U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0302 BLA

ANDY M. BAILEY	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE T COAL COMPANY	)	
	)	
and	)	
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OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 12/21/2021
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2018-BLA-05598) rendered on a subsequent claim filed on October 6, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 2.96 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718,[3] the ALJ found Claimant established he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). Thus, she further found Claimant established a change in an applicable condition of entitlement and awarded benefits.[4] 20 C.F.R. §718.309(c).

[1] Claimant filed two previous claims for benefits. Director's Exhibits 1, 2. The district director denied Claimant's first claim for reason of abandonment, which is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c); Director's Exhibit 1. Claimant withdrew his second claim. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The ALJ correctly found no evidence of complicated pneumoconiosis and thus Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 4 n.12.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, he must establish "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for reason of abandonment, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c)(3), (4).

On appeal, Employer argues the ALJ lacked the authority to preside over the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs violate the separation of powers doctrine and render her appointment unconstitutional. On the merits of entitlement, Employer contends the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation.[6] Claimant has not responded to Employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the ALJ had the authority to decide the case. Employer replied, reiterating the ALJ did not.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 12 (unpaginated). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* at 13-16; Employer's Reply Brief at 1-4 (unpaginated).

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance with the Appointments Clause. Director's Brief at 4-6. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819

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[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended 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. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Dana Rosen.

F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, it thus is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Rosen and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Rosen. The Secretary further acted in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ Rosen "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity.[10] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the ALJ. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 20 (unpaginated); Employer's Reply Brief at 8-10 (unpaginated). The Executive Order does not state that the prior appointment procedures were impermissible or violated the

[10] While Employer notes the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 15 n.3 (unpaginated), this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Rosen's appointment, which we have held constituted a valid exercise of his authority, bringing her appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-20 (unpaginated); Employer's Reply Brief at 4-8 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 18-19 (unpaginated); Employer's Reply Brief at 6-7 (unpaginated). Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 17-19 (unpaginated); Employer's Reply Brief at 4-7 (unpaginated).

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the

President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[11] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1136.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act without the benefit of a statutory presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

At the outset of its brief, Employer asserts the ALJ's decision "turns back the clock" because Claimant's pneumoconiosis "would not interfere with his job in the slightest" and

[11] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

"something else" prevents him from working. Employer's Brief at 1-2 (unpaginated) (citing *Freeman United Coal Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994)). But the ALJ awarded benefits, in part, precisely because the pulmonary function tests, medical opinions, and the record as a whole definitively establish Claimant *is totally disabled by a respiratory impairment.* Decision and Order at 30-32; 20 C.F.R. 718.204(b)(2). And despite Employer's threshold characterization, it does not in any way challenge that finding, which we have affirmed. *See supra* n.6. Employer instead limits its argument on appeal solely to allegations that substantial evidence does not support the ALJ's decision to credit Dr. Mansour's opinion that coal dust exposure sufficiently caused or aggravated Claimant's disabling emphysema such that it can be properly classified as legal pneumoconiosis. For the reasons that follow, we reject those allegations.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered three medical opinions: Dr. Mansour opined Claimant's chronic obstructive pulmonary disease (COPD)/emphysema is due to smoking and coal dust exposure, and Drs. Dahhan and Rosenberg diagnosed it as related to smoking and not coal dust exposure.[12] Decision and Order at 26-30; Director's Exhibits 24, 26 29; Employer's Exhibits 3, 4, 6, 7. The ALJ gave greatest weight to Dr. Mansour's opinion and found Claimant established his disabling COPD/emphysema as legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Contrary to Employer's argument, Employer's Brief at 21-28 (unpaginated), the ALJ acted in her discretion in making those credibility determinations. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983).

Dr. Mansour conducted the DOL-sponsored pulmonary evaluation on November 18, 2016. Director's Exhibit 24. He noted Claimant's respiratory symptoms of wheezing cough with sputum production and shortness of breath, a smoking history of thirty-two to

[12] The ALJ found Claimant has a thirty-three pack year history of smoking cigarettes. Decision and Order at 6.

forty-eight pack-years, and a coal mine employment history of six years. *Id*. at 3, 7. He indicated Claimant was in "chronic respiratory failure" based on the blood gas study, which showed "hypoxemia and mild CO2 retention." *Id*. at 5. He also opined the pulmonary function study showed a severe restrictive impairment. *Id*. Dr. Mansour diagnosed COPD/emphysema based on Claimant's pulmonary function testing, smoking history, occupational dust exposure, symptoms, and emphysema as shown on the November 18, 2016 x-ray. *Id*.

When asked on the DOL form to assign percentages to the possible etiologies for Claimant's diagnosed respiratory condition, Dr. Mansour wrote that ninety percent of Claimant's COPD was caused by smoking and ten percent was caused by coal mine dust exposure.[13] Director's Exhibit 24 at 6. In response to the claims examiner's request, Dr. Mansour prepared a supplemental report addressing the district director's finding that Claimant had two years and ten months of coal mine employment. He again opined that Claimant has legal pneumoconiosis, attributing ninety-five percent of Claimant's disabling COPD/emphysema to smoking and five percent to coal dust inhalation. Director's Exhibit 26. He explained:

> I emphasize that *dust exposure during [Claimant]'s coal mine employment has played a role in causing his chronic pulmonary disease, and that it played a significant although minor role in causing his pulmonary impairment.* The pneumoconiosis detected on the [C]laimant's chest x-ray cannot be caused by smoking cigarettes alone; and the short period of coal dust inhalation of two years and ten months has indeed affected [Claimant]'s lungs anatomically *and in my opinion functionally*.

Id. at 1 (emphasis added).[14]

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[13] Dr. Mansour considered a thirty-two to forty-eight pack-year smoking history. Director's Exhibit 24.

[14] Employer and our dissenting colleague make too much out of the ALJ's simple use of the word "impartial" in describing Dr. Mansour. Decision and Order at 30. As demonstrated herein, the ALJ did not credit Dr. Mansour simply because he provided the DOL-sponsored complete pulmonary examination. Nor is there any indication she considered Employer's experts biased. Rather she credited Dr. Mansour because she found his opinion documented, reasoned, and persuasive when compared to the other opinions of record. *Id.*, at 26, 30. We therefore see no harm in the ALJ's mere word choice. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991) (en banc) (the opinions of DOL-examining physicians are not presumptively more reliable than medical opinions presented by the parties). Similarly, that the ALJ further found Dr. Mansour's opinion consistent

Employer asserts that in crediting Dr. Mansour's diagnosis of legal pneumoconiosis, the ALJ "overlooked" that his opinion "relied" on Dr. DePonte's discredited positive x-ray reading diagnosing clinical pneumoconiosis. Employer's Brief at 21 (unpaginated). It also alleges Dr. Mansour's deposition testimony apportioning Claimant's impairment to coal mine dust exposure is "arbitrary" and not credible. *Id.* at 21-22. Employer's arguments are without merit.

As an initial matter, by not raising it to the ALJ, Employer forfeited its argument that Dr. Mansour's diagnosis of legal pneumoconiosis was based on an improper view of the x-ray evidence. It limited its argument below solely to an irreconcilable assertion that Dr. Mansour based his opinion on legal pneumoconiosis exclusively on Claimant's work history *and not any diagnostic criteria at all*, which the ALJ permissibly rejected. Employer's Post-Hearing Brief at 13-14 (exclusively arguing Dr. Mansour's opinion is arbitrary and undocumented); Decision and Order at 26. Employer thus did not attempt to argue Dr. Mansour relied on a discredited x-ray reading in diagnosing legal pneumoconiosis. Having taken a contrary position to the one it adopts for the first time on appeal, Employer forfeited its right to present its new argument to the Board. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ).[15]

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with the preamble, as it was, does not detract from her further analysis finding it documented and reasoned.

[15] Our dissenting colleague does not dispute that Employer did not raise the argument below, rather she characterizes the issue as a failure to consider evidence pursuant to 30 U.S.C. § 923(b). But counter to our colleague's assertion, the ALJ indisputably *did* weigh Dr. Mansour's consideration of Dr. DePonte's discredited positive x-ray reading in interrelating the evidence: she found it undermined his opinion Claimant suffered from clinical pneumoconiosis but further found his opinion on legal pneumoconiosis sufficiently independent of it to remain persuasive. Decision and Order at 26-7 ("As Doctor Mansour relied on the x-ray evidence to diagnose clinical pneumoconiosis, his opinion is entitled to diminished weight"; his legal pneumoconiosis diagnosis based on "years of coal dust exposure," on the other hand, is "well-reasoned," "well-documented," and "entitled to significant weight."). Our colleague's position properly viewed thus is not that the ALJ did not consider evidence, but rather that she failed to consider it *in a specific way*: in her view, the ALJ should have considered Dr. Mansour's opinion on legal pneumoconiosis completely dependent on a discredited view of the x-rays. *See infra* pp.17-19 and n.23.

But positing how a factfinder should *view* evidence is argument, not evidence, and Employer forfeited this one by arguing to the ALJ that the evidence should be viewed in a

But even if we did consider Employer's argument, we would find it without merit. Dr. Mansour did not state the positive x-ray evidence for clinical pneumoconiosis "was pivotal to his conclusion that coal dust contributed to [Claimant]'s impairment." Employer's Brief at 22 (unpaginated). Rather, as the ALJ recognized, he noted that Dr. DePonte's reading "bolstered" his opinion that coal dust exposure significantly contributed to Claimant's COPD. Employer's Exhibit 4 at 15; Decision and Order at 13.[16]

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fundamentally inconsistent manner than it urges on appeal. Considering its contrary position under these circumstances thus would condone sandbagging. *See, e.g.*, *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (refusing to consider a position not raised below because "[w]e have repeatedly held that a party forfeits any allegations that lack developed argument.") (citation omitted); *Freytag v. Comm'r*, 501 U.S. 868, 895 (Scalia, J., concurring) (Sandbagging is maintaining "the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error."). Furthermore, our colleague's characterization of Employer's post-hearing arguments aside, *its brief plainly speaks for itself*: "Dr. Mansour testified that his estimation of the percent causation of Mr. Bailey's COPD was not based on any objective medical evidence; it was based solely on the years of coal mine employment. The diagnosis of disease may not be made solely on the years of coal mine employment." Employer's Post-Hearing Brief at 14, underline in original. Employer's new position that his opinion was actually entirely based on discredited x-rays -- after losing its entire three line argument below -- plainly contradicts its previous one. *Id.*

[16] Much of our dissenting colleague's critique stems from a view that the ALJ did not make enough out of one exchange in Dr. Mansour's deposition testimony regarding Dr. DePonte's x-ray interpretation. *See discussion infra* pp. 17-19 and n.23. But while Dr. Mansour acknowledged it played a role in his opinion, Employer's Exhibit 4 at 12, the majority of his testimony unambiguously establishes he based his diagnosis primarily on Claimant's exposure histories (as Employer recognized below), *id.* at 9-12, and that, independent of clinical pneumoconiosis, the x-rays further showed Claimant's exposure was severe enough to cause "deposits of coal dust in his lungs." *Id.* at 12. Significantly, despite our colleague's insistence the x-ray evidence relates only to clinical pneumoconiosis, Dr. Mansour never retreated from his repeated conclusion that coal dust exposure substantially contributed to Claimant's emphysema, as shown on x-ray. Director's Exhibits 24 at 6 (attributing Claimant's emphysema shown on x-ray to dust exposure); 26 at 1 (emphasizing that coal dust played a role in causing his COPD). Our dissenting colleague thus makes too much out of a single exchange, and has not otherwise explained how the ALJ's finding that Dr. Mansour's consideration of Dr. DePonte's x-ray reading did not undermine his diagnosis of legal pneumoconiosis was outside of her discretion, despite reweighing much of the ALJ's findings. *Morrison*, 644 F.3d at 478;

Regardless, the ALJ did not "overlook" that aspect of Dr. Mansour's opinion in evaluating the evidence. She found it undermined his opinion on clinical pneumoconiosis. Decision and Order at 26. But she further found it did not detract from his identification of emphysema on x-ray that "anatomically" changed Claimant's lungs, his description of how objective testing further revealed it to cause a functional impairment, and his repeated conclusion that Claimant's history of exposure to coal dust was sufficient enough to significantly cause or aggravate it, notwithstanding his smoking history. Decision and Order at 10-13, 26. Those findings are independent of the separate issue of the existence of clinical pneumoconiosis, and they provide a documented and reasoned opinion that the ALJ permissibly found persuasive when compared with what she considered as the flawed opinions of Employer's experts. No more is required under binding precedent. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487 (6th Cir. 2012) (reliance on a discredited x-ray to diagnose clinical pneumoconiosis does not preclude an ALJ crediting a physician's documented and reasoned opinion on legal pneumoconiosis).[17]

We therefore would affirm the ALJ's determination that Dr. Mansour's opinion on legal pneumoconiosis was not dependent on a discredited view of the x-ray evidence even if Employer had preserved the issue.[18] 20 C.F.R. §718.201(a)(2), (b); *Groves*, 761 F.3d at 598-99.

Jericol Mining, Inc. v. Napier, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

[17] As noted, the ALJ discredited Dr. Mansour's opinion on clinical pneumoconiosis based on his reliance on Dr. DePonte's positive x-ray reading diagnosing the disease. Decision and Order at 26. By contrast, she concluded his diagnosis of legal pneumoconiosis was sufficiently based on other factors to remain persuasive when compared to Employer's expert opinions. *Id.* Contrary to our dissenting's colleague's assertion, that is precisely the situation the court addressed in *Cumberland*. 690 F.3d at 487 (because the "definition of legal pneumoconiosis is sufficiently broader than that of clinical pneumoconiosis" a physician's mistaken belief a claimant suffers from clinical pneumoconiosis does not preclude crediting his diagnosis of legal pneumoconiosis where he also "based his diagnosis on objective medical evidence, considered [claimant's] employment history and smoking history, and explained the basis for his opinion.").

[18] Although Employer correctly asserts Dr. Mansour's 2014 treatment record attributes Claimant's COPD to cigarette smoking, Employer has not explained the significance of this assertion, or explained how the treatment record is inconsistent with Dr. Mansour's opinion that "the overwhelming majority" of Claimant's impairment is due to smoking, with coal dust exposure also playing a "minor role in causing his pulmonary impairment." Director's Exhibit 26; Employer's Exhibit 4 at 13; *see Shinseki v. Sanders*,

Additionally, we reject Employer's separate contention that Dr. Mansour's deposition testimony undermines the overall credibility of his diagnosis of legal pneumoconiosis. Dr. Mansour was asked to identify, in terms of percentages, the point at which coal dust exposure would be a significant contributing cause for Claimant's impairment. Employer's Exhibit 4 at 14. Dr. Mansour explained that, while his apportionment percentages may be imprecise, he is unaware of any medical studies explaining how to show "equivalency," and he further indicated Claimant's two years and ten months of coal mine dust exposure "played a significant although minor role" in causing his COPD. *Id.* at 12-13; Director's Exhibit 26 at 1. That, too, is enough: a Claimant is not required to apportion percentages to different exposures to establish legal pneumoconiosis, *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Dr. Mansour explicitly diagnosed the disease and unambiguously explained how he determined coal dust exposure significantly contributed to Claimant's emphysema. Decision and Order at 14-15; 26; *Young*, 947 F.3d at 407 (recognizing the regulatory definition of legal pneumoconiosis to require "a contributing cause of some discernible consequence."). We therefore affirm the ALJ's reliance on his opinion.[19] *See Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-99; Decision and Order at 27, 30.

556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Because Employer's assertion is inadequately briefed, we decline to address it. 20 C.F.R. §802.211(b); *see Collieries, Inc. v. Barrett*, 478 F.3d 350, 352-53 (6th Cir. 2007); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[19] Employer argues the ALJ failed to consider that Dr. Mansour erroneously pointed to the blood gas studies to support his diagnosis of legal pneumoconiosis, when those results fluctuated over time, and that Claimant's impairment developed years after leaving the mines but while Claimant continued to smoke. Employer's Brief at 21 (unpaginated). Because the ALJ gave valid reasons for crediting Dr. Mansour's opinion on legal pneumoconiosis, we need not address Employer's additional arguments for why his opinion is not persuasive. *See Shinseki*, 556 U.S. at 413; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

We also reject Employer contention the ALJ erred in considering the opinions of Drs. Dahhan[20] and Rosenberg.[21] As the ALJ observed, Drs. Dahhan and Rosenberg "relied upon statistical averaging," which the preamble recognizes may understate the effects of coal mine dust exposure in individual miners. Decision and Order at 28 (citing Fed. Reg. 79,920, 79,941 (Dec. 20, 2000)); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012) (ALJ may assess the credibility of a medical opinion against the accepted medical and scientific views expressed in preamble); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may reject medical opinions that rely on generalities and not specifics of a miner's case). Moreover, the ALJ permissibly found their opinions that Claimant's impairment is due solely to smoking because smoking is more injurious than coal dust exposure fail to account for the DOL's recognition in the preamble that the risks of smoking and coal mine dust exposure may be additive. Decision and Order at 29; *see* 65 Fed. Reg. at 79,941; *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-02. The ALJ therefore permissibly discredited the opinions of Employer's experts as not well-reasoned. Decision and Order at 28-30; *see Cumberland*, 690 F.3d at 489; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255.

Ultimately, Employer's arguments on legal pneumoconiosis simply request a reweighing of the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Young*, 947 F.3d at 403-07; *Adams*, 694 F.3d at 801-02; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

[20] Dr. Dahhan opined that, although coal dust exposure can cause an obstructive impairment, "the amount of loss in the FEV1 that coal dust exposure per se will cause is estimated to be five to nine c[ubic] c[entimeters] per year" for a total of 10 to 20 c[ubic] c[entimeters], but "he has lost more than that." Decision and Order at 15; Employer's Exhibit 6 at 14-15. He stated Claimant's thirty pack-year smoking history would result in a loss of up to "ninety c[ubic] c[entimeters] per pack" year, sufficient to account for his FEV1 loss. *Id.*

[21] Dr. Rosenberg stated that the risk of adverse effects from smoking are "about 300 percent greater" than from coal dust exposure; smoking results in "roughly" a twelve cubic centimeter loss in FEV1 per year, while coal dust exposure results in a four cubic centimeter loss per year. Decision and Order at 19 n.33; Employer's Exhibit 7 at 11-12. He calculated Claimant's FEV1 "would have dropped roughly 8 or 9 c[ubic] c[entimeters] at most," which compared to his total loss of 790 cubic centimeters is a little more than a one percent loss, and is not a significant cause of impairment. *Id.*

Because it is supported by substantial evidence, we further affirm her overall finding that Claimant established legal pneumoconiosis.[22] 20 C.F.R. §718.202(a).

Disability Causation

To establish disability causation, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer generally contends the ALJ erred in finding that Claimant satisfied his burden to prove disability causation. We disagree.

Having affirmed the ALJ's permissible determination that Dr. Mansour's reasoned opinion is sufficient to prove Claimant's totally disabling COPD is legal pneumoconiosis, there is no error in finding it also establishes Claimant is totally disabled due to the disease; it is the only logical conclusion from those facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 30. Because Dr. Dahhan opined Claimant does not have a disabling respiratory impairment, and Dr. Rosenberg did not diagnose legal pneumoconiosis, the ALJ also permissibly found their opinions not credible on the issue of disability causation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose pneumoconiosis); *see also Toler v. Eastern Associated Coal*

[22] While Employer and our dissenting colleague reasonably disagree with the ALJ's credibility determinations, we nevertheless consider them "within the 'realm of rationality' and, therefore, supported by substantial evidence." *Morrison*, 644 F.3d at 478 (citation omitted). It is true that claimant had a much longer smoking history than mining history. But Dr. Mansour's attribution of a significant amount of Claimant's disabling emphysema to his coal dust exposure nevertheless meets the definition of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *Groves*, 761 F.3d at 598-99. And while it also may be reasonable to reach a different outcome on these facts, it does not allow us to disturb the ALJ's credibility determination that Dr. Mansour's opinion was more persuasive than the other physician opinions of record. *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence we must affirm the [ALJ's] decision, even though as triers of fact we might have arrived at a different result.").

Co., 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements).

We therefore affirm the ALJ's finding that Claimant established he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

Although I concur with my colleagues in all other respects, I respectfully dissent from the majority's decision as to the ALJ's crediting of Dr. Mansour's medical opinion on legal pneumoconiosis and disability causation.

As Employer argues, Dr. Mansour predicated his legal pneumoconiosis diagnosis on Dr. DePonte's positive interpretation of Claimant's November 18, 2016 x-ray. Specifically, Dr. Mansour cited Dr. DePonte's x-ray reading as indicating Claimant had "significant dust inhalation," and he attributed five percent of Claimant's COPD to coal dust exposure, because he thought "[Claimant's] coal mining, even though it's short, it was enough to cause deposits of coal dust in his lungs based on the x-ray report." Employer's

Exhibit 4 at 12. He reiterated, "[b]ecause of the x-ray showing the pneumoconiosis, I thought [Claimant's two years and ten months of exposure to coal dust in coal mine employment] was a very significant exposure." *Id.* at 15. Further, in response to Employer's questioning, Dr. Mansour stated if the ALJ were to find Claimant does not have clinical pneumoconiosis, then that would "influence [his] opinion on the significance of the coal dust." *Id.*

In crediting Dr. Mansour's opinion, the ALJ stated:

> Dr. Mansour's finding that coal dust exposure played a significant although minor role in causing his impairment and that Claimant's chronic obstructive pulmonary disease was significantly related to his coal mine dust exposure, and therefore constitutes legal pneumoconiosis is well-reasoned, well-documented, consistent with the Preamble [which recognizes additive risks of smoking and coal dust exposure on lung function], and is persuasive. Dr. Mansour's independent United States Department of Labor opinion is therefore entitled to significant weight.

Decision and Order at 30.

Contrary to the ALJ's finding, the opinions of DOL-examining physicians are not presumptively more reliable than medical opinions presented by the parties. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991) (en banc). The determination that an opinion is reasoned and documented "requires the factfinder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (footnote omitted); Employer's Brief at 22-23 (unpaginated). Although the ALJ closely reviewed the explanations of Employer's physicians, Employer correctly contends she "accepted Dr. Mansour's opinion without analysis and without resolving whether Dr. Mansour's opinion was sufficient to establish that [Claimant]'s coal dust exposure actually caused or contributed to [his] impairment." Employer's Brief at 24 (unpaginated). Specifically, Employer correctly asserts the ALJ failed to assess the credibility of Dr. Mansour's explanation that Claimant's coal dust exposure was significant enough to contribute to his COPD because it caused an x-ray to be positive for simple pneumoconiosis, in view of the ALJ's finding that the x-ray evidence is negative. *Id.* at 21-22, 27-28 (unpaginated).

Claimant has the burden to affirmatively establish, based on a reasoned and documented medical opinion, that he has a respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. § 718.201(a)(2), (b); 718.202(a)(4). Whether a physician's opinion is adequately reasoned is for the ALJ to determine. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th

Cir. 1989). However, the ALJ must consider all relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence.[23] 30 U.S.C. §923(b); *see Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881 (6th Cir.

[23] In this context it is specious to suggest, as the majority does, that the ALJ found Dr. Mansour's legal pneumoconiosis diagnosis "sufficiently independent" of Dr. DePonte's discredited positive x-ray. *See supra* n.15. The ALJ undertook no such analysis and made no such finding. Further, contrary to the majority's assertion, Dr. Mansour's reliance on the x-ray as showing "deposits of coal dust in [Claimant's] lungs" is not "independent of [its showing] clinical pneumoconiosis." *See supra* n.16 (citing Employer's Exhibit 4 at 12). Dr. DePonte's report notes opacities consistent with clinical pneumoconiosis and it does not address the presence of coal dust deposits independent of that diagnosis. Director's Exhibit 24 at 10. Moreover, although Dr. Mansour, at his August 2018 deposition, answered "Yes" to Employer's questioning whether his "opinion is bolstered by the positive x-ray," Employer's Exhibit 4 at 15, a full reading of the deposition shows that he relied on the positive x-ray to diagnose legal pneumoconiosis, rather than (as the majority indicates) cite it to merely "bolster[]" his diagnosis. *Id.* at 12-15. He clearly stated, in *both* his June 2017 supplemental opinion and August 2018 deposition, that he attributed five percent of Claimant's COPD to his two years and ten months of coal mine dust exposure because the exposure resulted in the clinical pneumoconiosis seen on Claimant's x-ray. *See* Director's Exhibit 26 at 1; Employer's Exhibit 4 at 12. He explained that the positive x-ray was the reason he continued to opine that Claimant's COPD was related to his coal mine exposure, even though Claimant's employment was two years and ten months rather than the seven or eight years of exposure on which he based his original opinion. Employer's Exhibit 4 at 12. Dr. Mansour's reliance on a positive x-ray directly contradicts the ALJ's finding that the x-rays are negative. Consequently, in considering all the relevant evidence as to the credibility of Dr. Mansour's diagnosis, the ALJ was obligated to consider this inconsistency.

Similarly, the majority's citation of *Cumberland River* v. *Banks*, 690 F.3d 477, 487 (6th Cir. 2012), is not apposite. In *Cumberland*, the court found that the physicians' diagnoses of clinical pneumoconiosis relied on positive x-ray evidence, contrary to the ALJ's finding; however, their diagnoses of legal pneumoconiosis rested on other evidence. Therefore, the court determined their opinions could be credited in establishing legal pneumoconiosis. The court did not find that the physicians had relied on the positive x-ray evidence in rendering their legal pneumoconiosis opinions. Here, however, after he was informed Claimant had only two years and ten months of coal mine employment, Dr. Mansour depended upon the positive x-ray to attribute five percent of Claimant's COPD to his coal mine dust exposure (*i.e.* to diagnose legal pneumoconiosis). As a result, his reliance on the positive x-ray affects the crediting of his opinion as to the existence of legal pneumoconiosis.

2012); *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999)); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). In evaluating Dr. Mansour's opinion, the ALJ erred in failing to address whether his reliance on a discredited positive x-ray undermines his diagnosis of legal pneumoconiosis and to apply the same level of scrutiny she applied to the opinions of Drs. Dahhan and Rosenberg.[24] *Rowe*, 710 F.2d at 255; *Hughes*, 21 BLR at 1-139-40.

Consequently, I would remand this case for the ALJ to appropriately review Dr. Mansour's opinion and provide an adequate explanation of her findings, in accordance with the dictates of the Administrative Procedure Act,[25] giving particular attention to whether Dr. Mansour's opinion is creditable when it is based on positive x-ray evidence of simple pneumoconiosis, contrary to the ALJ's finding. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). I therefore would vacate the ALJ's finding of legal pneumoconiosis

[24] In addition, the majority's suggestion that Employer is "sandbagging" the court is meritless. They indicate Employer did not raise the issue but somehow led the ALJ in one direction and altered course in this appeal. To the contrary, Employer challenged the credibility of the documentation underlying Dr. Mansour's diagnoses of both clinical and legal pneumoconiosis in specifically asserting the preponderance of x-ray evidence is negative. Employer's Post-Hearing Brief at 13. Moreover, Employer noted in its brief that Dr. Mansour "*diagnosed COPD* based on many years of smoking cigarettes, a few years of occupational dust exposure, and chest [x]-ray findings of emphysema and [pulmonary function test]s," and apportioned five percent to coal dust inhalation because there was positive x-ray evidence for medical pneumoconiosis. *Id*. at 7-8 (emphasis added). Employer contended, "Dr. Mansour's *diagnosis of legal pneumoconiosis* in Mr. Bailey's case is not based on any objective medical evidence," within the context of arguing Dr. Mansour arbitrarily apportioned five percent of Claimant's COPD to *coal dust exposure*. *Id.* at 13-14 (emphasis added). Specifically, Employer argued that Dr. Mansour's diagnosis was not credible because he "testified that his **percentage of causation was an arbitrary percentage and not based on any objective medical evidence**"-- which is a not unreasonable contention given the totality of x-ray evidence. *Id*. at 14 (citing Employer's Exhibit 4 at 13) (emphasis in original). Employer challenged the credibility of both the objective evidence underlying Dr. Mansour's opinion and his rationale for attributing Claimant's pulmonary disease to coal dust exposure. This is hardly "sandbagging."

[25] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

and also vacate the ALJ's determination that Claimant established total disability due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 30.[26]

My colleagues have suggested that Employer failed to raise below the issue of Dr. Mansour's reliance on a positive x-ray in finding legal pneumoconiosis and consequently cannot raise it now. I disagree. As Employer contends, having found that the x-ray evidence was negative, the ALJ was required to take that determination into account in assessing other evidence. Employer's Brief at 21-22 (unpaginated). Thus, when she determined the probative value of Dr. Mansour's opinion, it was incumbent upon her to consider the physician's reliance on the x-ray evidence being positive, contrary to the ALJ's conclusion to the contrary. *See Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) ("substantiality of evidence must take into account whatever in the record fairly detracts from its weight"); *Director, OWCP v. Congleton,* 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence does not warrant affirmance); *Rowe*, 710 F.2d at 255. The ALJ's failure to do so was a failure to consider all relevant evidence and resulted in arguably inconsistent findings. Since this was an error committed in the ALJ's Decision, it is appropriately raised to us now. Similarly, the ALJ's failure to apply equal scrutiny to the explanations Drs. Mansour, Dahhan and Rosenberg provided for their conclusions was an error the ALJ committed in her Decision that could not have been covered in briefing below.

Accordingly, I concur in part and dissent in part from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[26] Employer contends that the ALJ erred in crediting Dr. Mansour's opinion based on its consistency with the Preamble. To the extent that the ALJ credited Dr. Mansour's opinion on that basis, I agree. Mere consistency with the Preamble does not equate to the requisite determination that a physician exercising sound medical judgment found the miner suffers from pneumoconiosis and that the physician based the finding on objective medical evidence and medical and work histories and supported the finding with a reasoned medical opinion. 20 CFR 718.202(4). *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002).