

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

No. 12-1688

MUD LICK MINING CORPORATION and AMERICAN MINING INSURANCE
COMPANY,

Petitioners

v.

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
A. Statutory and regulatory background	3
1. The definition of pneumoconiosis	3
2. The 15-year presumption.....	4
B. Relevant medical evidence	6
1. Dr. Rosenberg’s report	6
2. Dr. Caffrey’s report	8
C. The decisions below.....	9
1. The ALJ award	9
2. The Board affirmance	12
SUMMARY OF THE ARGUMENT	14
ARGUMENT	16
A. Standard of review.....	16
B. Substantial evidence supports the ALJ’s discrediting of Drs. Rosenberg and Caffrey’s medical opinions.....	17
1. Dr. Rosenberg’s opinion	18

2. Dr. Caffrey's opinion	22
CONCLUSION	25
CERTIFICATE OF COMPLIANCE.....	26
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Barber v. Director, OWCP</i> , 43 F.3d 899 (4th Cir. 1995)	4
<i>Betty B Coal Co. v. Director, OWCP</i> , 194 F.3d 491 4th Cir. 1999)	17
<i>Colley & Colley Coal Co.</i> , 59 F. App'x. 563 (4th Cir. 2003)	18
<i>Consolidation Coal co. v. Director, OWCP</i> , 521 F.3d 723 (7th Cir. 2008)	17, 20
<i>Consolidation Coal Co. v. Williams</i> , 453 F.3d 609 (4th Cir. 2006)	17
<i>Consolidation Coal Co. v. Swiger</i> , 98 Fed. Appx. 227 (4th Cir. 2004)	21
<i>Crockett Collieries, Inc. v. Barrett</i> , 478 F.3d 350 (6th Cir. 2007)	21
<i>Dotson v. Peabody Coal Co.</i> , 846 F.2d 1134 (7th Cir. 1988)	7
<i>Elm Grove Coal Co. v. Director, OWCP</i> , 480 F.3d 278 (4th Cir. 2007)	17, 23
<i>Energy West Mining Co. v. Hunsinger</i> , 389 Fed.Appx. 891 (10th Cir. 2010)	4
<i>Harmon Mining Co. v. Director, OWCP</i> , 678 F.3d 305 (4th Cir. 2012)	19, 20
<i>Hobbs v. Clinchfield Coal Co.</i> , 45 F.3d 819 (4th Cir. 1995)	3

<i>Keene v. Consolidation Coal Co.</i> , 645 F.3d 844 (7th Cir. 2011)	5
<i>Keener v. Peerless Eagle Coal Co.</i> , 23 BLR 1-229, 2007 WL 1644032 (Ben. Rev. Bd. 2007) (<i>en banc</i>), <i>aff'd</i> , 372 Fed. App'x 399 (4th Cir. 2010)	12, 22
<i>Kowalchick v. Director, OWCP</i> , 893 F.2d 615 (3d Cir. 1990)	18
<i>Lane v. Union Carbide Corp.</i> , 105 F.3d 166 (4th Cir. 1997)	20
<i>Midland Coal Co. v. Director, OWCP</i> , 358 F.3d 486 (7th Cir. 2004)	24
<i>Milburn Colliery Co. v. Hicks</i> , 138 F.3d 524 (4th Cir. 1998)	24
<i>Mingo Logan Coal Co. v. Owens</i> , 724 F.3d 550 (4th Cir. 2013)	18
<i>Piney Mountain Coal Co. v. Mays</i> , 176 F.3d 753 (4th Cir.1999)	16
<i>Rose v. Clinchfield Coal Co.</i> , 614 F.2d 936 (4th Cir. 1980)	18
<i>Underwood v. Elkay Mining, Inc.</i> , 105 F.3d 946 (4th Cir. 1997)	16
<i>W. Va. CWP Fund v. Stacy</i> , 671 F.3d 378 (4th Cir. 2011) <i>cert. denied</i> 133 U.S. 127 (2012).....	2
<i>Westmoreland Coal Co., Inc. v. Cochran</i> , 718 F.3d 319 (4h Cir. 2013)	24

Statutes:

Black Lung Benefits Act,
30 U.S.C. §§ 901-944

Section 401, 30 U.S.C. § 9014
Section 401(a), 30 U.S.C. § 901(a).....3
Section 402(b), 30 U.S.C. § 902(b).....3
Section 411, 30 U.S.C. § 9214
Section 411(a), 30 U.S.C. § 921(a).....4
Section 411(c)(4), 30 U.S.C. § 921(c)(4)1, 4, 5
Section 422(a), 30 U.S.C. § 932(a).....16
Section 422(l); 30 U.S.C. § 932(l).....2

Longshore and Harbor Workers’ Compensation Act,
33 U.S.C. § 901 *et seq.*

Section 21(b)(3), 33 U.S.C. § 921(b)(3).....16

Regulations:

Title 20, Code of Federal Regulations

20 C.F.R. § 718.13
20 C.F.R. § 718.102.....3
20 C.F.R. § 718.103.....7
20 C.F.R. § 718.106.....3
20 C.F.R. § 718.2.....6
20 C.F.R. § 718.201.....6
20 C.F.R. § 718.201(a)3
20 C.F.R. § 718.201(a)(1).....3, 6
20 C.F.R. § 718.201(a)(2).....4, 6
20 C.F.R. § 718.202(a)(1)-(2).....3
20 C.F.R. § 718.202(a)(2).....6
20 C.F.R. § 718.202(a)(4).....4
20 C.F.R. § 718.202(d).....4
20 C.F.R. § 718.203.....6
20 C.F.R. § 718.204(b)(2)(i)(C)7, 10
20 C.F.R. § 718.204(c)18
20 C.F.R. § 718.305.....5, 10

20 C.F.R. § 718.305(d)(1)(i).....	5
20 C.F.R. § 718.305(d)(1)(ii)	5, 18
20 C.F.R. § 725.309(d)	2
20 C.F.R. § 725.309(d)(3)	2
20 C.F.R. § 725.414(a)	22
20 C.F.R. § 725.414(a)(1).....	12
20 C.F.R. § 725.414(a)(2)(i).....	12
20 C.F.R. § 725.414(a)(3)(i).....	12, 22
20 C.F.R. § 725.455(c)	17
20 C.F.R. § 725.545.....	2
20 C.F.R. § 725.602.....	2

Other authorities:

65 Fed. Reg. 79939	7
65 Fed. Reg. 79943	19
78 Fed. Reg. 59106	5, 18
78 Fed. Reg. 59107	18
78 Fed. Reg. 59114	6
78 Fed. Reg. 59115	5, 6, 18

CRITERIA FOR A RECOMMENDED STANDARD, OCCUPATIONAL EXPOSURE TO RESPIRABLE COAL MINE DUST, National Institute for Occupational Safety and Health (1995)	19
-------------------------------------------------------------------------------------------------------------------------------------------------------------	----

DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, (30th ed. 2003)	7, 8
-----------------------------------------------------------------	------

THE MERCK MANUAL (17th ed. 1999)	7
----------------------------------------	---

STATEMENT OF THE ISSUE¹

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that coal miners who worked underground for at least 15 years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis, and are therefore entitled to federal black lung benefits. There is no dispute that this presumption, which was restored by Congress in 2010, applies to this case.

In order to rebut the presumption, an employer must demonstrate either that the miner does not have pneumoconiosis, or that no part of the miner's respiratory disability was caused by pneumoconiosis. Here, petitioner Mud Lick Mining Company ("Mud Lick") cannot establish the first prong inasmuch as it concedes that respondent Charles Hash suffered from pneumoconiosis. Regarding the second prong, the ALJ determined, and the Benefits Review Board affirmed, that Mud Lick's medical expert opinions attributing Hash's respiratory disability solely to cigarette smoking were not credible, and therefore, it failed to rebut the presumption of entitlement.

The question for review is whether substantial evidence supports the ALJ's decision not to credit Mud Lick's expert opinions that smoking was the sole cause of Hash's respiratory disability.

¹ The Director, Office of Workers' Compensation Programs, concurs with the Petitioner's Statement of Jurisdiction. *See* Fed. R. App. P. 28(b)(1).

STATEMENT OF THE CASE

This claim, filed on June 18, 2007, is Hash's third claim for black lung benefits. J.A. 4. His first two claims, filed in 1997 and 2001, were denied by the district director in 1997 and 2002 respectively. He did not further pursue either claim. *Id.*² Following an administrative hearing in his current claim, ALJ Linda S. Chapman awarded benefits, finding that Hash was entitled to the 15-year presumption and that Mud Lick had failed to rebut it. J.A. 20-8. The coal company appealed to the Board, arguing, *inter alia*, that the ALJ improperly discredited the opinions of its experts on the cause of Hash's disability. J.A. 31-5.³

The Board rejected these arguments, J.A. 89, and Mud Lick petitioned this Court for review. J.A. 464-66.⁴

² Because the instant claim was filed more than one year following the denial of a prior claim, it is a subsequent claim. 20 C.F.R. § 725.309(d). A miner's subsequent claim may be approved only if evidence submitted with the new claim establishes a previously-denied element of entitlement. 20 C.F.R. § 725.309(d)(3). Here, the ALJ found that the newly-established element of entitlement was the presence of pneumoconiosis. J.A. 20.

³ J.A. refers to the Joint Appendix.

⁴ Mr. Hash passed away on February 14, 2009, while the claim was pending. The Black Lung Disability Trust Fund paid benefits to Hash on an interim basis. *See* 20 C.F.R. § 725.522(a). If the Court affirms his award, Mud Lick will have to reimburse the Trust Fund for the payments made, *see* 20 C.F.R. § 725.602, plus pay any back benefits owed to his widow. *See* 20 C.F.R. § 725.545. Last, Hash's award may provide the basis for his widow's receipt of automatic benefits. *See* 30 U.S.C. § 932(l); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) *cert. denied* 133 U.S. 127 (2012).

STATEMENT OF THE FACTS

A. Statutory and regulatory background

1. The definition of pneumoconiosis

The Black Lung Benefits Act, 30 U.S.C. §§ 901-944, provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as “black lung disease.” 30 U.S.C. § 901(a); 20 C.F.R. § 718.1(a). Since March 1, 1978, the Act has defined “pneumoconiosis” as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 30 U.S.C. § 902(b). 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). Clinical pneumoconiosis is often referred to as “coal workers’ pneumoconiosis” or “CWP.” *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995) (explaining there is a difference between “the particular medical affliction ‘coal workers’ pneumoconiosis’ [and] the broader legal definition of pneumoconiosis”).

“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); *see generally Energy West Mining Co. v. Hunsinger*, 389 Fed.Appx. 891 (10th Cir. 2010) (discussing “legal pneumoconiosis”).

2. The 15-year presumption

The BLBA mandates the payment of benefits “in respect of total disability of any miner due to pneumoconiosis.” 30 U.S.C. § 921(a). To be eligible for those benefits, a claimant must establish (1) the existence of pneumoconiosis, (2) that the pneumoconiosis arose out of coal mine employment, and (3) that the pneumoconiosis is totally disabling. *See* 30 U.S.C. §§ 901, 921; 20 C.F.R. §§ 718.202-.204, 725.202(d). From its inception, however, the BLBA has included various presumptions to assist miners in proving that they are totally disabled by pneumoconiosis.

Relevant to this case is 30 U.S.C. § 921(c)(4)’s fifteen-year presumption. It provides a rebuttable presumption of entitlement to miners who (1) suffer from a

totally disabling respiratory or pulmonary condition and (2) worked for at least fifteen years in underground coal mines or surface mines with substantially similar conditions. 30 U.S.C. § 921(c)(4).⁵ To rebut the presumption, the party opposing entitlement may establish that (A) the miner does not, or did not, have pneumoconiosis (*both* legal *and* clinical) arising out of coal mine employment; or (B) that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 78 Fed. Reg. 59102, 59115 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 718.305(d)(1)(i) and (ii)).⁶

⁵ Section 921(c)(4), which Congress eliminated in 1981, was restored as part of the Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010), and applies to claims, such as this one, that were filed after January 1, 2005, and pending on or after March 23, 2010, the amendment's enactment date. *Id.*; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011).

Section 921(c)(4) provides, in relevant part:

If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

⁶ As part of its promulgation of regulations implementing the ACA amendments, the Department revised 20 C.F.R. § 718.305 to make more clear the legal standards governing rebuttal, not to change them. 78 Fed. Reg. 59106. The revised regulation, which became effective October 25, 2013, applies to all pending

B. Relevant medical evidence⁷

1. Dr. Rosenberg's report

At Mud Lick's request, Dr. Rosenberg examined Hash on January 19, 2009, and reviewed his medical records. J.A. 411-40. Dr. Rosenberg reported an underground mining history of 30 years and a smoking history of a half-pack-a-day from ages 21 to 66. J.A. 414. Based on Hash's negative chest x-rays and total

claims, including Hash's claim. *See* 78 Fed. Reg. 59102, 59114 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 718.2). In relevant part, the regulation states:

(d) Rebuttal -- (1) Miner's claim. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by--

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in § 718.202(a)(2);
and

(B) Clinical pneumoconiosis as defined in § 718.201(a)(1),
arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that *no part* of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in § 718.201.

78 Fed. Reg. 59115 (emphasis added).

⁷ There is no dispute that Hash had clinical pneumoconiosis (based on autopsy findings) and was totally disabled by a respiratory disease at the time of his death. The only issue on appeal relating to the medical evidence is whether the ALJ reasonably discredited Drs. Rosenberg and Caffrey's opinions that cigarette smoking was the sole cause of Hash's total disability. Thus, the additional medical evidence of record, such as medical reports Drs. Agarwal, Fino, and Forehand, J.A. 115, 223, and 294 respectively, are not summarized.

lung volume, Dr. Rosenberg opined that Hash did not suffer from clinical pneumoconiosis. J.A. 415.⁸ Dr. Rosenberg, however, diagnosed a disabling airflow obstruction that was “undoubtedly” related to chronic obstructive pulmonary disease (COPD). J.A. 415.⁹

Dr. Rosenberg attributed the COPD solely to smoking and not coal dust exposure based on the results of Hash’s pulmonary function tests. J.A. 416.¹⁰ Dr. Rosenberg explained that when coal dust exposure causes a reduction in a miner’s

⁸ Total lung volume, or total lung capacity, measures the volume of gas contained in the lungs at the end of a maximal inhalation. *See* DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003) at 283.

⁹ COPD is a lung disease characterized by airflow obstruction. THE MERCK MANUAL 568 (17th ed. 1999). It encompasses chronic bronchitis, certain forms of asthma, and -- relevant here -- emphysema. 65 Fed. Reg. 79939 (Dec. 20, 2000).

¹⁰ A pulmonary function (or ventilatory) test is one measure of a miner’s pulmonary capacity. The test measures three values: the FEV₁ (forced expiratory volume), the FVC (forced vital capacity), and the MVV (maximum voluntary ventilation). The FEV₁ value measures the amount of air exhaled in one second on maximum effort. It is expressed in terms of liters per second. Obtaining a FVC value requires the miner to take a deep breath and then exhale as rapidly and forcibly as possible. The FEV₁ value is taken from the first second of the FVC exercise. The MVV value measures the maximum volume of air that can be moved by the miner’s respiratory apparatus in one minute, and is expressed in liters. *See Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 nn.6, 7 (7th Cir. 1988); 20 C.F.R. § 718.103; 20 C.F.R. Part 718 App. B.

The FEV₁/FVC ratio is a calculated ratio that is also used to measure respiratory disability. 20 C.F.R. § 718.204(b)(2)(i)(C). It represents the ratio of forced expiratory volume in one second (FEV₁) to forced vital capacity (FVC). The value measures the percentage of the total FVC that is expelled from a participant’s lungs during the first second of a forced exhalation.

FEV₁ measurement, there will be a corresponding loss in his FVC measurement, thus preserving the FEV₁/FVC ratio. J.A. 415. Here, Hash's FEV₁ measurement was reduced, but his FEV₁/FVC ratio, rather than being preserved, was "markedly decreased." J.A. 416. According to Dr. Rosenberg, this reduction in the FEV₁/FVC ratio was characteristic of smoking-related obstructive lung disease, "not one related in whole or in part to past coal dust exposure." *Id.*

Dr. Rosenberg found additional support for this conclusion in Hash's respiratory improvement following the administration of bronchodilators during the pulmonary function tests. He explained: "it should be appreciated that mineral dust exposure causes chronic airway scarring (citation omitted). As such, with the associated obstruction that develops, one would not expect a bronchodilator response." J.A. 416.¹¹

2. Dr. Caffrey's report

Dr. Caffrey submitted a medical report dated February 27, 2009. J.A. 245-50. In addition to reviewing an autopsy report and slides, he reviewed Hash's x-rays, medical records, smoking and coal mine employment histories, Hash's death certificate, and scientific articles, among other records, in concluding that Hash suffered from a disability solely due to smoking. J.A. 245-46. According to Dr.

¹¹ Bronchodilators are agents that cause expansion of the air passages of the lungs. *See DORLAND'S* at 253.

Caffrey, those records -- in total -- formed the basis of his opinions in the case:

“After review of these multiple records, the autopsy report, and the autopsy slides, it is my opinion that [Hash had very minimal clinical pneumoconiosis and did not have legal pneumoconiosis].” J.A. 248.

Although he ruled out legal pneumoconiosis based on the record, Dr. Caffrey concluded that Hash did suffer from “simple coal worker’s pneumoconiosis,” as well as “moderate to severe emphysema in both lungs.” J.A. 247. And although Dr. Caffrey discussed a great deal of the medical evidence in the case in his report, nowhere did he mention Hash’s exposure to coal dust based on his decades of underground mining. Nor did he discuss how that exposure might have caused or aggravated Hash’s respiratory conditions.

C. The decisions below

1. The ALJ award

The ALJ awarded benefits in a decision dated February 3, 2011. J.A. 3-30. Based on Hash’s application for benefits, and his social security records, she found that he worked as a coal miner for 23.19 years. J.A. 5. She then concluded that Hash had a totally disabling respiratory impairment based on his most recent pulmonary function studies, arterial blood gas studies, and the opinions of all the physicians that evaluated him, including Mud Lick’s experts. J.A. 18. On the

basis of these findings, she concluded that Hash had invoked the 15-year presumption of entitlement. J.A. 20-1, *citing* 20 C.F.R. § 718.305.

The ALJ then considered whether Mud Lick rebutted the presumption by proving that Hash did not suffer from “pneumoconiosis, or that his totally disabling respiratory impairment did not arise out of his coal mine employment.” J.A. 21. She found the first method not established because the x-ray evidence was in equipoise and Dr. Caffrey acknowledged that the autopsy slides confirmed the existence of the disease. J.A. 19. (Neither finding is challenged on appeal.)

Turning to the second method of rebuttal, the ALJ’s analysis focused primarily on the conflicting causation opinions of Drs. Forehand and Agarwal, who attributed Hash’s respiratory disability to coal dust exposure and smoking, J.A. 22, 23, and Drs. Fino, Rosenberg, and Caffrey, who attributed it solely to smoking. J.A. 23, 25, 27. For a variety of reasons not relevant here, the ALJ discredited Drs. Fino, Agarwal, and Forehand’s opinions. J.A. 22-24.¹²

With regard to Dr. Rosenberg, the ALJ found that his rationale that a reduced FEV₁/FVC ratio evidenced smoke-induced COPD was inconsistent with the Department’s black lung regulations, namely, 20 C.F.R. § 718.204(b)(2)(i)(C), which adopts a reduced ratio (less than 55%) as a basis for demonstrating respiratory disability. J.A. 26. The ALJ explained that it would not have made

¹² The parties do not challenge the ALJ’s decision not to credit these opinions.

sense for the Department to permit miners to use a decreased FEV₁/FVC ratio to establish disability if -- as Dr. Rosenberg submitted here -- a substantially decreased FEV₁/FVC ruled out pneumoconiosis. *Id.*, citations omitted. In addition, the ALJ pointed to the Department's approval of medical studies reporting that coal dust exposure results in decreased FEV₁/FVC values and Board precedent recognizing this medical principle. *Id.*, citations omitted. The ALJ thus rejected Dr. Rosenberg's view regarding FEV₁/FVC ratio as contrary to the regulations, the regulatory preamble, and Board precedent. *Id.*, citations omitted.

The ALJ also took issue with Dr. Rosenberg's opinion that the significant reversibility in Hash's obstruction following bronchodilation during the pulmonary function tests excluded coal dust as a causative factor of his respiratory impairment. *Id.* The ALJ found that Dr. Rosenberg did not adequately explain why such reversibility ruled out coal dust exposure, and she further faulted Dr. Rosenberg for not reconciling this reasoning with the fact that Hash's respiratory impairment remained disabling on the three most recent pulmonary function studies, even after the administration of bronchodilators. *Id.*

Turning to Dr. Caffrey, the ALJ noted that, although the report was offered as an autopsy report, the doctor reviewed numerous medical records in addition to the autopsy slides. The ALJ accordingly found that Dr. Caffrey's opinion of cigarette smoke-induced COPD exceeded the evidentiary limitations because Mud

Lick had already submitted two medical reports (from Drs. Rosenberg and Fino) as part of its affirmative case. J.A. 27-28.¹³ She then gave it no weight because it was “difficult to separate Dr. Caffrey’s opinions that rely strictly on his examination of the autopsy slides;” and regardless, she found that his opinion of cigarette smoke-induced COPD was “heavily based” on his impermissible review of Hash’s medical records, not the autopsy slides. J.A. 27. Finally, the ALJ ruled that even if it were appropriate to consider Dr. Caffrey’s causation opinion, Dr. Caffrey’s failure to discuss the contribution of Hash’s significant history of coal dust exposure to his disabling COPD undermined his conclusions. J.A. 28.

Having found pneumoconiosis present and having discredited Mud Lick’s expert medical opinions regarding the cause of disability, the ALJ concluded that Mud Lick had failed to rebut the 15-year presumption. J.A. 28. She accordingly awarded benefits. *Id.*

2. The Board affirmance

Mud Lick appealed to the Benefits Review Board, challenging the constitutionality of the restoration of the 15-year presumption and the ALJ’s

¹³ As explained more fully below, *infra* at n.22, the evidentiary limits permit two medical reports and one autopsy report supporting an affirmative case. Medical reports can encompass the record as a whole; autopsy reports are limited to autopsy materials. 20 C.F.R. § 725.414(a)(1), (a)(2)(i), (a)(3)(i); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237-38, 240, 2007 WL 1644032 at *3-4 (Ben. Rev. Bd. 2007) (en banc), *aff’d*, 372 Fed. App’x 399 (4th Cir. 2010). (Westlaw incorrectly characterizes the opinion as unpublished).

discrediting of Drs. Rosenberg and Caffrey's opinions. J.A. 84-86. The Board summarily rejected the constitutional arguments, J.A. 86, and then affirmed, as supported by substantial evidence, the ALJ's evaluation of the medical evidence and conclusion that Mud Lick failed to rebut the 15-year presumption. J.A. 86-89.

First, the Board upheld the ALJ's discounting of Dr. Caffrey's disability causation opinion. Observing Mud Lick's concession that Dr. Caffrey's review of Hash's medical records exceeded the scope of an autopsy report, it held that the ALJ had permissibly found it "difficult to separate" Dr. Caffrey's opinions based solely on the autopsy materials from those based on his impermissible review of additional medical records. Moreover, the Board ruled that the ALJ rationally found Dr. Caffrey's causation opinion "heavily based" on those impermissible additional materials. Finally, it rejected Mud Lick's contention that the ALJ should have redacted the offending portions of Dr. Caffrey's opinions because Mud Lick did not specify how that could be done. J.A. 87-8. The Board therefore held that it was well within the ALJ's discretion not to consider Dr. Caffrey's causation opinion. *Id.*

The Board then affirmed the ALJ's discrediting of Dr. Rosenberg's opinion. J.A. 88-89. It ruled that she permissibly accorded it little weight because Dr. Rosenberg's treatment of Hash's FEV₁/FVC ratio was inconsistent with the Department's regulations. Furthermore, it held that the ALJ permissibly found

unexplained Dr. Rosenberg’s reliance on the reversibility of Hash’s airway obstruction following bronchodilation when the three most recent pulmonary function studies all produced qualifying (disabling) values after their administration. *Id.* In light of that evidence, the Board concluded that the ALJ “properly found Dr. Rosenberg’s opinion deficient as to its analysis, the quality of its reasoning, and the extent to which its conclusions are consistent with the prevailing medical and scientific views accepted by the DOL.” J.A. 89, citations omitted.

Without a credible medical opinion establishing the cause of Hash’s totally disabling respiratory disability, the Board affirmed the ALJ’s finding that Mud Lick failed to rebut the 15-year presumption. Accordingly, it affirmed the award of benefits. *Id.*

SUMMARY OF THE ARGUMENT

There is no dispute that Hash worked as an underground coal miner for more than 15 years, that he suffered from a totally disabling respiratory impairment, and that he was entitled to the 15-year rebuttable presumption of entitlement. It is also undisputed that Mud Lick cannot rebut the presumption based on the absence of pneumoconiosis because autopsy findings showed he suffered from the disease at the time of his death. Thus, the only avenue left for Mud Lick to avoid liability is to prove that pneumoconiosis played no part in causing Hash’s disability. But this

path is barred by the ALJ's discrediting of its medical opinions attributing Hash's disability solely to cigarette smoking.

The ALJ permissibly rejected Dr. Rosenberg's opinion because it was based on an idiosyncratic interpretation of Hash's pulmonary function test results, a view that the ALJ recognized conflicts with the Department's regulations, and for that matter, scientific consensus. Moreover, she reasonably found that Dr. Rosenberg failed to adequately explain his reliance on the reversibility (*i.e.*, improvement) of Hash's respiratory impairment following the administration of bronchodilators when the three most recent pulmonary function studies produced disabling values even after their administration, and thus demonstrated an irreversible impairment.

Likewise, it was within the ALJ's discretion to exclude Dr. Caffrey's disability causation opinion because it exceeded the regulatory evidentiary limits, a fact Mud Lick concedes. As the ALJ found, Dr. Caffrey's opinion was "heavily based" on his impermissible review of Hash's medical records. Indeed, Dr. Caffrey could not have known of Hash's smoking history (and thereby attribute his respiratory disability to cigarette smoking) without having reviewed those records. Nor has Mud Lick offered any methodology (or examples) for segregating the permissible from the impermissible portions of Dr. Caffrey's report. Consequently, it has not demonstrated that the ALJ abused her discretion for not doing so.

These ALJ credibility findings easily pass muster under substantial evidence review and should be affirmed. As a result, Mud Lick cannot meet its burden to rebut the 15-year presumption by demonstrating that Hash's disability is not related to coal dust exposure. Accordingly, Hash is entitled to benefits pursuant to the 15-year presumption, and the Court should affirm the decisions below.

ARGUMENT

A. Standard of review

In federal black lung cases, the ALJ makes credibility determinations and weighs conflicting evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). The Board is authorized to consider appeals from ALJ decisions "raising a substantial question of law or fact," and must affirm the ALJ's decision if it is "supported by substantial evidence in the record considered as a whole" and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). Substantial evidence means evidence "of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir.1999).

This Court, in turn, "review[s] the decision of the Benefits Review Board for errors of law and to assure that the Board adhered to its statutory authority in reviewing the ALJ's factual determinations." *Underwood*, 105 F.3d at 949. As

the administrator of the BLBA, the Director's reasonable interpretations of its ambiguous provisions are entitled to deference. *See Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999).

This appeal involves an ALJ's application of regulatory limits on the submission of evidence. Such rulings are reviewed for an abuse of discretion. *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297 (4th Cir. 2007); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006) (considerable discretion afforded to [ALJs] in conducting hearings); 20 C.F.R. § 725.455(c) (same).

B. Substantial evidence supports the ALJ's discrediting of Drs. Rosenberg and Caffrey's medical opinions.

According to Mud Lick, the ALJ improperly discredited Drs. Rosenberg and Caffrey's medical opinions that Hash's respiratory disability was caused by cigarette smoking, not pneumoconiosis, and thus erred in finding it failed to rebut the 15-year presumption. Opening Brief (OB) 16-18, 22-28. Substantial evidence, however, supports the ALJ's rejection of these medical opinions: the ALJ permissibly found them insufficiently explained, inadequately documented, and contrary to the regulations. JA 20-28. Because Mud Lick has raised no other challenge to the ALJ's decision, the Court should affirm the award of benefits.¹⁴

¹⁴ Mud Lick concedes that its burden on rebuttal was to prove that Hash either did not have pneumoconiosis or that his respiratory disability did not arise out of his

1. Dr. Rosenberg's opinion

The ALJ first rejected Dr. Rosenberg's opinion because his underlying premise for distinguishing coal dust-induced COPD from smoking-induced COPD -- that coal dust exposure preserves the FEV₁/FVC ratio -- was contrary to the

coal mine employment. OB at 20. Because autopsy evidence revealed the presence of pneumoconiosis, it does not address the first prong. Regarding the second, Mud Lick assumes that it is established with proof that pneumoconiosis is not "a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." OB 21 (*citing inter alia* 20 C.F.R. § 718.204(c)). But this general causation standard governs a miner's *affirmative* case – and applies regardless of the number of years worked. The standard for rebutting the 15-year presumption of disability causation is more taxing: Mud Lick must show that "no part" of the miner's respiratory disability was caused by pneumoconiosis. 78 Fed. Reg. 59115 (to be codified as 20 C.F.R. § 718.305(d)(1)(ii); *see also* *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980) ("[I]t is the [employer's] failure to effectively rule out such a relationship [between the miner's lung disease and coal mine employment] that is crucial here."); *Colley & Colley Coal Co.*, 59 F. App'x. 563, 567 (4th Cir. 2003) ("[T]he rebuttal standard requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.") (citation and quotation omitted). In fact, the Department specifically rejected the "substantially contributing cause" standard for rebuttal when promulgating the revised Section 718.305. It explained that a more rigorous standard was appropriate because Congress had singled out for special treatment miners who were totally disabled and had at least 15 year of coal mine employment. 78 Fed. Reg. 59106-07; *but see* *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 559 (4th Cir. 2013) (Niemeyer concurring) (suggesting, before promulgation of revised section 718.305, that rebuttal may be established with proof that pneumoconiosis was not substantially contributing cause).

In any event, any discussion of the proper rebuttal standard is academic. Mud Lick waived any challenge to the rule out standard by not raising it before the Board, J.A. 50-54; *Kowalchick v. Director, OWCP*, 893 F.2d 615, 624 n.8 (3d Cir. 1990). And more important, the ALJ reasonably discredited *all* of Mud Lick's medical evidence, and consequently, there is no basis to establish rebuttal under *any* standard.

regulations and scientific consensus. As the ALJ found (J.A. 25-26), the black lung regulations use a reduced FEV₁/FVC ratio (less than 55%) as a measure of compensable respiratory disability. 20 C.F.R. § 718.204(b)(2)(i)(C). Thus, Dr. Rosenberg's belief that this measure actually demonstrates non-compensable respiratory disease -- COPD due solely to smoking -- is inconsistent with the regulations. The ALJ thus permissibly rejected his opinion. *Harmon Mining Co. v. Director, OWCP*, 678 F.3d 305, 312 (4th Cir. 2012) (upholding ALJ's discrediting of medical opinions that were inconsistent with regulations, citing "robust body of case law [that] holds that an ALJ should not credit expert opinions of doctors who rely on facts or premises that conflict with the Act").

Moreover, the ALJ recognized that the Department examined the available scientific evidence and reached a different view on the FEV₁/FVC ratio, namely, that coal dust exposure places miners at an increased risk of "decrements in certain measures of lung function, *especially FEV₁ and the ratio of FEV₁/FVC.*" 65 Fed. Reg. 79943 (Dec. 20, 2000) (preamble to Department's 2000 regulations, quoting the National Institute for Occupational Safety and Health's *Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust*, §4.2.3.2 (1995) (emphasis added). The ALJ's reliance on the science found in the preamble to discredit Dr. Rosenberg's opinion is entirely permissible. *Harmon*

Mining Co., 678 F.3d at 314 (ALJ may look to Department’s preamble in assessing credibility of physicians’ opinions).

Mud Lick attempts to side-step the ALJ’s finding, arguing, in essence, that Dr. Rosenberg did not actually rely on his professed belief about the FEV₁/FVC ratio, but was only making a “general” point about COPD detection. OB 24.¹⁵ The record, however, demonstrates otherwise. J.A. 208-09 (“So right off the bat you see that [Hash’s] FEV1 is down, the ratio is severely down, and that’s a classic pattern of smoking-related forms of COPD”); J.A. 415 (opining that preserved FEV₁/FVC ratio is one way to ascertain whether a given miner suffers from legal pneumoconiosis or obstruction from another reason). Mud Lick’s attempt to downplay Dr. Rosenberg’s reliance on his own idiosyncratic (and wrong) medical belief is hard to swallow – why would Dr. Rosenberg repeatedly express this belief if it did not inform his opinion?¹⁶ In any event, even if general in nature, it is still inconsistent with the regulation. *See Consolidation Coal co. v. Director, OWCP*,

¹⁵ The only authority Mud Lick cites for its position, *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997), OB 24, does not support its argument. The case does not stand for the proposition that COPD caused by coal dust exposure generally can be distinguished from COPD caused by smoking based on a miner’s FEV₁/FVC ratio, as Mud Lick implies. Instead, the part of the case relied on by Mud Lick stands for the unremarkable proposition that a physician must base his opinion on the facts before him and not rely on assumptions hostile to the Act. *Lane*, 105 F.3d at 173.

¹⁶ The Westlaw search -- fvc /s ratio /p rosenberg -- in the Benefits Review Board database (fwcf-brb) returned 58 cases in which Dr. Rosenberg expressed this identical belief.

521 F.3d 723, 726 (7th Cir. 2008) (doctor’s opinion that coal dust exposure “rarely” causes obstructive disease inconsistent with regulation, which did not so limit causality).

The ALJ also properly discredited Dr. Rosenberg for failing to explain why the reversibility following bronchodilation in Hash’s pulmonary function studies ruled out coal dust exposure as a causal or contributory cause of Hash’s disability. J.A. 26; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (holding that a failure to address why responsiveness to bronchodilators rules out a diagnosis of legal pneumoconiosis constitutes substantial evidence to discredit a physician’s opinion). Most telling, the ALJ faulted Dr. Rosenberg for not addressing the three most recent pulmonary studies, which demonstrated a totally disabling *residual* respiratory impairment, *i.e.*, a disabling, irreversible impairment following bronchodilation. *See Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. 2004) (“[T]he ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of [claimant’s] condition.”).¹⁷

¹⁷ Mud Lick counters that Dr. Rosenberg explained his diagnosis by stating that reversibility occurs in smokers who have never mined and cannot result from dust exposure “because coal dust deposition cause[s] scarring in the lungs, which in turn prevent[s] a response to bronchodilators.” OB 23. Neither observation holds water. Hash’s latest pulmonary function studies demonstrated an irreversible impairment, and the fact that non-miner smokers have a reversible component says

2. Dr. Caffrey's opinion

Mud Lick concedes that Dr. Caffrey's report exceeded the evidentiary limitations and must be redacted "to the extent he reviewed and addressed Mr. Hash's medical records." OB 27.¹⁸ It claims, however, that the ALJ wrongly rejected his opinion that smoking caused Hash's disability because it was based on his review of the autopsy slides alone, and not the plethora of medical records he impermissibly reviewed. *Id.* The Court should reject this entirely speculative assertion.

First, it directly contradicts Dr. Caffrey's own statement. Dr. Caffrey explained that he formed his conclusions based on his review of "*multiple medical records, the autopsy report, and the autopsy slides.*" J.A. 248, emphasis added.¹⁹ And second, because Dr. Caffrey relied on the totality of the medical records, his

nothing about whether miners (smokers or not) may also have a reversible component.

¹⁸ Mud Lick offered Dr. Caffrey's report as an autopsy report, not a medical report. As such, it was subject to the evidentiary limitations contained at 20 C.F.R. § 725.414(a). Under section 725.414(a)(3)(i), a company may submit no more than two medical reports in support of its affirmative case (here, Drs. Rosenberg and Fino). 20 C.F.R. § 725.414(a)(3)(i). A medical report consists of a written assessment of the miner's respiratory or pulmonary condition, "prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. § 725.414(a)(1). By contrast, an autopsy report is limited to a physician's review of autopsy slides and other autopsy materials. *See Keener*, 23 BLR at 1-237-38, 240, 2007 WL 1644032 at *3-4.

¹⁹ The medical records that Dr. Caffrey was not permitted to review comprise "most of the records in evidence in this claim." OB 27. They were given to him to review by Mud Lick's counsel. J.A. 245.

report does not associate any particular opinion with a particular medical record. Third and most important, Dr. Caffrey's opinion that cigarette smoking caused Hash's problems was necessarily based on his impermissible review of the medical records – Hash's smoking history is not mentioned in the autopsy materials Dr. Caffrey reviewed, J.A. 462-63, but was derived from Dr. Forehand's prior medical opinion. J.A. 246-47. Thus, the ALJ was undoubtedly correct in declining to consider Dr. Caffrey's causation opinion because it was "based heavily on his review of Mr. Hash's medical records," J.A.27.

Indeed, despite admitting that redaction is required, Mud Lick makes no attempt to explain how this is possible and which part (or parts) of Dr. Caffrey's opinion remains intact. *See* J.A. 87-88 (Board decision noting Mud Lick's failure to suggest redactions). Mud Lick has therefore failed to demonstrate that the ALJ abused her discretion in declining to separate out or redact the offending portions of Dr. Caffrey's report. *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297 (4th Cir. 2007) (ALJ's application of the evidentiary limits reviewed for an abuse of discretion).

Finally, the ALJ alternatively held that if she were to consider the entirety of Dr. Caffrey's report, she would nonetheless reject his disability causation opinion. She permissibly found that Dr. Caffrey relied solely on his finding that Hash's pneumoconiosis was mild, and failed to adequately address the potential impact of

Hash's "significant history of coal mine employment" (23 years underground) on his admittedly disabling emphysema. J.A. 28. *See, e.g., Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9 (4th Cir. 1998) ("An ALJ has discretion to disregard an opinion unsupported by a sufficient rationale."); *see also Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (ALJ's reasonable interpretation of physician's statement satisfies substantial evidence review even though other interpretations may be possible); *cf. Westmoreland Coal Co., Inc. v. Cochran.*, 718 F.3d 319, 324 (4th Cir. 2013) (ALJ reasonably gave less weight to doctors' opinions that inordinately focused on the existence of clinical pneumoconiosis, and not legal pneumoconiosis, "the salient diagnosis for awarding benefits").

CONCLUSION

Mud Lick's argument that the ALJ abused her discretion in discrediting Drs. Rosenberg and Caffrey should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B). This brief contains 5,907 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

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