

No. 09-3438

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

HELEN MINING COMPANY,

Petitioner

v.

JOHN OBUSH;

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

DEBORAH GREENFIELD
Acting Deputy Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
SEAN G. BAJKOWSKI
Counsel for Appellate Litigation
HELEN H. COX
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of
Workers' Compensation Programs

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	
A. <u>Facts and findings relevant to the timeliness issue</u>	4
B. <u>Facts and findings relevant to the merits of Obush’s claim</u>	8
1. X-ray evidence.....	9
2. Medical opinion evidence	10
a. Claimant’s Evidence	10
b. Department of Labor-Sponsored Pulmonary Evaluation	14
c. Employer’s Evidence	15
d. Medical opinions from the prior claim	18
3. ALJ Burke’s decision awarding benefits.	18
4. The Board’s decision affirming ALJ Burke’s award	21
SUMMARY OF THE ARGUMENT	23

TABLE OF CONTENTS (cont.)

	<u>Page</u>
ARGUMENT	
A. The Board properly applied the statute of limitations to Obush’s subsequent claim and correctly held that it was not time-barred	24
1. It is undisputed that the statute of limitations applies to all claims	25
2. The Board correctly held that the 1991 denial of benefits reset the limitations period by rendering any previous determination of total disability due to pneumoconiosis a misdiagnosis	27
B. Substantial evidence supports the ALJ’s decision to credit the opinions of Drs. Schaaf and Begley that Obush’s obstructive pulmonary impairment is due to coal dust exposure and smoking over Dr. Renn’s opinion that his obstructive impairment is due solely to smoking	33
CONCLUSION	39
COMBINED CERTIFICATIONS OF COMPLIANCE.....	40
CERTIFICATE OF SERVICE	41
ATTACHMENT	42

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Andryka v. Rochester & Pittsburgh Coal Co.</i> , 14 Black Lung Rep. (MB) 1-34 (Ben. Rev. Bd. 1990)	6, 26
<i>Arch of Kentucky, Inc., v. Director, OWCP</i> , 556 F.3d 472 (6th Cir. 2009)	7, 26, 30, 32
<i>Balsavage v. Director, OWCP</i> , 295 F.3d 390 (3d Cir. 2002)	34, 38
<i>Consolidation Coal Co. v. Director, OWCP [Beeler]</i> , 521 F.3d 723 (7th Cir. 2008)	38
<i>Consolidation Coal Co. v. Williams</i> , 453 F.3d 609 (4th Cir. 2006)	6, 7, 25, 26, 30, 32
<i>Cornett v. Benham Coal, Inc.</i> , 227 F.3d 569 (6th Cir. 2000)	37
<i>Energy West Mining Co. v. Oliver</i> , 555 F.3d 1211 (10th Cir. 2009)	26, 30, 32
<i>Faulk v. Peabody Coal Co.</i> , BRB No. 88-217 BLA, 1990 WL 284143 (DOL Ben. Rev. Bd. May 22, 1990)	6, 26
<i>Glen Coal Co. v. Seals</i> , 147 F.3d 502 (6th Cir. 1998)	11
<i>Kertesz v. Crescent Hills Coal Co.</i> , 788 F.2d 158 (3d Cir. 1986)	33
<i>Labelle Processing Co. v. Swarrow</i> , 72 F.3d 308 (3d Cir. 1995)	8, 24, 27, 28, 30, 31

TABLE OF AUTHORITIES (cont.)

<u>Cases:</u>	<u>Page</u>
<i>Lisa Lee Mines v. Director, OWCP</i> , 86 F.3d 1358 (4th Cir. 1996) (en banc)	27, 28, 29
<i>Lovilia Coal Co. v. Harvey</i> , 109 F.3d 445 (8th Cir. 1997)	27, 28
<i>Pauley v. BethEnergy Mines, Inc.</i> , 501 U.S. 680 (1991).....	24
<i>Peabody Coal Co. v. Spese</i> , 117 F.3d 1001 (7th Cir. 1997)	27, 28
<i>Sewell Coal Co. v. Director, OWCP</i> , 523 F.3d 257 (4th Cir. 2008)	26
<i>Sharondale Corp. v. Ross</i> , 42 F.3d 993 (6th Cir. 1994)	27, 28, 31
<i>Soubik v. Director, OWCP</i> , 366 F.3d 226 (3d Cir. 2004)	33
<i>Stolitza v. Barnes and Tucker Co.</i> , 23 Black Lung Rep. (MB) 1-93 (Ben. Rev. Bd. 2005)	6, 26
<i>Tennessee Consolidated Coal Co. v. Kirk</i> , 264 F.3d 602 (6th Cir. 2001)	5, 6, 25, 26, 30
<i>U.S. Steel Mining Co, LLC v. Director, OWCP</i> , 386 F.3d 977 (11th Cir. 2004)	28
<i>Wyoming Fuel Co. v. Director, OWCP</i> , 90 F.3d 1502 (10th Cir. 1996)	7, 25, 26, 28, 30, 31

TABLE OF AUTHORITIES (cont.)

<u>Statutes:</u>	<u>Page</u>
Black Lung Benefits Act, 30 U.S.C. §§ 901-945, as amended	
Section 413(b), 30 U.S.C. § 923(b)	14
Section 422(a), 30 U.S.C. § 932(a).....	2
Section 422(f), 30 U.S.C. § 932(f).....	4, 24
Section 422(k), 30 U.S.C. § 932(k)	24
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 <i>et seq.</i>	
Section 21(a), 33 U.S.C. § 921(a).....	2
Section 21(c), 33 U.S.C. § 921(c).....	1, 2
 <u>Regulations:</u>	
20 C.F.R. § 718.102(b)	10, 13
20 C.F.R. § 718.201(a)	9
20 C.F.R. § 718.201(a)(1).....	9
20 C.F.R. § 718.201(a)(2).....	9, 34, 37
20 C.F.R. § 718.201(b)	34, 37
20 C.F.R. § 718.201(c)	30
20 C.F.R. § 718.202.....	8
20 C.F.R. § 718.202(a)(4).....	20, 37
20 C.F.R. § 718.203	8
20 C.F.R. § 718.204.....	8
20 C.F.R. § 718.204(c)(1).....	9
 20 C.F.R. § 725.2(c)	4
20 C.F.R. § 725.202(b) (1999)	5
20 C.F.R. § 725.202(d)	8
20 C.F.R. § 725.202(d)(2)(i).....	5

TABLE OF AUTHORITIES (cont.)

Regulations (cont.):

Page

20 C.F.R. § 725.308.....	6
20 C.F.R. § 725.308(a)	4, 25
20 C.F.R. § 725.308(c)	4, 25
20 C.F.R. § 725.309	4
20 C.F.R. § 725.309(d)	3, 8, 29
20 C.F.R. § 725.309(d)(3)	29
20 C.F.R. § 725.309(d)(4)	22
20 C.F.R. § 725.414(a)(2)(i).....	13
20 C.F.R. § 725.479(a) (1999).....	5
20 C.F.R. § 725.482(b)	24

Miscellaneous:

65 Federal Register 79941 (Dec. 20, 2000).....	20, 38
3 A. Larson, The Law of Workmen’s Compensation, § 79.72(f) (1989)	28
Senate Report No. 95-209 (1977).....	24

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Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Helen Mining Company (Helen Mining or employer) petitions 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 John Obush (Obush or claimant). This Court has jurisdiction over Helen Mining's 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)—Obush'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 29, 2008. Joint Appendix (JA) 308. Helen Mining filed a notice of appeal with the Board on June 19, 2008, 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 24, 2009. JA 322. Helen Mining petitioned this Court for review on August 20, 2009, within the statutorily mandated sixty-day period. JA 332; 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

1. Is a physician's 1990 report stating that Obush was totally disabled due to pneumoconiosis sufficient to trigger the running of the BLBA's three-year limitations period despite the fact that an ALJ determined that Obush was not totally disabled due to pneumoconiosis in 1991?

2. Did the ALJ adequately weigh the conflicting medical evidence before finding that Obush is totally disabled due to pneumoconiosis and therefore entitled to BLBA benefits.

STATEMENT OF THE CASE

Obush filed his first application for black lung benefits in 1989. JA 5. Helen Mining was notified of, and accepted, its designation as the coal mine operator responsible for any benefits awarded to Obush. JA 5. In conjunction with that claim, Dr. Phillip Turco examined Obush in November 1990 and offered his medical opinion that Obush was totally disabled due to pneumoconiosis. JA 1-3. ALJ Tierney denied the claim on May 16, 1991, finding the opinions of two other doctors, who both testified that Obush did not have pneumoconiosis, to be more persuasive than Dr. Turco's diagnosis. JA 4-9. Obush did not pursue that claim any further.

Obush filed this subsequent claim for black lung benefits in 2006. JA 10; *see* 20 C.F.R. § 725.309(d) (a new claim filed more than one year after a final denial of a prior claim is a "subsequent claim" and "the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior

claim became final.”).¹ ALJ Burke conducted a hearing at which Helen Mining challenged the timeliness of Obush’s subsequent claim and his entitlement to benefits. JA 276-77. ALJ Burke determined that Obush’s subsequent claim was timely filed and that he was entitled to benefits, payable by Helen Mining. JA 303-20. Employer appealed, and the Board affirmed. JA 322-31. Helen Mining then petitioned for review. JA 332-35.

STATEMENT OF FACTS

A. Facts and findings relevant to the timeliness issue.

Under the Black Lung Benefits Act, a miner’s claim for benefits must be filed within three years after the miner receives a medical determination of total disability due to pneumoconiosis. 30 U.S.C. § 932(f); 20 C.F.R. § 725.308(a). “There is a rebuttable presumption that every claim for benefits is timely filed.” 20 C.F.R. § 725.308(c).

Obush filed his initial application for black lung benefits in 1989.² He last worked as a coal miner in August 1990. JA 5. In a report dated November 30, 1990, Dr. Turco diagnosed Obush as being disabled due to pneumoconiosis, which he attributed to Obush’s exposure to coal dust. JA 3. In his May 16, 1991,

¹ The current version of section 725.309 applies to claims, such as Obush’s 2006 application, that are filed after January 19, 2001. 20 C.F.R. § 725.2(c). Unless otherwise specified, all citations to the regulations are to the current version.

² There is no dispute that the 1989 claim was timely filed.

decision, ALJ Tierney found the negative x-ray evidence and the medical opinions of Drs. Strother and Parcinski finding no pneumoconiosis outweighed Dr. Turco's diagnosis. JA 7-9. Therefore, the ALJ denied benefits because Obush failed to establish the presence of pneumoconiosis, an essential element of entitlement.³ Obush did not appeal or seek modification of ALJ Tierney's decision, which became final on June 15, 1991. 20 C.F.R. § 725.479(a) (1999).

Obush filed this subsequent claim on January 31, 2006. JA 10. Helen Mining moved to dismiss it as untimely, arguing it was not filed within three years of receipt of Dr. Turco's 1990 medical determination of total disability due to pneumoconiosis. JA 46-48.⁴ Employer relied on language in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 (6th Cir. 2001), to support its contentions that 1) the statute of limitations applies to subsequent claims and 2) the limitations period was not reset when Obush's initial claim was denied in 1991. *Id.*

³ 20 C.F.R. § 725.202(b) (1999) (conditions of a miner's entitlement); *see also* 20 C.F.R. § 725.202(d)(2)(i) (2009) (to be entitled to benefits, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that pneumoconiosis contributes to the total disability).

⁴ The record contains no medical report dated after the 1991 denial of the prior claim and more than three years prior to the current claim that would constitute a "medical determination of total disability due to pneumoconiosis" sufficient to trigger the statute of limitations. JA 326 n.4.

In his May 29, 2008, decision, ALJ Burke rejected Helen Mining's argument because: 1) this case does not arise in the Sixth Circuit; 2) the relevant language in *Tennessee Consolidated* had been rejected by the Fourth Circuit in *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618 (4th Cir. 2006), which instead held that "a medical determination later deemed to be a misdiagnosis by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims[;]" and 3) Board precedent, which applied in the absence of Third Circuit precedent, holding that the statute of limitations does not apply to subsequent claims at all.⁵ JA 310. Therefore, the ALJ concluded that Obush had timely filed his second benefits claim. *Id.*

On appeal, both the Director and Helen Mining urged the Board to revisit its position that the statute of limitations does not apply to subsequent claims at all. However, these parties differed on how the limitations period should be applied. Helen Mining argued that Dr. Turco's 1990 medical opinion triggered the limitations period, that the period was not reset by ALJ Tierney's 1991 final denial, and that Obush's current claim was therefore untimely. JA 325. The

⁵ *Stolitz v. Barnes and Tucker Co.*, 23 Black Lung Rep. (MB) 1-93 (Ben. Rev. Bd. 2005) (20 C.F.R. § 725.308's three-year statute of limitations period only applies to initial claims); *Faulk v. Peabody Coal Co.*, 14 Black Lung Rep. (MB) 1-18 (Ben. Rev. Bd. 1990) (same); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 Black Lung Rep. (MB) 1-34 (Ben. Rev. Bd. 1990) (same).

Director argued that the claim was timely because Judge Tierney's final determination that Obush was not totally disabled due to pneumoconiosis in 1991 rendered Dr. Turco's earlier opinion to the contrary a misdiagnosis, legally insufficient to trigger the running of the statute of limitations for any subsequent claim. *Id.*

In a decision dated June 24, 2009, the Board overruled its previous decisions and held "that the three-year statute of limitations is applicable to the filing of both the initial claim by a miner and any subsequent claims." JA 325. Therefore, the Board agreed with the employer and the Director that the ALJ erred in holding that Obush's 2006 claim was not subject to the statute of limitations at all. *Id.* The Board then considered whether the three-year statute of limitations barred Obush's subsequent claim.

The Board agreed with the Director that a medical determination of total disability due to pneumoconiosis predating a denial of benefits is legally insufficient to trigger the statute of limitations for subsequent claims. JA 325. The Board noted that this approach is consistent with decisions of the Fourth, Sixth and Tenth Circuits.⁶ The Board also observed that this approach is

⁶ *Consolidation Coal*, 453 F.3d at 618; *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 483 (6th Cir. 2009); *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996).

consistent with this Court's holding that, in a subsequent claim, the prior denial must be accepted as correct when made. JA 325 (citing *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995)). Therefore, the Board held that ALJ "Tierney's final determination that claimant did not have pneumoconiosis as of May 16, 1991, necessarily repudiates Dr. Turco's 1990 opinion that claimant was totally disabled due to pneumoconiosis. . . . Consequently, Dr. Turco's medical report could not trigger the running of the three-year time limit for filing this claim." JA 326.

The Board noted that the record contained "no medical determination that post-dates the 1991 denial of claimant's prior claim, and that was communicated to claimant more than three years prior to claimant's filing of his 2006 claim." JA 326 n.4. Therefore, the Board affirmed the ALJ's finding that the present claim was timely filed. *Id.*

B. Facts and findings relevant to the merits of Obush's claim.

Obush's entitlement to benefits depends on his proving that, at the time of the hearing: 1) his condition had changed since the prior denial; 2) he has pneumoconiosis; 3) his pneumoconiosis arose out of his coal mine employment; and 4) he has a totally disabling respiratory or pulmonary impairment due, in part, to that pneumoconiosis. 20 C.F.R. §§ 725.202(d); 725.309(d); 718.202; 718.203; 718.204. Helen Mining conceded that Obush has a totally disabling respiratory

impairment and that his condition has changed since the denial of his prior claim. JA 277, 319. The contested issue is whether he has pneumoconiosis arising out of his coal mine employment that contributed to his disabling respiratory impairment. JA 277. *See* 20 C.F.R. §§ 718.201(a)(2), (b); 718.204(c)(1).

Pneumoconiosis includes both “clinical” pneumoconiosis and “legal” pneumoconiosis. 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to those diseases recognized by the medical community as a fibrotic reaction of lung tissue caused by the permanent deposition of particulate matter in the lungs, so long as that deposition was caused by dust exposure in coal mine employment. 20 C.F.R. § 718.201(a)(1). “Legal pneumoconiosis” refers to all lung diseases which meet the statutory or regulatory definition of pneumoconiosis, *i.e.*, any chronic pulmonary disease or impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. § 718.201(a)(2). A miner is totally disabled due to pneumoconiosis “if pneumoconiosis . . . is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment.” 20 C.F.R. § 718.204(c)(1).

1. X-ray evidence.

The record contains readings of four chest x-rays taken in 2005 and 2006. The interpretations of the three 2006 chest x-rays that were submitted into evidence and classified under the ILO classification system, 20 C.F.R.

§ 718.102(b), were all negative for clinical pneumoconiosis but showed abnormalities consistent with emphysema. JA 311, 29, 30, 65. Dr. John Schaaf interpreted a December 15, 2005, film as positive for minimal pneumoconiosis. JA 22, 23, 116-119. The record also contains the interpretations (three negative and one positive for pneumoconiosis) of three 1990 films from Obush's prior claim. JA 312.

2. Medical opinion evidence.

The record contains five physicians' medical opinions that were developed in conjunction with Obush's current claim.

a. Claimant's Evidence.

Dr. Schaaf examined Obush on December 15, 2005. He recorded that Obush was a former cigarette smoker, having quit in 1968 after smoking one to one-and-a-half packs of cigarettes a day for 24 years. JA 15. Dr. Schaaf reported that Obush's occupational exposure included 14 years of coal mine employment, then 8 years of construction work, followed by a return to underground mining for 15 years, until retiring in 1990. *Id.* Dr. Schaaf reported the results of a pulmonary function test he conducted, which revealed severe obstructive airway

disease with no significant response to bronchodilators.⁷ JA 17, 24. Dr. Schaaf read a chest x-ray taken as part of his examination and classified it as positive for pneumoconiosis. JA 22. Based on his examination and testing, Dr. Schaaf diagnosed 1) coal workers' pneumoconiosis based on the x-ray and Obush's work history; and 2) "severe chronic obstructive airways disease." JA 17. Because Obush lacked a significant cough and sputum production, Dr. Schaaf determined the severe chronic obstructive airway disease "is probably predominantly emphysema" caused by "both his coalworkers' pneumoconiosis and his smoking history." JA 18. Dr. Schaaf stated that Obush was totally disabled by the severe chronic airway disease. *Id.*

Dr. Schaaf was deposed on September 22, 2006, during which he was questioned about the cause of Obush's airway obstruction. After ruling out asthma and chronic bronchitis, Dr. Schaaf testified that he was "reasonably certain" that Obush's obstructive airway disease was emphysema and that Obush's coal dust exposure was a significant cause of that emphysema. JA 120, 146. Dr. Schaaf stated that, even if the x-ray he relied on was negative for

⁷ A bronchodilator is a drug that causes relaxation of bronchial muscle resulting in expansion of the air passages of the bronchi. *Glen Coal Co. v. Seals*, 147 F.3d 502, 507 n.4 (6th Cir. 1998).

pneumoconiosis, he still attributed Obush's emphysema to coal dust exposure. JA 123.

Dr. Schaaf concluded that coal workers' pneumoconiosis was responsible for Obush's impairment based on 1) his lengthy history of coal dust exposure; 2) his severe obstructive airway disease, which is associated with coal dust exposure; 3) the gap of roughly 40 years between the time he stopped smoking and Dr. Schaaf's examination; and 4) the sum total of Obush's remote smoking history in relation to his total exposure to coal mine dust and the timing of the development of his severe airway obstruction. JA 109-111, 133. Dr. Schaaf did not exclude smoking as a contributing factor, noting that his opinion was based on a maximum smoking history of 36-pack years (24 years smoking one-and-a-half packs per day). JA 111. Dr. Schaaf testified that the intensity of Obush's smoking history was not as significant as the remoteness of that history, explaining that Obush had not smoked for roughly 40 years prior to his examination and "that's just inconsistent with smoking induced disease of this severity." JA 113.

Dr. Christopher Begley examined Obush on December 1, 2006, and provided Obush's counsel with a report of that examination on April 25, 2007. JA 237. Dr. Begley reported a 23-year pack-per-day smoking history that ended in 1968 and coal mine work "for many years." *Id.* Dr. Begley stated that a

December 1, 2006, x-ray taken at the Miners Medical Center revealed evidence of simple pneumoconiosis.⁸ He diagnosed pneumoconiosis based on claimant's exposure history and x-ray. JA 238. Based on his examination, pulmonary function studies, and blood gas analysis, Dr. Begley also diagnosed severe obstructive lung disease that would prevent Obush from working as a coal miner. *Id.* In a follow-up letter, Dr. Begley opined that both coal workers' pneumoconiosis and tobacco use were "significant contributing cause[s]" of Obush's pulmonary impairment. JA 239.

Dr. Begley was deposed on October 31, 2007. JA 316-17; Claimant's Exhibit (CX) 5. He stated that Obush's disabling pulmonary impairment is due to both coal dust exposure and smoking because the progressive decline in Obush's pulmonary status began long after Obush ceased smoking. CX 5 pp. 21-22, 24, 34-35, 52. Dr. Begley also stated that a negative x-ray would not change his opinion that Obush's debilitating obstructive pulmonary disease was caused, in part, by his exposure to coal dust. *Id.* at 23-24. Dr. Begley ruled out asthma as a

⁸ At his deposition, Dr. Begley stated he interpreted the x-ray himself but did not classify it under the ILO classification system. *See* 20 C.F.R. § 718.102(b). Obush did not submit Dr. Begley's reading into evidence as one of the "two chest X-ray interpretations" he was entitled to submit in support of his affirmative case. 20 C.F.R. § 725.414(a)(2)(i).

potential diagnosis because Obush's pulmonary condition was not episodic and progressively deteriorated over time. JA 317; CX 5 pp. 26, 39.

b. Department of Labor-Sponsored Pulmonary Evaluation.⁹

Dr. John Martin examined claimant on March 10, 2006. Dr. Martin recorded a 30-year coal mine work history that ended in 1990 and a 24-year one-and-a-half pack-per-day smoking history that ended in 1968. JA 43. The chest x-ray taken as part of this examination revealed chronic obstructive pulmonary disease (COPD) but no evidence of clinical pneumoconiosis. JA 30, 41, 44. Based on his testing and examination, Dr. Martin diagnosed "chronic obstructive lung disease, severe degree with hypoxemia," which disabled Obush from any activity other than sedentary work. JA 44. Dr. Martin attributed this severe impairment to "50% smoking" and "50% industrial exposure." JA 42.

In a September 25, 2006, deposition, Dr. Martin was asked to explain his opinion attributing claimant's severe obstructive impairment to both smoking and coal dust exposure in the absence of x-ray evidence of pneumoconiosis. JA 159. Dr. Martin answered, "[Obush] has not smoked for over 35 years, so obviously, it doesn't go away completely, as far as any damage previously done. But

⁹ The Department of Labor has the 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).

basically, with that interval, that makes it less likely that it's all due to smoke.”

Id. He noted that his opinion on causation would be the same whether Obush had a 24-pack-year or a 36-pack-year history, because the most significant fact was that Obush stopped smoking 40 years ago. JA 176.

Dr. Martin agreed that there was nothing in Obush's testing or physical examination that was necessarily inconsistent with a cigarette smoke-induced COPD. JA 167. Likewise, he agreed that there was nothing that was inconsistent with coal dust-induced COPD. JA 168. However, Dr. Martin explained it is unusual for an individual who has stopped smoking to have his pulmonary function significantly worsen due to smoking 10 to 15 years after he ceased smoking. JA 171.

c. Employer's Evidence.

Dr. Gregory Fino examined Obush on July 6, 2006. JA 62. Dr. Fino recorded a 24-year pack-per-day smoking history that ended in 1968 and a 30-year coal mine employment history that ended in 1990. JA 62-63. Dr. Fino reported that the chest x-ray taken as part of his examination showed no pneumoconiosis but was consistent with pulmonary emphysema. JA 65. The pulmonary function test revealed a severe obstructive ventilatory defect. JA 67. Dr. Fino also reviewed the medical evidence from Obush's prior claim, Dr.

Schaaf's 2005 report, Dr. Martin's 2006 report and other medical records from 2004 and 2005. JA 70.

Based on his own examination and his review of the available records, Dr. Fino diagnosed Obush as having “[r]eversible and irreversible lung disease with an oxygen transfer impairment: he has chronic obstructive bronchitis, reversible airway obstruction consistent with asthma and pulmonary emphysema. He is disabled from a respiratory standpoint.” JA 74. Dr. Fino stated that the reversible portion of claimant's airway disease was not due to the inhalation of coal dust. He suspected that portion was related to asthma. *Id.* He noted that Obush had a significant progressive worsening in his ventilatory capacity between 1990 and 2006 “that cannot be explained by coal dust or smoking.” JA 75. Dr. Fino stated that Obush does not have clinical pneumoconiosis and that Obush's case is not typical of a patient with legal pneumoconiosis. *Id.*

Dr. Fino was deposed on March 19, 2007. Dr. Fino first corrected a mistake in his written report, clarifying that Obush does not suffer from chronic bronchitis because there is no cough or mucus production. JA 218. Dr. Fino noted that Obush has an irreversible airway obstruction, although there was evidence of reversibility in the past. JA 225. Dr. Fino diagnosed pulmonary emphysema but could not determine the etiology of claimant's airway obstruction. JA 225-26. Dr. Fino explained that his clinical findings were not

typical of a coal dust-related diagnosis, a smoking-related diagnosis, or an asthma-related diagnosis. JA 226. Dr. Fino stated that this is “a very difficult case from a specific diagnostic standpoint” and, at best, he could conclude only that there were three possible causes of Obush’s obstruction—smoking, asthma and coal dust exposure—but he could neither exclude nor include any of these causes. JA 229.

Dr. Joseph Renn reviewed the available medical records at the request of Helen Mining and provided his consulting opinion on February 3, 2007. He concluded that Obush does not have either clinical or legal pneumoconiosis but does have emphysema and asthma. JA 204. Dr. Renn attributed Obush’s pulmonary emphysema solely to smoking. *Id.* Dr. Renn noted that claimant is totally disabled by his respiratory impairment. JA 205.

Dr. Renn was deposed on August 16, 2007. He agreed with the other physicians’ diagnoses of pulmonary emphysema. JA 249. In his opinion, however, Obush’s obstructive airway disease was “far too severe to have ever been caused by simple coal workers’ pneumoconiosis.” JA 252. He concluded the pattern of claimant’s disease revealed by the breathing tests was associated with emphysema and with asthma. JA 252-53. He attributed the emphysema to smoking. *Id.* Dr. Renn stated, “[T]here is no causation or contribution from coal mine dust exposure because, number one, he doesn’t have radiographic evidence

of coal workers' pneumoconiosis. Therefore, he could not have the focal emphysema. Without the focal emphysema, it could not be contributing to the symptoms caused by tobacco smoking." JA 256.

d. Medical opinions from the prior claim.

The record also contains reports from three physicians that were part of Obush's unsuccessful claim that was denied in 1991. The first report, Dr. Turco's November 1990 opinion, diagnoses total disability due to pneumoconiosis. JA 1. The second and third reports, by Dr. Richard Parcinski and Dr. George Strother, diagnose a mild obstructive pulmonary impairment due to Obush's former smoking habit. JA 7-8.

3. ALJ Burke's decision awarding benefits.

In his May 29, 2008, decision, ALJ Burke adopted ALJ Tierney's uncontested finding that Obush worked as a coal miner for 28 years and 4 months and that his employment ended in 1990. JA 309. Crediting Obush's testimony that he "smoked approximately one pack per day, occasionally more and occasionally less" for approximately 25 years, as corroborated by his medical records, Judge Burke determined that Obush had a 25-pack year cigarette smoking history that ended in 1968. *Id.*

Weighing the conflicting medical evidence, the ALJ determined that, while the x-ray evidence did not establish the presence of clinical pneumoconiosis, the

weight of medical opinion evidence established the presence of legal pneumoconiosis. JA 312, 318. The ALJ found Dr. Fino's opinion—that he could neither rule in nor rule out coal dust exposure, asthma or cigarette smoking as the cause or causes of Obush's COPD—to be too equivocal to credit. JA 318.

The ALJ specifically credited the opinions of Drs. Schaaf and Begley (who concluded that Obush's severe obstructive airway disease was caused, in significant part, by exposure to coal dust) over the opinion of Dr. Renn. (who concluded that Obush's emphysema was solely due to tobacco use). The ALJ credited Dr. Schaaf's and Dr. Begley's opinions on causation because: 1) each is a board certified pulmonologist who determined that coal dust played a role in the development of Obush's emphysema; 2) their discussions of causation accounted for the remoteness and intensity of claimant's smoking habit in comparison to his occupational exposure to coal dust, which continued for another twenty years after he stopped smoking; and 3) each stated that his diagnosis was not dependent on an x-ray finding of simple pneumoconiosis. JA 318. The ALJ noted that Dr. Martin, who attributed Obush's obstructive impairment equally to coal dust exposure and to prior tobacco use, echoed Drs. Schaaf's and Begley's findings. *Id.*

In contrast, the ALJ determined that Dr. Renn did not persuasively explain his basis for excluding Obush's more recent coal mine employment as a cause of

his disabling respiratory condition and instead attributing it solely to Obush's remote smoking history. Specifically, the ALJ rejected Dr. Renn's explanation that coal dust was not a possible cause of Obush's disabling emphysema due to a lack of radiographic evidence of pneumoconiosis because that explanation is inconsistent with the definition of legal pneumoconiosis, which provides for the diagnosis of pneumoconiosis "notwithstanding a negative X-ray" and the preamble to the regulations, which states "coal dust exposure is associated with significant deficits in lung function in the absence of clinical CWP [Coal Workers' Pneumoconiosis]." JA 319 (citing 20 C.F.R. § 718.202(a)(4) and 65 Fed. Reg. 79941 (Dec. 20, 2000)). Therefore, the ALJ accorded little weight to Dr. Renn's opinion that coal dust played no role in causing Obush's obstructive airway disease. Finally, the ALJ determined that the medical opinions from Obush's prior claim warranted little weight as they were too dated to reflect Obush's present respiratory condition. JA 319.

Crediting Drs. Schaaf's and Begley's opinions, as supported by Dr. Martin's, the ALJ found that Obush had established that he suffers from legal pneumoconiosis and that his total disability is due to pneumoconiosis. JA 319. Accordingly, the ALJ found Obush entitled to benefits, payable by Helen Mining. JA 320.

4. The Board's decision affirming ALJ Burke's award.

The Board rejected Helen Mining's contention that the ALJ erred in his assessment of the conflicting medical evidence. The Board held that the ALJ properly found Drs. Schaaf's and Begley's opinions—that Obush's COPD is due to both cigarette smoking and coal mine dust exposure—to be well-reasoned and supported by the record. JA 327-28. The ALJ permissibly credited these doctors' attribution of Obush's disabling obstructive impairment to both coal dust and cigarette smoking based on the duration and recency of the occupational exposure versus the remoteness and moderation of the smoking exposure. JA 327. The Board noted that, although both doctors understated the length of Obush's smoking history (23 or 24 years instead of 25), each doctor found the remoteness of Obush's smoking history, rather than the intensity of that history, to be paramount. JA 327 n.8. The Board also affirmed the ALJ's determination that neither doctor's diagnosis of COPD arising out of coal dust exposure depended upon x-ray evidence of pneumoconiosis. JA 328.

The Board also held that the ALJ permissibly discounted Dr. Fino's opinion on causation as equivocal because Dr. Fino was unable to determine the cause of Obush's obstructive pulmonary disease. JA 328. The Board also ruled that the ALJ properly discounted Dr. Renn's opinion on causation as inconsistent with the regulatory definition of pneumoconiosis. According to the Board, Dr.

Renn's claim that Obush's emphysema could not be causally related to coal dust exposure in the absence of radiographic evidence of clinical coal workers' pneumoconiosis is at odds with the definition of legal pneumoconiosis and with the preamble to the black lung program regulations. JA 329. Therefore, the Board affirmed the ALJ's determination that the weight of the medical opinion evidence proved the presence of legal pneumoconiosis. JA 330.

The Board affirmed, as not explicitly challenged by Helen Mining, the ALJ's finding that the medical evidence established that Obush's total disability is due to legal pneumoconiosis. JA 330. For the same reasons that the ALJ credited Drs. Schaaf and Begley as persuasively establishing that Obush has legal pneumoconiosis, the Board affirmed the ALJ's finding that these medical opinions prove that coal mine dust exposure was a significant contributing cause of Obush's total disability. JA 331.

Finally, the Board found no merit in Helen Mining's contention that ALJ Burke was bound by ALJ Tierney's purported finding concerning the length of Obush's smoking history because Judge Tierney made no such finding in his 1991 decision. JA 327 n.7; *see also* JA 5. Moreover, even if Judge Tierney had made such a finding, the Board noted that Judge Burke could have revisited it because Obush established a change in one of the applicable conditions of entitlement. JA 327 n.7 (citing 20 C.F.R. § 725.309(d)(4) (once claimant

establishes a material change in a condition of entitlement, parties are not bound by any prior findings made in connection with the prior claim absent waiver or stipulation)).

SUMMARY OF THE ARGUMENT

The Black Lung Benefits Act's statute of limitations requires a miner to file a claim within three years after he learns of a medical determination finding him totally disabled due to pneumoconiosis. Because a miner's physical condition can change over time, a miner who files an unsuccessful claim is permitted to file subsequent claims. Obush filed a previous claim that was finally denied in 1991. This denial irrefutably establishes the fact that Obush was not totally disabled by pneumoconiosis in 1991. It also establishes that Dr. Turco's 1990 report to the contrary is a misdiagnosis that is legally insufficient to trigger the three-year limitations period; therefore, the 2006 claim was timely filed. All three courts of appeals that have considered the question have rejected Helen Mining's argument that the limitations period is not reset by a final denial, and this Court should do the same.

The Court should also affirm the ALJ's determination that Obush suffers a totally disabling respiratory impairment that is due, in part, to his exposure to coal dust. Helen Mining's attack on the merits of the award amounts to nothing more than an improper request that the Court reweigh the medical opinion evidence and

reconsider the ALJ's credibility determinations. The ALJ's findings are supported by substantial evidence and should be affirmed.

ARGUMENT

A. The Board properly applied the statute of limitations to Obush's subsequent claim and correctly held that it was not time-barred.

The facts regarding this issue are not in dispute. Whether the facts establish that the claim is time-barred is a question of law that the Court reviews *de novo*. *Labelle Processing*, 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.*; *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991).¹⁰

Section 422(f) of the Act provides that any miner's claim for benefits "shall be filed within three years after whichever of the following occurs later—(1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. § 932(f). The implementing regulation similarly states:

¹⁰ Section 422(k) of the Act, 30 U.S.C. § 932(k), makes the Secretary a party "in any proceeding relative to a claim for benefits[.]" Congress enacted section 422(k) "to afford the Secretary the right to advance [her] views in the formal claims litigation context. . . . This participation is especially significant . . . where significant issues relating to the interpretation of the Act are to be determined." S.Rep. No. 95-209, at 21-22 (1977). The Secretary has given the Director the authority to appear and present argument on her behalf in all proceedings conducted under the Act. 20 C.F.R. § 725.482(b).

A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.

20 C.F.R. § 725.308(a).

The Act's three-year statute of limitations period begins to run when a medical determination of total disability due to pneumoconiosis is communicated to a miner. *Consolidation Coal*, 453 F.3d at 615 (limitations period is triggered when miner receives a medical determination of total disability arising from pneumoconiosis); *Tennessee Consolidated*, 264 F.3d at 607 (explaining that the limitations period is triggered only by a physician's "reasoned opinion"). *Accord Wyoming Fuel*, 90 F.3d at 1507.

There is a rebuttable presumption that all BLBA claims are timely. 20 C.F.R. § 725.308(c). Since Obush filed his claim on January 31, 2006, "it is the employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to" Obush prior to January 31, 2003. *Tennessee Consolidated*, 264 F.3d at 607.

1. It is undisputed that the statute of limitations applies to all claims.

The statute of limitations applies to every claim a miner files, not just the initial filing. Contrary to Helen Mining's protestations (Pet. br. at 15-20), there is

no dispute on this point. The Director has long held the position that the statute of limitations is applicable to the filing of both the initial claim and any subsequent claims. *See Arch of Kentucky, Inc., v. Director, OWCP*, 556 F.3d 472 (6th Cir. 2009); *Sewell Coal Co. v. Director, OWCP*, 523 F.3d 257 (4th Cir. 2008); *Consolidation Coal*, 453 F.3d at 618; *Tennessee Consolidated*, 264 F.3d at 607; *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996).¹¹ The Fourth, Sixth and Tenth Circuits have held that the statute of limitations applies to subsequent claims, as well as the initial claim. *Sewell Coal*, 523 F.3d at 259; *Tennessee Consolidated*, 264 F.3d at 607; *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1221 (10th Cir. 2009).

The Board, however, long held that the statute of limitations only applied to the initial claim. *Stolitza*, 23 Black Lung Rep. (MB) 1-93 (Ben. Rev. Bd. 2005); *Faulk*, 14 Black Lung Rep. (MB) 1-18 (Ben. Rev. Bd. 1990); *Andryka*, 14 Black Lung Rep. (MB) 1-34 (Ben. Rev. Bd. 1990). Since this Court had not yet addressed the issue, ALJ Burke relied on Board precedent and found that Obush's subsequent claim was not subject to the statute of limitations at all. JA 310. At

¹¹ Helen Mining erroneously states that the Director argued before the Tenth Circuit in *Wyoming Fuel* that the statute of limitations did not apply to subsequent claims and has since changed his stance. *See* Pet. br. at 19. In fact, the Director argued to the Tenth Circuit, as he does here, that the statute of limitations applied to subsequent claims, but that a prior final denial reset the limitations period for any new claim. 90 F.3d at 1508.

the Director's urging, the Board finally abandoned its position in the case below and held "that the three-year statute of limitations is applicable to the filing of both the initial claim by a miner and any subsequent claim." JA 325.

2. The Board correctly held that the 1991 denial of benefits reset the limitations period by rendering any previous determination of total disability due to pneumoconiosis a misdiagnosis.

Helen Mining argues that this claim is barred by the statute of limitations because Dr. Turco's 1990 opinion that Obush was, at that time, totally disabled due to pneumoconiosis was communicated to Obush more than three years before this claim was filed in 2006. According to Helen Mining, ALJ Tierney's determination, in 1991, that Obush was not totally disabled by pneumoconiosis did not reset the limitations clock for his 2006 claim. This argument has been rejected by all three courts of appeals that have considered it. This Court should do the same.

It has long been recognized that a miner who files an unsuccessful claim may file subsequent claims, asserting a new cause of action and alleging that he is now totally disabled due to pneumoconiosis. *Labelle Processing*, 72 F.3d at 313; *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09 (7th Cir. 1997); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 453-54 (8th Cir. 1997); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997 (6th Cir. 1994). As the Fourth Circuit explained:

The health of a human being is not susceptible to once-in-a-lifetime adjudication. It is almost too obvious for comment that *res judicata* does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases.

Lisa Lee, 86 F.3d at 1363 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, § 79.72(f) (1989)). Therefore, despite his unsuccessful prior claim, Obush is entitled to bring this subsequent claim on the theory that he is now totally disabled due to pneumoconiosis.

To accommodate traditional principles of *res judicata*, however, courts have unanimously held that a prior denial of benefits must be "presumed to have been correct when made and to continue to be correct through time." *Lisa Lee*, 86 F.3d at 1363. *Accord Labelle Processing*, 72 F.3d at 313; *U.S. Steel Mining Co, LLC v. Director, OWCP*, 386 F.3d 977, 989 (11th Cir. 2004); *Peabody Coal*, 117 F.3d at 1008-09; *Lovilia Coal*, 109 F.3d at 453-54; *Wyoming Fuel*, 90 F.3d at 1508-09; *Sharondale*, 42 F.3d at 997. A miner filing a subsequent claim, therefore, is "precluded from collaterally attacking the prior denial of benefits," but he "may file a new claim, asserting that he is *now* eligible for benefits because he has become totally disabled due to coal miner's pneumoconiosis and that his disability occurred subsequent to the prior adjudication." *Labelle Processing*, 72 F.3d at 314. Accordingly, ALJ Tierney's final decision establishes, as an irrefutable fact, that Obush was not totally disabled by pneumoconiosis in 1991.

Consequently, in order for a miner to succeed on a subsequent claim, he must prove not only that he is totally disabled due to pneumoconiosis, but also—with evidence developed after the denial of the earlier claim—that he now satisfies at least one of the elements of entitlement previously decided against him, thereby establishing that his condition has materially changed since the earlier denial. 20 C.F.R. § 725.309(d). Proving a change in conditions with new evidence is required to ensure that the miner has a new claim, and is not simply seeking reconsideration of his prior, finally-denied claim. Therefore, a medical opinion that predates the final denial of a prior claim is insufficient as a matter of law to establish the miner’s entitlement to benefits in a subsequent claim because (a) it is contrary to the earlier final decision and (b) it does not constitute new evidence establishing a material change in the claimant’s condition. 20 C.F.R. § 725.309(d)(3); *see Lisa Lee*, 86 F.3d at 1363 (rejecting Board holding that allowed “resort to evidence available before the prior denial” to prove material change). Thus, Obush could not rely on Dr. Turco’s 1990 opinion to establish that he is currently totally disabled due to pneumoconiosis.

The question is whether such an opinion is nevertheless sufficient to start the limitations clock for this claim. All three Circuits that have addressed this question have answered it in the negative, holding that a medical determination of total disability due to pneumoconiosis predating a final denial of benefits is a

misdiagnosis as a matter of law and legally insufficient to trigger the statute of limitations for subsequent claims. JA 325; *Arch of Kentucky*, 556 F.3d at 479-83; *Energy West*, 555 F.3d at 1221-22; *Consolidation Coal*, 453 F.3d at 616-18; *Wyoming Fuel*, 90 F.3d at 1506-08.

The only contrary authority Helen Mining cites is language in *Tennessee Consolidated* suggesting that the limitations clock is reset only if the claimant continues to work as a miner after the initial denial. Pet. br. at 25. However, the Sixth Circuit itself recently identified that language as dicta and expressly repudiated it in *Arch of Kentucky*, 556 F.3d at 481.¹² Moreover, the position is incompatible with the well-established fact that pneumoconiosis 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). It is also impossible to square with this Court’s *Labelle Processing* decision, which rejected an employer’s argument that a claimant who “did not return to work in a coal mine after the

¹² Helen Mining contends that *Arch of Kentucky*’s repudiation of *Tennessee Consolidated* is itself dicta because *Arch of Kentucky* was decided on default grounds and did not need to reach the timeliness issue. Pet. br. at 26. This is not true. While the court resolved other disputed issues on default grounds, it expressly declined to resolve the statute of limitations issue on that basis. 556 F.3d at 479 n.2 (“none of the respondents have challenged here the BRB’s decision to permit Arch to make the statute of limitations argument several years after Hatfield filed his subsequent claim, so we will *not* consider whether the BRB erred by permitting Arch to pursue the argument.”) (emphasis added).

denial of his first claim . . . cannot, as a matter of law, establish a new cause of action” because “pneumoconiosis is a *latent* dust disease.” 72 F.3d at 314.¹³

The Director’s position, that the limitations clock is reset by a final denial of benefits, gives meaning to the statute of limitations while recognizing both the finality of the earlier denial and the fact that a miner’s pulmonary condition may deteriorate over time and give rise to a new cause of action. The prior, final denial of benefits must be accepted as correct in any subsequent claim. That final denial not only precludes the miner’s entitlement at that time, it also renders any prior medical determination of total disability due to pneumoconiosis a misdiagnosis. *Wyoming Fuel*, 90 F.3d at 1507 (“[A] claimant should not be barred from bringing a [subsequent] claim when his or her first claim was premature because the claimant’s condition had not yet progressed to the point where the claimant met the Act’s definition of total disability due to pneumoconiosis”); *Sharondale*, 42 F.3d at 996 (“claimant must be free to reapply for benefits if his first filing was premature”).

¹³ The subsequent claim on appeal in *Labelle Processing* had been filed in October, 1989, more than three years after the claimant’s physician diagnosed totally disabling pneumoconiosis in February, 1986. 72 F.3d at 311. In Helen Mining’s view, the claim in *Labelle Processing* should have been dismissed as time-barred. In the Director’s view, it was timely because the diagnosis was invalidated in May, 1986, when the miner’s previous claim was denied. *Id.* at 310. The *Labelle Processing* decision does not explicitly discuss the statute of limitations, however, so it is not a controlling precedent on that point.

Since the final denial repudiates any earlier medical determination of total disability due to pneumoconiosis, the final denial also resets the statute of limitations. *Arch of Kentucky*, 556 F.3d at 482-83; *Energy West*, 555 F.3d at 1222; *Consolidation Coal*, 453 F.3d at 618. These courts all recognized that if a prior denial did not reset the limitations period, then a medical opinion that was legally insufficient to establish the miner's entitlement to benefits in a subsequent claim could nevertheless trigger the time limit within which the miner must file a subsequent claim. Such a result would be contrary to the remedial purposes of the Act and "penalize a miner who sought a consultation too soon and received a determination from a physician who decided to err on the side of aggressive diagnosis." *Arch of Kentucky*, 556 F.3d at 482. It would also effectively abolish subsequent claims. *Id.* ("[I]f any positive diagnosis starts the clock, then in a substantial number of cases, the miner will get only one chance to file for benefits.")

Therefore, the Director urges this Court to adopt the position explicitly endorsed by the Board in the instant case and by the Fourth, Sixth and Tenth Circuits: the final denial of a prior claim resets the statute of limitations, and the limitations period for filing a subsequent claim is triggered only when the miner receives a new medical determination of total disability due to pneumoconiosis following that denial.

Applying this rule to the facts here, Obush's 2006 filing is timely. ALJ Tierney's 1991 determination that Obush was not totally disabled by pneumoconiosis renders Dr. Turco's earlier opinion to the contrary a misdiagnosis that is legally insufficient to trigger the running of the limitations period for the filing of any subsequent claim. Helen Mining has not alleged that the record contains any other medical determination that could trigger the running of the statute of limitations. The Court should therefore affirm the Board's holding that this claim is timely.

B. Substantial evidence supports the ALJ's decision to credit the opinions of Drs. Schaaf and Begley that Obush's obstructive pulmonary impairment is due to coal dust exposure and smoking over Dr. Renn's opinion that his obstructive impairment is due solely to smoking.

Helen Mining's challenge to the merits of the award focuses on ALJ Burke's credibility determinations and weighing of the medical evidence on the disease causation issue. In federal black lung cases, the ALJ makes factual findings, evaluates the credibility of witnesses and weighs the conflicting evidence. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). This Court is to undertake an independent review of 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.*

To establish his entitlement to benefits, Obush 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). If so, he suffers from legal pneumoconiosis. *Id.* The ALJ found that the weight of the medical opinion evidence established that Obush's disabling obstructive pulmonary impairment was substantially due to coal dust exposure; therefore, Obush proved that he is totally disabled due to legal pneumoconiosis. The Court should affirm this finding, as it is supported by substantial evidence. Helen Mining's challenges to the ALJ's assessment of the conflicting medical opinion evidence amount to a request for this Court to reweigh the evidence and should be rejected.

On the issue of disease causation, ALJ Burke adequately explained his reasons for crediting the opinions of Drs. Schaaf and Begley (who attribute Obush's obstructive impairment to a combination of coal dust exposure and smoking), for discounting the views of Dr. Fino (who could neither include nor exclude coal dust, smoking or asthma as causes of the obstructive impairment), and for discounting the contrary opinion of Dr. Renn (who attributes Obush's respiratory disease solely to smoking). 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 any conflicts in the evidence. *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).

The ALJ determined that Dr. Schaaf provided a reasoned opinion, supported by his examinations and testing of Obush, that coal dust exposure was a significant contributing cause of Obush's obstructive airway disease. JA 318. The ALJ credited Dr. Schaaf's explanation that the severe deterioration in Obush's lungs was not solely due to Obush's former smoking habit because that exposure to tobacco was too remote to have caused the severe air flow obstruction Dr. Schaaf saw on his examination almost forty years after Obush stopped smoking. JA 315, 110. Dr. Schaaf explained that Obush's more recent and lengthier coal dust exposure played a predominant role in the air flow obstruction that began around the time Obush quit working as a miner in 1990, over twenty years after he stopped smoking. JA 110-11. Contrary to Helen Mining's contention that Dr. Schaaf relied "heavily" on positive x-ray evidence, the ALJ correctly found that Dr. Schaaf explained that his diagnosis of legal pneumoconiosis was not dependent on evidence of clinical pneumoconiosis. Pet br. at 33; JA 318, 123.

Similarly, the ALJ found that Dr. Begley did not "heavily" rely on x-ray evidence of clinical pneumoconiosis to diagnose COPD due to coal dust. JA 318.

Like Dr. Schaaf, Dr. Begley stated that his opinion would be the same even if the x-ray evidence were negative for pneumoconiosis. CX 5 pp. 23-24. The ALJ permissibly determined that Dr. Begley adequately explained his opinion and documented it with examination findings and testing results. JA 318. Dr. Begley concluded that Obush's COPD was a result of both coal dust exposure and smoking because Obush had a progressive decline in his respiratory status over many years, a decline which began while he was still mining, but many years after he had stopped smoking. CX 5 pp. 34-35, 52. Both Dr. Schaaf and Dr. Begley reasonably explained that their etiology opinions were based on their clinical experience and claimant's entire history, factoring in duration and recency of the potential causative factors; therefore, the ALJ permissibly found their opinions well-reasoned and persuasive.

The ALJ correctly noted that Dr. Martin's causation opinion is consistent with Drs. Schaaf's and Begley's. JA 318. Contrary to Helen Mining's suggestion, Dr. Martin's opinion was not flawed because the physician was unable to differentiate with certainty the relative contributions coal dust exposure and cigarette smoking make to Obush's impairment. JA 164. The ALJ rationally determined that Dr. Martin adequately explained his basis for attributing Obush's chronic obstructive airway disease equally to his lengthy coal dust exposure history and to his distant smoking history. JA 314, 318. To diagnose legal

pneumoconiosis, a physician need only demonstrate that the miner's lung disease is "significantly related to, or substantially aggravated by," coal mine dust exposure. 20 C.F.R. § 718.201(b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000). Because Dr. Martin's opinion meets this standard, the Court should reject Helen Mining's general assertion that the ALJ erred in giving this physician's opinion any weight.

Dr. Renn categorically excluded 29 years of coal dust exposure as a potential cause of Obush's emphysema because there was no x-ray evidence of pneumoconiosis.¹⁴ The ALJ properly held that this opinion is inconsistent with the definition of legal pneumoconiosis, 20 C.F.R. § 718.201(a)(2), which specifically encompasses pulmonary diseases unrelated to fibrosis, and with 20 C.F.R. § 718.202(a)(4), which allows pneumoconiosis to be diagnosed "notwithstanding a negative X-ray." JA 319. The ALJ also correctly found that Dr. Renn's opinion was at odds with the Department's determination, based on an extensive review of scientific literature and set forth in the preamble to the BLBA regulations, that "coal dust exposure is associated with significant deficits in lung

¹⁴ Helen Mining does not dispute the ALJ's characterization of the opinion of its other expert, Dr. Fino, as equivocal. Employer's silence is not surprising. Dr. Fino's characterization of Obush's examination as atypical, and his resulting inability to categorically state the cause of Obush's obstructive impairment, stands in sharp contrast to the certitude expressed by Dr. Renn.

function in the absence of clinical CWP.” JA 319 (citing 65 Fed. Reg. 79941 (Dec. 20, 2000)). Therefore, Dr. Renn’s opinion was properly discounted. *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 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 regulatory preamble).

In sum, there is no basis to set aside ALJ Burke’s award. He discussed all the relevant evidence, fulfilled his duty to render findings of fact and conclusions of law, and provided an adequate explanation of what he did and why he did it. *Balsavage*, 295 F.3d at 396. Based on the opinions of Drs. Schaaf and Begley, the ALJ reasonably determined that Obush has a chronic obstructive pulmonary condition caused, in part, by his coal mine employment, and that this condition is a substantially contributing cause of his totally disabling pulmonary impairment. Accordingly, this Court should affirm the ALJ’s award of benefits as supported by substantial evidence.¹⁵

¹⁵ Helen Mining’s final contention—that ALJ Burke erred in reconsidering facts unchanged from the prior ALJ decision—warrants little consideration as Helen Mining fails to specify what fact ALJ Burke reconsidered and to present any argument how a change in the smoking history would alter the outcome. Pet. br. at 47-49. The Board considered this argument below and held that Judge Burke did not revisit a prior smoking history finding because “Judge Tierney did not make a finding regarding the length of claimant’s smoking history.” JA 327. Further, any error on this score would be harmless. Drs. Begley’s and Schaaf’s
(continued...)

CONCLUSION

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

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Helen H. Cox
HELEN H. COX
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
BLLS-SOL@dol.gov
Cox.helen@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

(...continued)

opinions that Obush's lung disease was caused by coal dust exposure as well as tobacco primarily focused on the remoteness, rather than the intensity, of Obush's tobacco use. Nor could any smoking history render Dr. Renn's consistent with the regulations, or Dr. Fino's opinion anything other than equivocal.

COMBINED CERTIFICATIONS OF COMPLIANCE

Certificate of Bar Admission

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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 9034 words, as counted by the Microsoft Office Word 2003 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.

/s/ Helen H. Cox
HELEN H. COX
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Cox.helen@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2010, copies of the Director's brief were served electronically and by mail, postage prepaid, on the following:

William S. Mattingly, Esq.
Jackson Kelly PLLC
150 Clay Street, Suite 500
P.O. Box 619
Morgantown, WV 26507

Robert J. Bilonick, Esq.
Pawlowski, Bilonick & Long
603 North Julian Street
P.O. Box 658
Ebensburg, PA 15931

/s/ Helen H. Cox
HELEN H. COX
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Cox.helen@dol.gov

ATTACHMENT

Black Lung Benefits Act, Section 422(f):

Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later—

- (1) a medical determination of total disability due to pneumoconiosis; or
- (2) the date of the enactment of the Black Lung Benefits Reform Act of 1977 [March 1, 1978].

30 U.S.C. § 932(f).

Title 20, Code of Federal Regulations § 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

...

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. § 725.308 (2009).