No. 12-1330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND CREEK KENTUCKY MINING,

Petitioner,

v.

ROY P. RAMAGE, SR., AND DIRECTOR, OFFICE OF WOKERS' 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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF ORAL ARGUMENT

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3873

ISLAND CREEK KENTUCKY MINING,

Petitioner,

v.

ROY P. RAMAGE SR., 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

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Island Creek Kentucky Mining (Island Creek) petitions this Court to review a final order of the Benefits Review Board affirming a Department of Labor administrative law judge's (ALJ's) award to Roy Ramage. Joint Appendix (JA) 345-350. The Court has jurisdiction over Island Creek's petition for review under Section 21(c) of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), 33 U.S.C. § 921(c), as incorporated by Section 422(a) of the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. § 932(a). The injury in

this case, within the meaning of Section 21(c), occurred in Kentucky, where Mr. Ramage worked as a coal miner.

Island Creek's petition for review meets Section 21(c)'s timeliness requirement. The Board affirmed the ALJ's award of benefits on May 22, 2012. JA 335-344. Island Creek filed its petition for review with the Court on July 17, 2012. JA 345. *See* 33 U.S.C. § 921(c) (providing sixty-day period for seeking review after final decision of Board). The Board, in turn, had jurisdiction to review the ALJ's decision under Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as incorporated. The ALJ awarded benefits on April 26, 2011. JA 304-334. Island Creek timely filed a notice of appeal with the Board on April 29, 2011. JA 353. *See* 33 U.S.C. § 921(a) (providing thirty-day period for appeal of administrative law judge decisions). Accordingly, this Court has jurisdiction over Island Creek's petition for review.

STATEMENT OF THE ISSUES

Totally disabled miners who were "employed for fifteen years or more in one or more underground coal mines" are rebuttably presumed to be entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4). The Department of Labor's regulations implementing the Act define "underground coal mine" to include "all land, structures, facilities . . . and other property, real or personal, appurtenant thereto." 20 C.F.R. § 725.101(a)(30). There is no dispute that Mr. Ramage is

totally disabled, that he worked for more than 15 years at an underground mine, or that most of his work was performed in above-ground portions of that mine.

The first question presented is: Did the ALJ and Benefits Review Board correctly hold that Mr. Ramage is entitled to 30 U.S.C. § 921(c)(4)'s rebuttable presumption of entitlement?

After invoking the Section 921(c)(4) presumption, the ALJ weighed the medical evidence and found that Island Creek failed to rebut the presumption. The Board affirmed the ALJ's finding of no rebuttal.

The second question presented is: Does substantial evidence support the ALJ's finding that Island Creek failed to rebut the presumption by proving that Mr. Ramage's totally disabling lung disease was unrelated to his coal mine employment?

STATEMENT OF THE CASE

Mr. Ramage filed a claim for benefits under the BLBA on March 1, 2007. JA 1-4. The district director issued a Proposed Decision and Order awarding benefits on October 22, 2007. JA 20 – 24. Island Creek subsequently requested a formal hearing before an ALJ. JA 33.

The ALJ held a formal hearing on September 2, 2009, in Madisonville, Kentucky. JA 270. On April 26, 2011, the ALJ issued a Decision and Order Awarding Benefits. JA 304-334. The Board affirmed the award on May 22, 2012.

JA 335-344. Island Creek timely petitioned this Court for review on July 17, 2012. JA 345.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background.

1. The Definition of Pneumoconiosis.

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. § 901(a); 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).[1] 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.

[1] Before 1978 the BLBA defined pneumoconiosis more narrowly as "a chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. § 902(b) (1976). This term generally encompassed only what is now known as clinical pneumoconiosis. *See* 20 C.F.R. § 410.101(o) (1970); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2); *Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999). Clinical pneumoconiosis is often referred to as "coal workers' pneumoconiosis," "CWP" or "medical pneumoconiosis." *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). Any chronic lung disease or respiratory impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust "arises out of coal mine employment" and therefore is legal pneumoconiosis; coal mine dust need not be the disease's sole or even primary cause. 20 C.F.R. § 718.201(b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *see also Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (explaining clinical and legal pneumoconiosis).

Pneumoconiosis (both types) is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

2. The Section 921(c)(4) 15-Year Presumption.

From its inception, 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 15-year presumption, which was enacted in 1972 and 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 shall not apply all or a portion of the requirement . . . that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. 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.

30 U.S.C. § 921(c)(4) (1972). *See also* 20 C.F.R. § 718.305 (implementing the 15-year presumption).

In short, section 921(c)(4) 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. *See Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) (stating that rebuttal requires

an "affirmative showing" that the "'claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work'") (citations omitted).

In 1981, the 15-year presumption was eliminated for all claims filed after that year. Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (1981). Accordingly, subsection (e) was added to 20 C.F.R. § 718.305 to explain that the 15-year presumption would not be available in such claims. The regulation has not been amended since.[2] In 2010, Congress restored the 15-year presumption in section 1556 of the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010).[3] This restoration 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).

B. Relevant Facts.

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[2] While the current version of 20 C.F.R. § 718.305 does not, by its own terms, apply to claims filed after 1981, it remains the Department's definitive interpretation of section 921(c)(4).

[3] The Department has issued proposed regulations implementing section 921(c)(4) as revived in 2010. *See* Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 77 Fed. Reg. 19456 (Mar. 30, 2012). A final regulation is expected to be promulgated in September 2013. The relevant portion of DOL's regulatory agenda is available on the Internet at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201 210&RIN=1240-AA04.

There are two key disputes in this case. The first is basically legal, namely, whether Mr. Ramage's undisputed 23 years of above-ground work at Island Creek's underground mine is, for purposes of Section 921(c)(4), "employment in a coal mine other than an underground mine." The second issue is medical. Island Creek does not challenge the ALJ's finding that Mr. Ramage has a totally disabling chronic obstructive pulmonary disease (COPD), primarily in the form of emphysema.[4] *See* Pet. Br. 6, 8. If Mr. Ramage's COPD is "significantly related to, or substantially aggravated by" his occupational exposure to coal mine dust, his COPD is compensable legal pneumoconiosis. *See* 20 C.F.R. § 718.201(b). Moreover, if Mr. Ramage's legal pneumoconiosis "substantially contributes," *i.e.*, has a "material adverse effect on" or "materially worsens," his COPD, his total respiratory disability is due to pneumoconiosis. *See* 20 C.F.R. § 718.204(c).

1. Facts

Mr. Ramage worked as a coal miner for Island Creek for over 28 years, including 5 years working underground and 23 years working above ground at an underground mine site, most recently as a preparation foreman. JA 306; Pet. Br. at 6. Mr. Ramage testified that he worked above ground as a chief preparation

[4] COPD "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma." 65 Fed. Reg. 79939 (Dec. 20, 2000). The doctors in this case describe Mr. Ramage's respiratory condition as being chronic bronchitis or emphysema when not using the umbrella category of COPD.

foreman who was "in charge of all of the outside," including the preparation plant, or tipple. JA 282-283. He testified that working above ground was a dusty job and stated that "somedays [*sic*] [he] was as black as black, always covered in dust." JA 285. Mr. Ramage further testified that even though he usually showered before going home at the end of the work day, he "still had dust around [his] eyes and spit up dust and all that," and that after the weekend, he "would still be spitting up coal dust when [he] went back to work on Monday." JA 285-286.

Mr. Ramage smoked 1 to 2.5 packs of cigarettes a day for forty years. JA 307.

Mr. Ramage suffered through throat and bladder cancer. JA 317. Treatment for the throat cancer included a total laryngectomy and permanent tracheostomy.[5] *Id*.; JA 139, 209.

2. Medical Reports

Dr. V. Simpao examined Mr. Ramage in March 2007 at the Department's request, issued a report, and was later deposed.[6] JA 6-11, 41-61. The doctor

[5] A laryngectomy is the surgical removal of the larynx; a tracheostomy is a surgical procedure that creates a hole in the trachea and inserts a tube to assist in breathing. *Dorland's Illustrated Medical Dictionary* (30 ed. 2003) [*Dorland's*] at 999, 1929. *See also* JA 209.

[6] The Department provided this examination in order to fulfill its statutory duty to give the claimant-miner "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b); *see also* 20 C.F.R. § 725.406.

physically examined the miner, had a chest X-ray taken, which showed COPD, and performed a blood gas analysis.[7] He also recorded the miner's medical, work, and smoking histories. Dr. Simpao diagnosed legal pneumoconiosis and COPD (*i.e.*, centrilobular emphysema, JA 41) based on his "x-ray, arterial blood gas test, physical assessment, and symptomology."[8] JA 9. He also determined that Mr. Ramage was totally disabled by his pulmonary impairment. *Id*. Dr. Simpao attributed the totally disabling respiratory impairment to coal dust exposure and smoking, although he could not apportion each agent's respective impact. JA 59-60.

Dr. W. Houser, a Board-certified internist and pulmonologist, examined Mr. Ramage in April 2009, issued a report, and was later deposed. JA 62-66, 128-200. The doctor physically examined the miner, had a chest X-ray taken, which

[7] The examining physicians (Drs. Simpao, Houser, and Selby) were unable to conduct pulmonary function studies due to Mr. Ramage's tracheostomy.

[8] There are many different forms of emphysema. *See Dorland's* at 606. Relevant here are three types: "bullous" emphysema, which consists of a "single or multiple large cystic alveolar dilations of lung tissue;" "centriacinar," or "centrilobular" emphysema, which is "one of the principal types of pulmonary emphysema, characterized by enlargement of air spaces in the proximal part of the acinus, primarily at the level of the respiratory bronchioles. See *bronchiolectasis* and *coal workers' pneumoconiosis*;" and "focal" emphysema which is "centriacinar emphysema associated with inhalation of environmental dusts, producing dilation of the terminal and respiratory bronchioles." *Id*.

showed severe emphysema, and performed an oxygen saturation test.[9] He also recorded the miner's medical, work, and smoking histories. Dr. Houser diagnosed severe emphysema (the centrilobular form), legal pneumoconiosis, and a "severe respiratory impairment" that prevented Mr. Ramage from performing his prior coal mine work. JA 63-64, 146-47. He opined that the emphysema was secondary to cigarette smoking and the coal and rock-dust inhalation that occurred during Mr. Ramage's coal mine employment. Dr. Houser accordingly concluded that coal and rock dust inhalation was a "contributory factor in the development of his emphysema/legal pneumoconiosis and resultant disability." JA 64, 150. Like Dr. Simpao, Dr. Houser was unable to apportion the respective contributions of smoking and coal and rock dust exposure on the respiratory impairment, although he made clear that smoking alone did not cause it. JA 148, 150.

Dr. J. Selby, a Board-certified internist and pulmonologist examined Mr. Ramage on behalf of Island Creek in July 2007, issued two reports, and was deposed. JA 12-19, 67-127, 266-268. The doctor physically examined the miner, had a chest X-ray and CT scan taken, which both revealed emphysema, and performed a blood gas analysis. He also recorded the miner's medical, work, and smoking histories and reviewed various treatment records and other medical

[9] An oxygen saturation test measures the percentage of red blood cells coming from the lungs that are fully loaded (or saturated) with oxygen. *See* Harvard Health Publication on Diagnostic Tests available at http://www.health.harvard.edu/diagnostic-tests/oxygen-saturation-test.htm.

reports and deposition testimony. Dr. Selby diagnosed bullous emphysema due entirely to smoking, and asthma. JA 15, 92-93. Unlike all the other examining physicians of record, he further affirmatively opined that Mr. Ramage did not suffer from clinical or legal pneumoconiosis, *i.e.*, any "respiratory or pulmonary disease defect or abnormality as a result of coal mine dust exposure or coal mine occupation." JA 15. Indeed, Dr. Selby believed that Mr. Ramage's coal mine employment actually improved his pulmonary health by preventing him from smoking cigarettes during his work shift. JA 119-120. Finally, unlike the other doctors of record, Dr. Selby did not find Mr. Ramage's COPD totally disabling, but instead explicitly declined to render an opinion on the extent of Mr. Ramage's respiratory disability. JA 95.

Dr. L. Repsher, a Board-certified internist and pulmonologist retained by Island Creek, issued two consultative reports and was deposed. JA 36-40, 251-65, 201-244. He initially opined that Mr. Ramage had neither medical nor legal pneumoconiosis "or any other pulmonary or respiratory disease or condition, either caused by or aggravated by work as a coal miner with exposure to coal mine dust." JA 37. Rather, Dr. Repsher diagnosed COPD and "probably severe" centrilobular emphysema due solely to Mr. Ramage's "long and heavy cigarette smoking habit." JA 37, 38. Dr. Repsher explained that, notwithstanding the scientific literature documenting "to a statistical certainty" a small number of coal miners who will

develop COPD from coal dust inhalation, it was the "overwhelming probability" in any individual case that the COPD would be due to smoking or other non-work related reasons. JA 38, 40. In his first report, Dr. Repsher did not render an opinion on the extent of Mr. Ramage's respiratory disability.

At deposition, Dr. Repsher changed his opinion. At first, he reiterated that there was no convincing evidence of legal pneumoconiosis and that Mr. Ramage did not suffer from it. JA 208, 231. But he then acknowledged that as a general matter, inhalation of coal mine dust can cause "very mild" COPD and focal, not centrilobular, emphysema. JA 208, 224, 229. He thus opined that coal dust exposure comprised a de minimis component of Mr. Ramage's COPD and respiratory impairment and that Mr. Ramage *did* have legal pneumoconiosis. JA 222, 232-33, 234. Dr. Repsher also was more forthcoming about the extent of Mr. Ramage's respiratory disability, stating that he "doubt[ed]" Mr. Ramage could return to work because of his "pulmonary abnormality" and "other surgical changes." JA 213.

In a post-deposition review of several scientific articles, Dr. Repsher reiterated that coal dust exposure can cause only a de minimis loss of lung function. JA 252.

Dr. D. Rasmussen, a Board-certified internist, provided a consultative report after reviewing various treatment records and the medical opinions of Drs.

Simpao, Selby, and Repsher. JA 244-250. Dr. Rasmussen explained that the scientific literature "overwhelming[ly]" demonstrates "a relationship between coal mine dust exposure and emphysema," even in the absence of radiographic changes of pneumoconiosis; that epidemiologic studies further indicate that "coal mine dust causes chronic obstructive lung disease;" that the "mechanisms by which coal mine dust and cigarette smoke cause emphysema. . . are virtually identical;" and that only a small minority of smokers or miners develop COPD. JA 246-47. He thus reasoned that "[t]here is no way physical, physiologic or radiographic by which a distinction can be made between identical forms of COPD caused by smoking and coal mine dust." JA 247. Accordingly, given Mr. Ramage's lengthy history of smoking and coal mine employment, Dr. Rasmussen reached "[t]he only rational conclusion []that both smoking and mine dust are important contributing causes of Mr. Ramage's lung disease." *Id*. He thus diagnosed legal pneumoconiosis, namely "COPD/emphysema caused in part by coal mine dust exposure," and a totally disabling chronic obstructive lung disease due to both cigarette smoking and coal mine dust exposure. JA 247.

C. Decisions Below

***ALJ Award*:** The ALJ found that Mr. Ramage had established total disability based on his arterial blood gas results and the medical opinions of Drs. Simpao, Houser, Rasmussen, and Repsher. JA 321-324. He further found that Mr.

Ramage worked for Island Creek for 28 years, five of which were underground, and that Mr. Ramage then "moved outside while continuing to work for the same employer." JA 320. Relying on the Board's decision in *Alexander v. Freeman United Coal Mining Co.*, 2 Black Lung Rep. (MB) 1-497 (1979), the ALJ determined that "the portion of the 15-presumption [found in Section 921(c)(4)] requiring proof of conditions substantially similar to underground conditions was not intended to apply to above-ground miners working on underground coal mine operations." JA 320. Having credited Mr. Ramage "with 28 years of employment as an above-ground worker on an underground mining operation," the ALJ determined that it was unnecessary to determine whether Mr. Ramage was employed in conditions substantially similar to those in an underground mine. JA 320. Coupled with his total disability finding, the ALJ concluded that Mr. Ramage had invoked Section 921(c)(4)'s rebuttable presumption of entitlement. JA 320-324.

The ALJ then evaluated the conflicting medical opinion evidence to determine whether Island Creek had rebutted the presumption by proving Mr. Ramage did not have legal pneumoconiosis. (The evidence showed Mr. Ramage did not have clinical pneumoconiosis. JA 324-25.)

The ALJ first discredited Drs. Selby and Repsher's opinions that Mr. Ramage's disabling obstructive lung disease and impairment were entirely due to

smoking. The ALJ faulted Dr. Selby's smoking-only etiology: for improperly relying on (1) Mr. Ramage's use of bronchodilators (which treated his asthma and was irrelevant to the cause of his emphysema); (2) Mr. Ramage's bladder and laryngeal cancer history (which did not demonstrate a special susceptibility to smoking-induced lung disease); and (3) his conclusion that Mr. Ramage's emphysema was of the bullous type and the absence of x-ray evidence of clinical pneumoconiosis (both of which were inconsistent with the DOL regulations and preamble to the regulations). JA 325-26.

The ALJ likewise found Dr. Repsher's smoking-only diagnosis not credible because it was based on Dr. Repsher's belief that coal dust exposure causes COPD only in a statistical sense and not in an individually-measureable way (which was inconsistent with the DOL preamble) and that Mr. Ramage's centrilobular emphysema can only be due to smoking (again inconsistent with the preamble). Finally, the ALJ found Dr. Repsher's opinion "equivocal" because he diagnosed legal pneumoconiosis while also opining that coal dust exposure was only a "de minimis" causal factor in Mr. Ramage's respiratory impairment . JA 328.

In contrast, the ALJ found Drs. Simpao and Rasmussen's dual-cause diagnoses well-reasoned, credible, and entitled to full weight. JA 328-330. (The ALJ accorded less weight to Dr. Houser's opinion of coal dust and smoking-induced emphysema because the doctor relied on an inaccurate smoking history.

JA 329.) The ALJ found that the doctors' inability to differentiate the effects of coal dust and smoking on Ramage's COPD or apportion their respective impacts did not undermine or make their opinions equivocal. JA 328-329. Rather, he accepted their unequivocal views that coal dust exposure contributed to Mr. Ramage's COPD and respiratory impairment. *Id*.

Weighing the conflicting opinions together and taking into account the doctors' qualifications, the ALJ credited Drs. Simpao and Rasmussen's opinions over Drs. Selby and Repsher's and found the presence of legal pneumoconiosis established. JA 330.

Addressing the issue whether Mr. Ramage's disability arose in whole or in part from coal mine employment, the second rebuttal prong, the ALJ credited Drs. Simpao and Rasmussen's opinions over Dr. Selby and Repsher's "for the reasons already stated." JA 331. The ALJ further observed that this issue is "essentially the same" as whether the miner suffers from legal pneumoconiosis. Last, the ALJ noted that Drs. Selby and Respher's conclusions regarding the cause of Mr. Ramage's disability were entitled to less weight because they did not diagnose pneumoconiosis in the first instance. JA 331.

The ALJ accordingly concluded that Island Creek had failed to rebut the presumption of entitlement and awarded benefits. *Id*.

Benefits Review Board Affirmance: The Board affirmed the award. The

Board found as unchallenged on appeal that Mr. Ramage suffers from a total pulmonary disability. JA 336. It also affirmed the ALJ's reliance on *Alexander* to find that the miner's surface work at an underground mine site constituted underground coal mine employment for purposes of invoking the 15-year presumption. JA 172. The Board rejected Island Creek's challenge to the constitutionality of the 15-year presumption, along with Island Creek's argument that the presumption does not apply until the Department issues new regulations implementing the statutory amendments set forth in Section 1556 of the ACA. JA 337.

Finally, the Board affirmed the ALJ's conclusion that Island Creek had failed to rebut the presumption. JA 173-75. In particular, the Board determined that the ALJ had reasonably accorded less weight to Drs. Selby and Repsher's opinions "based on flaws in their reasoning." JA 340. It upheld as within the ALJ's discretion, his evaluation of the doctors' findings in light of the preamble and his determination that the doctors' medical beliefs were inconsistent with it. JA 340-41. The Board further upheld the ALJ's finding that Dr. Selby had improperly relied on Mr. Ramage's susceptibility to smoking-related cancers in opining that he was also susceptible to smoking induced emphysema. JA 340. The Board disagreed with Island Creek that Drs. Simpao and Rasmussen's opinions were vague and equivocal, finding that the ALJ had permissibly credited

their opinions because they "specifically attributed" Mr. Ramage's respiratory impairment to both coal dust exposure and smoking and "explained the bases for their findings." JA 341.[10]

Last, the Board upheld the ALJ's determination that Island Creek had failed to rebut the presumption of disability causation. Despite the brevity of the ALJ's analysis, the Board agreed that the ALJ had reasonably given less weight to Drs. Selby and Repsher's opinions because they did not diagnose "clinically significant legal pneumoconiosis, contrary to the [ALJ's] findings." JA 342. In addition, the Board recognized that there was "considerable overlap" between the findings regarding disability causation and legal pneumoconiosis, and that its affirmance of the ALJ's finding that Island Creek failed to disprove the existence of legal pneumoconiosis provided a basis for affirming the ALJ's finding on disability causation. It therefore concluded that Island Creek had not rebutted the presumption and awarded benefits.

This appeal followed.

SUMMARY OF THE ARGUMENT

The ALJ and Board correctly held that Mr. Ramage had worked for at least 15 years "in one or more underground coal mines" for purposes of invoking 30

[10] The Board disagreed with the ALJ's finding that Dr. Repsher's opinion was equivocal. According to the Board, Dr. Repsher "consistently testified" that any contribution to claimant's impairment from coal mine dust was de minimis. JA 341.

U.S.C. § 921(c)(4)'s rebuttable presumption of entitlement. The Act's implementing regulations define "underground coal mine" to include land, structures, and other property above the underground coal deposit. 20 C.F.R. § 725.101(a)(30). There is no dispute that Mr. Ramage worked for more than 15 years in underground coal mines, so defined. This regulation is consistent with the text and history of Section 921(c)(4) and provides a workable, bright-line rule. It is well within the Department of Labor's regulatory authority and is entitled to this Court's deference.

Substantial evidence supports the ALJ's finding that Island Creek failed to rebut the Section 921(c)(4) presumption. It was well within the ALJ's discretion to discredit the opinions of Island Creek's medical experts. The ALJ reasonably found Drs. Selby and Repsher's medical beliefs to be inconsistent with the medical and scientific findings contained in the Department's preamble to the black lung regulations. Moreover, the ALJ reasonably rejected Dr. Selby's unexplained and disputed belief that simply because Mr. Ramage suffered from smoking-related throat and bladder cancer he was more susceptible to smoking-induced lung disease. The ALJ also correctly found equivocal Dr. Repsher's opinion, which changed without explanation over the course of this litigation. Finally, the ALJ permissibly accepted Dr. Simpao and Rasmussen's well-reasoned and documented opinions that Mr. Ramage's 28 years of coal mine employment contributed to his

totally disabling respiratory impairment.

STATEMENT OF STANDARD OF REVIEW

Island Creek's challenge to the invocation of the 15-year presumption presents a question of law. This Court reviews the Board's legal conclusions *de novo*. *A&E Coal Co. v. Adams*, 694 F.3d 798, 800-801 (6th Cir. 2012); *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA as expressed in its implementing regulations is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Caney Creek Coal Co. v. Satterfield*, 150 F.3d at 572. The Director's interpretation of the BLBA's implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation[,]" *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted), even if they are expressed in a brief, *see Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

Island Creek's challenge to the ALJ's finding that it failed to rebut the 15-year presumption raises substantial evidence issues. "When the question is whether the ALJ reached the correct result after weighing conflicting medical evidence, [the Court's] scope of review is exceedingly narrow. Absent an error of law, findings of fact and conclusions flowing therefrom must be affirmed if

supported by substantial evidence." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 489 (6th Cir. 2003). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.*

ARGUMENT

A. The ALJ properly invoked the 15-year presumption.

1. The Fact that the BLBA's Implementing Regulations have not been Updated to Incorporate the ACA's Restoration of the 15-Year Presumption does not Bar an Award of Benefits to Mr. Ramage.

Island Creek contends that because the Secretary has not yet promulgated regulations implementing the ACA, the ACA's restoration of the 15-year presumption is ineffective and the ALJ erred in awarding Mr. Ramage based on it. Pet. Br. at 39-42. This argument is meritless.

The Director acknowledges that the regulation implementing Section 921(c)(4), 20 C.F.R. § 718.305, has not yet been amended to reflect the 2010 amendment and therefore does not, by its own terms, apply to claims filed after 1981. *See* 20 C.F.R. § 718.305(e).[11] However, the fact that the regulation has not yet been updated does not preclude the application of the 15-year presumption to this claim, as Island Creek contends. Section 1556(c) of the ACA plainly states that the changes made to the BLBA under that section apply to all claims filed after

[11] The Department is in the process of issuing regulations to implement the ACA amendments. *See supra* n.3

January 1, 2005, and that are pending on or after the enactment of the ACA. Because the effective date for application of the 2010 amendment is specifically set forth in the statute, the statute is self-executing, and it is not necessary for the Department to issue implementing regulations before the amendment can form the basis for an award of benefits. *See Helen Mining Co. v. Fairman*, 490 Fed. Appx. 459, 460 (3d Cir. 2012) (rejecting argument that award issued under ACA amendments should be vacated and claim held in abeyance pending promulgation of implementing regulations); *Parker-Hannifin Corp. v. Commissioner of Internal Revenue*, 139 F.3d 1090, 1099 (6th Cir. 1998) (lack of implementing regulation by Treasury Department was irrelevant to issue of whether employer's deductions for employee benefits were properly disallowed because statute specifically set forth allowable deductions). *Cf. Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-1142 (9th Cir. 2002) (under self-executing penalty provision of the Longshore Act, district director has no discretion when evaluating whether penalty is due). Further, a recent act of Congress surely trumps the portions of an agency's regulation implementing an earlier version of the law. *See, e.g., Cumberland v. Dep't of Agric. of U.S.*, 537 F.2d 959, 961 (7th Cir. 1976) (a new conflicting statute supersedes inconsistent regulations). Accordingly, the Court should reject Island Creek's argument that the absence of regulations implementing the 2010 amendment renders the 15-year presumption inapplicable to this claim.

2. Mr. Ramage qualifies for the 15-year presumption because he spent more than 15 years working at an underground coal mine.

a. 20 C.F.R. §725.101(a)(30) defines "underground coal mine" to include the above-ground locations where Mr. Ramage worked.

The 15-year presumption is available to miners "employed for fifteen years or more in one or more underground coal mines" who suffer from a "totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). Island Creek does not dispute that Mr. Ramage worked above ground at an underground coal mine for more than 15 years and that he now suffers from a totally disabling pulmonary impairment. It is equally undisputed that Mr. Ramage did not spend 15 years actually working underground at any mine. [12] The question is whether Mr. Ramage's surface work at Island Creek's underground mine counts as work "in one or more underground coal mines[.]" If so, he is entitled to the 15-year presumption.

The answer is in the BLBA's implementing regulations, and that answer is "yes." The Department's regulations define "underground coal mine" as:

> a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (*i.e.*, overburden)

[12] Time a miner spends working "in a coal mine other than an underground mine" also counts toward the 15-year requirement, but only if conditions in that mine were "substantially similar to conditions in an underground mine." 30 U.S.C. § 921(c)(4). Because the ALJ adopted the Director's construction of Section 921(c)(4), he did not rule on the issue of whether Mr. Ramage's above-ground work was "substantially similar to conditions in an underground mine."

> are not removed in mining; ***including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto***.

20 C.F.R. § 725.101(a)(30) (emphasis added). The plain language of this regulation makes clear that Mr. Ramage's work as a chief preparation foreman on the land and in the preparation plant over Island Creek's underground mine was work in an "underground coal mine" for purposes of the BLBA. JA 282- 283, 320, 338. Mr. Ramage is therefore entitled to the 15-year presumption without needing to prove that he worked in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(a).

b. 20 C.F.R. §725.101(a)(30)'s definition of "underground coal mine" is a permissible construction of the Act under *Chevron.*

The Director's interpretation of the BLBA in this regulation, adopted after notice-and-comment rulemaking, is entitled to *Chevron* deference. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d at 572.[13] The first step in *Chevron's* familiar two-step analysis is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. It has not. Section 921(c)(4) does

[13] The BLBA authorizes the Secretary of Labor to promulgate regulations implementing the Act. 30 U.S.C. § 936(a). The Secretary's authority to administer the Act has been delegated to the Director. *See* Secretary's Order 10-2009 (Nov. 6, 2009), 74 Fed. Reg. 58,834 (Nov. 13, 2009). The current definition of "underground coal mine" – 20 C.F.R. § 725.101(a)(30) – was originally promulgated in 1978 as 20 C.F.R. § 725.101(a)(24). *See* 43 Fed. Reg. 36776 (Aug. 18, 1978).

not specifically address how time a miner spends working above ground at an underground coal mine should be treated for purposes of the 15-year presumption. Nor does the Act define "underground coal mine."[14] In light of Congress's silence on this question, the analysis proceeds to *Chevron* step two, which asks "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. The regulation is entitled to "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

The Director's construction of the Act – that an underground coal mine includes land, structures, facilities, and other property above ground, and that employment in those areas therefore qualifies as work in an underground coal mine for purposes of the 15-year presumption – is permissible. Indeed, it is arguably compelled by the Act's history. When Congress enacted the BLBA in 1969, benefits were limited to underground coal miners. *See* 30 U.S.C. §902(d) (1970) (defining "miner" as "any individual who is or was employed in an underground coal mine"); *see also* 30 U.S.C. §§ 901, 902(b), (d), 932(h) (1970). But it is clear

[14] The more general term "coal mine" is defined, for purposes of the BLBA, as "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities[.]" 30 U.S.C. § 802(h)(2). This is substantially identical to the regulatory definition of the same term. *See* 20 C.F.R. § 725.101(a)(12).

that miners who, like Mr. Ramage, worked above ground at underground coal mines were covered by the Act. The first regulation implementing the Act, much like the current one, defined "underground coal mine" to include "all land, buildings, and equipment appurtenant thereto." 20 C.F.R. § 410.110 (i) (1971). Any doubt on this score is erased by the first regulatory definition of "miner" as "any individual who is working or has worked as an employee in an underground coal mine, ***whether he works under the surface performing functions in extracting the coal or above the surface at the mine preparing the coal so extracted***." 20 C.F.R. § 410.110 (j) (1971) (emphasis added).

When Congress adopted Section 921(c)(4) in 1972, it is presumed to have been aware that "underground coal mine" had been interpreted to include accompanying above-ground locations. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Int'l Union, United Automobile, Aerospace & Agric. Implement Workers of America, Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248 (6th Cir. 1996). But this presumption is unnecessary, because the legislative history of the 1972 amendments – which also extended benefits generally to miners at above ground strip mines – plainly shows Congress's awareness of this fact. As explained in the Senate report on H.R. 9212, the Black Lung Benefits Act of 1972:

> The House and Senate version of H.R. 9212 would make miners working on surface or strip mine operations eligible for black lung

> payments, but would not change the requirements of proof of black lung.
> ***
> Existing law limits the program to underground miners. This means that those who have worked exclusively in surface mines – the strip miners – are presently ineligible for program benefits.
> ***
> ***Under current law, the miners who have worked their entire adult lives at above ground facilities of an underground coal mine are eligible for benefits*** if they are totally disabled by coal miners pneumoconiosis but those who may have worked their entire adult lives at even dustier above ground facilities of surface mines are not eligible, even if they have complicated pneumoconiosis.
> ***
> [The 1972 amendments to the BLBA] would correct the inequity by striking the word "underground" from the present law, so that the program would apply to all coal miners, regardless of the physical characteristics of the mine.

S. Rep. No. 92-743, at 22-23 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2326-2327 (emphasis added).

This legislative history leaves no doubt that the 92nd Congress was aware that "underground coal mines," for purposes of the BLBA, included above-ground land, buildings, and facilities. Its decision to use that term in Section 921(c)(4) strongly suggests that it intended to incorporate that established meaning and make the 15-year presumption available to miners like Mr. Ramage. *See McLean v. U.S.*, 566 F.3d 391, 396 (4th Cir. 2009) ("When Congress directly incorporates language with an established legal meaning into a statute, we may infer that

Congress intended the language to take on its established meaning.").[15] While the 1972 amendments struck language from various sections of the Act that previously limited benefits to underground coal miners, Island Creek points to nothing in their text or legislative history suggesting that Congress wanted to limit or change the established definition of an "underground coal mine" for purposes of the new 15-year presumption.

In addition to reflecting Congress's probable intent, the Director's interpretation of Section 921(c)(4) is reasonable and workable. It provides a clear dividing line: all miners who work at least 15 years at an underground mine site are entitled to the 15-year presumption. This eliminates the need to distinguish among miners at the same mine site who work underground regularly, intermittently, or not at all, or to determine (often long after the fact) how much of a given miner's time was spent underground. Even if this interpretation is not compelled by the statute's history, it falls comfortably within the range of permissible options for the Director to adopt under *Chevron*.

[15] The Director's view is also supported by Section 921(c)(4)'s focus on the type of mine a miner works at rather than the locus of the particular miner's work. The provision does not speak in terms of underground coal miners and surface coal miners. Instead, it distinguishes "employ[ment] . . . in one or more underground coal mines" from "employment in a coal mine other than an underground mine[.]" 30 U.S.C. § 921(c)(4).

c. The Seventh Circuit's *Summers* decision does not support Island Creek's position because that court did not address 20 C.F.R. § 725.101(a)(30).

Island Creek does not address 20 C.F.R. § 725.101(a)(30), the Act's history, or *Chevron*. Instead, the operator pins its hopes on *Freeman United Coal Mining Company v. Summers*, 272 F.3d 473 (7th Cir. 2001) . Pet. Br. at 17-18. *Summers* involved a miner who, like Mr. Ramage, worked for more than 15 years at underground coal mines but spent only a few years working underground. *Summers*, 272 F.3d at 476. After affirming the ALJ's ruling that the miner "labored in conditions substantially similar to those underground[,]" the court found that the miner was entitled to the 15-year presumption. *Id.* at 479-80. *Summers* nevertheless provides no support for Island Creek's position because the court did not even consider, let alone reject, the Director's argument that miners who work above-ground at underground mine sites are underground miners under section 921(c)(4). *Cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."), *quoted in Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006).[16]

[16] The Director's interpretation of Section 921(c)(4) was raised to a separate panel in an earlier stage of the *Summers* litigation. *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1225 (7th Cir. 1994). The court declined to consider the question, explaining that "[w]hether Mr. Summers was entitled to the presumption of § 921(c)(4) is not a dispositive issue in this case. The ALJ

Even if it were possible to construe *Summers* as authority for Island Creek's position in the Seventh Circuit, that decision – which did not address 20 C.F.R.§ 725.101(a)(30), the Act's history, or the deference due to the Director's interpretation of the Act – has no persuasive value here. The Court should affirm the ALJ's ruling that Mr. Ramage is entitled to the 15-year presumption because he worked in an underground coal mine for more than 15 years.[17]

B. The ALJ correctly ruled that Island Creek did not rebut the 15-year presumption.

Unlike its legal challenge to the ALJ's invocation of the 15-year presumption, Island Creek's arguments regarding rebuttal primarily raise substantial evidence issues concerning the ALJ's weighing of the conflicting medical opinions.[18] In evaluating whether there is substantial evidence to support

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assumed for the sake of argument that he was, and so must we." *Id.* at 1225. Thus, the Seventh Circuit did not consider the Director's interpretation in either *Summers* decision.

[17] If the Court disagrees, Mr. Ramage is still entitled to the 15-year presumption if he establishes that the conditions of his above-ground work were "substantially similar to conditions in an underground coal mine." While the ALJ did not rule on the question, Mr. Ramage testified that he experienced such heavy dust exposure in his surface work that he was covered with black dust at the end of the workday. JA 285 – 286. The record appears to contain no contrary evidence. The Director takes no position on whether, given the undisputed evidence, a remand would be necessary for the ALJ to make an equivalency determination.

[18] Island Creek summarily argues (Pet. Br. 41-42) that coal mine operators are not limited to rebutting the 15-year presumption by the methods set forth in Section 921(c)(4), and that the ALJ wrongly denied it the opportunity to rebut the

the ALJ's finding, "an appellate tribunal may not reweigh the evidence or make credibility determinations" or "evaluate and resolve conflicting medical evidence." *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1120-21 (6th Cir.1987). When an ALJ explains his reasoning and does not rely on an impermissible basis, this Court must defer to his discretion and judgment in assessing the conflicts in the evidence.

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presumption "by proving mild pneumoconiosis was not substantially responsible for the disability." But Island Creek points to nothing in the record that would support its assertion that it was not permitted an opportunity to rebut the presumption in that manner. Moreover, the question of whether the limitations on rebuttal in Section 921(c) apply to coal miner operators is not determinative to the outcome of this case. As explained herein, the ALJ reasonably discredited Island Creek's rebuttal evidence, thus leaving the presumption intact. In addition, the ALJ found most persuasive Drs. Simpao and Rasmussen's medical opinions that coal dust exposure contributed to Mr. Ramage's total pulmonary disability, JA 330, which adds further credence to Section 921(c)(4)'s presumption of entitlement. JA 331. In these circumstances, the Court need not reach Island Creek's argument regarding appropriate methods of rebuttal for coal mine operators under the statute. *See Smith v. Martin County Coal Corp.*, 233 Fed. Appx. 507, 513 (6th Cir. 2007) (declining to address validity of regulations because issue was unnecessary to outcome of case).

Another issue lurking in the record (but not properly presented either factually or in Island Creek's opening brief) is Island Creek's bare claim that rebuttal may be established by demonstrating that the total disability is not *substantially due* to coal dust exposure. Pet. Br. 12, 36 (emphasis added). To disprove disability causation, however, the party opposing entitlement must show that the miner's totally disabling impairment did not arise in whole or in part out of his coal mine employment. 20 C.F.R. § 718.305(d); s*ee Blakley v. AMAX Coal Co.*, 54 F.3d 1313, 1320 (7th Cir. 1995) F.3d at 1320; *Turner v. Director, OWCP*, 927 F.2d 778, 780 (4th Cir. 1991). This standard in turn requires the employer to "rule out" pneumoconiosis as a contributing cause of disability and not merely prove that the disability was not "substantially due" to pneumoconiosis. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179 (6th Cir. 1989) (interpreting rebuttal of interim presumption under 20 C.F.R. § 727.203); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984) (same and requiring proof that pneumoconiosis played no part in disability).

See Director, OWCP v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983). When medical testimony conflicts, the question "'of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.'" *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir.1989) (quoting *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir.1985)). The ALJ must, however, adequately explain the reasons for his decision. *See Director, v. OWCP Congleton*, 743 F.2d 428, 430 (6th Cir.1984).

Here, the ALJ adequately explained his reasons for discrediting Drs. Selby and Repsher's opinions that smoking was the sole cause of Mr. Ramage's respiratory impairment and for according full weight to Drs. Simpao and Rasmussen's contrary opinions that Mr. Ramage's respiratory impairment was due to both smoking and coal dust exposure. The Court should accordingly affirm the award below.

1. The ALJ permissibly found that the medical opinions submitted by Island Creek's medical experts were not credible.

Island Creek contends that the ALJ irrationally discredited Drs. Selby and Repsher's opinions and thus erred in finding no rebuttal of the 15-year presumption. Pet. Br. 27-36. Island Creek, however, is wrong. The ALJ's garden-variety credibility determinations regarding Drs. Selby and Repsher's opinions easily pass substantial evidence review.

The ALJ gave four reasons for discrediting Dr. Selby's opinion that coal mine dust exposure played no part in Mr. Ramage's COPD or respiratory impairment. Dr. Selby improperly relied on Mr. Ramage's use of bronchodilators, Mr. Ramage's susceptibility to smoking-related cancer, Mr. Ramage's emphysema being of the bullous variety, and the absence of x-ray evidence of clinical pneumoconiosis. JA 325-27. Of these four reasons, Island Creek claims only that the ALJ wrongly found Dr. Selby's diagnosis of bullous emphysema due to smoking to be inconsistent with the preamble.[19] Pet. Br. 29-30. Because Island Creek has let stand the ALJ's other three reasons for discrediting Dr. Selby's opinion, the ALJ ruling must be affirmed. *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 313 (4th Cir. 2012) (*citing Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000) ("declining to reach the employer's other arguments that the ALJ erred in discrediting doctors" opinions "'in light of [the reviewing court's] conclusion that there was a sufficient factual basis to support one reason for discrediting each opinion'").[20]

[19] Dr. Selby was the only physician to diagnose bullous emphysema. To the extent they specified the type of emphysema, the other doctors diagnosed centrilobular emphysema.

[20] In passing, Island Creek asserts that Dr. Selby did not rely on negative x-ray evidence of clinical pneumoconiosis, Pet. Br. at 30, but does not explain why the ALJ's interpretation of the doctor's opinion was wrong. *See* JA 106 (Dr. Selby testifying that diagnosis of smoking-induced emphysema is "tied together" with negative x-ray of clinical pneumoconiosis.). Thus, Island Creek provides the Court

In any event, Island Creek has no answer for the ALJ's refusal to accept Dr. Selby's unexplained belief (again shared by no other doctor) that Mr. Ramage's susceptibility to smoking-related cancer made him more susceptible to smoking-induced lung disease. Dr. Houser specifically and persuasively rebutted this notion, explaining that the two processes were distinct. JA 151-52, 165, and 170. The ALJ reasonably found Dr. Houser's explanation compelling and accordingly discredited Dr. Selby's opinion. JA 325-26. Island Creek's effort to convince this Court of the probity of Dr. Selby's opinion amounts to no more than a call to reweigh the evidence, which this Court does not do. *See, e.g., Adams,* 816 F.2d at1120-21.

The ALJ also properly rejected Dr. Repsher's opinion. First, the ALJ correctly found the opinion "equivocal." JA 328. The doctor first opined that Mr. Ramage did not have legal pneumoconiosis or any respiratory disease caused or aggravated by coal dust exposure," JA 37, 208, 231; he then reversed course and stated Mr. Ramage does have legal pneumoconiosis, *i.e.*, a respiratory condition "*significantly* related to or *substantially* aggravated by coal dust exposure; JA 231, 234; and he then reversed course again (now his third different opinion) by

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with no basis for rejecting the ALJ's interpretation of Dr. Selby's opinion. *See Midland Coal Co. v. Director, OWCP,* 358 F.3d 486, 492 (7th Cir. 2004) (on substantial evidence review, where expert's opinion may be interpreted in several ways, an ALJ's permissible interpretation of the opinion will not be rejected by the court).

asserting coal dust exposure had a *de minimis* effect on Mr. Ramage's respiratory condition. JA 232-23. Dr. Repsher does not explain these reversals, and Island Creek entirely ignores them. Pet. Br. 8-9, 34-35. At bottom, Dr. Repsher's opinion is not so much equivocal as it is contradictory and unintelligible. In any event, the ALJ properly refused to credit it on this basis.[21]

The ALJ also permissibly discredited Dr. Repsher's opinion because it was based on medical beliefs that are inconsistent with the medical and scientific findings contained in the preamble to the black lung regulations. *A & E Coal Co.*, 694 F.3d at 802. Dr. Repsher's diagnosis here was premised on his general medical belief that coal dust exposure causes (at most) only a de minimis impact on lung function.[22] JA 38, 240, 252. As the ALJ found, this belief is inconsistent

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[21] The Board disagreed with the ALJ that Dr. Repsher's opinion was equivocal. JA 341. The Board's characterization of Dr. Repsher's opinion, however, is incomplete and inaccurate. JA 341 (Dr. Repsher "consistently *testified* that any contribution to claimant's impairment from coal dust was de minimis."). As the ALJ found, Dr. Repsher's deposition testimony of a de minimis contribution contradicted his diagnosis of legal pneumoconiosis, JA 328, as well as his prior written report. The Board's incorrect assessment is no bar to this Court reviewing the ALJ's finding. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 355 (6th Cir. 2007) (affirming ALJ's decision as supported by substantial evidence, even though Board did not substantively review that decision); *see also Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997) (explaining that the Board and this Court have the same scope of review: both determine if the ALJ's findings and conclusions are supported by substantial evidence).

[22] The ALJ also correctly observed that Dr. Repsher's belief that focal emphysema is the only type of emphysema caused by coal mine dust exposure is contrary to the Department of Labor's preamble finding. JA 328; *see* 65 Fed. Reg. 79,941

with the preamble findings. JA 327-28; *see* 65 Fed. Reg. 79,399 (Dec. 20, 2000) (reporting medical studies that show a significant reduction in the FEV_1 value related to coal mine employment and explaining that a doctor's opinion that coal mine employment's contribution to COPD is not "clinically significant" is "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature"). Given the divergence between Dr. Repsher's medical beliefs and the Department's (and the scientific community), the ALJ permissibly used his discretion to discredit Dr. Repsher's opinion. *A & E Coal Co.*, 694 F.3d at 802; *Harman Mining Co. v. Director, OWCP*, 678 F.3d at 312; *see also Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) (holding that "[t]he ALJ's reference to the preamble to the regulations unquestionably supports the reasonableness of" the ALJ's weighing of the medical evidence); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (describing ALJ's "sensible" decision to discredit physician's opinion conflicting with scientific consensus on clinical significance of coal-dust-induced COPD, as determined by the Department in the preamble).

(describing study results that showed that "[c]entrilobular emphysema (the predominant type observed) was [s]ignificantly more common among the coal workers"); *see also* JA 146-47 (Dr. Houser testifying that centrilobular emphysema is caused by smoking and coal dust exposure); *Dorland's* at 1461 (defining coal workers' pneumoconiosis as "typically characterized by centrilobular emphysema"). Dr. Repsher diagnosed centrilobular emphysema here.

In sum, substantial evidence supports the ALJ's discrediting of Drs. Selby and Repsher's medical opinions. Because these medical opinions were the only ones that arguably could rebut the 15-year presumption of total disability due to pneumoconiosis, the ALJ's award of benefits must be affirmed.

2. The ALJ properly accorded full weight to Drs. Simpao and Rasmussen's opinions that 28 years of coal dust exposure and 40-plus pack years of cigarette smoking together caused Mr. Ramage's totally disabling respiratory impairment.

Although unnecessary to affirm the award below (because the ALJ permissibly rejected Island Creek's rebuttal evidence), the Court should nonetheless uphold the ALJ's according full weight to Drs. Simpao and Rasmussen's opinions that both coal dust exposure and smoking caused Mr. Ramage's disabling respiratory condition. Island Creek claims the doctors' opinions are "uncertain and speculative" because the doctors could not differentiate and apportion the effects of the two assaults on Mr. Ramage's lungs. Pet. 20-27. To make its case, however, Island Creek simply mischaracterizes the doctors' opinions and relies on inapposite case law.

First, Island Creek's assertion that the doctors' opinions are uncertain is plainly wrong. Neither doctor equivocated in diagnosing both coal dust exposure and smoking as the twin causes of Mr. Ramage's respiratory disease and impairment. JA 9, 60, 247. Although both agreed that smoking, *in the absence of coal dust exposure*, could have caused Mr. Ramage's problems, that was not the

case here, and neither believed smoking was the sole culprit. Moreover, the doctors' inability to differentiate or apportion the effects of coal dust and smoking-induced emphysema does not make their opinions speculative, as Island Creek suggests -- it makes them consistent with the preamble and the state of medical and scientific knowledge. *See* 65 Fed. Reg. at 79,943 ("These observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms…").

Indeed, the ALJ's reliance on Drs. Simpao and Rasmussen's opinions was perfectly consistent with the case law. *See A & E Coal Co.*, 694 F.3d at 800, 803 (upholding ALJ's reliance on Dr. Rasmussen opinion that miner's COPD was due to smoking and coal dust exposure where Dr. Rasmussen opined that both smoking and coal dust exposure cause similar impairments and thus could not differentiate between their effects). *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (ALJ erred in rejecting doctors' reports diagnosing smoking and coal dust as causes of miner's obstructive lung defect but not "allocate[ing the] blame between them"); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) ("'doctors need not make such particularized findings'" regarding competing etiologies) (quoting *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001)). "The ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's

disability." *Summers*, 272 F.3d at 483; *Cornett*, 227 F.3d at 576. No more is needed to support the ALJ's conclusion that Drs. Simpao and Rasmussen offered reasoned and documented opinions. *See Director, OWCP v. Rowe*, 710 F.2d at 255 (to determine if a medical opinion is documented and reasoned, the fact finder must "examine the validity of the reasoning…in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based").

Island Creek's reliance (Pet. Br. 22-24) on *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009) and *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665 (6th Cir. 2010) is misplaced. The medical opinions in those cases were of an entirely different character than Drs. Simpao and Rasmussen's. In *Greene*, the medical opinion was couched in undeniable equivocations, such as sixteen years of coal dust exposure "would probably be significant" and "may have contributed to some extent," whereas nine years of coal dust exposure would "perhaps" not make a "significant contribution." 575 F.3d at 632. More important, unlike here, the ALJ found the medical opinion seriously flawed and discredited it, a determination this Court called "well within the ALJ's discretion." 575 F.3d at 635-36. Thus, this aspect of *Greene* is best understood as a straightforward application of the substantial evidence standard.[23]

[23] Island Creek also relies on *Griffith v. Director, OWCP*, 49 F.3d 184, 185-86 (6th Cir. 1995). There, applying substantial evidence review, the Court upheld an

Finally, Island Creek's assertion that Drs. Simpao and Rasmussen's etiology conclusions are essentially identical to the one this Court rejected in *Tamraz* is off the mark. In *Tamraz*, a products liability case turned on the cause of a welder's Parkinson's disease. The Court held the district court erred in allowing a neurologist to present a purely speculative opinion that manganese exposure could have caused the welder's Parkinson: the neurologist speculated that the welder was exposed to fumes presumably containing manganese, that manganese exposure theoretically could trigger Parkinson's disease, that this welder may have had genes predisposing him to Parkinson's and, therefore, manganese exposure induced Parkinson's by triggering the welder's genetic pre-disposition. 620 F.3d at 670. The Court rejected the doctor's hypothesizing as based on multiple "leaps of faith" and especially on his reliance on a theoretical link between manganese and the development of Parkinson's when there was no scientific support for his premise. *Id*. In contrast, as set forth in the preamble, the scientific studies support – and the medical community accepts – that there is a link between coal dust exposure and the development of obstructive lung disease in coal miners independent of cigarette smoking. 65 Fed. Reg. at 79,939. Moreover, it is not disputed that the effects of smoking and coal dust exposure are additive. *Id*. at 79,939, 79,941; JA 115 (Dr. Selby's testimony that smoking and coal dust

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ALJ's discrediting as equivocal a doctor's opinion that stated the miner's COPD "*might* be due to both smoking and working in the coal mines." Emphasis added.

inhalation have an additive effect); JA 148 (Dr. Houser's testimony that coal dust exposure and smoking have a cumulative effect); JA 223 (Dr. Repsher's testimony that smoking and coal dust inhalation have an additive effect). Therefore, Drs. Simpao and Rasmussen's opinions do not falter. They are based on scientific evidence, as opposed to a theoretical premise.

In sum, the opinions of Drs. Simpao and Rasmussen were not uncertain or speculative and the ALJ reasonably accorded them full weight.

CONCLUSION

The Court should affirm the award 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 10, 340 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2013, copies of the Director's brief were served electronically using the Court's CM/ECF system and by mail, postage prepaid, on the Court and the following:

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