

No. 13-1702

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NORA COLLINS (widow of Johnnie Collins),

Petitioner

v.

POND CREEK MINING COMPANY

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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**STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION**

This case involves a claim for survivor's benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), filed by Nora Collins, widow of Johnnie Collins, who worked in coal mine employment for over thirty-six years. On January 10, 2012, Administrative Law Judge Michael P.

Lesniak issued a decision denying Mrs. Collins survivor's benefits. Appendix, p. (A.) 772. She appealed this decision to the United States Department of Labor Benefits Review Board (BRB or Board) on January 27, 2012, 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). Pond Creek Coal Company (Pond Creek), the coal mine company responsible for any benefits due Mrs. Collins, filed a cross-appeal on February 6, 2012, within fourteen days of Mrs. Collins' appeal, as prescribed by 20 C.F.R. § 802.205(b). The Board had jurisdiction to review ALJ Lesniak's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On April 22, 2013, the BRB affirmed the denial. A.788. Mrs. Collins then petitioned this Court for review on May 29, 2013. A.799. The Court has jurisdiction over Mrs. Collins' 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 BRB decision in the court of appeals in which the injury occurred. The injury, within the meaning of section 21(c), arose in West Virginia, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

Prior to his death, Mr. Collins (the miner) filed a claim for BLBA benefits. Although the X-ray evidence did not show pneumoconiosis, an ALJ awarded this claim in 1988, finding that the medical opinions established that coal dust exposure contributed to the miner's chronic obstructive lung disease (COPD) and resulting total disability. By finding this contribution, the ALJ effectively found legal pneumoconiosis, defined by regulation as a respiratory condition arising out of coal mine employment, as well as disability-causation (that pneumoconiosis contributed at least in part to total respiratory disability).

Upon the miner's death in 1997, Mrs. Collins filed a survivor's claim for benefits, which required her to prove that the miner's pneumoconiosis hastened his death (death-causation). Her claim was litigated for many years. Eventually, this Court in 2006 remanded the case for further review after determining that Pond Creek was collaterally estopped from arguing that the miner did not suffer from totally disabling pneumoconiosis at the time of his death.

Much litigation again ensued, until the ALJ denied benefits in 2012, finding that Mrs. Collins failed to prove that pneumoconiosis hastened the miner's death. The ALJ made this finding despite the fact that Pond Creek was estopped from disputing the presence of legal pneumoconiosis (i.e., COPD due to coal mine dust exposure), and despite the fact that there was credible evidence

from both Mrs. Collins' and Pond Creek's doctors that the miner's COPD did, in fact, hasten his death.

The issue then, is whether substantial evidence supports the ALJ's finding that Mrs. Collins failed to prove that the miner's pneumoconiosis hastened his death.

STATEMENT OF THE CASE

Mrs. Collins filed her claim for survivor's benefits in 1997.¹ A.1. Administrative Law Judge Richard A. Morgan (ALJ Morgan) denied benefits because the evidence failed to establish that the miner suffered from pneumoconiosis prior to his death. A.508, 523. In arriving at this determination, ALJ Morgan declined to give collateral estoppel effect to the finding of pneumoconiosis (COPD related to coal mine dust exposure) in the miner's claim because of an alleged change in the law in proving the disease. A.520-21. Upon Mrs. Collins' appeal, the BRB remanded the case because ALJ Morgan had not considered all of the chest X-rays of record. A.591-92. The Director filed a motion for reconsideration to the BRB on the collateral estoppel issue, which the BRB considered but denied. A.612-13.

¹ In 2010, Congress restored a survivor's automatic entitlement to benefits provided the miner was awarded benefits prior to his death. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); see *W.VA. CWP Fund v. Stacy*, 671 F.3d 378, 381-82 (4th Cir. 2011). This amendment applies only to pending claims filed after January 1, 2005, and thus is inapplicable to the instant claim filed in 1997.

On remand, ALJ Morgan again determined that Mrs. Collins had failed to establish the existence of pneumoconiosis. A.641, 647, 651-53. He also held that, even if the miner had suffered from pneumoconiosis, there was insufficient proof that this condition hastened the miner's death. Upon Mrs. Collins' appeal, the BRB affirmed the denial. A.685, 688-91. She then petitioned this Court for review.

In a published 2-1 decision, the Court vacated the denial. A.708-733; *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 221, 223-24 (4th Cir. 2006). The majority determined that Pond Creek was estopped from arguing against the existence of pneumoconiosis, A.721, and further that the opinions of its doctors were entitled to little or no weight because they were based upon a mistaken belief of no pneumoconiosis. A.723-24.

On remand, ALJ Morgan awarded benefits because, in his view, he "was constrained" to do so by the Court's decision. A.739. Upon Pond Creek's appeal, the BRB vacated the award because ALJ Morgan erred in weighing the evidence and in concluding that he was "constrained" to award based upon the Court's decision. A.745-48. On remand, ALJ Morgan denied benefits because the medical opinion evidence supporting death-causation was cursory and the contrary evidence was better-reasoned and supported by the fact that the miner did not suffer from pneumoconiosis. A.753. Upon Mrs. Collins' appeal, the BRB vacated

the denial because the ALJ erred in weighing the medical evidence and in continuing to hold that the miner did not suffer from pneumoconiosis. The Board also instructed that the case be reassigned to a different administrative law judge. 2011 BRB Decision at 8.²

On remand, the case was reassigned to ALJ Lesniak, who denied benefits. He found the medical opinion evidence reporting that pneumoconiosis hastened the miner's death to be unreasoned and undocumented. A.778. Upon Mrs. Collins' appeal, the BRB affirmed the denial. A.788. Mrs. Collins thereupon petitioned this Court for review. A.799.

STATEMENT OF THE FACTS

General

The miner was born in January 1924 and worked in coal mine employment for over thirty-six years, starting in 1943 and ending in June 1983. A.18-19 (history of coal mine employment); 1987 ALJ Hearing Transcript at 12, 24. He worked in the mines for many years before the institution of mandatory federal respirable dust standards. He smoked up to a pack of cigarettes a day until the 1990s. A.31, 164; HT 477-78. He died on September 16, 1997, at the age of seventy-three. A.194. His widow, Mrs. Collins, is seventy-eight years old and has been litigating this claim since she was sixty-one.

² No Appendix pages are designated here because the Appendix is missing pp.6-9 of the BRB decision.

1988 ALJ Award of the Miner's Claim

The miner filed a claim for lifetime BLBA benefits in 1983.³ A.6. In February 1988, Administrative Law Judge Leonard N. Lawrence (ALJ Lawrence) issued a decision awarding benefits. A.10. He first found that the weight of the chest X-rays was negative for pneumoconiosis (and therefore failed to prove clinical pneumoconiosis).⁴ A.12. He then determined that the miner had a

³ In order to be entitled to benefits, a miner must prove that he suffers from pneumoconiosis (disease), that the pneumoconiosis arose out of coal mine work (disease-causation), that he has a totally disabling respiratory impairment (disability), and that his pneumoconiosis contributed to this employment (disability-causation). *See, e.g.* 20 C.F.R. § 725.202(d). The required pneumoconiosis may take the form of clinical or legal pneumoconiosis. *See* n.4 *infra*.

⁴ Compensable pneumoconiosis takes two distinct forms, “clinical” and “legal.” 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to a cluster 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), and is generally diagnosed by chest X-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

In contrast, “legal pneumoconiosis” is a broader category referring to “any chronic lung disease or impairment . . . arising out of coal mine employment,” 20 C.F.R. § 718.201(a)(2), and may be diagnosed by a physician “notwithstanding a negative X-ray,” 20 C.F.R. § 718.202(a)(4). “‘Legal pneumoconiosis’ . . . includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2); *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (explaining clinical and legal pneumoconiosis). A miner may have legal pneumoconiosis (for example, centrilobular emphysema arising out of coal mine work) but not clinical pneumoconiosis (for example, no “fibrotic reactions of lung tissue,” resulting in a negative X-ray). *See, e.g., Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319 (4th Cir. 2013).

respiratory condition (which took the form of chronic obstructive pulmonary disease (COPD), *see* DX 31 at 189), and that the more credible doctors concluded that coal mine work contributed to the COPD (thereby proving legal pneumoconiosis). A.13. Based upon this determination, and the fact that the miner's COPD was totally disabling, ALJ Lawrence concluded that the miner met all the conditions of entitlement. A. He therefore awarded benefits. This award became final upon Pond Creek's failure to appeal, and Pond Creek paid the miner's disability benefits until his death.

Relevant Medical Evidence

Hospital reports completed on September 7, 1997, nine days before the miner's death, record that the miner was in "[a]cute respiratory failure"; that he had a '[h]istory of chronic obstructive pulmonary disease – coal workers' pneumoconiosis with chronic respiratory failure"; and that [the miner was] felt to have end-stage [COPD]. A.33. As to recommendations, the report stated: "Aggressive cardiac workup is not recommended, given [the miner's] end stage lung condition." *Id.*

Dr. Maan Younes is a Board-certified internist and pulmonologist. A.162. He was the miner's treating physician from October 1994 until the miner's death in September 1997. *Id.* Dr. Younes' treatment reports consistently note COPD and frequently note coal workers' pneumoconiosis. A.164-193. Dr. Younes

prescribed, in addition to other respiratory treatments, the use of oxygen. A.164; *see also* A.475. In a November 1997 report, issued only weeks after the miner's death, Dr. Younes explained that, during the miner's last year, his respiratory condition "was very severe with frequent exacerbations and hospitalizations," and that the hospitalizations occurred "once or twice a month." A.162. The doctor then described how the miner died: when his condition in the hospital became stable on September 15, 2009, he insisted on leaving the hospital, and he was found dead at home the next day. *Id.*

In the same report, Dr. Younes related the miner's death to his respiratory condition:

"Mr. Collins had Severe Respiratory Disability from his Coal Workers' Pneumoconiosis and there is no question that his severe Pneumoconiosis is a major contributing factor to his death. The evidence for Pneumoconiosis is his long work history in the coal mines for 42 years, the findings of severe Coal Workers' Pneumoconiosis on his chest x-ray, and the severe Pulmonary Disability he had.

Id. In the miner's death certificate, completed on September 22, 1997, Dr. Younes reported that the miner died on September 16, 1997, due to cardiac arrest due to respiratory failure, with coal workers' pneumoconiosis as a contributing cause.

A.194.

Dr. Dominic Gaziano is a Board-certified internist and pulmonologist. A.513. At DOL's request, he reviewed the case file and answered questions

submitted to him by a DOL claims examiner. A.195. In this manner he reported that the miner was totally disabled by pneumoconiosis at the time of his death, and that, while pneumoconiosis did not “cause” the miner’s death, he “died as a result of cardio-pulmonary failure in a background of severe heart and lung disease.” *Id.* Dr. Gaziano concluded that “[pneumoconiosis] was a significant contributing factor in [the miner’s] death.” *Id.*

Dr. Gregory Fino is a Board-certified internist and pulmonologist, A.213, who reviewed medical records at Pond Creek’s request, A.196. In a September 1998 report he observed that the miner’s X-rays were negative for pneumoconiosis and that the miner’s totally-disabling COPD was due to smoking rather than coal mine dust exposure. A.207, 210. Dr. Fino concluded that the miner’s death was due to cardiac disease and that, even if the miner had suffered from pneumoconiosis, it would not have caused or hastened his death. A.210. Dr. Fino reported in August 1999 that review of additional medical records did not alter his prior conclusions. A.217, 222. Finally, Pond Creek deposed Dr. Fino in February 2000 where he repeated his prior observations. A.223.

Dr. Thomas Jarboe is a Board-certified internist and pulmonologist, A.273-74, who reviewed medical reports at Pond Creek’s request, A.264. He reported that the miner’s X-rays were negative for pneumoconiosis and that the miner’s totally disabling COPD was due to cigarette smoking rather than coal mine dust

exposure. He explained that both the miner's heart condition and his smoking-related COPD contributed to the miner's death:

[The miner] died from a combination of severe respiratory insufficiency due to chronic obstructive pulmonary disease [COPD] [sic]. In turn, I feel this COPD was caused by a long history of heavy smoking. In addition, cardiac disease in the form of coronary heart disease and severe left ventricular dysfunction contributed to his death as well. In fact, it is likely that some type of cardiac event (he had had multiple arrhythmias) was the cause of his sudden death at home.

A.271-72.

Dr. James Castle is a Board-certified internist and pulmonologist, A.290, who reviewed medical reports at Pond Creek's request, A.276, 292. He reported that the miner's X-rays were negative for pneumoconiosis and that the miner's totally disabling COPD was due to cigarette smoking rather than coal mine dust exposure. Concerning whether the miner's disabling COPD caused the miner's death, Dr. Castle's was inconsistent. Initially in his report, he suggested no contribution:

[The miner's] sudden death was not due to an exacerbation of any underlying lung disease. . . . This man because of his severe cardiac disease would have died at the same time and in the same fashion whether or not he had any underlying lung disease. It is my opinion with a reasonable degree of medical certainty that coal workers' pneumoconiosis did not cause, hasten, or contribute to his demise in anyway.

A.288; see also A.320, 323 (deposition testimony identifying cardiac disease as the sole cause of death). However, in the report's concluding paragraph, Dr. Castle

attributed death to the miner's heart disease *and* his COPD: "Therefore, when reviewing all the objective data, it is abundantly clear these findings and this man's death were due to his cardiac disease. . . *and* his tobacco smoke induced chronic obstructive pulmonary disease. A.289 (emphasis added).

Dr. W. Morgan reported on medical data in January 1999 at Pond Creek's request. A.353. He concluded that the miner did not have pneumoconiosis by X-ray and that his disabling COPD was due to smoking. The doctor reported that the miner's death was due to arrhythmia rather than respiratory failure, but then explained that the miner's hypoxemia, made worse by the miner's totally disabling COPD, in turn made the miner's arrhythmias worse.⁵ A.360. Dr. Morgan further explained "that hypoxaemia [sic] makes a subject more prone to develop arrhythmias and it makes the arrhythmias more difficult to treat," but that the miner's hypoxemia "was not related to his former occupation of coal mining or to the inhalation of coal dust, but was a consequence of his COPD." *Id.*

Dr. George Zaldivar is a Board-certified internist and pulmonologist with additional certification in sleep disorders and clinical care. A.379. He examined the miner in February 1985, at which time he diagnosed a severe obstructive

⁵ Arrhythmia is "any variation from the normal rhythm of the heartbeat." Dorland's Illustrated Medical Dictionary at 133 (30th ed. 2003). Hypoxemia is "deficient oxygenation of the blood." Dorland's at 900.

impairment due to smoking rather than coal mine dust exposure.⁶ A.362. Dr. Zaldivar also examined the miner in the hospital in July 1997, and notes completed at that time indicate treatment for sleep apnea. A.389, 428. Pond Creek deposed the doctor in 1999 after he reviewed the miner's medical reports. A.377. The doctor diagnosed no pneumoconiosis by X-ray. A.414. When asked about the death certificate completed by Dr. Younes, Dr. Zaldivar disputed the diagnosis of clinical pneumoconiosis but stated that the diagnoses of cardiac arrest and respiratory failure "[made] sense." A.417. He then explained that the miner's death was due solely to his cardiac condition:

[T]he cause of death was really cardiac arrest, which in light of the severe cardiac dysfunction and cardiac arrhythmias unrelated to his lungs, it is reasonable to record that the problem was cardiac death in spite of the fact that there was severe lung disease present. . . . It appears that the heart would have done what it did regardless of the state of the lungs.

A.418-19.

Dr. A. Dahhan reviewed medical reports in 1999 at Pond Creek's request. A.429. He concluded that the miner suffered from totally disabling COPD and cardiac problems prior to his death. A.435. The doctor also concluded that the miner's death "was cardiac in origin due to his severe artery disease that

⁶ This opinion was rendered in connection with the miner's lifetime claim for benefits and rejected by ALJ Lawrence when he awarded benefits.

precipitated various cardiac arrhythmia,” and that neither coal mine dust exposure nor clinical pneumoconiosis contributed to the heart condition. A.435.

Finally, Dr. Samuel Spagnolo reviewed medical reports in November 1999 at Pond Creek’s request. A.437. He reported that, prior to death, the miner’s heart condition but not his respiratory condition was totally disabling, and that the miner did not have clinical pneumoconiosis. A.440. Dr. Spagnolo then concluded that the miner’s death was due to “an acute cardiac arrhythmia caused by severe congestive cardiomyopathy,” and that pneumoconiosis neither caused nor hastened the miner’s death. *Id.*

Relevant Decisions

Court’s 2006 Remand Decision, A.708. As indicated *supra* at 5, this Court reviewed the BRB’s decision affirming ALJ Morgan’s denial of Mrs. Collins’ survivor’s claim for failure to prove that the miner’s death was caused or hastened by pneumoconiosis. A.708. In those decisions, the ALJ and BRB both concluded that the finding of pneumoconiosis (i.e., COPD related to coal mine dust exposure) in the 1988 award of the miner’s claim was not entitled to collateral estoppel effect because there allegedly had been an intervening change of law. In a 2-1 decision, the Court disagreed and ruled that the 1988 findings, including the existence of pneumoconiosis, were entitled to collateral estoppel effect. A.715-16.

The Court then addressed the weight to be given on remand to the Pond Creek doctors who found no death-causation based on the belief – contrary to the estopped-fact of pneumoconiosis—that the miner did not suffer from pneumoconiosis prior to his death. A.721. Citing and quoting its decision in *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), the Court warned against giving controlling weight to opinions based upon erroneous factual assumptions because, as the Court held in *Toler v. E. Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995), such opinions are entitled to little or no weight. The Court even suggested that the little weight allowed by *Toler* was not likely to trump a medical opinion (ostensibly Dr. Younes’) based upon an accurate understanding of the existence of pneumoconiosis, even if that opinion was “poorly documented.” Quoting the *Scott* decision, the Court stated:

Two opinions that may hold no weight, or at most may hold the little weight allowed by *Toler*, cannot suffice as substantial evidence to support the ALJ determination that [the miner’s disability] was not caused at least in part by pneumoconiosis. This is especially true when one causation opinion based on the proper diagnosis, *even a poorly documented one*, links the disability to pneumoconiosis.

A.723-24 (emphasis added). Finally, the Court observed that, although the Court in *Scott* had remanded the case with directions to award, “the appropriate course here is a remand so that “the BRB will have the first opportunity to assess whether the ALJ’s causation ruling meets the rigorous standards outlined in *Scott*.” A.724.

ALJ Lesniak's 2012 decision denying survivor's benefits, A.772.⁷

ALJ Lesniak first considered whether the opinions of Drs. Younes and Gaziano (diagnosing death-causation) were reasoned and documented. The judge concluded that Dr. Younes' opinion was not documented because he failed to "set[] forth the clinical findings, observations, facts and other data on which the physician based the diagnosis." A.776 (internal quotation marks omitted). The ALJ discounted Dr. Younes' treatment records because:

[Dr. Younes'] *initial* diagnosis, or any subsequent diagnosis of CWP is not relevant at this point; the remaining question is whether CWP hastened miner's death in 1997, an issue about which Dr. Younes could not have had an opinion in 1994. Claimant's discussion of miner's continuing respiratory impairment, which is well supported in the record, is similarly non-responsive to the issue at hand; again, there is no dispute that miner suffered from, and died of respiratory failure.

A.776-77. Moreover, the ALJ determined that hospital reports discussing the miner's condition immediately prior to the miner's death were not relevant documentation because he could not *assume* that Dr. Younes "based his diagnosis on any particular pieces [of] information." A.777.

⁷ As explained in the Statement of the Case, following the Court's order of remand, ALJ Morgan was given two opportunities by the BRB to resolve Mrs. Collins' entitlement to survivor's benefits. *See supra* at 5-6. But because the judge failed to weigh the evidence in accordance with collateral estoppel principles, the BRB ultimately remanded the case for reassignment to a different ALJ. The judge assigned was ALJ Lesniak.

Turning to whether Dr. Younes' opinion was reasoned, the ALJ observed that, even though the hospital and treatment reports revealed that the miner's pulmonary impairment was serious and that he died from a respiratory condition, neither fact was relevant to the question of death causation" because "there [was] no disputing that miner suffered from, and died of, respiratory failure." *Id.* The judge then explained that, even though the miner had a respiratory impairment prior to death and that he "died a respiratory death," it did not necessary follow "that this *same* pulmonary impairment caused miner's death," and that, in any event, "many of the physicians . . . opined that miner's death was purely cardiac, despite his respiratory failure. "⁸ *Id.*

As a further criticism of Dr. Younes' opinion, the judge noted that the doctor "gave no explanation as to *how* this [coal workers' pneumoconiosis] in fact contributed [to the miner's death], explaining only the reasons he believed miner had pneumoconiosis in the first place." *Id.* In support, the ALJ cited the Court's

⁸ "Respiratory [] failure is a condition in which not enough oxygen passes from your lungs into your blood. . . . Diseases and conditions that affect your breathing can cause respiratory failure. Examples include COPD (chronic obstructive pulmonary disease). . . . COPD prevents enough air from flowing in and out of the airways." <http://www.nhlbi.nih.gov/health/health-topics/topics/rf/>. See also The Merck Manual at 544 (17th ed. 1999).

decision in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000):

The Fourth Circuit rejected the Board's reliance on a similarly conclusory opinion in *Branch*, finding an opinion that "provided no explanation of how, or if, [miner's] pneumoconiosis hastened his death [and] never explained the connection between the miner's pneumoconiosis and his death" to be insufficient to establish that CWP hastened miner's death.

Id. The ALJ also cited *Bill Branch* for the proposition that a death certificate was too cursory, "without additional explanation," to support a doctor's conclusion on death-causation. A.778.

ALJ Lesniak then considered whether Dr. Gaziano's diagnosis of death-causation was reasoned and documented. *Id.* The judge found it was not because the doctor failed to provide the documentation he relied upon and did not explain how the documentation supported his diagnosis. *Id.*

Next, Judge Lesniak considered the diagnoses of the Pond Creek doctors who, in finding that pneumoconiosis did not contribute to the miner's death, mistakenly assumed that the miner did not have pneumoconiosis. A.778. In this regard, ALJ Lesniak gave no weight to the opinions of Drs. Fino, Castle, Jarboe, Dahhan and Spagnolo because their finding that pneumoconiosis did not contribute to the miner's death was directly based upon their mistaken assumption that the miner did not suffer from that condition. A.781-85. And the ALJ, consistent with *Toler*, gave a "little weight" to the opinions of Drs. Morgan and Zaldivar because those doctors based their finding of no death-causation on their belief that the

miner's death was due solely to the miner's heart condition, so that the doctors' mistaken belief that pneumoconiosis was absent did not figure prominently into the doctors' opinions.⁹ A.783-84.

After determining that the Pond Creek doctors were entitled to little or no weight, ALJ Lesniak observed that he was not required to weigh the opinions of Drs. Morgan and Zaldivar against the contrary opinions of Drs. Younes and Gaziano because those latter opinions "were not sufficient to meet Claimant's burden even if they were uncontroverted." A.786. Finally, ALJ Lesniak considered in a footnote an argument made by Mrs. Collins that the opinions of Drs. Castle, Morgan and Jarboe, while disputing the existence of pneumoconiosis, actually supported her claim because they reported that the miner's COPD contributed to his death. A.775 n.4. In making this argument, Mrs. Collins suggested that the ALJ needed to "correct" the diagnoses of these doctors in light of the fact that their understanding concerning the existence of pneumoconiosis was contrary to the estopped fact that the miner suffered from pneumoconiosis. The ALJ rejected this argument, noting that the Court's decision "[had] no editorial effect on the evidence of record." *Id.*

⁹ ALJ Lesniak did not explain how the doctors' diagnoses of death solely from cardiac disease were consistent with the ALJ's observation in an earlier part of his decision that "there [was] no dispute that [the miner] suffered from, and died of, respiratory failure," A.776-77.

BRB's 2013 decision affirming ALJ Lesniak's denial of benefits, A.788.

Both Mrs. Collins and the Director argued to the BRB that ALJ Lesniak erred in denying survivor's benefits. Mrs. Collins asserted that the ALJ erred in finding the opinions of Drs. Younes and Gaziano to be undocumented and unreasoned. The Director argued more specifically that the ALJ mistakenly assumed he was *required* to deny survivor's benefits in light of the Fourth Circuit's decisions in *Bill Branch* and *Compton*; that the ALJ erroneously failed to consider that the opinions of Drs. Jarboe, Castle, and Morgan – that the miner's respiratory condition (COPD) contributed to the miner's death – actually supported the opinions of Drs. Younes and Gaziano because COPD was found in the miner's claim to be due to coal dust exposure; and that the ALJ erroneously failed to note or consider that a hospital report completed in the month of the miner's death stated that “[a]ggressive cardiac workup [was] not recommended, given patient's end-stage lung condition,” A.33.

The BRB, in a 2-1 decision, rejected Mrs. Collins' arguments with the general observation that, determining whether a doctor's opinion is reasoned and documented, is within the discretion of the ALJ, A.792, and that the ALJ properly discredited the opinions of Drs. Younes and Gaziano because they failed to explain their opinions and/or identify the documentation relied upon, A.793. The BRB then rejected the Director's arguments by observing, without explanation, that ALJ

Lesniak did not misapply the Court's holding in *Bill Branch*, A.793 n.10; that the ALJ reasonably refused to accept that a finding of COPD due to coal dust exposure in the miner's claim supported a finding of death-causation since "the [ALJ] properly observed that the existence of a pulmonary impairment caused by coal dust exposure does not produce 'a foregone conclusion that this *same* pulmonary impairment caused [the] miner's death,'" A.793; and that the ALJ was not obligated to consider the end-stage respiratory statement in treatment records or find that the opinions of Drs. Jarboe, Castle, and Morgan supported Drs. Younes and Gaziano because the end-stage observation "did not state whether the miner's COPD was related to coal dust exposure, while Drs. Jarboe, Castle and Morgan all attributed the COPD to smoking," A.793-94.

A dissenting opinion largely agreed with the Director's arguments and urged vacating the denial and remanding the case for further review of the opinions of Drs. Younes and Gaziano. A.795.

SUMMARY OF THE ARGUMENT

As the widow of a long-term coal miner, Mrs. Collins is entitled to BLBA survivor's benefits if pneumoconiosis contributed to or hastened his death. There is no question that before his death, the miner suffered from pneumoconiosis, namely, COPD due to coal mine dust exposure and smoking. That is a collaterally-estopped fact arising from a 1988 lifetime BLBA award in the miner's

claim. It is also a collaterally-estopped fact that his respiratory condition at that time was totally disabling.

Drs. Younes and Gaziano, both Board-certified internists and pulmonologists, both concluded that the miner's pneumoconiosis contributed to his death. Dr. Younes was the miner's treating physician for approximately three years immediately prior to death and the record contains a number of his treatment reports; Dr. Gaziano completed a reviewing report at DOL's request. In addition, their conclusions are supported by two of Pond Creek's doctors: Drs. Jarboe and Morgan. Those doctors reported that the miner's heart condition and COPD (which they wrongly believed was due solely to smoking) contributed to his death, and COPD is the condition found in the miner's 1988 lifetime award to be due to coal mine dust exposure. In addition, Dr. Morgan clearly and concisely explained how the miner's respiratory condition adversely affected his heart condition: the miner's COPD caused hypoxemia (deficient oxygenation), which in turn caused arrhythmia (irregular heartbeat).

ALJ Lesniak denied benefits because he found the opinions of Drs. Younes and Gaziano to be unreasoned and undocumented. That is not the case. While the opinions may have been short and to the point, they were undeniably credible. Moreover, Pond Creek's contrary evidence – doctors reporting that the miner's death was due solely to his heart condition – is fatally flawed by the doctors'

mistaken assumption that the miner did not suffer from pneumoconiosis prior to his death. Finally, this Court in its 2006 opinion in the case explained that, where doctors are mistaken about the existence of pneumoconiosis, even “poorly documented” opinions based upon accurate knowledge concerning the existence of that disease are enough to prevail. ALJ Lesniak lost sight of this consideration in his weighing of the evidence.

ARGUMENT

ALJ LESNIAK’S FINDING THAT THE MEDICAL EVIDENCE FAILED TO PROVE THAT PNEUMOCONIOSIS CONTRIBUTED TO THE MINER’S DEATH IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In order to be entitled to survivor’s benefits, Mrs. Collins was required to prove that pneumoconiosis caused or at least hastened the miner’s death. *See* 30 U.S.C. § 921(a) and 20 C.F.R. § 718.205(a); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979 (4th Cir. 1992) (holding that pneumoconiosis need not be the sole or main cause, and that pneumoconiosis is a “substantially contributing cause” if it hastens the miner’s death). Here, Drs. Younes and Gaziano, both pulmonary experts, reported that the miner’s heart disease, together with his respiratory impairment, caused the miner’s death. The ALJ refused to credit these doctors, however, finding their conclusions were not reasoned or documented. In her opening brief, Mrs. Collins asserts that the ALJ erred in analyzing these opinions. The Director agrees.

A. Standard of Review.

This case presents an issue of fact. The Court reviews ALJ's findings of fact to determine whether they are supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Substantial evidence is of "sufficient quality and quantity 'as a reasonable mind might accept as adequate to support' the finding under review." *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389 (1971)). The Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Doss v. Director, OWCP*, 53 F.3d 654, 658 (4th Cir. 1995).

B. ALJ Lesniak misapplied the Court's decision in *Bill Branch Coal*.

The ALJ concluded he was *required* to give no weight to the opinions of Drs. Younes and Gaziano in light of *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000), explaining that the Court "rejected the Board's reliance on a similarly conclusory opinion" contained in a death certificate to establish death-causation. A.777-78. The ALJ's reliance on *Bill Branch Coal*, however, is misguided. In that case, there was no proof that the miner's pneumoconiosis was totally disabling prior to his death and there was credible contrary evidence on the

extent of Sparks' respiratory disease. Consequently, there arguably was a need for an explained opinion as to how pneumoconiosis contributed to the miner's death.

Here, however, not only was the miner adjudicated to be totally disabled by pneumoconiosis prior to his death, but he was repeatedly hospitalized for exacerbations of his respiratory disease and suffered from "end-stage COPD" when he died. Thus, unlike *Bill Branch Coal*, the undisputed existence of pneumoconiosis and the very severity of the miner's pulmonary condition itself at the time of his death lend support to the Younes and Gaziano causation diagnoses.¹⁰

Moreover, this Court's remand for further review of the evidence undermines the ALJ's reliance on *Bill Branch Coal*: if the opinions of Drs. Younes and Gaziano were insufficient as a matter of law to support death-causation, there would have been no reason to remand the case. Indeed, the Court suggested the legal sufficiency of their opinions when it explained that the opinion of doctors (like the Pond Creek doctors) who mistakenly assume the miner did not

¹⁰ The seriousness of the miner's COPD discouraged his doctors from being more aggressive in treating his heart condition: hospital reports note that "[a]ggressive cardiac workup [was] not recommended, given [the miner's] end stage lung condition," A.33.

suffer from pneumoconiosis prior to his death cannot trump a “causation opinion based on the proper diagnosis, *even a poorly documented one*,” A.723-24.¹¹

Finally, this and other courts have affirmed decisions based upon cursory medical opinions. *See Nance v. Benefits Review Board*, 861 F.2d 68, 70-71 (4th Cir. 1998) (affirming ALJ’s causation finding based on physician’s checking the “yes” box that “whatever condition [the miner] has is related to dust exposure in [the miner’s] coal mine employment”); *see also Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) (affirming ALJ’s credibility finding despite employer’s allegation that the doctor’s opinion was conclusory and not supported by the underlying documentation); *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522 (6th Cir. 2002) (rejecting employer’s argument that an ALJ erred in crediting a medical opinion lacking “an articulate rationale”); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893 (7th Cir. 1990) (affirming ALJ’s decision to credit documented but unexplained medical opinion, holding “[s]uch reports . . . minimally sufficient to support a claim for benefits”).

¹¹ Notably, the BRB rejected this argument, but failed to explain why; the Board merely stated it was “unpersuaded.” A.793 n.10.

C. ALJ Lesniak failed to recognize that the opinions of Drs. Jarboe and Morgan actually support the opinions of Drs. Younes and Gaziano that pneumoconiosis (the miner's coal-dust-related COPD) contributed to the miner's death.

Drs. Jarboe and Morgan –Pond Creek's doctors – reported that the miner's COPD contributed to his death. Dr. Jarboe stated: "I feel [the miner] died from a combination of severe respiratory insufficiency due to chronic obstructive pulmonary disease [COPD] . . . and cardiac disease," A.271); and Dr. Morgan explained "that hypoxaemia [sic] makes a subject more prone to develop arrhythmias and it makes the arrhythmias more difficult to treat," and that the miner's hypoxaemia was due to his COPD, A.360. Because these doctors support a finding that the miner's COPD contributed to his death, and because ALJ Lawrence's decision in the miner's claim established that the miner's COPD – his only identified pulmonary condition – was due in part to coal mine dust exposure, these opinions actually support a finding that the miner's pneumoconiosis contributed to his death.

Admittedly, these Pond Creek doctors mistakenly believed – contrary to ALJ Lawrence's finding in the miner's claim – that the miner's COPD was due exclusively to smoking. Collateral estoppel, however, only undermines their opinions as to *the cause of the COPD*. It does not affect their opinions that the miner had COPD and that his COPD (irrespective of cause) hastened his death. *See Scott*, 289 F.3d at 269 (explaining that only doctors' opinions that directly

contradict ALJ's determination should be given little or no weight). Consequently, the doctors' opinions must be considered and recognized as supporting Drs. Younes' and Gaziano's view that COPD contributed to the miner's death, and because the prior award established that the COPD was legal pneumoconiosis, Drs. Morgan and Jarboe support a finding of death-causation. *Cf. Richardson v. Director, OWCP*, 94 F.3d 164, 168 (4th Cir. 1996) (Director's stipulation to miner's award provided necessary link that COPD was due to coal mine employment in widow's claim).

The Director made this argument to the BRB, but the Board rejected it on unsupportable grounds. It stated that ALJ Lesniak reasonably refused to accept that a finding of COPD due to coal dust exposure in the miner's claim supported a finding of death-causation since "the [ALJ] properly observed that the existence of a pulmonary impairment caused by coal dust exposure does not produce 'a foregone conclusion that this *same* pulmonary impairment caused [the] miner's death.'" A.793. The BRB, however, missed the point. The miner was found to have COPD at the time he was awarded benefits in 1988; he was consistently diagnosed with COPD thereafter; doctors still diagnosed that condition when discussing the miner's condition at the time of his death; and there was no other respiratory condition that rivaled the COPD diagnosis. In short, there is no record evidence on which to posit the existence of some other pulmonary disease as the

cause of the miner's death. *See Gulf & Western Indus. v. Ling*, 176 F.3d 226, 232 (4th Cir. 1999) (coal company was required to pay miner's medical bills for pulmonary treatment where, *inter alia*, there was no evidence of a different pulmonary condition becoming manifest following award of benefits). And it has been conclusively determined that the COPD is legal pneumoconiosis.

D. ALJ Lesniak ignored the Court's 2006 mandate.

In its 2006 decision, the Court remanded the case for a determination of whether the ALJ's decision then under review met "the rigorous standards outlined in *Scott*," namely whether the Pond Creek doctors' failure to accept the existence of pneumoconiosis (COPD-related to coal mine dust exposure) completely undermined their opinions. A.724. But ALJ Lesniak turned this mandate on its head. His decision is based on the sufficiency of the evidence that comports with the established facts rather than on the unreliability of the medical opinions that depart from them, as was directed. A.786. After sixteen years of litigation, this seventy-eight year old widow-claimant has waited too long for administrative decision makers to correctly apply collateral estoppel and *Scott* in her case. The evidence, properly understood, leads to one result – an award.

Here, Drs. Younes and Gaziano – with complete understanding that the miner was totally disabled by pneumoconiosis prior to his death – concluded that the miner's pneumoconiosis – his COPD due in part to coal mine dust exposure –

contributed to the miner's death. These two doctors are specialists – Board-certified radiologists and pulmonologists. Dr. Younes treated the miner for almost three years before his death and completed the miner's death certificate. And while he did not identify the specific reports he reviewed, he discussed the details of the miner's last hospitalizations – even describing the miner's "insistence" on returning home on the day before he died – thus indicating personal knowledge of the applicable hospital records. And he clearly knew of his own treatment records, which showed the miner's deteriorating health over the three years before his death. Similarly, although Dr. Gaziano's January 1998 report simply states he reviewed the "case file," the DOL case file at that time notably consisted of the miner's death certificate, treatment reports, and the consultation report completed by a hospital doctor on September 7, 1997. *See* DX 1-15. Only by ignoring the obvious could the ALJ conclude that these doctors' causation opinions were undocumented.

Likewise, while neither doctor described the exact process by which the miner's totally disabling COPD/pneumoconiosis contributed to his death, that description was provided by Dr. Morgan. He gave a concise description explaining how a pulmonary condition has a negative effect on a heart condition, how the miner's hypoxemia, which was made worse by the miner's totally disabling COPD, in turn made the miner's arrhythmias worse, which were

detrimental to his all-round heart condition. Further, Dr. Morgan's narrative is supported by the medical evidence of record, which consistently showed the miner's problem with arrhythmia.¹²

This Court's 2006 decision made it clear that even a poorly documented opinion will suffice to outweigh contrary opinions based upon mistaken assumptions. Here, the opinions of Drs. Younes and Gaziano are not poorly documented; nor are they poorly reasoned. Their opinions, together with support from the other medical evidence of record, are sufficiently reasoned and documented to prove that the miner's totally disabling COPD/pneumoconiosis contributed to his death. ALJ Lesniak erred in not coming to this conclusion. Mrs. Collins, the widow of a miner who was totally disabled due to pneumoconiosis after more than thirty-six years in the coal mines, is entitled to survivor's benefits; she is entitled to have her sixteen-year-old-claim finally put to rest.

¹² Moreover, these doctors' opinions, along with Dr. Jarboe's (reporting death due to severe respiratory insufficiency and heart disease), comport with the ALJ's own observation that there is "no dispute that the miner suffered from, and died of, respiratory failure." A.776-77.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court reverse ALJ Lesniak's and the BRB's denial of benefits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,554 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2013, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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