"The miner can establish total disability upon a mere showing of evidence that satisfies any one 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)). "If contrary evidence does exist, the ALJ must assign the contrary evidence appropriate weight and determine whether it outweighs the evidence that supports a finding of total disability." *Id*.

Central to this appeal are the criteria for ABG studies set forth at Section 718.204(b)(2)(ii), Appendix C.[3]. Appendix C sets forth the ABG values that can establish a miner's total disability. The Appendix contains three separate tables, each of which takes into account the altitude of the location where the ABG is performed. One set establishes values for locations at or below 2,999 feet above sea level, one for altitudes between 3,000 and 5,999 feet, and one for altitudes 6,000 feet or greater. In promulgating this graduated system through notice and

[3] "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).

comment rulemaking, , the Department acknowledged that altitude may impact ABG results (hence the tripartite system), but explained that altitude does not exert a "straightforward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude" because "the human body has compensatory mechanisms." 45 Fed. Reg. 13712 (Feb. 29, 1980).[4] DOL also acknowledged that blood gas tensions can vary with age; but noted that altitude has a greater effect on blood tension than age. Having considered these medical principles, and seeking to avoid an overly complicated process for analyzing whether ABG evidence is qualifying under the regulation, DOL adopted "an acceptable and valid compromise" – a simple sliding scale designating three levels based on altitude for comparing PCO2 and PCO values. *Id.* Thus, the qualifying values[5] adopted were designed to represent " a level or arterial oxygen tension below which the claimant can be considered to be disabled regardless of age." *Id.*

[4] No substantive revisions were made to Appendix C when the regulations were revised in 2000. *See* 65 Fed. Reg. 79953 (Dec. 20, 2000). Thus, the comments accompanying the promulgation of the prior table, 20 C.F.R. Part 718, Appendix C (1999) continue to be instructive.

[5] ABG studies that produce values that meet or fall below the listed values are called "qualifying," those that do not are "nonqualifying."

Finally, Section 718.204(a) explicitly addresses the effect of 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. *Spring Creek Coal Co.*, 881 F.3d at 1217. 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. *Spring Creek Coal Co.*, 881 F.3d at 1218. 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).[6]

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

[6] 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).

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 F.3d 1331, 1336 (10th Cir. 2014).

C. Relevant general background facts

Claimant worked for 28 years in underground coal mine employment. CCR Hearing Transcript at 6-7; JA 242-43. For the last five years, he performed maintenance during the graveyard or downshift (while extraction operations were shutdown). CCR Hearing Transcript at 19; JA 255. But for the preceding 23 years, he worked at the mine face, where he operated, among other jobs, the longwall shear machine. CCR Hearing Transcript at 14, JA 250. He was exposed to heavy dust during this time. *Id*. His coal mine work was strenuous, requiring heavy lifting. CCR Hearing Transcript at 15; JA 251.

As of August 2014, Claimant was using supplemental oxygen for 14 hours a day at 2-3 liters per minute. CCR CX 2 (Aug. 5, 2014 progress note at 1); JA 225.

D. Relevant medical evidence

Energy West challenges the ALJ's findings that Lyle is totally disabled and that he suffers from legal pneumoconiosis. The medical evidence relevant to those issues (the ABGs and medical opinions) is summarized below.[7]

Arterial blood gas studies

The record contains the results of four ABG studies - two were performed in connection with the miner's claim for benefits, and two are contained in the miner's treatment records. The results are summarized below:

Date	Exhibit Number	Physician	Elevation[8]	PCO2	PO2	Qualifies under regulations?

[7] Although the pulmonary function studies produced non-qualifying values, we do not summarize them here because they are not considered "contrary" to qualifying blood gas study results. 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* at 7,8 nn.2, 3 (describing respective impairments measured by the different tests); 45 Fed. Reg. 17683 (Feb. 29, 1980) (13678 ("[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.").

[8] The ABGs were performed in Salt Lake City, Utah, which sits at an elevation of 4330 feet, *see* CCR ALJ Dec. at 10, n.10; JA 272 n.10, or in Price, Utah, which sits at 5577 feet. *See* http://elevation.maplogs.com/poi/price_ut_usa.54683.html. Accordingly, 20 C.F.R. Part 718 Appendix C, Table 2 is used to determine disability.

9/08/2011	DX 11 JA 16	Gagon	3000 to 5999 ft.	31.	59	Yes
5/21/2012	DX 32 JA 25	Farney	3000 to 5999 ft.	31.5	64.1	Yes
11/05/2012 (treatment)	CX 2 JA 224	Cahill	3000 to 5999 ft.	33	60	Yes
8/5/2014 (treatment)	CX 2 JA 226	Cahill	3000 to 59999 ft.	31	67	No

Medical Opinions

Dr. Gagon

On September 9, 2011, Dr. Gagon performed the miner's DOL-sponsored examination – including a chest x-ray, pulmonary functions tests, and a qualifying ABG – and subsequently provided a written report. CCR DX 11; JA 9-19; *see* 30 U.S.C. 923(b) (providing each miner with an opportunity to substantiate his claim by means of a complete pulmonary evaluation). Dr. Gagon diagnosed chronic bronchitis with chronic cough, abnormal blood gases, a questionable nodule in the left lung, and coronary artery disease. CCR DX 11 at 4; JA 12. He attributed these conditions to "coal dust exposure and likely a component of congestive heart

failure." *Id*. He assessed a mild/moderate pulmonary impairment with shortness of breath after walking less than one-half mile and abnormal blood gases. He attributed 75% of the impairment to chronic bronchitis, and 25% to coronary artery disease/congestive heart failure. *Id.*

Although Dr. Gagon reviewed no additional evidence, his testimony at deposition departed from his medical report. CCR EX 5; JA 73-92. He stated (without explanation) that the miner did not "meet the criteria" for legal pneumoconiosis," that his ABG study was normal, and that the miner could perform his last coal mine job as a belt inspector. CCR EX 5 at 10, 15-16; JA 82, 87-88.

Dr. Farney

Dr. Farney issued a written report in May 2012 after examining the miner, conducting various tests, including a qualifying ABG study, and reviewing the miner's medical records. CCR DX 32; JA 20-49. Dr. Farney admitted that the miner "clearly has pulmonary disease" as well as a pulmonary impairment, and is disabled from working in a coal mine. CCR DX 32 at 8, 10; JA 27, 29. But the doctor stated that the miner's multiple medical conditions were "non-occupational" and unrelated to coal dust exposure. *Id*. In particular, Dr. Farney believed that the miner's pulmonary findings were consistent with usual interstitial pneumonia or

non-specific interstitial pneumonitis,[9] "neither of which he asserted were caused by or associated with coal dust exposure." *Id.*

By way of explanation, Dr. Farney stated that the miner's work "was consistently performed during the 'downshift' from 11:00 PM until 9:00 AM at which time coal extraction was not being performed. His duties involved repair and maintenance of equipment which may have created some dust exposure but this would be considerably less than during active mining." CCR DX 32 at 8; JA 27. The doctor also claimed that the miner's risk of developing pneumoconiosis was low, because "the prevalence of [coal worker's pneumoconiosis] in the western United States is relatively low." *Id.*

At deposition, Dr. Farney largely reiterated his findings. CCR EX 11; JA 161-212. He restated the significance of the miner's work occurring during "graveyard shifts" when "there would not be actual mining taking place," and "his exposure level would be relatively reduced compared to someone who was

[9] Usual interstitial pneumonia and nonspecific interstitial fibrosis are interstitial lung diseases of unknown origin. The Merck Manual at 1945 (19th ed. 2011). Interstitial lung diseases are a group of lung disorders that cause progressive scarring of lung tissue which eventually affects the ability to breathe and oxygenate blood. *Interstitial Lung Disease, available at* Mayoclinic.org/diseases-conditions/interstitial-lung disease/symptoms-causes/syc-20353108. Usual interstitial pneumonia is also known clinically as idiopathic pulmonary fibrosis. The Merck Manual at 1945.

working, for example, as a continuous miner at the fact of the mine on a regular basis." EX 11 at 13; JA 173.

Dr. Farney likewise restated that the qualifying ABG study he conducted as part of the miner's examination actually produced normal results for the miner's age, gender, and elevation. CCR EX 11 at 25-26; JA 185-186. According to the doctor, he based this determination on unidentified research conducted by his hospital colleagues, Drs. Crapo and Morris. CCR EX 11 at 25-26; JA 185-186. Dr. Farney also pointed to the results of a six-minute walk test that showed the miner's oxygen levels "remained within normal limits at 92 percent." CCR EX 11 at 28; JA 188. He conceded, however, that the results of the miner's walk test could not be used to determine the type of labor the miner could perform, because the walk test "reflects usually what people are doing in ordinary activities of life, not strenuous work." *Id.* Dr. Farney acknowledged that the miner's last job involved "pretty rigorous work" that "required a lot of strength," as the miner was required to perform heavy lifting and some walking. And he observed that because the mines were located at an elevation of 7,000 feet, the ability to do "long, strenuous activities may be reduced" due to the lower barometric pressure and oxygen level at that elevation. CCR EX 11 at 13; JA 173.

Dr. Farney reiterated his conclusion that there was no basis for diagnosing legal pneumoconiosis. CCR EX 11 at 30; JA 190. He admitted that the pathological studies he reviewed from a lung biopsy in October 2012 showed the existence of lung disease; however, he opined that the disease did not cause any functional impairment. CCR EX 11 at 38; JA 198. Instead, the doctor believed the miner's pulmonary incapacity arose from his obesity, not an intrinsic lung disease. JA 198-99.

Dr. Tomashefski

Dr. Tomashefski issued a written medical opinion in January 2014, after reviewing the miner's claim for benefits, employment history, and slides from the October 2012 lung biopsy. CCR EX 7; JA 93-95. He diagnosed "constrictive bronchiolitis with chronic small airways remodeling, lumen distortion and lumen narrowing" and "patchy areas of advanced Interstitial fibrosis with a Usual Interstitial Pneumonia (UIP) pattern."[10] CCR EX 7 at 2; JA 94. He concluded that neither the bronchiolitis nor the UIP was a result of coal dust exposure, but opined

[10] Constrictive bronchiolitis is a fibrotic disease affecting the small airways in the lungs. Also known as bronchiolitis obliterans, or obliterative bronchiolitis, the disease is associated with the fibrotic destruction of the bronchiolar airways. Gary R. Epler, *Diagnosis and Treatment of Constrictive Bronchiolitis,* F1000 Med. Rep. 2010; 2:32, *available at* ncbi.nlm.nih.gov/pmc/articles/PMC2948389.

the miner was totally disabled by his pulmonary condition. CCR EX 7 at 2-3; JA 94-95.

Dr. Tomashefski issued a supplemental written opinion after reviewing additional medical records. CCR EX 9; JA 96-101. He reaffirmed his prior diagnoses, but revised his total disability opinion, stating that the miner's dyspnea on exertion was due to a combination of obesity, coronary artery disease, arthritis, and GERD (gastroesophogeal reflux disease), which were documented in the miner's treatment records. CCR EX 9 at 5; JA 100. He further explained that his change of opinion was based on the ABG studies, "which are in the low normal range for his altitude," and the "clarification in the records that Mr. Lyle's supplemental oxygen use is mainly during sleep." *Id.*

At deposition, Dr. Tomashefski reiterated that the miner suffered from constrictive bronchiolitis and interstitial fibrosis. CCR EX 10 at 14; JA 150-51, 54. He could not identify the cause of either condition, other than rejecting a coal dust etiology because he saw no significant coal dust in the affected areas. *Id*.

Dr. Tomashefski further opined that the miner's pulmonary disease would not preclude him from performing his last coal-mine job, although he admitted he did not know what that job was. CCR EX 10 at 21; JA 152-53, 157. According to Dr. Tomashefski, the changes in the miner's lungs appeared to be significant on the

biopsy slides, but overall they were not causing a great physiological impact, as the miner's oxygenation and blood gas values "were within normal limits for the altitude where they were taken," and that his pulmonary function studies were essentially normal. CCR EX 10 at 16-17; JA 152-153.

E. Decisions below

The ALJ awards benefits.

The ALJ issued an award of benefits to the miner on March 9, 2017. He determined that the miner worked for over 28 years in underground mining, which included several years as a shear operator at the face of the mine in very dusty conditions. CCR ALJ Dec. at 5; JA 267. The ALJ also determined that during the miner's last five years of employment he worked on the downshift as a beltman – a job that involved heavy labor. CCR ALJ Dec. at 28; JA 290.

The ALJ concluded that the miner established total respiratory disability based on the qualifying ABG studies and Dr. Gagon's initial written medical report. *See* 20 C.F.R. §§ 718.204(b)(2)(ii) and (b)(2)(iv); CCR ALJ Dec. at 33; JA 29. Conversely, he found unpersuasive Dr. Gagon's deposition testimony and Drs.

Farney's and Tomashefski's opinions that the miner was able to perform his last coal-mine job.[11] CCR ALJ Dec. at 29-31; JA 291-293.

The ALJ discounted Dr. Farney's total disability opinion for the following reasons: (a) the opinion was premised on as inaccurate belief that the miner's ABG studies were normal; (b) unlike the six minute walk test Dr. Farney conducted, later tests showed abnormal results and oxygen desaturation on minimal exertion; (c) Dr. Farney did not clearly state that the miner had no pulmonary disability (only that the pulmonary insufficiency was not due to pneumoconiosis); and (d) Dr. Farney incorrectly believed that the miner used supplemental oxygen only at night, whereas the miner's treatment records indicated that he also used oxygen on exertion. CCR ALJ Dec. at 30; JA 292.

Similarly, the ALJ discounted Dr. Tomashefski's opinion because (a) the doctor mistakenly believed that the miner used supplemental oxygen only at night; and (b) he failed to explain his opinion in light of the miner's qualifying ABG studies. CCR ALJ Dec. at 30-31; JA 292-293.

[11] The ALJ noted that the miner's treating physicians – Drs. Ross, Cahill and Scholand - offered no conclusions on the question of total disability. CCR ALJ Dec. at 32; JA 294.

On the other hand, the ALJ found that Dr. Gagon's written opinion -- that the miner had a mild to moderate respiratory impairment as demonstrated by the miner's shortness of breath and abnormal ABG results -- was credible and supported a finding of total disability. CCR ALJ Dec. at 31, 33; JA 293, 295. The ALJ rejected Dr. Gagon's deposition testimony (that the miner could return to work) because it "inexplicably contradicted" his written report and the doctor "incorrectly deposed [*sic]* Claimant's arterial blood gas study did not produce qualifying values." *Id.*

Having found that the miner was employed in coal mine employment for over 15 years and suffered from a totally disabling pulmonary impairment, the ALJ invoked the presumption of total disability due to pneumoconiosis. CCR ALJ Dec. at 33; JA 295. He then addressed rebuttal of the presumption. The ALJ found that Energy West had rebutted the presence of clinical pneumoconiosis,[12] but failed to disprove the existence of legal pneumoconiosis or rule out legal pneumoconiosis as a cause of the miner's disability.

In so concluding, the ALJ credited Dr. Gagon's written opinion that the miner's chronic bronchitis was due to coal dust exposure because it was based on

[12] The miner has not challenged this ruling.

the miner's ABG study and took into account both his smoking history and history of coal dust exposure. CCR ALJ Dec. at 39; JA 301. He discounted Dr. Gagon's contradictory deposition testimony on the ground that the doctor failed to explain the basis for his changed opinion. *Id.*

The ALJ found Dr. Farney's no legal pneumoconiosis opinion not well-reasoned. CCR ALJ Dec. at 40; JA 302. He observed that Dr. Farney had underestimated the extent of the miner's coal dust exposure by incorrectly assuming the miner worked only during the downshift and not during excavation in dusty conditions at the face of the mine. *Id.* The ALJ also rejected Dr. Farney's supposition that the miner likely did not have pneumoconiosis because pneumoconiosis rarely occurs in Utah, as Dr. Farney failed to explain "how this general fact applies to the specific findings in this case." CCR ALJ Dec. at 41; JA 303. Finally, the ALJ found that Dr. Farney did not explain why his diagnosis of UIP was incompatible with a diagnosis of pneumoconiosis. *Id.*

The ALJ similarly concluded that Dr. Tomashefski's opinion was not well-reasoned, finding that Dr. Tomashefski failed to adequately explain why the miner's extensive history of coal dust exposure played no role in his constrictive bronchiolitis and interstitial fibrosis. *Id.*

Turning to the second rebuttal prong (disability causation), the ALJ first rejected Drs. Farney's and Tomashefski's opinions because they incorrectly failed to diagnose legal pneumoconiosis. He then observed that Dr. Gagon did not assist Employer's cause because the doctor had determined that the miner's legal pneumoconiosis (chronic bronchitis due to coal dust exposure) contributed 75% to the miner's respiratory disability. CCR ALJ Dec. at 42; JA 304. With neither rebuttal prong established, the ALJ awarded benefits.

The Board affirms the award of benefits.

The Board affirmed the award of benefits in a decision issued on April 24, 2018. First, the Board affirmed the ALJ's determination that the ABG studies established total disability. It found that the ALJ acted within his discretion in rejecting Dr. Farney's opinion and Dr. Gagon's deposition testimony that the ABG results were normal taking altitude into account because the Appendix C tables were already adjusted for age and altitude. CCR Board Dec. at 3-4; JA 311-312.

The Board also upheld the ALJ's weighing of the medical opinions on total disability. It found that the ALJ reasonably relied on Dr. Gagon's written report (diagnosing a moderate respiratory impairment), rather than his deposition testimony (finding none), because the "blood gas studies that Dr. Gagon relied on [in his report] are qualifying, while his testimony is based on the rejected view that

these studies are normal." CCR Board Dec. at 4; JA 312. The Board further determined that the ALJ permissibly discredited Dr. Gagon's deposition testimony on total disability because he failed to provide a reason for the shift in his opinion. CCR Board Dec. at 5; JA 313.

Similarly, the Board found that the ALJ reasonably discounted Dr. Tomashefski's opinion because "he failed to adequately explain the fundamental shift in his primary conclusion" on total disability. CCR Board Dec. at 6; JA 413. The Board found that Dr. Tomashefski's proffered reason for the change – that the miner used oxygen only at night – was contradicted by the miner's treatment records, and the Board further added that Dr. Tomashefski's opinion was unexplained in light of the qualifying ABG values. *Id.*

In regards to the ALJ's discrediting of Dr. Farney's total disability opinion, the Board upheld as unchallenged on appeal the ALJ's finding that the doctor failed to issue a "clear opinion" on the issue. CCR Board Dec. at 7 n.10; JA 413.

The Board thus affirmed the ALJ's invocation of the 15-year presumption.

Addressing rebuttal, the Board concluded that the ALJ permissibly rejected Drs. Farney's and Tomashefski's opinion on legal pneumoconiosis. It agreed with the ALJ that Dr. Farney: (1) incorrectly assumed that the miner worked only during the graveyard, downshift and thus minimized his coal dust exposure; (2)

failed to adequately explain why his UIP diagnosis excluded any contribution from coal mine dust; and (3) failed to explain how his general assertion that pneumoconiosis rarely occurs in Utah related to the specific facts of this case (citing *Antelope Coal Co.,* 743 F.3d at 1345-46). CCR Board Dec. at 8-9; JA 316-317. In regard to Dr. Tomashefski, the Board confirmed that the doctor failed to sufficiently explain why coal dust did not contribute to the miner's constrictive bronchiolitis and interstitial fibrosis. CCR Board Dec. at 9, JA 317.

Finally, the Board acknowledged that Employer had raised no separate allegations of error with respect to the ALJ's determination that it had failed to disprove the causal relationship between Claimant's disability and pneumoconiosis (rebuttal prong two). It accordingly affirmed the finding as unchallenged on appeal (citing *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)). CCR Board Dec. at 10; JA 318.

SUMMARY OF THE ARGUMENT

The Supreme Court specified in *Lucia* that relief is available on *timely* Appointments Clause challenges. But Energy West's challenge – raised for the first time before this Court and not once in seven years of administrative proceedings – is decidedly not timely. In *Turner Bros., Inc. v. Conley*, __ F. App'x __, 2018 WL 6523096, *1 (10th Cir. 2018), this Court held that the coal

company's Appointments Clause challenge was forfeited because it failed to raise the argument before the agency. The Court should reach the same result here and find Energy West's challenge forfeited and decline relief.

On the merits of the miner's award, the ALJ properly rejected the expert opinions that determined the miner was not totally disabled. Among other problems, these doctors believed the miner's ABG studies were normal, when in fact, the studies demonstrated total respiratory disability under DOL's binding regulations. Experts may not employ an undisclosed impairment rating system that conflicts with the impairment values established by DOL.

The ALJ also permissibly rejected the expert opinions that claimed the miner did not have legal pneumoconiosis. These experts greatly underestimated the extent of the miner's coal dust exposure, misunderstood his overall medical condition, or simply failed to adequately explain the basis for their diagnosis.

The Court should affirm the award of the benefits.

ARGUMENT

A. Standard of review

Energy West's challenge to the ALJ's authority under the Appointments Clause involves a question of law that this Court reviews *de novo*. *Antelope Coal Co.*, 743 F.3d at 1341.

With regard to the challenges made to merits of the case, the Court's "task is to determine whether the Board properly concluded that the ALJ's decision was supported by substantial evidence." *Hansen v. Director,* 984 F.2d 364, 368 (10th Cir. 1993). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). In determining whether substantial evidence exists, the Court does not reweigh the evidence, but recognizes that the "task of weighing conflicting medical evidence is within the sole province of the ALJ." *Hansen v. Director, OWCP,* 984 F.2d at 368; *see also Energy West Mining Co. v. Oliver,* 555 F.3d 1211, 1217. The ALJ is not required to accept any medical opinion, but is empowered to "weigh the medical evidence and draw his own inferences." *Kaiser Steel Corp. v. Director, OWCP,* 748 F.2d 1426, 1430 (10th Cir. 1984). The Court gives "substantial deference to the [Director's] reasonable interpretation of [her] own regulations." *Anderson v. Director, OWCP,* 455 F.3d 1102, 1103 (10th Cir. 2016).

B. Energy West's argument for vacating the ALJ's decision because he was not appointed in accordance with the Appointments Clause should be rejected.

1. Energy West forfeited its Appointments Clause challenge by failing to raise the issue before the agency.

Energy West's failure to preserve its Appointments Clause claim results in its forfeiture before this Court. Under *Turner Bros., Inc. v. Conley*, __ F. App'x __, 2018 WL 6523096, *1 (10th Cir. 2018), and longstanding principles that govern judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court held that Securities and Exchange Commission ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause.[13] In so holding, the Supreme Court explained that it "has held that one who makes a

[13] On the merits of the Appointments Clause challenge, the Director agrees that ALJs who preside over Black Lung proceedings are inferior officers, and that the ALJ below was not properly appointed when he adjudicated the case. In December 2017, the Secretary of Labor ratified her appointment and the appointments of other then-incumbent Department of Labor ALJs. *See infra* at 34-35.

timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." *Id.* at 2055 (emphasis added, quotation marks omitted). To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he – unlike other litigants – had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservations concerns were raised in *Lucia's* merits briefing, as amici the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).

Unlike the challenger in *Lucia*, Energy West failed to timely raise and preserve its Appointments Clause challenge before the agency. For over five years, from November 2012, when it requested an ALJ hearing, through April 2018, when the Board issued its decision affirming the award of benefits, Energy West never raised the Appointments Clause issue. Instead, Energy West waited until after it had lost before both the ALJ and the Board before raising its

challenge. In nearly identical circumstances, this Court held in *Turner Brothers* that the coal company had forfeited its Appointments Clause challenge by failing to raise it to the agency, and the court therefore declined to address the challenge. 2018 WL 6523096, *1.

Although unpublished, *Turner Brothers'* reasoning is persuasive, as it comports with the longstanding principle of administrative law that a party may not raise in court an argument it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. Based on the improper appointment, the district court invalidated the agency's order. *Id.* The Supreme Court reversed, holding that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the agency's proceedings "while it has opportunity for correction." *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, the Court refused to entertain the forfeited claim based on the "general rule that courts should not topple over

administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice," *id.* at 37.

This Court has consistently applied these normal principles of forfeiture, explaining that the failure to do so would require "frequent remand for additional evidence gathering and findings; would undermine the need for finality in litigation and judicial conservation of resources; and would often have this court hold everything accomplished below for naught." *Lyons v. Jefferson Bank and Trust,* 994 F.2d 716, 721 (10th Cir. 1993) (citations and internal quotations omitted). And in cases under the Black Lung Benefits Act, the Court will not consider issues that were not raised and preserved before the Board.[14] *See, e.g., Big Horn Coal Co. v. Director, OWCP,* 897 F.2d 1052, 1053 (10th Cir. 1990) (refusing to address employer's argument regarding validity of miner's test results raised for the first

[14] Energy West did not raise its Appointments Clause challenge to either the ALJ or the Board. Although it arguably was required to apprise both tribunals, *Dankle v. Duquesne Light Co.*, 20 Black Lung Rep. (MB) 1-1, 1-6/7 (1996) (issues not raised before ALJ are deemed waived or forfeited), the Court need not reach the question because Energy West failed to meet even the bare minimum obligation of timely raising the issue to the Board. *See e.g.*, *Higgins v. Elkhorn Eagle Min. Co.*, No. 17-0475 BLA, 2018 WL 3727423, *1 n.3 (Ben. Rev. Bd 2018) (unpublished) (coal company's Appointments Clause challenge waived when not raised until post- briefing motion) *appeal filed*, *Elkhorne Eagle Min. Co. v. Higgins, et al*, No. 18-3926 (6th Cir.); *Elkins v. Dickenson-Russell Coal Co.*, No. 17-0461 BLA, 2018 WL 3727420, *1 n.3 (Ben. Rev. Bd. 2018) (same).

time on appeal); *McConnell v. Director, OWCP,* 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (refusing to consider argument not raised before Board); *see also Micheli v. Director, OWCP,* 846 F.2d 632, 635 (10th Cir. 1988) (refusing to review ALJ's finding that was not appealed to Board); *accord Hix v. Director, OWCP,* 824 F.2d 526, 527 (6th Cir. 1987); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 220 (7th Cir. 1986); *Director, OWCP v. North American Coal Corp.,* 626 F.2d 1137, 1143-44 (3d Cir. 1980).

These principles apply with full force to Appointments Clause challenges. The courts of appeals have consistently held that Appointments Clause challenges are "nonjurisdictional" and receive no special entitlement to review. *E.g.*, *GGNSC Springfield LLC v. NLRB,* 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *Turner Bros*., 2018 WL 6523096 at *1 ("Appointments Clause challenges are nonjurisdictional and may be waived or forfeited."). Thus, even after *Lucia*, this Court, as well as the Sixth and Ninth Circuits, have all held that Appointments Clause claims were forfeited when a petitioner failed to preserve them before the agency. *Turner Bros.*, 2018 WL 6523096, *1 (agreeing that "Turner Brothers' failure to raise [Appointments Clause] issue to the agency is fatal."); *Jones Bros. v. Secretary of Labor*, 898 F.3d

669, 677 (6th Cir. 2018) (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case); *Kabani & Co., Inc. v. S.E.C.*, 733 F. App'x 918 (Mem.), 2018 WL 3828524 at *1 (9th Cir. 2018) ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."). Likewise, the Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (finding litigant forfeited Appointments Clause argument by failing to raise it before agency). Similarly, the Ninth, Sixth and D.C. Circuits have found Appointments Clause challenges forfeited when the petitioner failed to raise it in its opening brief before the court. *Kabani & Co.*, *supra*; *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2013).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus]

discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). Both of those reasons apply here. If Energy West had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor, or the Board, could well have provided an appropriate remedy.

In fact, both the Secretary of Labor and the Board have taken appropriate remedial actions: the Secretary ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Available at* https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html. And the Board has held that where an ALJ was not properly appointed, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge," and accordingly remanded the case for that to occur. *Miller v. Pine Branch Coal Sales, Inc.,* --- Black Lung Rep. (MB) ---, BRB No. 18-0325 BLA

(Oct. 22, 2018) (en banc) (*available at* https://www.dol.gov/brb/decisions/blklung/published/18-0323.pdf); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (remanding for Appointments Clause remedy); *Crum v. Amber Coal*, BRB No. 17-0387 (Feb. 26, 2018) (same). But because Energy West never raised the issue, neither the Secretary nor the Board was given an opportunity to consider and resolve it during the normal course of administrative proceedings.

Finally, considering Appointments Clause arguments raised for the first time on appeal "would encourage what Justice Scalia has referred to as sandbagging, *i.e.*, 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error.'" *In re DBC*, 545 F.3d at 1379 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)); *see also Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (explaining that "[w]e have recognized the value of waiver and forfeiture rules in complex cases," because "the consequences of a litigant sandbagging the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor – can be particularly severe" (internal quotation marks, alterations, and citations omitted)); *First-Citizens Bank & Trust Co. v.*

Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969) ("[O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level."); *cf. Jones Bros.*, 898 F.3d at 677 (observing that "it's not as if Jones Brothers sandbagged the Commission or strategically slept on its rights"). Here, Energy West's conduct suggests that it sandbagged its constitutional claim – it did not raise the issue before the ALJ or the Board, but waited to see if the Board would grant its appeal and then, only after losing, appealed and raised the issue in its opening brief to Court.[15]

[15] Aside from sandbagging's obvious prejudice (allowing the proverbial two bites at the apple), it is especially problematic in black lung proceedings. This is because a claimant is entitled to interim benefits while an initially approved claim continues to be litigated. 20 C.F.R. §§ 725.420(a), 725.502(a)(1), 725.522(a) (providing for interim benefits at various stages of litigation). Typically, the Black Lung Disability Trust Fund pays these interim benefits. *See* 20 C.F.R. §§ 725.420(a), 725.522(a). If the initial award is later overturned based on a coal company's Appointments Clause claim – raised for the first time in court – the claimant may well have spent the interim benefits and be unable to repay them. In that scenario, it is the Trust Fund, not the coal company, which is saddled with the loss. *See* 20 C.F.R. §§ 725.522(b), 725.542. On the other hand, if Lyle's award is affirmed, Energy West will have to reimburse the Trust Fund (with interest). 20 C.F.R. § 725.602.

In sum, Energy West's failure to present any Appointments Clause objection to the Board is quintessential forfeiture. There is no reason that he could not have timely raised a constitutional challenge during the administrative proceedings.

2. There are no grounds to excuse Energy West's failure to raise the Appointments Clause before the Benefits Review Board.

Energy West attempts to justify its administrative inaction by claiming that neither the ALJ nor the Board could cure the constitutional infirmity by appointing a new ALJ. OB 51. But Energy West mischaracterizes the relief it seeks. It has not asked this Court to appoint a new ALJ (OB 52), for this Court, like the ALJ and Board, is not empowered to do so. Rather, Energy West seeks a ruling that ALJ here was not constitutionally appointed, that his decision must therefore be vacated, and per *Lucia*, that a new ALJ decision must be rendered by a different, properly appointed ALJ. The Board has issued many such orders already, *supra* at 35, which would have spurred the Secretary of Labor (whose delegatee, the Director OWCP, is a party to this suit) to ensure the availability of properly appointed ALJs, if he had not already done so, *supra* at 34.[16] So the fact that

[16] The Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr, Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the

neither the ALJ nor Board could appoint a new ALJ is no excuse at all. If Energy West had timely acted before the agency, it could have obtained effective relief.[17]

Finally, although Energy West does not rely on *Jones Brothers* to excuse its forfeiture in its opening brief, it may change strategies given the fatal weakness of its asserted justification for failing to make a timely challenge. Rather than providing an excuse for Energy West's failure to timely raise the Appointments Clause issue, however, *Jones Brothers* confirms that Energy West's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the Sixth Circuit to excuse the forfeiture

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Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). Indeed, the Board has long addressed constitutional issues generally. *See Shaw v. Bath Iron Works*, 22 BRBS 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Machine & Shipyard*, 17 BRBS 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet General Shipyards,* 16 BRBS 49 (1983) (addressing due process issue); 4 Admin L. & Prac. § 11.11 (3d ed) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance.").

[17] *Bandimere v. S.E.C.*, 844 F3d 1168, 1170 (10th Cir. Dec. 27, 2016) (holding unconstitutional the appointment of SEC ALJs) was decided three months before Energy West filed its notice of appeal with the Board in March 2017. Thus, Energy West had no excuse for not timely raising an Appointments Clause challenge before the Board. *See Shupe v. Director, OWCP*, 12 1-200 (Ben. Rev. Bd. 1989) (*en banc*) (applying law of the circuit where the miner last worked (here Oklahoma)).

in that case. In *Jones Brothers*, the court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons. First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers"). Second, Jones Brothers' timely identification of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (merely identifying the issue was a "reasonable" course for a "petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it."). Given these circumstances, the court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "we generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, Energy West did not timely identify the Appointments Clause issue to the Board.

See Turner Bros., 2018 WL 6523096 at *1 (distinguishing *Jones Brothers* on ground that coal company did not mention issue in agency filings). Moreover, Energy West could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 35, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 36 n.16 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

If the Court were to excuse Energy West's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six hundred cases from around the country – arising under the Black Lung Benefits Act, the Longshore Act, and its extensions – currently pending before the Board. But in over five hundred of these cases, no Appointments Clause claim has been raised. Should this Court excuse Energy West's forfeiture here – where he failed to raise the claim to the agency – it would be inviting every losing party at the Board to seek a re-do of years' worth of administrative proceedings based on an Appointments Clause claim raised for the first time before a court of appeals. For the Black Lung program, whose very purpose is to provide timely and certain relief to disabled workers, that is precisely the kind of disruption that forfeiture

seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice).

In sum, basic tenets of administrative law required Energy West to raise its Appointments Clause challenge before the agency. The company's proffered reason for not doing so is meritless. The Court should therefore find that Energy West forfeited its right to challenge the ALJ's authority under the Appointments Clause.

C. The ALJ's determination that Claimant suffers from a totally disabling respiratory impairment is rational and supported by substantial evidence.

In determining whether a miner suffers from a totally disabling pulmonary impairment, an ALJ is required to consider all relevant evidence, including the pulmonary function tests, ABG studies, and medical opinion evidence. *See Bosco v. Twin Pines Coal Co.,* 92 F.2d 1473, 1479 (10th Cir. 1989). Here, the ALJ found that the miner's ABG studies produced qualifying values under the regulations and credited Dr. Gagon's written opinion that the miner is totally disabled, finding that it was based on objective test results, including the qualifying ABG studies. The ALJ considered, and permissibly rejected, the contrary opinions of Drs. Farney and Tomashefski. Accordingly, the

ALJ properly weighed evidence, and reasonably concluded that the miner is totally disabled.

1. The ALJ correctly rejected Drs. Farney's and Thomashefski's opinions, and Dr. Gagon's deposition testimony, that Claimant was not totally disabled because they believed Claimant's qualifying ABG studies, which demonstrate total disability under the regulations, were normal.

Under DOL regulations, promulgated following notice and comment rulemaking, ABG evidence that meets the standards set forth in Part 718 Appendix C establishes total respiratory disability in the absence of contrary probative evidence. 20 C.F.R. § 718.204(b)(2)(ii). Citing Drs. Farney's and Thomashefski's opinions, and Dr. Gagon's deposition testimony, Employer contends that the ABG studies here that met those standards were in fact normal when accounting for his age and the altitude where the tests were conducted. The ALJ, however, permissibly discredited their opinions as contrary to the regulations, which do factor in age and altitude. Simply put, these experts used a largely unidentified impairment-rating system, which departed widely from the regulatory standards, rather than apply the governing regulations. Clearly, the ALJ was right to reject their opinions for this reason.

This Court has previously considered and rebuffed a similar challenge to the Appendix C tables and an ALJ's finding of total disability based on them. In

Consolidation Coal Co. v. Director, OWCP [*Thompson*], 719 F. App'x 819 (10th Cir. 2017), as here, the coal company claimed the Appendix C tables failed to fully account for the age of the miner and the altitude where the test was conducted, and urged the Court to apply a different standard. 719 F. App'x at 820. The Court, however, rejected these challenges. It held that DOL regulations require the use of the Appendix C tables in assessing ABG results, observing that "evidence that meets the standards for ABG studies listed in appendix C 'shall establish a miner's total disability.'" 719 F. App'x. at 820-21 (quoting 20 C.F.R. § 718.204(b)(2)(ii)). The Court further dismissed the coal company's preferred standard, commenting that it was "handwritten on one document in the record, without any explanation of where the numbers came from." *Id*. at 821. Here, Employer has not identified any standards at all, let alone where they came from.[18] *Id*.

The Fourth Circuit reached a similar conclusion in *Cannelton Industries, Inc. v. Frye*, 93 F. App'x 551, 560 (4th Cir. 2004). There, the coal company's expert characterized a qualifying ABG study as "not disabling" and normal at the test site elevation (2000 feet above sea level). *Id*. The ALJ, however, rejected the

[18] Dr. Farney made a vague reference to "research" done by his colleagues, CCR EX 11 at 25-26; JA 185-86, whereas Drs. Tomashefski and Gagon (in deposition) mentioned no sources whatsoever.

doctor's opinion "because it "went to great lengths to alter the meaning of test results that didn't support his [diagnosis]." *Id*. In upholding the ALJ's decision, the court explained

> [b]oth of these statements plainly contradict federal regulations. Under the table contained in Appendix C of 20 C.F.R. § 718, [the miner]'s 1995 blood gas study results indicate that he is presumed to be totally disabled. Yet [the company's expert]'s comments show that he presumed just the opposite. The federal regulations also demonstrate that an elevation of 2000 feet does not affect the results of a blood gas study. *See* 20 C.F.R. § 718, Appendix C (noting that "A miner who meets the following medical specification shall be found to be totally disabled ... (1) For arterial blood gas studies performed *at test sites up to 2,999 feet above sea level* ... " (emphasis added)). Because [his] analysis disregarded the plain language of the regulation, there is a 'sufficient factual basis to support one reason for discrediting [his] opinion."

Id.

Here, as in *Thompson* and *Cannelton Industries*, the Court should affirm the ALJ's rejection of Employer's unsupported expert opinions because they conflicted with DOL's regulations.[19] *See Kaiser Steel Corp. v. Director, OWCP*,

[19] Employer argues that the ALJ was required to "resolve the scientific controversy" regarding the effects of age and altitude on ABG studies. OB 28. But the Department did exactly that when it promulgated the Appendix C tables following notice and comment rulemaking. *See supra* at 8-9; Board Dec. at 3-4. *Cf. Big Horn Coal Co. v. Temple*, 793 F.2d 1165 (10th Cir. 1986) (observing that age and elevation were *not* taken into account in ABG table in the predecessor interim regulation under 20 C.F.R. Part 727). The Part 727 regulations may be found at 43 Fed. Reg. 36818 (Aug. 18, 1978) or 20 C.F.R. parts 500 to end, edition revised as of April 1, 1999.

748 F.2d 1426, 1430 (10th Cir. 1984) (ALJ "may reject or accord little weight to the opinion of a physician whose basic medical assumptions are contrary to the findings and purposes of the Act"); *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 313 (4th Cir. 2012) (upholding ALJ's discounting of expert opinion that "finds no support in the Department's regulations"); *see also Blue Mt. Energy*, 805 F.3d at 1259-61 (ALJ may use preamble to black lung regulations to evaluate the credibility of expert reports and accord less weight to opinion that conflicts with it).

2. The ALJ's additional reasons for rejecting Drs. Farney and Tomashefski's opinions on total disability are supported by substantial evidence.

The ALJ additionally rejected Drs. Farney's and Tomashefski's opinions on total disability because the doctors did not have an accurate picture of the miner's medical condition. The ALJ pointed out that both physicians mistakenly believed that the miner used supplemental oxygen only at night, when in fact used it on exertion *and* at night, up to fourteen hours a day. CCR ALJ Dec. at 30-31; JA 292-93. Furthermore, the ALJ faulted Dr. Farney's reliance on his own six-minute walk test when later results for the same test showed reduced and abnormal oxygen levels. CCR ALJ Dec. at 30; JA 292. The ALJ's analysis is rational, supported by the record evidence, and consistent with existing case precedent.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 534 (4th Cir. 1998) (holding that the ALJ erred in crediting a physician who had not considered all the relevant evidence regarding the claimant's condition); *see also Stark v. Dir., OWCP,* 9 Black Lung Rep. 1-36, 1-37 (Ben.Rev.Bd.1986) ("[A]n administrative law judge may legitimately assign less weight to a medical opinion which presents an incomplete picture of the miner's health.").

Energy West nonetheless argues that the ALJ could not have relied on the miner's treatment records to discredit its experts because he determined the treatment records did not specifically address the miner's respiratory disability. *See* OB at 33 (citing CCR ALJ Dec. at 33; JA 295). This argument is wide of the mark. Nothing prevented the ALJ from utilizing the *factual information* in the treatment records and comparing it to the *facts* as understood by Employer's experts. *See Thompson*, 719 F. App'x. at 821-22 (primary care doctor's notes indicating miner had progressively worsening pulmonary condition constituted substantial evidence that justified ALJ's discounting of medical opinion). Moreover, it cannot be, as Employer suggests (OB 33), that the ALJ could not evaluate its experts' reports based on the very same tests (*i.e.*, walk test) and treatment (O_2 use) that its experts used to find no respiratory disability. Employer can't have it both ways: either the tests and treatment do not address respiratory

impairment, in which case its expert opinions are flawed, or they are relevant, and it was proper for the ALJ to review the treatment records including them. In any event, Employer does not suggest the treatment records are inaccurate, and in fact utilizes them for its own purposes. *See* OB 25-26 (claiming ALJ error for failing to consider ABG study in treatment records).

Finally, the ALJ rejected Dr. Farney's opinion on total disability because the doctor did not "clearly conclude that Claimant has no pulmonary impairment or respiratory insufficiency due to any cause."[20] CCR ALJ Dec. at 30; JA 292. The Board affirmed this reasoning as unchallenged on appeal. CCR Board Dec. at 7 n.10; JA 315 n.10. (Review of Energy West's brief to the Board confirms the Board's determination. *See* CCR Employer's petition for review and brief with attached cover letter at 35-85). Energy West's opening brief to this Court does not address the Board's waiver ruling, and so Energy West has waived (like its

[20] Dr. Farney opined that Claimant's respiratory impairment was not caused by pneumoconiosis or by an intrinsic lung disease. JA 27, 29, 199. But these statements, which include a causation qualifier, miss the point when it comes to determining the *existence* of respiratory disability. *See supra* at 9-10 (discussing 20 C.F.R. § 718.204(a)); *Consolidation Coal Co. v. Director, OWCP*, 911 F.3d 824, 842 (7th Cir. 2018) ("It is clear from the Act, the regulations, and Board precedent that an ALJ must decide whether a totally disabling respiratory or pulmonary disability exists before invoking the presumption, but that in doing so, the ALJ should not let medical opinion evidence about the cause of such respiratory or pulmonary impairment affect the analysis.").

Appointments Clause challenge) any challenge to the ALJ's rejection of Dr. Farney's opinion on this basis. *See e.g. San Juan Citizens Alliance v, Stiles*, 654 F.3d 1038, 1050 (10th Cir. 2011); *see also Big Horn Coal Co.*, 897 F.2d at 1053 (failure to raise the issue before the Board results in waiver on appeal); *McConnell*, 993 F.2d at 1460 n.8 (same). Thus, there is no reason for the Court to reach Energy West's other contentions of ALJ error regarding Dr. Farney's opinion on total disability. *See Island Creek Coal Co. v. Compton* [*Compton*] 211 F.3d 203, at 213 n. 13 (4th Cir. 2000) (declining to reach the employer's other arguments that the ALJ erred in discrediting its doctors' opinions "in light of [the reviewing court's] conclusion that there was a sufficient factual basis to support one reason for discrediting each opinion"); *see generally, e.g., U.S. v. Benard*, 680 F.3d 1206, 1210 (10th Cir. 2012) (where decision below affirmed on one ground, need not consider alternative grounds for same result).

3. The ALJ acted within his discretion in crediting Dr. Gagon's initial written report while disregarding his contrary deposition testimony.

An ALJ need not accept or reject all of a physician's opinion, but may credit those portions that are found to be supported by the evidence. *Drummond Coal Co. v. Freeman,* 17 F.3d 361, 366 (11th Cir. 1994) (ALJ may find one part of an expert opinion well-supported but another not so; ALJ need not find an opinion "is

either wholly reliable or wholly unreliable"). Here, the ALJ acted within his discretion in crediting Dr. Gagon's initial written opinion diagnosing total disability, finding it well-reasoned and documented because it was based on the miner's qualifying ABG results and symptoms of shortness of breath. Conversely, the ALJ reasonably rejected Dr. Gagon's deposition testimony that the miner is not totally disabled, finding that it was contrary to the qualifying ABG results. Thus, the Court should find that the ALJ's findings regarding Dr. Gagon's opinion are supported by substantial evidence.

4. Energy West waived its contention that the ALJ erred in failing to specifically address an ABG study included in the treatment records.

Finally, Energy West makes a cursory argument that the ALJ failed to consider all the relevant evidence, namely a non-qualifying 2014 ABG study contained in the treatment records. OB 25. The ALJ, however, was aware of the test, CCR ALJ Dec. at 25 n.24; JA 287 n.24, but apparently did not include it in his weighing of the ABG studies because claimant failed to provide the required the written summary of the treatment records. *Id*. at 21 n.19; JA 283 n.19. Moreover, Employer never designated the study as evidence it would rely on. *See* CCR Employer's Initial and Final Evidence Summary Forms, submitted to the ALJ on February 29, 2016, and April 9, 2016.

In any event, Employer waived the issue that the ALJ failed to consider all relevant evidence by not raising it to the Board. In fact, before the Board, Energy West conceded that the ABG studies were qualifying. It presented the first issue to the Board as:

> *Although arterial blood gas studies yielded qualifying values*, in assessing the significance of these results both examination physicians explained during their respective depositions that the results were normal for the altitude and barometric pressure. ALJ Romano [sic] found the uncontested medical opinion was unpersuasive in light of the "qualifying" testing results. Is the decision either rational or based on substantial evidence?

CCR 35-85 (Employer's petition for review and brief at 24 (emphasis added)). Energy West then argued that "[a]rterial blood gas studies were also obtained in 2011 and 2012. The ALJ concluded that both studies produced qualifying results under the regulations and showed disability. . . . The ALJ erred in failing to credit the uncontested medical opinions explaining that notwithstanding the 'qualifying' results, the arterial blood gas results were normal…" *Id*. (Employer's Brief at 27). Nowhere in its brief before the Board did Energy West claim that the ALJ failed to consider a nonqualifying ABG study. Just the opposite. It repeatedly admits the ABG studies were qualifying. Its failure to raise this issue before the Board results in waiver on appeal. *See Big Horn Coal Co.*, 897 F.2d at 1053; *McConnell*, 993 F.2d at 1460 n.8; *Blue Mt. Energy*, 805 F.3d at 1259 n.3 (issues listed but not

argued are waived; scattered and perfunctory issues that are not developed are waived).

In any event, any alleged error by the ALJ was harmless. Energy West neglects to mention that the treatment records contain a second ABG study, and this test produced qualifying values. JA 224. Thus, in all, there are three qualifying tests and only one nonqualifying. The great weight of the ABG studies thus supports the ALJ's conclusion that the studies were qualifying. *See Thompson*, 719 F. App'x at 820 (three of four ABGs were qualifying and supported ALJ's finding of disability); *Sea "B" Min. Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (company arguing that ALJ failed to consider all relevant evidence must demonstrate prejudice and show "how "the result would have been different").[21]

[21] Employer's comment that "the improvement of oxygen in blood gas testing is important to consider" (OB 26) does not make a case for prejudicial error. Moreover, its suggestion that because pneumoconiosis is a latent and progressive disease, the 2014 test may have added probative value is misguided. ABG studies address the existence of a respiratory impairment from *any* cause, not only pneumoconiosis, and no one contends that *all* respiratory impairments are latent and progressive. *See supra* at 8 n.3. In any event, it is specious to argue that later, better results indicate the absence of pneumoconiosis. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). At most, the ABG studies mildly conflict, and Employer has not provided a valid reason to accord the sole nonqualifying ABG study greater weight than the three qualifying ones.

D. The ALJ reasonably found that Energy West failed to rebut the presumption that Lyle suffers from legal pneumoconiosis.[22]

The ALJ concluded that the opinions of Drs. Farney and Tomashefski did not rebut the presumption that the miner suffered from legal pneumoconiosis because they were not well-reasoned. This conclusion is rational and supported by substantial evidence.

In rendering his no legal pneumoconiosis opinion, Dr. Farney emphasized that the miner worked only during the graveyard, or downshift, when coal extraction was temporarily suspended. CCR DX 32 at 8, EX 11 at 12-13; JA 27, 172-73. This job assignment, however, comprised only the last five years of the miner's 28 years of underground coal mine employment. Dr. Farney thus failed to address the miner's previous 23 years of work, which occurred at the face of the mine in dusty conditions. CCR ALJ Dec. at 5; JA 267. As Dr. Farney's opinion failed to account for the totality of the miner's dust exposure throughout his coal mine employment, the ALJ reasonably discounted it. *See Compton,* 211 F.3d at

[22] It is uncontested that Energy West failed to rebut the presumption of total disability due to pneumoconiosis. CCR Board Dec. at 10. In addition, Claimant has not challenged the ALJ's finding that Energy West rebutted the presumption of clinical pneumoconiosis.

213 (ALJ permissibly discounted opinion where physician misunderstood the degree of miner's exposure to coal dust).

Energy West insists that Dr. Farney was "fully aware that Mr. Lyle had worked as a coal miner from 1981 until 2010," (OB 41), yet it points to nothing in the record indicating that Dr. Farney was actually aware of the miner's extensive dust exposure in the 23 years prior to his last five years of employment. The ALJ reasonably interpreted Dr. Farney's opinion as misconstruing the extent of the miner's dust exposure. *See Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (recognizing that under substantial evidence review, court must accept ALJ's permissible interpretation of doctor's opinion); *Piney Mt. Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999) (explaining that "through the prism of the 'substantial evidence' standard[,]". . . "to overturn the ALJ, we would have to rule as a matter of law that no 'reasonable mind' could have interpreted and credited the doctor's opinion as the ALJ did.").

The ALJ also permissibly rejected Dr. Farney's opinion regarding legal pneumoconiosis because it was based in part on statistical probabilities rather the facts of this case. CCR ALJ Dec. at 41; JA 303. In *Antelope Coal Co.*, this Court held that it was permissible for an ALJ to reject a medical opinion that eliminated pneumoconiosis on the basis that a claimant "statistically has less risk" of

developing the disease rather than specifically explaining why the claimant could not be one of those miners who developed pneumoconiosis despite the statistical risk factor. 743 F.3d at 1345-46. Here, Dr. Farney similarly eliminated pneumoconiosis as a diagnosis based in part on his belief that the miner worked in a part of the country where the prevalence of pneumoconiosis was low.[23] The Court should therefore find that the ALJ permissibly gave Dr. Farney's opinion on legal pneumoconiosis little weight.[24] *See also Energy West Mining Co. v. Estate of Blackburn,* 857 F.3d 817, 839 (10th Cir. 2017) (administrative law judge permissibly rejected medical opinion due to "overreliance on statistics and lack of individualized application").

With regard to Dr. Tomashefski's no legal pneumoconiosis opinion, the ALJ rejected it due to the doctor's failure to adequately explain why the miner's extensive coal dust exposure in no way "affected" his pulmonary disease. CCR ALJ Dec. at 41; JA 303. It is, of course, within the ALJ's province to assess the

[23] Notably, Dr. Farney cited no authority for his assertion that "the prevalence of [pneumoconiosis] in the western United States is relatively low." CCR DX 32 at 8; JA 27.

[24] Employer's attempt to distinguish *Goodin* is unavailing. Although Dr. Farney cited additional reasons for his diagnosis, his reliance on statistics was clearly a basis for his finding that the miner does not have legal pneumoconiosis.

persuasiveness of a medical opinion, *Kaiser Steel Corp.*, 748 F.2d at 1430, and courts accordingly do not undertake to reweigh the evidence or substitute their judgment for the ALJ's. *E.g., Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013). Here, Dr. Tomashefski – a pathologist -- conceded that he could not identify the cause of the miner's pulmonary disease.[25] CCR EX 7 at 2, EX 10 at 14, 18; JA 94, 150, 154; *see also* JA 94, 158 (diagnosing emphysema without identifying its cause). In addition, his rationale for dismissing coal dust as a cause focused on the amount of dust in the miner's lungs as seen on a biopsy, a concern that largely relates to the existence of *clinical* pneumoconiosis. *See* 20 C.F.R. §718.201(a).(defining clinical pneumoconiosis as "conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs"); *see also* 20 C.F.R. § 718.106 ("negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis"). Under these circumstances, the ALJ reasonably refused to rely on the doctor's opinion. *See Spring Creek Coal Co.*, 881 F.3d at 1225 (affirming rejection of medical opinions that failed to

[25] The Fourth Circuit has affirmed an award of black lung benefits based on an ALJ's finding (on a more complete medical record than here) that the miner's interstitial pulmonary fibrosis (or UIP, *see supra* at 15 n.9) was caused by coal dust exposure. *See Consolidation Coal Co. v. Latusek*, 717 F. App'x 207 (4th Cir. 2018).

explain why miner's coal dust exposure did not contribute to his pulmonary disease); *Antelope Coal Co.*, 743 F.3d at 1346 (holding that record supported ALJ's finding that doctors failed to adequately explain why coal dust exposure could not have contributed to miner's lung disease); *Westmoreland v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010) (observing that an ALJ may disregard a medical opinion that does not adequately explain the basis for its conclusion).

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

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

CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(C), I certify that this brief is proportionately spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 12,648 words as counted by Microsoft Office Word 2016.
2. Pursuant to the ECF User Manual, I certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.
3. Pursuant to the ECF User Manual, I certify that the hard copies to be submitted to the Court and parties to the case will be exact copies of the version submitted electronically today.
4. Pursuant to 10th R. 25.5, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, the Director's brief was served electronically using the Court's CM/ECF system on

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