

No. 12-3310

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**NATIONAL MINES CORPORATION;
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE CO.**

Petitioners

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
WILLIAM E. DAVIS**

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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**On Petition for Review of a Final Order of the Benefits
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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

National Mines Corporation and its insurance carrier (collectively, National Mines or employer) petition this Court to review the final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's (ALJ's) decision awarding federal black lung benefits to William Davis (Davis or claimant). This Court has jurisdiction over National Mines' petition 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 (the Act or the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c)—Davis's exposure to coal mine dust—occurred in Pennsylvania, within the jurisdictional boundaries of this Court.

The petition also meets section 21(c)'s timeliness requirements. The administrative law judge issued his decision awarding benefits on May 27, 2011. Petitioner's Appendix (App.) 14. National Mines filed a notice of appeal with the Board on June 20, 2011, within the statutorily mandated thirty-day period. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(a)). The Board issued its final order on June 22, 2012. App. 6. National Mines petitioned this Court for review on August 17, 2012, within the statutorily mandated sixty-day period. App. 1; 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)). Thus, this Court has both subject-matter and appellate jurisdiction to review the Board's order. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)).

STATEMENT OF THE ISSUES

Former miners who are totally disabled by a chronic obstructive pulmonary disease (COPD) are entitled to federal black lung benefits if that disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). There is no dispute that Davis suffers from

totally disabling COPD. The medical experts offered conflicting opinions about whether his COPD was caused solely by smoking or by a combination of smoking and exposure to coal dust. In weighing the credibility of these experts, the ALJ considered the preamble to the regulation, which sets forth the legal, medical, and scientific premises underlying the Department's inclusion of COPD due to coal dust exposure in the definition of pneumoconiosis. The ALJ, crediting the expert who attributed Davis's disease to a combination of smoking and mining, awarded benefits.

The questions presented are:

1. Is it permissible for an ALJ to consult the BLBA's regulatory preamble when assessing the credibility of a medical expert's testimony?
2. Does substantial evidence support the ALJ's assessment of the conflicting medical opinions and ultimate decision awarding benefits to Davis?

STATEMENT OF THE CASE

A. Legal framework

Former coal miners who are totally disabled by pneumoconiosis, a respiratory or pulmonary impairment arising out of coal mine employment, are entitled to BLBA benefits. 30 U.S.C. §§ 901(a), 902(b). It is undisputed that claimant William Davis suffers from chronic obstructive pulmonary disease

(COPD) that totally disables him from performing his former work as a miner.¹ Pet. Br. at 21; App. 30, 48. The disputed issue in this case is whether Davis’s disabling COPD is pneumoconiosis.

1. Regulatory provisions

Compensable pneumoconiosis takes two 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). This cluster of diseases includes, but is not limited to, “coal workers’ pneumoconiosis” as that term is commonly used by doctors. 20 C.F.R. § 718.201(a)(1). Clinical pneumoconiosis is generally diagnosed by chest x-ray, CT scan, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

“Legal pneumoconiosis” refers to “any chronic lung disease or impairment ...arising out of coal mine employment” and specifically includes “any chronic restrictive or obstructive pulmonary disease” with such causation. 20 C.F.R.

¹ Chronic obstructive pulmonary disease, commonly abbreviated “COPD,” is a lung disease characterized by airflow obstruction. The Merck Manual at 568 (17th ed. 1999). COPD “includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma.” 65 Fed. Reg. 79939 (Dec. 20, 2000). The medical experts categorized Davis’s COPD as emphysema. App. 73 (Dr. Jaworski), 84 (same), 122 (Dr. Fino), 140 (same).

§ 718.201(a)(2); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 312 (3d Cir. 1995) (“The ‘legal’ definition of pneumoconiosis (*i.e.*, any lung disease that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment) is much broader than the medical [or ‘clinical’] definition, which only encompasses lung diseases caused by fibrotic reaction of lung tissue to inhaled dust.”); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n. 2 (4th Cir. 1996) (“COPD, if it arises out of coal-mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis.”). Coal mine dust does not need to be the sole or even the primary cause of a claimant’s disabling respiratory disease for that disease to constitute legal pneumoconiosis. A disease arises out of coal mine employment if it is “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b). Finally, pneumoconiosis is “a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure.” 20 C.F.R. § 718.201(c); *Swarrow*, 72 F.3d at 314 (“Congress, in enacting the BLBA, recognized the perniciously progressive nature of the disease.”).

2. Background to the inclusion of certain obstructive pulmonary diseases in the definition of pneumoconiosis (20 C.F.R. § 718.201(a)(2)).

Since 1978, the BLBA has defined pneumoconiosis broadly 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); *see* Pub. L. 95-239, § 2(a) (Mar. 1, 1978). This definition is the source of the concept of “legal” pneumoconiosis, and the original implementing regulation mimicked the statute’s language. *See* 20 C.F.R. § 718.201 (Definition of pneumoconiosis); Standards for Determining Coal Miners’ Total Disability or Death Due to Pneumoconiosis (Final Rule), 45 Fed. Reg. 13677, 13685 (Feb. 29, 1980) (initial promulgation); *see generally* *Swarrow*, 72 F.3d at 315 (describing pneumoconiosis under section 718.201(1999)).

As these provisions were applied over the years, there was much litigation over exactly what type of lung disease might be considered to have arisen out of coal mine employment. While there was no dispute (or very little) in the medical community that chronic *restrictive* lung disease could arise from coal mine employment and therefore be designated as legal pneumoconiosis, some medical experts testified that chronic *obstructive* disease could not. These doctors provided such opinions despite the fact that courts of appeals had accepted that COPD arising out of coal mine employment is legal pneumoconiosis. *See, e.g., Swarrow*, 72 F.3d at 315; *see also Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368 (11th Cir. 1997); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996); *Freeman United Coal Mining Co. v. Director, OWCP*, 957 F.2d 302, 303 (7th Cir. 1992); *Consolidation Coal Co. v. Hage*, 908 F.2d 393, 395 (8th Cir. 1990);

Peabody Coal Co. v. Holskey, 888 F.2d 440, 442 (6th Cir. 1989); *see generally* 65 Fed. Reg. 79,943-44 (Dec. 20, 2000) (collecting cases).

To avoid inconsistent results and claim-by-claim review of the issue, the Department in 1997 proposed changing the regulation to prevent the categorical rejection of coal dust exposure as a possible cause of COPD. *See* Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended; Proposed Rule (“1997 Proposed Rule”), 62 Fed. Reg. 3337, 3343 (Jan. 22, 1997); *see also* Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended; Final Rule (“2000 Final Rule”), 65 Fed. Reg. 79,938 (Dec. 20, 2000). The proposed rule provided that:

“Legal pneumoconiosis” includes any chronic disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any *chronic* restrictive or *obstructive pulmonary disease* arising out of coal mine employment.

62 Fed. Reg. 3376 (emphasis added).

The proposed change resulted in both favorable and unfavorable comments. Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended; Proposed Rule (“1999 Proposed Rule”), 64 Fed. Reg. 54,978-79 (Oct. 8, 1999). Individuals providing unfavorable comments asserted that COPD—in particular, emphysema—does not arise from coal dust exposure, or at

least not unless the miner had complicated pneumoconiosis.² *See* 2000 Final Rule, 65 Fed. Reg. 79,938-39; 79,942-44. In support, they argued that the scientific studies relied upon by the Department in the proposed rule were not valid or were misinterpreted, and that any obstruction resulting from coal dust exposure was not “clinically significant.” *Id.*, at 79,939-43.

The regulatory preamble to the final rule addresses these unfavorable comments in painstaking detail and presents and assesses the medical and scientific literature supporting the Department’s contrary conclusion that exposure to coal mine dust can cause COPD. 2000 Final Rule, 65 Fed. Reg. 79937-45. The preamble also addresses medical literature on the interrelationship between coal dust exposure and smoking as causes of COPD, crediting studies finding the risks of smoking and dust exposure to be additive. *Id.*, at 79939-41.

Of particular significance in reaching these conclusions, the preamble identifies the Department’s reliance on a comprehensive study by the National Institute for Occupational Safety and Health (NIOSH). *Id.*, at 79939, 79943; 1997 Proposed Rule, 62 Fed. Reg. 3343 (citing National Institute for Occupational

² “Complicated” pneumoconiosis, sometimes referred to as “progressive massive fibrosis” or “severe fibrosis”, is a severe form of coal workers’ pneumoconiosis. A miner suffering from that disease is irrebuttably presumed to be totally disabled by it. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *Bridger Coal Co. v. Director, OWCP*, 669 F.3d 1183, 1186-87 (10th Cir. 2012).

Safety and Health, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust* § 4.2.2. *et seq.* (1995)).³ NIOSH, the statutory scientific advisor to the black lung benefits program, *see* 30 U.S.C. § 902(f)(1)(D), and an expert in the analysis of occupational disease research, reviewed the Department's proposed revisions and concluded that "NIOSH scientific analysis supports the proposed definitional changes." 1999 Proposed Rule, 64 Fed. Reg. 54979.

In regards to the unfavorable comments, the Department rejected, point-by-point, the criticisms leveled at the scientific studies it relied on. 2000 Final Rule,

³ In April 2011, 16 years after publication of its original *Criteria for a Recommended Standard*, NIOSH released Current Intelligence Bulletin 64, *Coal Mine Dust Exposure and Associated Health Outcomes, A Review of Information Published Since 1995* (2011). As its title indicates, the purpose of the Bulletin was to "update the information on coal mine dust exposures and associated health effects from 1995 to the present." *Id.*, at iii. One of the main conclusions drawn from the review of new information was that the "new findings strengthen [the] conclusions and recommendations" [reached in the original 1995 publication]. *Id.*, at 5. Among other findings, the Bulletin confirms the dust-related effects on chronic airway obstruction, including emphysema, as well as the similar effects on COPD caused by smoking and dust exposure. *Id.*, at 23-24. A draft of Bulletin 64 was made available for notice and comment, 75 Fed. Reg. 52,355 (August 25, 2010), and the National Mining Association submitted largely unfavorable comments criticizing, *inter alia*, the science underlying a connection between coal dust exposure and the development of COPD. Both Bulletin 64 and the 1995 *Criteria for a Recommended Standard* are available on the NIOSH website at <http://www.cdc.gov/niosh/docs/2011-172/> and <http://www.cdc.gov/niosh/docs/95-106/>, respectively.

65 Fed. Reg. 79,938-43. With regard to emphysema in particular, the Department noted that:

Drs. Fino and Bahl find no scientific support that clinically significant emphysema exists in coal miners without progressive massive fibrosis [*i.e.*, complicated pneumoconiosis]...but the available pathologic evidence is to the contrary...Centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers.

Id., at 79,941 (study and rulemaking record citations omitted). Thus, the Department concluded that “[c]ontrary to the commenters’ argument, then, the record does contain overwhelming scientific and medical evidence demonstrating that the coal mine dust exposure can cause obstructive lung disease.” *Id.*, at 79,944.

The proposed rule became effective January 19, 2001, and is codified at 20 C.F.R. § 718.201(a). The Department gave the provision retroactive effect, making it applicable to all claims pending on the new regulation’s January 19, 2001, effective date, because the changes were consistent with prior court decisions, all of which accepted that legal pneumoconiosis may include COPD. The revised definition of pneumoconiosis was upheld both as to substance and retroactive effect. *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002); *see also Nat’l Mining Ass’n v. Chao*, 160 F.Supp.2d 47, 72-73 (D.D.C. 2001), *aff’d and rev’d in part*, 292 F.3d 849 (rejecting challenge to DOL’s authority to define pneumoconiosis).

B. Course of the proceedings below.

Davis filed this claim for federal black lung benefits in April 2004. Director's Exhibit (DX) 2, 34.⁴ After a formal hearing, ALJ Burke denied the claim. App. 48. On appeal, the Benefits Review Board vacated the denial and remanded for further consideration. App. 38. The Board denied employer's motion for reconsideration. App. 28. On remand, the ALJ awarded benefits. App. 26. The Board affirmed the award on June 22, 2012. App. 13. National Mines then petitioned this Court for review. App. 1.

STATEMENT OF THE FACTS

A. Davis's work and smoking histories.

Davis worked as an underground coal miner in Pennsylvania for at least sixteen years between 1967 and 1984. App. 29 n.1, 30 n.2, 41, 42; DX 3; Pet. Br. at 5. He smoked cigarettes from 1956 to 2004. App. 15. The evidence of Davis's smoking history varies, but the ALJ determined that he had a smoking history of at least forty pack-years. App. 41; Pet. Br. at 5-6.

⁴ The Director's Exhibits are included in the Board's September 27, 2012, Index of Documents but are not paginated. *See* App. 5. The DX citation is employed for the reader's convenience to refer to record documents that are not also part of the Appendix. Employer's Exhibits not included in the Appendix will be cited to as "EX."

B. The relevant medical evidence.⁵

This appeal centers on the ALJ's weighing of Drs. Jaworski's and Fino's conflicting medical opinions regarding the etiology of Davis's disabling COPD. Dr. Jaworski concluded that Davis suffers from COPD/emphysema caused by smoking and coal dust exposure, whereas Dr. Fino diagnosed COPD/emphysema due solely to smoking.

1. Dr. Jaworski.

Dr. Andrzej Jaworski examined Davis in December 2004.⁶ Dr. Jaworski recorded a 20-year underground coal mine employment history; a 48-year pack-per-day smoking history; and Davis's complaints of shortness of breath, wheezing and dyspnea when walking. App. 50-51. He conducted medical testing—a chest x-ray, electrocardiogram, and pulmonary function and arterial blood gas tests—and reported that, although the blood gas test showed normal results, the pulmonary

⁵ The parties agree that Davis has totally disabling COPD and that he does not have clinical pneumoconiosis. Pet. Br. at 6; App. 30 n.2, 31. Only the cause of Davis's COPD is at issue. Much of the medical evidence of record is not directly relevant to this issue, and is therefore not included in this summary of the evidence. For example, the results of various x-ray readings (which are primarily used to diagnose clinical pneumoconiosis, *see* 20 C.F.R. § 718.202(a)(1)) and pulmonary function tests and arterial blood gas studies (which are primarily used to determine the extent of a respiratory impairment, *see* 20 C.F.R. § 718.204(b)(2)(i)-(ii)), are not summarized here.

⁶ This examination was provided by the Department of Labor to fulfill its statutory duty to provide a claimant-miner with “an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. § 923(b).

function test revealed “mild restriction and moderately severe obstruction” with “no bronchoreversibility.”⁷ App. 52. Based on these results, his physical examination, and Davis’s occupational and smoking histories, Dr. Jaworski diagnosed “moderately severe COPD” due to “cigarette smoking with significant contribution of coal dust exposure.” App. 53. Dr. Jaworski concluded that Davis’s pulmonary impairment “was severe enough to prevent [Davis] from performing certain aspects of his last coalmining job, such as walking steps, escaping from coal mine in case of an emergency.” App. 53.

⁷ 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 FEV 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.

Arterial blood gas tests “are performed to detect an impairment in the process of alveolar gas exchange.” 20 C.F.R. § 718.105(a). The defect primarily manifests “as a fall in arterial oxygen tension either at rest or during exercise.” *Id.* “[A]lveolar gas” refers to “the gas in the alveoli of the lungs, where gaseous exchange with the capillary blood takes place.” *Dorland’s Illustrated Medical Dictionary* at 756 (30th Ed. 2003). Alveoli are the “small saclike structures” in the lungs. *Id.*, at 55, 1070.

Dr. Jaworski elaborated on and provided further support for his diagnosis in deposition testimony. App. 54-109. Dr. Jaworski stated that Davis “suffers from chronic obstructive lung disease as a general category,” and based on the pulmonary function spirometry, his disease is “between emphysema and bronchial type of obstruction.” App. 68, 67. Based on the lapse of twenty years since Davis’s last coal dust exposure and the lack of a history of cough and sputum, Dr. Jaworski ruled out chronic industrial bronchitis. App. 68, 73. Based on Davis’s age when the examination was conducted (66), his 20-year underground coal dust exposure history, and 48-pack-year smoking history, Dr. Jaworski determined that Davis’s COPD had been caused by both coal dust and cigarette smoke. App. 99-101.

Dr. Jaworski stated that smoking was the predominant cause of Davis’s COPD, “mainly because of the duration of exposure.” App. 101. Similarly, Dr. Jaworski concluded that Davis’s history of coal dust exposure and the pulmonary function test results indicated that Davis’s coal dust exposure had also contributed to his COPD. App. 104. Dr. Jaworski stated that “with a reasonable degree of medical certainty there’s a contribution, but the degree of the contribution, I can’t really estimate.” App. 106. “It could be up to 30 percent.” *Id.* When asked to specify coal dust’s contribution to the disease more precisely, Dr. Jaworski testified that “[t]here’s no other specific test that discriminates the chronic

obstructive lung disease from cigarette smoking and other causes, other than history and pulmonary function testing.” App. 106-07. Dr. Jaworski explained he could assign contribution percentages based on the discrepancy of exposure, for example “[i]f somebody has 50 years of smoking and 10 years of coal dust exposure, then obviously the degree of contribution of cigarettes would be at least five times greater than based on the amount of exposure, duration of exposure.” App. 107-08.

2. Dr. Fino.

Dr. Gregory Fino examined Davis in November 2006 and conducted a review of additional medical records provided to him. App. 111, 117. He recorded a 20-year underground mining history ending in 1985, a 42 pack-year smoking history ending in 2002, and a history of shortness of breath for the last 20 years. App. 112. Dr. Fino diagnosed severe emphysema with no evidence of clinical pneumoconiosis. App. 122. He noted “no evidence of an increased deposition of coal dust in the lungs that would result in significant emphysema” and that the “number of years worked in the mines would not be expected to cause a severe expiratory impairment.” *Id.* Dr. Fino acknowledged that coal dust can cause emphysema independent of cigarette smoking; however, he stated, “there is ample evidence in this case to indicate cigarette smoking as the cause of this man’s emphysema.” *Id.*

Dr. Fino summarized several studies that, in his view, showed correlations between emphysema and both clinical pneumoconiosis and the “coal content” of a miner’s lungs. App. 124-26. Dr. Fino explained that one study showed that the average non-smoking miner with “an average lung coal content (correlating with minimal or sparse [clinical] pneumoconiosis)” has 7% to 10% more emphysema than a non-smoking non-miner, and that this 10% increase in the amount of emphysema correlated to a 7% reduction in the pulmonary function test FEV1 results. App. 126. Dr. Fino noted, “This reduction is not clinically significant in the average coal miner.” *Id.* This same study concluded, in Dr. Fino’s words, that “the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema.” *Id.*

Based on the medical literature, Dr. Fino stated that “it is indeed possible to determine in a given miner whether or not coal mine dust inhalation was a clinically significant contributing factor in impairment or disability.” *Id.* With respect to Davis, Dr. Fino concluded that there was “insufficient objective evidence to justify a diagnosis of coal workers’ pneumoconiosis,” that Davis has “a disabling respiratory impairment...secondary to cigarette smoking,” that Davis is totally disabled from a respiratory standpoint, and that, even if Davis has coal workers’ pneumoconiosis, “it has not contributed to his disability. He would be as disabled had he never stepped foot in the mines.” App. 127.

When deposed, Dr. Fino testified that Davis has a severe obstructive impairment and that “it’s all due to emphysema, which is destruction of the lung tissue.” App. 138. He again stated that it is medically feasible to distinguish between coal dust exposure and cigarette smoking as the cause of emphysema. First, he looked at the “dose-response relationship.” App. 141. Noting Davis’s 40 pack-year smoking history and 16 to 19 years of exposure to coal mine dust, Dr. Fino concluded that “smoking wins in terms of appearing to be a more significant factor in this case.” App. 142. Second, relying on the medical literature correlating coal dust-induced emphysema with clinical pneumoconiosis, and the absence of x-ray evidence that Davis had clinical pneumoconiosis, Dr. Fino stated that he “would not expect [Davis] to have any more than an average loss of FEV-1” as a result of his coal dust exposure. App. 142-43. He reiterated his view that this average loss (a 7% reduction in FEV-1) was not a “clinically significant contributing factor to [Davis’s] disability” because the miner “would be as disabled as I find him now” even if “he had never worked in the mines.” App. 143-44, 149, 150, 151.

3. Dr. Renn.⁸

Dr. Joseph Renn examined Davis in March 2005, and provided a supplemental report in March 2007. DX 20; EX 2. Dr. Renn recorded a 20-year history of coal mine work and a smoking history of 40 to 50 pack years. He reported the chest x-ray was negative for pneumoconiosis. Dr. Renn diagnosed “pulmonary emphysema owing to tobacco smoking” with a resulting “moderately severe obstructive ventilatory defect” that disabled claimant from performing his last coal mine job or similar work. *Id.* Dr. Renn concluded, “with a reasonable degree of medical certainty that [Davis’s] pulmonary emphysema and moderately severe obstructive ventilatory defect resulted from his years of tobacco smoking rather than exposure to coal mine dust.” *Id.* He reiterated his conclusion when deposed. EX 2.

C. Summary of the decisions below.

1. ALJ Denial, January 23, 2008.

ALJ Burke found that Davis worked as a coal miner for at least 16 years and smoked a pack of cigarettes a day for at least 40 years. App. 41, 42. He found that Davis was totally disabled. App. 48. He denied benefits, however, on the ground

⁸ National Mines does not challenge the ALJ’s determination that Dr. Renn’s opinion on the cause of Davis’s COPD was conclusory and unexplained in this appeal. It is, however, necessary to briefly summarize Dr. Renn’s opinion in order to fully understand the ALJ and Board decisions.

that Davis had failed to establish either clinical or legal pneumoconiosis. *Id.* The ALJ found the x-ray readings and CT scan interpretations to be negative for clinical pneumoconiosis. *Id.* at 46. On the question of legal pneumoconiosis, the ALJ gave “[s]ignificant weight” to the opinions of Drs. Renn and Fino, which the ALJ characterized as “reasoned and well documented” and “supported by the objective medical evidence of record.” *Id.* at 47. He also described their credentials as “excellent.” *Id.* In contrast, the ALJ gave “little weight” to Dr. Jaworski’s opinion, which the ALJ described as “based on possibilities as he was unable to determine whether [Davis’s] emphysema was caused by *his* coal dust exposure.” *Id.* (emphasis in original).

2. Benefits Review Board Remand, February 19, 2009.

Acting *pro se*, Davis appealed to the Board, which vacated the ALJ’s denial of benefits and remanded the case for further consideration. App. 29, 38. The Board affirmed the ALJ’s finding that Davis had not established that he suffered from clinical pneumoconiosis, but vacated the ALJ’s finding on legal pneumoconiosis. App. 31, 37. The Board held the ALJ failed to adequately explain the basis for his treatment of all three medical experts. App. 33-37.

The Board held that the ALJ had failed to “determin[e] the rationale, if any, Dr. Renn provided for his conclusion that claimant’s COPD (emphysema) is unrelated to coal dust exposure[.]” App. 34. As for National Mines’ other expert,

the Board pointed out that the ALJ had failed to adequately address Dr. Fino's statement that "the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema" and his reliance on various articles reaching the same conclusion. App. 35-36 (quoting App. 143-44). The Board pointed out that the BLBA's implementing regulation provides that pneumoconiosis can be diagnosed "notwithstanding a negative x-ray" and the Department's recognition, in the regulatory preamble, "that coal mine dust exposure can cause obstructive lung disease, separate and distinct from clinical pneumoconiosis." App. 36 (quoting 20 C.F.R. § 718.202(a)(4); citing 2000 Final Rule, 65 Fed. Reg. 79938-45). The Board instructed the ALJ to "further consider whether Dr. Fino provided a reasoned opinion as to the existence of legal pneumoconiosis." App. 36.

The Board also identified flaws in the ALJ's evaluation of Dr. Jaworski's testimony. The ALJ's decision to discredit Dr. Jaworski's opinion as "based on probabilities and not on the record evidence" was inconsistent with the ALJ's evaluation of National Mines' experts because the ALJ "failed to recognize" that Dr. Jaworski, like Dr. Renn, had based his opinion "on his review of claimant's work and smoking histories, the objective evidence demonstrating an obstructive respiratory condition, and the results of his own physical examination of [Davis]." App. 34. The Board also held that the ALJ's analysis "does not reflect consideration of Dr. Jaworski's complete deposition testimony" where that doctor

explained why it was not medically feasible to distinguish between COPD caused by smoking and coal dust exposure. App. 35. The Board noted that the Department had credited evidence that “smoking and coal dust exposure can impair the lungs similarly, causing an obstructive impairment” and favorably cited cases in the regulatory preamble holding that “a claimant should not be denied benefits because a physician is unwilling or unable to state the exact degree of impairment caused by pneumoconiosis.” App. 35 (citing 2000 Final Rule, 65 Fed. Reg. 79943, 79946). The Board instructed the ALJ to consider these comments in evaluating Dr. Jaworski’s opinion on remand, and also to consider Dr. Jaworski’s qualifications, which the ALJ had not addressed in his first decision. App. 35.

The Board summarily denied National Mines’ motion for reconsideration. App. 28

3. ALJ Award, May 27, 2011.

On remand, ALJ Burke found that the weight of the medical opinion evidence established that Davis had legal pneumoconiosis and awarded benefits. App. 26. The ALJ determined that Dr. Jaworski’s opinion was both well-documented and well-reasoned. The ALJ found that the doctor had detailed the exposure histories, symptoms, and objective test results upon which he based his diagnosis of legal pneumoconiosis. App. 23. While Dr. Jaworski stated that it was not medically feasible to distinguish between impairment due to smoking and that

due to coal mine dust exposure, the ALJ found that the doctor had adequately explained, based on Davis's pulmonary function tests and exposure histories, why cigarette smoking was the major cause of Davis's COPD but coal dust exposure was still a significant contributing factor. *Id.* The ALJ noted that Dr. Jaworski's opinion was consistent with the Department's view that smokers who engage in coal mining have an additive risk for developing significant obstruction. App. 23-24 (citing 2000 Final Rule, 65 Fed. Reg. 79,940).

The ALJ "accorded little probative weight" to Dr. Fino's opinion because that doctor had "ruled out coal dust exposure as a significant factor in [Davis's] COPD based on his view that the amount of emphysema due to coal dust exposure is based on the degree of clinical pneumoconiosis that is present." App. 24. According to the ALJ, this view is "inconsistent with the Department of Labor's recognition that coal dust can contribute significantly to a miner's obstructive lung disease independent of clinical pneumoconiosis. *Id.* (citing 2000 Final Rule, 65 Fed. Reg. 79,940; *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008); *J.O.[Obush] v. Helen Mining Co.*, 24 Black Lung Rep. (Juris) 1-117, 1-125-26 (Ben. Rev. Bd. 2009)). The ALJ acknowledged that Dr. Fino had testified that he did not rule out legal pneumoconiosis solely on the basis of the negative chest x-ray, but found that Dr. Fino's report was "devoid of any other explanation for his exclusion of Claimant's sixteen years of exposure to coal mine

dust as a significant contributing cause of his COPD.” App. 24. The ALJ also rejected Dr. Fino’s view that the average 7 percent decrease in FEV1 due to coal dust reported in the studies he relied on was clinically insignificant in Davis’s case. App. 25. The ALJ found the doctor’s conclusion flawed and inconsistent with the “discussion in the preamble recognizing that statistical averaging may hide the significant effect that coal mine dust exposure can have on the pulmonary function of an individual miner.” App. 25.

Finally, the ALJ found that Dr. Renn’s opinion warranted little probative weight because it was conclusory. The ALJ determined that Dr. Renn had provided no rationale for his conclusion that Davis’s emphysema resulted solely from tobacco smoking and was not significantly related to his years of coal dust exposure. App. 24. Because both Dr. Fino and Dr. Renn did not believe Davis’s COPD constituted legal pneumoconiosis, the ALJ discounted their conclusions that pneumoconiosis did not contribute to Davis’s disability. App. 25.

4. Benefits Review Board Affirmance, June 22, 2012.

The Board affirmed the award of benefits. The Board held that substantial evidence supported the ALJ’s decision to credit Dr. Jaworski’s diagnosis of legal pneumoconiosis as well-reasoned and documented. App. 10. Because it affirmed on this ground, the Board held it was not necessary to address the employer’s argument that the ALJ had erred in finding Dr. Jaworski’s opinion to be consistent

with the Department's preamble regarding the additive risk of smoking and coal mine dust exposure. App. 10 n.6.

The Board held that the ALJ had acted within his discretion in discounting Dr. Fino's opinion because that doctor relied heavily on the absence of clinical pneumoconiosis to support his conclusion that Davis does not have legal pneumoconiosis, a chain of reasoning the Board described as "contrary to the premises underlying the regulations, which permit a finding of legal pneumoconiosis notwithstanding the absence of radiographic evidence of clinical pneumoconiosis." App. 11. The Board rejected National Mines' contention that the ALJ had improperly treated the regulatory preamble "as evidence, a legal rule, or a presumption that all obstructive lung disease is pneumoconiosis," instead concluding that the ALJ had "permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment." *Id.* The Board also affirmed the ALJ's determination that Dr. Renn's opinion on the cause of Davis's COPD was conclusory and warranted little consideration. *Id.* Accordingly, the Board affirmed the ALJ's decision to credit Dr. Jaworski's opinion over those of Drs. Fino and Renn and to find that claimant established the presence of legal pneumoconiosis.

The Board also affirmed, as supported by substantial evidence, the ALJ's determination that Davis's legal pneumoconiosis substantially contributed to his total pulmonary disability. App. 12. The Board held that the ALJ had permissibly discounted Dr. Fino's and Dr. Renn's opinions on disability causation because neither doctor diagnosed legal pneumoconiosis, contrary to the ALJ's finding. App. 12-13. Having affirmed the ALJ's conclusion that Davis was totally disabled by legal pneumoconiosis, the Board affirmed the award of benefits.

SUMMARY OF THE ARGUMENT

National Mines argues that the ALJ violated the Administrative Procedure Act (APA) by consulting the preamble to the BLBA's implementing regulations, which contains the Department of Labor's evaluation of certain medical and scientific issues underlying the regulations, and then crediting the medical experts on the ground that their opinions were either consistent or inconsistent with the views expressed in the preamble. National Mines produces no authority for its claim of an APA violation, and four courts of appeals, including this one, have rejected it. The Court should uphold the ALJ's discretion to rely on the Department's preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis. The ALJ properly exercised his discretion here. To the extent

that the Board erred by instructing the ALJ to consider the preamble in its first decision remanding the claim, that error was harmless.

In addition to its APA argument, National Mines raises various substantial evidence challenges to the award of benefits. These are essentially requests for this Court to re-weigh the evidence. The ALJ adequately explained his reasons for crediting Dr. Jaworski's opinion and for discounting Dr. Fino's opinion. Credibility determinations are the ALJ's to make, and this ALJ's assessment of the two conflicting expert opinions is supported by substantial evidence and should be affirmed.

ARGUMENT

The ALJ's Ruling That Davis Suffers From A Totally Disabling Pulmonary Disease Caused, In Part, By His Exposure To Coal Mine Dust Is In Accord With The APA And Supported By Substantial Evidence.

A. Standard of Review.

To the extent that National Mines' challenge to the ALJ's reliance on the preamble presents a question of law, the Court reviews that de novo. *Swarrow*, 72 F.3d at 313. The Director's reasonable interpretation of the Act and the Department's black lung regulations, however, is entitled to substantial deference. *Id.*

National Mines' challenges to ALJ Burke's credibility determinations and weighing of the medical evidence on the disease causation issue are subject to

substantial evidence review. This Court is to review the record to determine whether the ALJ's factual findings are rational, consistent with applicable law, and based upon substantial evidence. *Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

B. The ALJ's consideration of the preamble to the BLBA's implementing regulations, which provides the Department of Labor's rationale for the regulations and evaluation of the medical and scientific literature on black lung disease, did not violate the APA.

1. An ALJ may consider the regulatory preamble in assessing the credibility of medical experts.

National Mines expends much effort arguing that an ALJ cannot rely on the Department of Labor's preamble evaluation of relevant scientific and medical issues to credit or discredit medical experts without violating the APA. Pet. Br. at 17-21, 31-37. Contrary to National Mines' contention, neither the ALJ, nor the Board, relied on the preamble "as a source of binding legal standards and criteria for evaluating medical evidence" in violation of the APA. Pet. Br. at 32. Rather, in a proper exercise of his discretion, the ALJ permissibly consulted the preamble for further elaboration of the Department's position on the regulatory definition of pneumoconiosis to support his conclusion that Dr. Jaworski's opinion was consistent with both the regulation and the interpretative case law and that Dr. Fino

based his opinion on a premise inconsistent with the regulatory definition. App. 23-25.

An ALJ's reliance on the preamble to evaluate conflicting medical opinions, far from being an APA violation, has been uniformly endorsed by the courts of appeals to consider the issue, as well as the Benefits Review Board. *Helen Mining Co. v. Director OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) ("The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion"); *A&E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) ("Although the ALJ was not required to look at the preamble to assess the doctors' credibility...the ALJ was entitled to do so....") (internal quote and citation omitted); *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 314-315 (4th Cir. 2012) ("Although the ALJ did not need to look to the preamble in assessing the credibility of Dr. Fino's views, we conclude that the ALJ was entitled to do so"); *Little David Coal Co. v. Director, OWCP*, 2012 WL 3002609 at *6 (6th Cir. July 23, 2012) (unpublished) ("[I]t was permissible for the ALJ to turn to the preamble for guidance when determining the relative weight to assign two conflicting medical opinions"); *Ethel Groves v. Island Creek Coal Co.*, 2011 WL 2781446 at *3, BRB No. 10-0592 BLA (DOL Ben. Rev. Bd. June 23, 2011) ("an administrative law judge has the discretion to examine whether a physician's

reasoning is consistent with the conclusions contained in medical literature and scientific studies relied upon by DOL in drafting the definition of legal pneumoconiosis.”); *Consol. 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 Department of Labor in preamble). *See also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7 (7th Cir. 2001) (“During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino [denying that coal dust inhalation causes significant obstructive lung disease] and concluded that his opinions ‘are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.’” (quoting 2000 Final Rule, 65 Fed. Reg. 79,939)).

In all these cases, the ALJs permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis. The ALJs did not, as National Mines suggests, treat the preamble as a binding source of substantive law apart from the regulation. *See A&E Coal*, 694 F.3d at 801; *Harman Mining*, 678 F.3d at

314-15.⁹ “[T]he preamble merely explains why the regulations were amended. It does not expand their reach.” *A&E Coal*, 694 F.3d at 802. See *Harman Mining*, 678 F.3d at 314 (“The preamble to the regulations simply sets forth the medical and scientific premises relied on by the Department in coming to these conclusions in its regulations.”).

The case *National Mines* primarily relies upon for its view that the preamble is off limits, *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249 (4th Cir. 2011), stands for nothing of the sort.¹⁰ In *Harman Mining*, the Fourth Circuit addressed this precise point and wasted no words in finding it too dull to hit home:

⁹ *National Mines* attempts to dismiss *Harman Mining*’s discussion of the preamble as dicta because the Fourth Circuit also held that the award was supported by substantial evidence. Pet. Br. at 34. This view was not shared by the employer in that case, which explicitly disavowed any substantial evidence challenge and relied solely on the argument that the ALJ’s consideration of the preamble violated the APA. 678 F.3d at 310, 314. The court separately examined the substantial evidence because the employer “intermittently...challenge[d] the ALJ’s factual findings.” *Id.* at 310. The court’s conclusion that the ALJ “was well within her discretion” to find Dr. Fino’s opinion less persuasive because his views conflicted with the “Department’s rationale in amending the regulations” is not dicta. *Id.*, at 315-16. Even if it were, it is well-considered and consistent with this Court’s decision in *Helen Mining*.

¹⁰ *Home Concrete* involved the IRS’s attempt to rely on a policy position set forth in the preamble to a regulation to extend the statutorily-set six-year limitations period. 634 F.3d at 257-58. The distinction between a tax case and a black lung case is of no import. Pet. Br. at 33. The distinction that matters is the IRS regulatory preamble contradicted statutory language whereas the Department’s
(continued...)

[*Home Concrete & Supply*] provides a clear example of a regulatory preamble on which any reliance would be problematic. For there we concluded that the preamble *contradicted* the plain statutory language. 634 F.3d at 256-57. For this reason, we properly refused to defer to the IRS’s interpretation of the statute contained in the preamble. By contrast, here, the preamble is entirely consistent with the Act and its regulations and simply explains the scientific and medical basis for the regulations.

Harman Mining, 678 F.3d at 315 n.4. Certainly, the Fourth Circuit’s rejection of the employer’s reading of its case law, with which the Sixth Circuit has already agreed, should lead this Court to reject it as well. *See A&E Coal*, 694 F.3d at 802.

National Mines’ reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), and *El Comte Para Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062 (9th Cir. 2008), founder on the same shoals. Like *Home Concrete*, the preamble in question in *Wyeth* addressed a legal issue—the preemptive effect of FDA regulations on state law remedies—rather than a scientific or technical one, and was “at odds with what evidence we have of Congress’s purposes” and, to top it off, “revers[ed] the FDA’s own longstanding position without providing a reasoned explanation[.]” *Wyeth*, 555 U.S. at 577. None of these facts are true of the regulatory preamble at issue in this case. The employer accurately quotes *Warmerdam*’s language that “the preamble language should not be considered unless the regulation itself is

(...continued)

preamble is consistent with the BLBA and “merely explains the regulations’ bases.” *A&E Coal*, 694 F.3d at 802.

ambiguous,” but omits the court’s qualifying statement that “the preamble does not ‘prescribe rights and duties and otherwise declare the legislative will,’ nor does it ‘enlarge or confer powers on administrative agencies or officers,’ but it nevertheless ‘may aid in achieving a general understanding of the statute.’” *Warmerdam*, 539 F.3d at 1070 (internal citation omitted). Such is the case here, where section 718.201 unambiguously defines clinical and legal pneumoconiosis, and the preamble to the regulation “simply sets forth the medical and scientific premises relied on by the Department in coming to these conclusions in its regulations.” *Harman Mining*, 678 F.3d at 314; *Little David Coal*, 2012 WL 3002609 at *3 (the preamble “simply summarizes the medical and scientific evidence upon which the regulations are founded”).

Thus, National Mines is simply wrong that the preamble represents a legislative rule and is therefore subject to the APA’s notice and comment requirement. Rather, the preamble provides notice of substantive rules, which are binding and have the force and effect of law. The preamble also addresses comments to the proposed rules. *Harman Mining*, 678 F.3d at 315 (ALJ’s citation to the preamble did not “imbue it with the force of law or to transform it into a legislative rule”); *Little David Coal*, 2012 WL 3002609 at *3 (“The preamble does not itself impose any substantive rules or requirements”).

Finally, there is no merit to National Mines' contention that the ALJ erred in considering the preamble because it was not part of the record. Both the Fourth and Sixth Circuits have rejected this precise argument. *Harman Mining*, 678 F.3d at 316 (“[T]he APA does not provide that public law documents, like the Act, the regulations, and the preamble, need be made part of the administrative record. Harman cites no authority supporting its contrary view and we have found none”); *A&E Coal*, 694 F.3d at 802 (same); *Little David Coal*, 2012 WL 3002609 at *3 (the record as a whole included “the DOL regulations, which, in turn, include the preamble”).

2. While ALJs are not required to consider the regulatory preamble in assessing the credibility of medical experts, any error in the Board's first decision remanding the case is harmless.

In addition to its frontal attack on the well-established rule that ALJs may consider the preamble in assessing the credibility of medical experts, National Mines, in passing, suggests that the Board went beyond settled law in its initial decision to remand the case by instructing the ALJ to consider the preamble. Pet Br. at 22 n.4. It is true that ALJs are “not required to look at the preamble to assess [a] doctor's credibility[.]” *A&E Coal Co.*, 694 F.3d at 802. On its face, the Board's decision remanding the case goes further by requiring the ALJ to consider the consistency of Dr. Jaworski's and Dr. Fino's opinions with the preamble. App. 35, 36. This legal error was, however, harmless.

The Board identified at least five errors in the ALJ's initial evaluation of Dr. Jaworski's testimony. App. 34-34. Three of these errors—(1) “The [ALJ] applied an inconsistent standard in assessing whether Dr. Jaworski's opinion was reasoned, in comparison to Dr. Renn's opinion,” App. 34; (2) “the [ALJ's] analysis does not reflect consideration of Dr. Jaworski's full deposition testimony[,]” App. 35; and (3) “the [ALJ]...did not discuss Dr. Jaworski's credentials,” App. 35 n.7—have nothing to do with the preamble at all. National Mines does not and cannot argue that these are not legitimate reasons for the Board to vacate and remand an ALJ's decision. The Board's decision to vacate the ALJ's initial ruling is adequately supported by these grounds, which are unrelated to the preamble.

Even if the Board's explicit references to the preamble were necessary to support its decision to remand, the error would remain harmless. The Board instructed the ALJ to consider two points made in the preamble when considering Dr. Jaworski's evaluation of legal pneumoconiosis. The first was the “Department of Labor's agree[ment] with the scientific evidence referenced by Dr. Jaworski that smoking and coal dust exposure can impair the lungs similarly, causing an obstructive impairment.” App. 35 (citing 2000 Final Rule, 65 Fed. Reg. 79943). But while the Board cited the preamble for the point, the regulation itself makes clear that coal dust can cause obstructive lung disease, which is recognized as legal pneumoconiosis. 20 C.F.R. § 718.201(a)(2). The second was the fact that the

preamble “point[s] out that courts have stated that a claimant should not be denied benefits because a physician is unwilling or unable to state the exact degree of impairment caused by pneumoconiosis.” App. 35 (citing 2000 Final Rule, 65 Fed. Reg. 79946). But the preamble’s discussion of the issue (which extends to 65 Fed. Reg. 79947) consists of little more than a string of citations to cases (including one from this Court) standing for the quoted proposition. Ultimately then, the Board’s instruction to consider the preamble on these issues boils down to an instruction to consider the controlling regulation and caselaw. The fact that the Board cited to the preamble rather than the primary sources is not reversible error.

The same is true of the Board’s finding that the ALJ initially failed to consider “the prevailing view of the Department of Labor” in his initial evaluation of Dr. Fino’s testimony attributing Davis’s disability solely to smoking. The Board cited the preamble for the proposition that “coal mine dust exposure can cause obstructive lung disease, separate and distinct from clinical pneumoconiosis.” App. 36 (citing 2000 Final Rule, 65 Fed. Reg. 79938-45). But its discussion properly focused on the relevant regulations: 20 C.F.R. § 718.202(a)(4) (“A determination of the existence of pneumoconiosis may...be made if a physician, exercising sound medical judgment, *notwithstanding a negative x-ray*, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201”) and 20 C.F.R. § 718.201(a)(2) (defining legal

pneumoconiosis to include obstructive pulmonary disease arising out of coal mine employment). *See* App. 36. Instructing an ALJ to consider the controlling regulations is no error at all.

To the extent that ALJ Burke referred to additional comments from the preamble in his second decision awarding benefits to Davis, he properly treated the preamble as a source of the Department's views but not a "source of law." Pet. Br. at 24. *See* App. 15, 24, 25. The ALJ found that Dr. Jaworski's opinion, (which he had already determined was well-reasoned and documented) also was consistent with the Department's view that smokers who engage in coal mining have an additive risk for developing significant obstruction. App. 24. Similarly, the ALJ determined that Dr. Fino's opinion (which he had already discounted because the doctor relied on the absence of clinical pneumoconiosis to find that Davis does not have legal pneumoconiosis) was also suspect because Dr. Fino relied on a statistical study to determine that Davis's dust exposure was "clinically insignificant[,]" a deduction the ALJ found to be inconsistent with the "discussion in the preamble recognizing that statistical averaging may hide the significant effect that coal mine dust exposure can have on the pulmonary function of an individual miner." App. 25. Thus, the ALJ acted within his discretion in finding that the preamble further supported his credibility assessments. While the Board

erroneously instructed the ALJ to consider portions of the preamble, the error was harmless.¹¹

C. Substantial evidence supports the ALJ's decision to credit the opinion of Dr. Jaworski that Davis's COPD is due to both coal dust exposure and smoking over Dr. Fino's opinion attributing Davis's lung disease solely to smoking.

To establish his entitlement to benefits, Davis must prove that his disabling chronic obstructive airway disease arose, at least in part, out of his exposure to coal mine dust. 20 C.F.R. § 718.201(a)(2), (b).¹² If so, he suffers from legal pneumoconiosis. *Id.* The ALJ permissibly found that Dr. Fino's testimony (which attributed Davis's COPD solely to smoking) was significantly flawed and lacked credibility while Dr. Jaworski's opinion (attributing Davis's COPD to a combination of smoking and coal dust) was well-reasoned and reliable. The ALJ's

¹¹ Should this Court disagree, the proper remedy is to remand the case for the ALJ's further consideration with an instruction that he is not required to consider the preamble in evaluating the credibility of Drs. Fino and Jaworski.

¹² The BLBA was amended in 2010 to restore a long-dormant 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. Pub. L. No. 111-148, § 1556(a), (c), 124 Stat. 119, 260 (2010) (amending 30 U.S.C. § 921(c)(4)). This amendment does not apply to Davis's claim because it was filed roughly eight months before the amendment's January 1, 2005, effective date. *Id.*; see also *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011).

conclusion that Davis is totally disabled due to legal pneumoconiosis is accordingly rational and supported by substantial evidence.

1. The ALJ rationally discounted Dr. Fino's opinion.

National Mines argues that the ALJ wrongly rejected Dr. Fino's opinion as inconsistent with the findings and medical literature credited in the preamble. Pet. Br. 23-25. But the ALJ permissibly declined to credit Dr. Fino's opinion because the doctor's conclusion (that Davis's COPD was not legal pneumoconiosis because it was not caused, in part, by the miner's exposure to coal dust) was premised on the absence of evidence that Davis had clinical pneumoconiosis, a position contrary to the regulation. App. 24, 10-11. The ALJ reasonably found Dr. Fino focused on clinical pneumoconiosis to rule out coal dust as a contributing cause of Davis's COPD because Dr. Fino referenced medical studies that correlated coal dust's contributing impact on COPD/emphysema with the amount of clinical pneumoconiosis in lungs and then relied on the lack of any x-ray or CT scan evidence of pneumoconiosis to dismiss a causal connection between Davis's COPD and his coal dust exposure. App. 24. Even though Dr. Fino testified that he did not rule out legal pneumoconiosis based on the negative x-ray, the ALJ determined that Dr. Fino provided no other explanation for excluding Davis's 16 years of coal dust exposure as a potentially contributing cause of his COPD. App. 24. This is a permissible interpretation of Dr. Fino's testimony.

The ALJ also faulted Dr. Fino's opinion for failing to discuss the effects of coal dust exposure on Davis's COPD in terms of legal pneumoconiosis. App. 24. Dr. Fino testified that it was medically feasible to distinguish between coal mine dust exposure and cigarette smoking as the cause of emphysema but then explained that he distinguished those causes by comparing a patient's exposure histories (the same methodology used by Dr. Jaworski).¹³ App. 141. Based on Davis's longer smoking history, Dr. Fino said that "smoking wins in terms of appearing to be *a more significant* factor in this case." App. 141-42 (emphasis added). Dr. Fino did not explain, however, why he concluded Davis's chronic pulmonary disease did not "significantly relate" to or was not "substantially aggravated" by 16 years of coal dust exposure, *see* 20 C.F.R. § 718.201(b), except in terms of the absence of clinical pneumoconiosis. App. 142-43. Thus, the ALJ sensibly discounted Dr. Fino's opinion because his expressed view that the absence of clinical

¹³ To determine contribution from different risk factors, Dr. Fino relied on "dose-response relationship," which Dr. Fino explained means that "the more smoking or the more coal dust that is inhaled in the lungs, the more likely you are to get emphysema. Right off the top, 40-pack years of smoking versus 16 to 19 years of coal mine dust, smoking wins in terms of appearing to be a more significant factor in this case." App. 141-42. This is no different than Dr. Jaworski's methodology for assessing the contribution from different risks that produce similar changes on pulmonary function testing. *Compare* App. 101-02 (Dr. Jaworski testifying that where there are two causes that result in similar changes of pulmonary function, determining the amount of contribution depends on "the duration of exposure.").

pneumoconiosis excluded the presence of legal pneumoconiosis contradicted the regulatory definition of pneumoconiosis. App. 24; 20 C.F.R. § 718.202(a)(4); *see R.F.I. Energy, Inc. v. Director, OWCP*, 488 Fed. Appx. 622, *635, 2012 WL 2899252, *3 (3d Cir. 2012) (where Dr. Fino attributed the miner’s COPD exclusively 40 years of smoking and none to 26 years of coal mine employment based on negative x-ray and statistics, the Court held “it was rational for the ALJ to discredit Dr. Fino’s opinion because his explanation of how he distinguished the effects of cigarette smoke from the effects of coal mine dust was insufficient”).

2. The ALJ rationally credited Dr. Jaworski’s opinion.

National Mines alleges the ALJ erred in crediting Dr. Jaworski’s report because Dr. Jaworski testified that the effects of cigarette smoking and coal dust inhalation are indistinguishable and, therefore, his medical opinion that both exposures caused Davis’s COPD/emphysema is legally insufficient. Pet. Br. 25-28. Dr. Jaworski, however, adequately explained the bases for his dual-causation diagnosis. App. 98-101, 104-08. After examining Davis, he testified that the two etiologies—coal dust and smoking—“can result in similar changes of pulmonary function testing. Then you can’t tell which caused it, other than by amount of exposure.” App. 101. Based on a comparison of Davis’s exposure histories (similar to Dr. Fino’s “dose-response-relationship” method, App. 141-42), Dr. Jaworski concluded that smoking was the predominant cause of Davis’s COPD,

but that the miner's occupational exposure to coal dust was also a significant contributing cause, accounting for as much as 30 percent of Davis's disability. App. 101, 106.

Contrary to National Mines' suggestion, the fact that Dr. Jaworski was unable to precisely attribute a particular portion of Davis's disability to coal dust exposure does not mean that the doctor's opinion was speculative. Pet. Br. 26-29. See *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)); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (same). "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. No more is needed to support the ALJ's conclusion that Dr. Jaworski offered a reasoned and documented opinion. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990) (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").

In sum, the ALJ acted within his discretion in determining that Dr. Fino's opinion lacked credibility and in finding that Dr. Jaworski's medical opinion is a

well-reasoned report sufficient to establish that Davis is totally disabled due to pneumoconiosis. The ALJ's assessment of the medical opinions is supported by substantial evidence; therefore, this Court should affirm the award of benefits. *Balsavage v. Director, OWCP*, 295 F.3d 390, 395 (3d Cir. 2002) (“If substantial evidence exists, we must affirm the ALJ’s interpretation of the evidence even if we ‘might have interpreted the evidence differently in the first instance.’”) (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 9,825 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee Security VirusScan Enterprise 8.0.0. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2013, the Director's brief was served electronically using the Court's CM/ECF system on, and copies mailed, postage prepaid, to the Court and the following:

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