

No. 09-1948

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

LONG CONSTRUCTION COMPANY,

Petitioner

v.

ESTIL STILTNER

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Long Construction Company (Long 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 Estil Stiltner (Stiltner or claimant). The Court has jurisdiction over employer's petition for review under section 21(c) of the Longshore and Harbor

Workers' Compensation Act (the Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c)—Stiltner's exposure to coal mine dust—occurred in Virginia, within the jurisdictional boundaries of this Court. *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989); 33 U.S.C. § 921(c).

Long's petition for review meets section 21(c)'s timeliness requirement. The ALJ issued a decision adverse to the employer on September 13, 2007. Joint Appendix (JA) at 59. Long filed a Notice of Appeal with the Benefits Review Board on October 9, 2007, within the thirty-day statutorily prescribed period for appeal. 33 U.S.C. § 921(a) (incorporated by 30 U.S.C. § 932(a)). On November 26, 2008, the Board issued a decision and order affirming the ALJ's decision. JA 70. The employer timely moved for reconsideration on December 23, 2008. 20 C.F.R. § 802.407 (2009). The Board denied reconsideration on June 30, 2009. JA 1. Long then petitioned this Court for review of both Board orders on August 26, 2009, within the sixty-day time limit set forth in section 21(c). JA 3. 33 U.S.C. § 921(c); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 495-96 (4th Cir. 1999) ("if a timely motion for reconsideration is filed with the BRB, the sixty-day period 'will run from the issuance of the Board's decision on reconsideration.' 20 C.F.R. § 802.406"). Accordingly, this Court has jurisdiction over Long's petition

for review.

STATEMENT OF THE ISSUES

1. Did the ALJ properly find that Stiltner's condition had materially changed based on Long Construction's stipulation that Stiltner currently suffers from pneumoconiosis?
2. Are the ALJ's conclusions that Stiltner is totally disabled, in part, due to his pneumoconiosis and entitled to black lung benefits supported by substantial evidence?

STATEMENT OF THE CASE

Stiltner filed his first application for black lung benefits in 1983 while still working as a coal miner. A district director in the Department of Labor's Office of Workers' Compensation Programs—an official who processes claims and makes initial eligibility determinations—denied benefits because Stiltner failed to establish any of the necessary conditions of entitlement, *i.e.*, that he has the disease pneumoconiosis, that the disease was caused by his coal mine employment, and that he has a totally disabling breathing impairment due, in part, to pneumoconiosis. JA 6. Stiltner did not pursue that claim any further. Instead, he continued working as a miner until 1987.

Stiltner filed a second application for benefits in 1999. A district director denied this claim on May 12, 1999, because Stiltner again failed to establish any of

the necessary conditions of entitlement and, moreover, failed to show a material change in his condition since the prior claim was denied. 20 C.F.R. § 725.309(d) (1999) (a new claim filed more than one year after the denial of a prior claim is a “duplicate claim” and will be automatically denied based on the prior claim denial unless the claimant demonstrates a “material change in conditions”).¹

On June 2, 2000, Stiltner filed his third and pending duplicate claim for benefits. A district director proposed awarding this claim, identified Long Construction as Stiltner’s most recent coal mine employer of at least one year, and notified Long of its potential liability for the payment of any black lung benefits awarded to him. JA 19. Long disputed Stiltner’s entitlement to benefits and contested all issues, including whether he had pneumoconiosis arising out of coal mine employment. *Id.*; *see also* Director’s Exhibit 34 (Employer’s Jan. 22, 2001 letter listing contested issues) (DX 34). The matter was referred to the Office of Administrative Law Judges for a hearing.

At the September 9, 2003 hearing, Long withdrew from controversion the issues that Stiltner has the disease pneumoconiosis, that disease arose out of his

¹ The version of section 725.309 set forth in the 1999 Code of Federal Regulations governs this claim, which was filed in 2000. The current version of that regulation applies only to claims filed after January 19, 2001. 20 C.F.R. § 725.2(c) (2009). However, the majority of the current BLBA regulations do apply to this claim. *Id.*; 20 C.F.R. § 718.2 (2009). For the reader’s convenience, this brief includes the relevant year for each regulatory citation.

coal mine employment, and that he was a coal miner. JA 251-52.

Following the hearing, the ALJ entered his first decision awarding benefits to Stiltner, payable by Long Construction. JA 18. Long appealed to the Board. The Board vacated the ALJ's decision in part and remanded the case for further consideration. JA 37. In his decision on remand, the ALJ again awarded benefits to claimant. JA 44. Employer appealed to the Board, which again vacated the ALJ's decision and remanded for further consideration. JA 53. The Board directed the Office of Administrative Law Judges to reassign the case to a different ALJ for a fresh look at the evidence. JA 56-57.

A different ALJ adjudicated the case and, on September 13, 2007, issued a second decision on remand awarding benefits to Stiltner, payable by Long. JA 59. Long again appealed to the Board. The Board affirmed the ALJ's award of benefits. JA 70. Long timely moved for reconsideration *en banc*, which the Board summarily denied. JA 1. Long then petitioned this Court for review. JA 3.

STATEMENT OF THE FACTS

Stiltner worked as a coal miner for over 23 years, ending when he was laid off in 1987. JA 21. He continued working for another two-and-a-half years at a furniture factory until his breathing problems led him to quit. JA 22.

Stiltner was a cigarette smoker from age 20 until 1989 or 1990. The medical treatment records list smoking histories ranging from as little as one pack of

cigarettes a day for 15 years to “over 100-pack years.” JA 60 n. 2. The physicians who provided their expert opinions for the purpose of this litigation relied on smoking histories within the range of 30- to 40-pack years. *Id.* The ALJ concluded that Stiltner had a 30-year smoking history. *Id.*

1. Summary of the medical evidence and reports.

a. Stiltner’s medical treatment records from 1995-1999.

In 1995, a Dr. Bennett Cowan diagnosed Stiltner, at age 56, with squamous cell carcinoma caused by smoking. JA 78. A lung biopsy revealed squamous cell carcinoma and prominent anthracosis with macules (discolored stains or spots) consistent with simple coal workers’ pneumoconiosis in the left upper lobe. JA 88. That year, Stiltner’s left lung was removed via pneumonectomy. JA 89. A post-surgery chest x-ray revealed “a small 7 or 8 mm nodular opacity along the major fissure of the right mid lung region.” JA 103. The radiologist, Dr. Weinacker, reported this was probably a granuloma (a lesion), most likely due to Stiltner’s 20-plus years working in coal mines. *Id.*

Treatment records from 1997, 1998 and 1999 note the “complete obliteration of left lung secondary to previous surgery and squamous cell carcinoma.” JA 113. Stiltner’s right lung showed no evidence of metastatic disease. JA 108, 111, 113. During this time, treatment records from Drs. V. Modi and J. P. Sutherland, Jr., contained diagnoses of chronic obstructive pulmonary disease (COPD), chronic

bronchitis and emphysema. JA 106-117. These treatment records contain no mention of pneumoconiosis, anthracosis or coal workers' pneumoconiosis.

b. Evidence from Stiltner's unsuccessful 1999 claim.

Dr. J. Randolph Forehand examined Stiltner in conjunction with his 1999 benefits application. JA 128. Dr. Forehand found that a March 4, 1999, chest x-ray revealed no evidence of coal workers' pneumoconiosis. JA 130. He diagnosed carcinoma of the lung and chronic bronchitis due to cigarette smoking. JA 131. Dr. Forehand noted that removing Stiltner's left lung had left him with "insufficient residual lung function to work." *Id.* Dr. Forehand concluded that Stiltner has a serious respiratory impairment and is totally disabled. *Id.*

On May 12, 1999, the district director denied Stiltner's second claim for benefits because the medical evidence, namely Dr. Forehand's report, did not show that he had pneumoconiosis, or that pneumoconiosis arose out of his coal mine employment, or that he was totally disabled by pneumoconiosis. JA 12.

c. Complete pulmonary evaluation provided by Department of Labor in conjunction with the present claim.

Stiltner filed his current claim on June 2, 2000. In conjunction with this new claim, at the request of the Department of Labor, Dr. D. L. Rasmussen examined claimant on July 28, 2000.² Dr. Rasmussen recorded a 25-year coal mine work

² The Department of Labor has the statutory duty to provide a claimant-miner
(continued...)

history and a 33-year pack-per-day smoking history. JA 231, 233. He noted the left pneumonectomy as a result of lung cancer. JA 231. Based on a July 28, 2000, chest x-ray and Stiltner's work history, Dr. Rasmussen diagnosed coal workers' pneumoconiosis.³ JA 233. Based on breathing tests, he diagnosed "COPD/Emphysema" due to coal mine dust exposure and cigarette smoking, *i.e.*, legal pneumoconiosis. *Id.* Dr. Rasmussen reported that Stiltner has severe loss of lung function; however, his "loss of lung function significantly exceeds the loss expected from a pneumonectomy alone." JA 236. Dr. Rasmussen therefore concluded that Stiltner's cigarette smoking and coal dust exposure are responsible for the additional impairment and that "his coal dust exposure is a significant contributing factor to his total disability." *Id.*

The Department asked Dr. Rasmussen to review his report and provide his

(...continued)

with "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b).

³ There are two types of pneumoconiosis for purposes of the BLBA: "clinical" and "legal." 20 C.F.R. § 718.201(a) (2009). "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) (2009). This cluster of diseases includes, but is not limited to, "coal workers' pneumoconiosis" as that term is commonly used by doctors. *Id.* "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." 20 C.F.R. § 718.201(a)(2).

opinion based on information that claimant only established 20 years of coal mine employment and that the x-ray was interpreted as negative for pneumoconiosis by a board-certified radiologist. Director's Exhibit 15 (Oct. 10, 2000 letter to Dr. Rasmussen). Dr. Rasmussen responded that, even without x-ray evidence of pneumoconiosis, his medical opinion is that Stiltner suffers from a chronic dust disease of the lung caused, in part, by his coal mine employment. JA 239-40. Dr. Rasmussen based his diagnosis on pulmonary function study and arterial blood gas test results indicating a severe loss of lung function.⁴ JA 238. Some of the results were "consistent with what one might expect from a pneumonectomy." *Id.* However, Dr. Rasmussen explained that Stiltner exhibited a greater "reduction in diffusing capacity" and "considerably more exercise hypoxemia at the light exercise level . . . than would be expected from a pneumonectomy." JA 238. Accordingly, Dr. Rasmussen determined that Stiltner "certainly has evidence of an

⁴ A pulmonary function study measures an individual's lung capacity. The regulations require two values: a Forced Expiratory Volume (FEV₁) and either a Forced Vital Capacity (FVC) or a Maximum Voluntary Ventilation (MVV). 20 C.F.R. § 718.103(a) (2009). FEV₁ measures the amount of air that can be exhaled in one second on maximum effort, FVC measures total lung volume, and MVV measures the maximum volume of air that can be moved by the miner's respiratory apparatus in one minute. *See* 20 C.F.R. § 718, Appx. B (2009).

Arterial blood gas tests "are performed to detect an impairment in the process of alveolar gas exchange." 20 C.F.R. § 718.105(a) (2009). The defect primarily manifests "as a fall in arterial oxygen tension either at rest or during exercise." *Id.*; *see generally* 20 C.F.R. § 718, Appx. C (2009).

additional disease process effecting [sic.] his remaining right lung.” *Id.*

Referencing several epidemiologic studies on the cause of COPD in coal miners and mortality of coal miners from pneumoconiosis, Dr. Rasmussen explained these studies concluded that loss of lung function among coal miners is caused independently by both cigarette smoking and coal mine dust exposure. JA 238-39. Based on his examination and testing of Stiltner and that research, Dr. Rasmussen concluded that “Mr. Stiltner suffers from a totally disabling lung disease which is in significant part the consequence of his coal mine dust exposure as well as his cigarette smoking.” JA 240.

d. Medical reports submitted by Stiltner to support the present claim.

Dr. Rasmussen examined Stiltner again on January 29, 2002. JA 241. Dr. Rasmussen reported that ventilatory function and incremental treadmill exercise studies indicated a marked loss of lung function. JA 242-43. Relying on research documenting that a pneumonectomy in an otherwise-healthy individual would cause no significant loss of pulmonary function except for a reduction in total lung capacity, Dr. Rasmussen explained that Stiltner’s “loss of lung function far exceeds what would be expected from his pneumonectomy.” JA 243. He noted that Stiltner had three risk factors for his impaired lung function: cigarette smoking; coal mine dust exposure; and previous lung cancer with pneumonectomy. *Id.* Therefore, Dr. Rasmussen attributed Stiltner’s marked loss of lung function—

above that expected from his pneumonectomy—to his cigarette smoking and coal mine dust exposure. *Id.* Dr. Rasmussen concluded that Stiltner’s coal mine dust exposure is “a significant or major contributing factor” to his overall disabling respiratory impairment. JA 244. In addition to again diagnosing legal pneumoconiosis, Dr. Rasmussen concluded, based on an x-ray interpreted by Dr. Manu Patel as positive for pneumoconiosis, that claimant has clinical pneumoconiosis. JA 242-43.

Dr. Emory Robinette examined Stiltner on August 17, 2001. JA 225. Dr. Robinette reported a 25-year coal mining history and at least a 40-year pack-of-cigarettes-a-day smoking history. *Id.* He had previously seen Stiltner in 1995 and, at that time, a pulmonary function study performed revealed an FEV₁ of 2.33 (66% of predicted value). At the time of the 2001 examination, the pulmonary function studies revealed an FEV₁ of 1.25 (43% of predicted value) and a chest x-ray showed “radiographic evidence of an occupational pneumoconiosis” in the form of scattered opacities. JA 228. These results were “compatible with severe airflow obstruction with components of restriction based on the reduction in total lung capacity and vital capacity measurements.” JA 228. Dr. Robinette concluded that Stiltner’s respiratory impairment “appears to be chronic and irreversible and at least partially related to his occupational pneumoconiosis.” JA 229.

Dr. Mohammed Ranavaya examined Stiltner on August 27, 2002. JA 245.

Dr. Ranavaya recorded a coal mine work history of “about 25 years” and an “over 15 years” smoking history. JA 245-46. He conducted a chest x-ray, ventilatory study and arterial blood gas tests. Dr. Ranavaya diagnosed Stiltner with coal workers’ pneumoconiosis based on x-ray abnormalities consistent with pneumoconiosis and his occupational exposure history. Based on the ventilatory test results, Dr. Ranavaya diagnosed “moderately severe combined (restrictive and obstructive) ventilatory defect with moderate hypoxemia at rest.” JA 247. The doctor stated this amount of pulmonary impairment is totally disabling. *Id.* Dr. Ranavaya concluded that Stiltner has a “moderately severe disabling pulmonary insufficiency . . . which primarily arose from his coal mining dust exposure.” JA 248.

e. Evidence submitted by Long in opposition to Stiltner’s current claim.

On March 27, 2001, Dr. Richard Naeye, a pathologist, provided Long Construction with an opinion based on his review of slides of tissue samples that had been taken from Stiltner’s lungs in 1995. JA 132. Dr. Naeye noted that the most striking abnormalities in the lungs are “nests and larger masses of very well differentiated squamous cell carcinoma at multiple sites.” *Id.* He attributed the squamous cell cancer to Stiltner’s many years of cigarette smoking. JA 133. Dr. Naeye also saw “moderate numbers of anthracotic macules and 2-3 micronodules [with] just enough admixed fibrous tissue to meet the diagnostic criteria for the

presence of mild, simple coal worker's pneumoconiosis." JA 132. Dr. Naeye found no chronic bronchitis and "surprisingly mild emphysema in [claimant's] lung tissues mak[ing] it unlikely that clinically significant abnormalities in lung function that could be attributed to the CWP are present. The CWP that is present is also too mild to cause disability." JA 133.

Dr. Gregory Fino examined Stiltner on February 12, 2001. JA 187. Dr. Fino recorded a coal mine work history of 27 years and a cigarette smoking history of 34 years. JA 187-88. He noted that Stiltner's medical history included the left pneumonectomy in 1995, bronchitis and emphysema. JA 188. Dr. Fino reviewed a chest x-ray taken in conjunction with his examination of Stiltner, as well as x-rays taken in August of 1995 and November of 1998. Dr. Fino found no abnormalities consistent with occupational pneumoconiosis in any of these films. JA 190. He diagnosed simple coal workers' pneumoconiosis based on the 1995 pathology report. JA 196. Dr. Fino also diagnosed "chronic obstructive bronchitis consistent with previous cigarette smoking" and a "history of lung cancer due to cigarette smoking." *Id.* He concluded, based on a review of research literature, that Stiltner's lung cancer was not caused by working in coal mines. JA 197. Dr. Fino attributed Stiltner's disabling respiratory impairment solely to the left-lung pneumonectomy, which was a direct result of lung cancer, which, in turn, was caused by cigarette smoking. JA 198.

Dr. Fino concluded that Stiltner's simple pneumoconiosis was not a cause of any respiratory impairment. He explained that Stiltner's 1983 pulmonary function study, "performed at or about the time when Mr. Stiltner left the mines," suggested a qualitative obstruction that "was not clinically significant" so "it clearly would not have resulted in an impairment or a disability."⁵ *Id.* Dr. Fino determined that only after Stiltner underwent the removal of his left lung and radiation therapy did his pulmonary function study results document significantly reduced lung function. *Id.* Therefore, Dr. Fino opined that, but for the left pneumonectomy, Stiltner would not be disabled or impaired. *Id.*

Dr. Fino provided a supplemental report after reviewing Dr. Robinette's August 17, 2001, opinion. JA 199. This additional medical information did not cause him to change his opinion that Stiltner has simple coal workers' pneumoconiosis and a disabling respiratory impairment that is related only to the pneumonectomy and cigarette smoking. JA 205-06. Dr. Fino was then asked to review Dr. Rasmussen's January 29, 2002, report, Dr. Ranavaya's August 27, 2002, report, and Dr. Castle's September 30, 2002 report. JA 207-15, 217.⁶ Dr. Fino stated that his opinion remained unchanged. JA 215, 217, 224.

⁵ Stiltner left coal mine employment in 1987, not in 1983. JA 21.

⁶ Dr. Fino incorrectly captions Dr. Castle's September 30, 2002, examination as a Department of Labor examination. JA 217. Dr. Castle examined Stiltner at Long Construction's request. JA 134.

Dr. James Castle examined Stiltner on September 30, 2002. JA 134. He recorded a 35-year smoking history and a 25-year coal mine work history. Dr. Castle found no abnormalities consistent with pneumoconiosis on chest x-rays taken on September 30, 2002, August 17, 2001, and February 12, 2001. JA 135-36. A pulmonary function test showed moderate airway obstruction without significant change after bronchodilators. JA 136. Dr. Castle concluded that there was no evidence of coal workers' pneumoconiosis by physical examination, x-ray evaluation, physiologic testing or arterial blood gas tests. JA 136. He diagnosed moderate airway obstruction due to tobacco smoke-induced chronic bronchitis. *Id.*

Dr. Castle also reviewed the medical records from the prior claim files and the medical evidence developed in conjunction with the pending claim. JA 137-152. Dr. Castle relied on Dr. Naeye's pathology report to diagnose simple coal workers' pneumoconiosis in Stiltner. JA 152. Dr. Castle determined that Stiltner had worked a sufficient time in underground coal mining "to have possibly caused a susceptible individual to develop coal workers' pneumoconiosis." *Id.* Dr. Castle found that Stiltner's smoking history was "sufficient enough" to cause him to develop COPD and lung cancer. *Id.* He found Stiltner to be permanently and totally disabled due to a combination of smoking-induced COPD and his left-lung pneumonectomy, which was necessitated by lung cancer. JA 154, 173. Dr. Castle concluded that Stiltner's total disability was not the result of coal workers'

pneumoconiosis because Stiltner did not have a disabling respiratory impairment prior to the development of lung cancer. *Id.* Dr. Castle was deposed on September 2, 2003, during which he reiterated the opinions expressed in his written reports. JA 171-73.

2. Summary of decisions.

a. ALJ Solomon's Initial Award.

In his February 12, 2004 decision, ALJ Solomon noted that Long Construction had narrowed the contested issues by agreeing that Stiltner was a miner, that he has pneumoconiosis, and that his pneumoconiosis arose out of coal mine employment. JA 20. Long continued to contest the timeliness of the claim, the length of Stiltner's coal mine employment, whether Stiltner was totally disabled, whether that total disability was due to pneumoconiosis, whether Long Construction is the properly designated responsible operator, whether Stiltner had a dependent, and whether Stiltner established a material change in conditions pursuant to 20 C.F.R. § 725.309.

The ALJ quickly dispensed with most of these nominally-contested issues based on undisputed evidence, determining that claim was a timely-filed duplicate claim, JA 20-21, that Stiltner worked as a coal miner for 23.5 years, JA 21, that Long was the responsible operator because it employed Stiltner during his last year coal mining work, JA 21-22, and that Stiltner's wife was a dependent for the

purposes of augmenting any benefits award. JA 21. The issues of material change, total disability, and total disability causation remained.

The ALJ noted that Stiltner bears the burden of demonstrating a material change in his condition by proving, with new evidence, the existence of at least one element of entitlement previously adjudicated against him. JA 22 (citing *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (*en banc*); *Sharondale Corp. v. Ross*, 42 F.2d 993 (6th Cir. 1994)). The ALJ concluded that Long's stipulations constituted new evidence establishing two elements of entitlement (that Stiltner suffers from pneumoconiosis and that it arose out of coal mine employment) that had been found against Stiltner in his most recent claim. JA 22-23. He also noted that the record substantiated Long's stipulations. JA 23. Consequently, the ALJ found that Stiltner had proved a material change in his condition and proceeded to consider whether he proved the remaining elements of entitlement (namely, total disability and disability causation). *Id.*

The ALJ found the pulmonary function tests, the arterial blood gas studies and the medical opinions sufficient to demonstrate that Stiltner is totally disabled by a respiratory impairment that would preclude him from doing the heavy labor required by his former coal mine work. JA 32. The ALJ then weighed the medical opinion evidence to determine whether pneumoconiosis was at least a contributing cause of Stiltner's disability. The ALJ discounted Drs. Forehand's and Naeye's

opinions, accorded little weight to the opinions of Drs. Castle and Ranavaya, and found the opinions of Drs. Robinette, Rasmussen and Fino to be well documented, albeit in conflict, on the cause of Stiltner's respiratory disability. JA 33-34. The ALJ gave the greatest weight to Dr. Rasmussen's opinion that Stiltner has a greater respiratory impairment than the pneumonectomy alone can explain, and that this was due to both coal dust exposure and smoking. JA 34. Finding that opinion, bolstered by Dr. Robinette's opinion and the pulmonary function tests, to outweigh Dr. Fino's contrary testimony, the ALJ concluded that Stiltner proved that pneumoconiosis is at least a contributing cause of his total disability and awarded benefits. *Id.*

b. The Benefits Review Board's First Remand.

In its appeal to the Board, Long Construction challenged ALJ Solomon's findings on the material change and disability causation issues. JA 38. It did not challenge the finding that Stiltner has a totally disabling respiratory impairment. JA 38 n.1. On the question of material change, the Board held that the ALJ properly relied on Long's stipulation conceding the existence of coal workers' pneumoconiosis to establish an element of entitlement previously adjudicated against Stiltner. JA 39. Reviewing the ALJ's analysis of disability causation, the Board found the ALJ's explanation of the weight he accorded to the various medical opinions, especially to Dr. Robinette's, to be confusing and insufficiently

explained. The Board therefore vacated the award and remanded the case for further consideration. JA 40.

c. ALJ Solomon's Second Award and the Benefits Review Board's Second Remand.

On remand, ALJ Solomon again credited the opinions of Drs. Rasmussen and Robinette over the contrary opinions of Drs. Castle and Fino and awarded benefits. JA 44-51. Long appealed. The Board ruled that the ALJ's analysis of the medical opinion evidence on causation again appeared to be confused, inconsistent and insufficiently explained. JA 55. The Board vacated the award and remanded the case with instructions to reassign it to a different ALJ to provide a fresh look at the evidence. JA 56-57.

d. ALJ Price's Award.

On remand, after additional briefing by the parties, ALJ Price awarded benefits in a decision dated September 13, 2007. JA 59. The ALJ found that Stiltner worked as a coal miner for 23.5 years and had a 30-year smoking history. JA 60 n. 2. The only issue before him was whether pneumoconiosis is a substantially contributing cause of Stiltner's total disability. He noted the consensus among the physicians that Stiltner is totally disabled and that "the pneumonectomy caused some level of disability." JA 62.

After summarizing the medical evidence, the ALJ explained that the evidence from the prior claims had little probative value. JA 66-67. He found the

opinions of Drs. Forehand, Modi and Sutherland were not probative on the cause of Stiltner's impairment because none of them diagnosed pneumoconiosis. JA 64. Moreover, Drs. Modi and Sutherland did not address the etiology of Stiltner's COPD or his disability. JA 64, 66. The ALJ also found Dr. Naeye's opinion to be of little relevance on the cause of Stiltner's current impairment because it was based primarily on tissue samples taken in 1995 rather than more recent clinical data. JA 64.

The ALJ noted that Drs. Fino, Castle, Robinette and Rasmussen all agreed that Stiltner has pneumoconiosis and that he has an obstructive lung impairment beyond the impairment caused by his pneumonectomy. JA 67. These doctors also agreed that Stiltner has two possible risk factors that could cause this obstructive impairment: smoking and coal mine employment. *Id.* Drs. Rasmussen and Robinette attributed a substantial portion of Stiltner's disability to coal dust exposure while also recognizing the effects of effects of smoking. Drs. Castle and Fino attributed Stiltner's pulmonary obstruction solely to cigarette smoking, concluding coal dust exposure did not materially worsen his pulmonary impairment. *Id.* The ALJ found all four physicians to be well-qualified, but concluded that Drs. Rasmussen's and Robinette's opinions were more persuasive than Drs. Castle's and Fino's because:

- Dr. Rasmussen documented his reasons for diagnosing additional

obstructive impairment that was not related to the pneumonectomy with pulmonary function studies, and provided a well-reasoned basis, supported by medical literature, for attributing this added impairment to COPD arising out of a combination coal dust exposure and smoking (JA 63);

- Dr. Robinette provided a well-reasoned opinion, documented by multiple examinations and radiographic and physiologic testing, that Stiltner's severe disability is partially related to his occupational pneumoconiosis (JA 66);
- Dr. Fino's opinion was internally inconsistent, stating at one point that Stiltner's disability is solely due to the pneumonectomy yet stating at another point that he has additional obstructive impairment (JA 62);
and
- Dr. Castle did not attribute any additional impairment to pneumoconiosis since his examination did not reveal any physical findings such as rales (abnormal, discontinuous sounds in the breath) or rhonchi (dry rattling of the throat or bronchial tube) that are consistent with the presence of pneumoconiosis; however, after reviewing the other medical data of record, he failed to account for and reconcile his findings with the other physicians' findings of rales

and rhonchi (JA 65).

Finding Drs. Rasmussen's and Robinette's opinions to be more persuasive and internally consistent, the ALJ determined that Stiltner had established, by the weight of the medical opinion evidence, that pneumoconiosis is a significantly contributing cause of his totally disabling obstructive impairment and, therefore, awarded benefits to Stiltner. JA 67.

e. The Benefits Review Board's Decision Affirming ALJ Price's Award.

On appeal, the Board affirmed ALJ Price's award of benefits. The Board rejected Long's challenge to the ALJ's smoking history determination, finding that the ALJ accurately summarized the conflicting smoking histories recorded in various medical records and Stiltner's testimony and then acted within his discretion in crediting that testimony in finding that Stiltner had a significant smoking history of 30 years.⁷ JA 72. The Board affirmed as reasonable the ALJ's decision to accord little weight to Drs. Forehand's and Naeye's opinions, which did not address Stiltner's current condition or whether that condition had worsened due to pneumoconiosis. JA 73.

The Board held that the ALJ acted within his discretion in according less

⁷ The Board also rejected Long's argument that Stiltner had no impairment beyond the impairment caused by his pneumonectomy as it was contrary to the evidence, including the opinions of Long's own medical experts, Drs. Castle and Fino. JA 72-73.

weight to Drs. Fino's and Castle's opinions that Stiltner's COPD was caused entirely by smoking than he did to the opinions of Drs. Rasmussen and Robinette, who concluded that this impairment was caused by a combination of coal dust exposure and smoking. *Id.* The Board affirmed as proper the ALJ's decision to discredit Dr. Fino's opinion because his several reports are inconsistent concerning the existence of an impairment beyond that attributed to the pneumonectomy and because he failed to acknowledge that Stiltner's pneumoconiosis could progress and result in a significant obstruction after he left the coal mines. JA 73-74. Likewise, the Board held that the ALJ properly discounted Dr. Castle's opinion because he failed to adequately explain why the additional obstruction seen in Stiltner's right lung was not related to the pneumoconiosis he diagnosed. *Id.* The Board also concluded that the ALJ permissibly determined that Dr. Castle's opinion was not consistent with the definition of legal pneumoconiosis, which includes COPD due to coal dust exposure. JA 74.

The Board also held that the ALJ acted within his discretion by crediting Dr. Robinette's report, even though he did not have access to all of the medical records reviewed by Drs. Castle and Fino. JA 75. The Board agreed with the ALJ that Dr. Robinette's opinion was well-reasoned, based on accurate work and smoking histories, consistent with the objective studies, and documented by multiple examinations and clinical testing. *Id.*

The Board also held that the ALJ properly found Dr. Rasmussen's opinion to be well-reasoned and supported by the record. While Dr. Rasmussen's January 29, 2002, report understated Stiltner's smoking history, the ALJ noted that the doctor had listed an accurate smoking history in an earlier report, in which he reached the same diagnosis. JA 75-76. Acknowledging Dr. Rasmussen's multiple examinations of Stiltner, exhaustive review of the objective tests, and citations to medical literature, the Board affirmed the ALJ's decision to credit Dr. Rasmussen's opinion as well-reasoned. JA 75-76.

Finally, the Board affirmed the ALJ's credibility determinations and refused, as beyond its scope of review, Long Construction's request to reweigh the medical opinion evidence. JA 75. Accordingly, the Board affirmed, as supported by substantial evidence, the ALJ's findings that Stiltner is totally disabled due to pneumoconiosis and entitled to benefits.

SUMMARY OF THE ARGUMENT

In 1999, a district director denied Stiltner's claim because he failed to prove, *inter alia*, that he suffered from pneumoconiosis. His subsequent claim must be automatically denied unless he establishes a material change in his condition. At the 2003 hearing, Long Construction stipulated that Stiltner suffers from pneumoconiosis caused by his coal mine employment. This stipulation relieves Stiltner of his burden to produce evidence proving these two elements of

entitlement that Long knew had been adjudicated against Stiltner in the 1999 claim. Long cannot avoid the legal consequences of its voluntary stipulation. By withdrawing its controversion of the issues of pneumoconiosis and its cause, Long conceded that Stiltner's condition had materially changed in those two respects.

Furthermore, the Court should affirm the ALJ's determination that Stiltner has proved that his totally disabling respiratory impairment is due, in part, to his pneumoconiosis. Long'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 and should be affirmed.

ARGUMENT

- 1. The ALJ properly found that Long's stipulations established two elements of entitlement previously decided against Stiltner and, as a result, established a change in Stiltner's condition since his prior claim was denied.**

Stiltner's most recent previous claim was denied on May 12, 1999, because he failed to establish, *inter alia*, that he suffered from pneumoconiosis.⁸ JA 12. This does not bar his present claim, because "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication." *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (*en banc*). It does, however, mean that

⁸ Unsurprisingly, he also failed to establish that his pneumoconiosis was caused by his coal mine work or that he was totally disabled by pneumoconiosis. JA 12.

Stiltner must prove that his condition has materially changed. 20 C.F.R. § 725.309(d) (1999). To do this, he must demonstrate, with evidence addressing his current medical condition, that he now satisfies at least one of the elements of entitlement previously decided against him. *Lisa Lee*, 86 F.3d at 1362. Once a material change is established, his current claim will be reviewed on the merits based on all evidence of record.

Long Construction initially contended that Stiltner satisfied none of the elements of entitlement. DX 34. At the September 9, 2003, hearing in this case, however, Long agreed that Stiltner currently suffers from pneumoconiosis. JA 252, 20 (“the parties have stipulated . . . [t]hat the medical evidence establishes that the miner suffers from pneumoconiosis”). The ALJ and BRB found that this stipulation necessarily proved a material change in a condition of entitlement (existence of pneumoconiosis) that had been decided against Stiltner in his 1999 claim. JA 23, 39, 71.

Long asserts that the Board and ALJ erred as a matter of law in finding a material change based on its stipulation. Petitioner’s Brief at 18-20. This Court applies *de novo* review to legal conclusions made by the Board and the ALJ. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 186 (4th Cir. 2002). To the extent the interpretation of the black lung benefits program regulations is raised, the Director’s construction of those regulations warrants this Court’s deference. *Doss*

v. Director, OWCP, 53 F.3d 654, 658 (4th Cir. 1995).

Long argues that the ALJ could not rely on its stipulation that Stiltner suffers from pneumoconiosis to establish a material change in Stiltner's condition because Long "did not stipulate to a change in the miner's condition." Petitioner's Brief at 19.⁹ This misunderstands the nature of stipulations. Once a fact is stipulated to, "*the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it* It is, in truth, a substitute for evidence, in that it does away with the need for evidence." 9 Wigmore, Evidence § 2588, at 821 (Chadburn 1981) (emphasis added)." *Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999). Accordingly, it must be "taken for granted" that Stiltner currently suffers from pneumoconiosis. In 1999, he was found not to suffer from that disease. The only possible conclusion to draw

⁹ Long's implication that it intended the stipulation only to apply to the ALJ's decision on the ultimate merits of Stiltner's claim and not to his consideration of the material change issue is unsupported by the record. It is also irrelevant. Even if the material change and merits inquiries are viewed as separate phases of a BLBA claim proceeding, Long's stipulation would apply with equal force to each. *See, U.S. v. Dailey*, 918 F.2d 747, 748 (8th Cir. 1990) (criminal defendant's stipulation to the weight of cocaine base in prosecution exhibit "for the purposes of chain of custody and authenticity" barred defendant from weighing that exhibit during the sentencing phase because "[a] stipulation made for trial purposes is no less binding at sentencing"). If stipulations have binding effect across phases of a criminal prosecution, with its heightened due process concerns, they certainly have the same effect in a BLBA claim.

from these facts is that Stiltner's condition materially changed.¹⁰

Long Construction attempts to avoid the effect of its stipulations by claiming that “[t]he only basis for stipulating to pneumoconiosis was claimant’s 1995 biopsy evidence which showed a minimal degree of simple pneumoconiosis.” Petitioner’s Brief at 19. The ALJ and Board properly declined this invitation to look behind Long’s stipulation, and this Court should as well. The issue is whether new evidence demonstrates that Stiltner suffers from pneumoconiosis. The stipulation itself is such evidence. *U.S. v. Cruz-Rodriguez*, 570 F.3d 1179, 1184 (10th Cir. 2009) (“Stipulations are evidentiary.”).¹¹

¹⁰ Any other interpretation of Long’s concession would be contrary to this Court’s holding that the prior denial must be accepted by the employer and subsequent ALJs as final and correct. *Lisa Lee Mines*, 86 F.3d at 1361 (the legal conclusion attendant with a prior denial must be accepted as correct and “is as off-limits to criticism by the respondent as by the claimant”). It would be illogical and inequitable to let an employer stipulate to the presence of pneumoconiosis in a manner that contradicts the findings in the prior denial. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616 (4th Cir. 2006) (“To accommodate the finality considerations that attach to a prior denial, we instead adopted a standard that presumed that the factual determinations underlying a prior denial are correct . . .”).

¹¹ Moreover, if one looked behind Long’s stipulation, it is not obvious that the 1995 biopsy report must have been Long’s only basis for stipulating to the presence of pneumoconiosis in 2003. After the district director notified Long in 2000 that Stiltner’s new application would be awarded, Long contested all elements of entitlement, including the issues of pneumoconiosis and its cause. JA 19; DX 34. It did not withdraw those issues until the 2003 hearing, after additional medical evidence was developed, including x-rays dated July 28, 2000, August 17, 2001, and August 27, 2002, which were each interpreted as positive for
(continued...)

“Once a party has entered into a stipulation . . . that party is not at liberty to renege unilaterally on a stipulated fact without leave of court, which ordinarily will not be granted absent a showing of good cause.” *Caban Hernandez v. Phillip Morris USA, Inc.*, 486 F.3d 1, 6 (1st Cir. 2007); *accord*, *U.S. v. Webb*, 595 F.2d 203, 206 (4th Cir. 1979) (“stipulations of attorneys made during a trial may not be disregarded or set aside at will”) (internal citation omitted). Long gives no legitimate reason why it should not be held to its voluntary stipulation. To hold otherwise would be unfair to Stiltner, who reasonably relied on Long’s stipulation as removing his burden of proving the stipulated elements of entitlement.

In sum, Long Construction, knowing that Stiltner had been found not to suffer from pneumoconiosis in his prior claim, voluntarily admitted that Stiltner now has that disease. It cannot escape the obvious consequence of that decision. Long’s argument that the ALJ and Board committed reversible error in finding that Stiltner’s condition had materially changed should be rejected.¹²

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pneumoconiosis. JA 222-23. While Long mentioned the biopsy evidence when initially making its stipulation, it is impossible to know in retrospect whether this additional evidence was a factor in that decision.

¹² Even if the Court finds that Long’s stipulation does not establish a material change, a remand would not be necessary if the Court agrees with the Director that the ALJ’s finding that Stiltner is totally disabled due to pneumoconiosis is supported by substantial evidence. *Infra* at 31-38. Affirming a material change finding here on grounds different from the Board does not invoke the concerns of
(continued...)

2. The ALJ’s finding that Stiltner’s pneumoconiosis is a significant contributing cause of his disabling respiratory impairment is supported by substantial evidence.

Long Construction’s brief is primarily dedicated to challenging the ALJ’s credibility determinations and weighing of the medical evidence on the disability causation issue. In federal black lung cases, the ALJ makes factual findings, evaluates the credibility of witnesses and weighs the conflicting evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). This Court is to undertake an independent review of the record to determine whether the ALJ’s factual findings are based upon substantial evidence. *Doss*, 53 F.3d at 659. Substantial evidence is more than a mere scintilla and is such evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

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the *Chenery* doctrine. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency”); *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994). Here, the ALJ—the Congressionally-designated fact finder in the BLBA’s adjudication scheme—has already weighed the evidence and reached a reasoned conclusion that Stiltner is now totally disabled due to pneumoconiosis. JA 67. This conclusion was based on evidence (the testimony of Drs. Robinette and Rasmussen) that was developed after Stiltner’s previous claim was denied, and it was properly reviewed and affirmed by the Board. Accordingly, the *Chenery* doctrine should not preclude the Court from drawing the legal conclusion that Stiltner’s condition materially changed. *Cf. Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 115 (4th Cir. 1995) (refusing to affirm ALJ’s decision on alternate grounds where ALJ had not yet rendered a factual finding on the question).

To establish his entitlement to benefits, Stiltner must prove that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. 20 C.F.R. § 718.204(b)(1) (2009); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). The ALJ found that the weight of the medical opinion evidence established that an obstructive pulmonary impairment caused, in part, by coal dust exposure, was a significant factor in Stiltner's total respiratory disability, above and beyond the impairment caused by his pneumonectomy. The Court should affirm this finding, as it is supported by substantial evidence. Long's attacks on the ALJ's credibility determinations—that Drs. Fino's and Castle's opinions are internally inconsistent and contrary to the regulations, that Drs. Naeye's and Forehand's opinions are not probative on the disability causation issue, and that Drs. Rasmussen's and Robinette's opinions warrant persuasive weight—amount to a request for this Court to reweigh the evidence and should be rejected.

a. The ALJ did not attribute Stiltner's lung cancer to coal mine employment.

Many of Long's attacks on the ALJ's analysis flow from its position that no evidence connects coal dust exposure to Stiltner's pneumonectomy. *See* Petitioner's Brief at 22, 25-26, 31, 40. However, contrary to Long's assumption, neither the ALJ's decision nor any of the medical opinions dispute this fact. To the contrary, all agree that the pneumonectomy contributed to Stiltner's disability and

that it was necessitated by lung cancer which, in turn, was caused by smoking. However, the ALJ (and two of Long's own experts, Drs. Castle and Fino) concluded that Stiltner has an additional impairment in his right lung. JA 9. The question is whether the ALJ's conclusion that this additional impairment was caused by a combination of coal dust exposure and smoking, rather than by smoking alone, is supported by substantial evidence.

b. The ALJ properly weighed the evidence supporting Stiltner's claim.

The ALJ adequately explained his basis for crediting the opinions of Drs. Robinette and Rasmussen (who attribute Stiltner's additional obstructive impairment to a combination of pneumoconiosis and smoking) and for discounting the contrary opinions of Drs. Castle, Fino, Forehand and Naeye (who attribute Stiltner's impairment 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 the conflicts in the evidence. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 (4th Cir. 1996). “[A]s the trier of fact, the ALJ is not bound to accept the opinion or theory of any medical expert.” *Underwood*, 105 F.3d at 949. The ALJ need only provide a factual basis to support his one reason for discrediting an opinion. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000).

The ALJ determined that Dr. Rasmussen provided a reasoned opinion,

supported by his examinations and testing of Stiltner as well as citations to relevant medical research, that Stiltner has an obstructive loss of lung function beyond that caused by his pneumonectomy. JA 63. Dr. Rasmussen attributed this additional obstruction to both smoking and coal dust exposure and, based on his experience and treatment of claimant, determined that coal mine dust exposure was a significant contributing factor to Stiltner's secondary obstructive impairment. JA 240. The ALJ rightfully determined that Dr. Rasmussen adequately explained his opinion, properly documented it with examination findings and testing results, and supported it with relevant medical research; therefore, the ALJ credited Dr. Rasmussen's opinion that pneumoconiosis was a significant contributing factor in worsening Stiltner's respiratory disability. *See Compton*, 211 F.3d at 211 (it is the province of the ALJ to evaluate a physician's opinion and to determine from the totality of the report whether the doctor has reached a reasoned medical opinion).

The ALJ found that Dr. Rasmussen unequivocally concluded that coal mine dust exposure was a contributing factor to Stiltner's total disability.¹³ That is

¹³ Long contends "Dr. Rasmussen's speculation regarding causation is not enough" and cites to *U.S. Steel Mining Co., Inc., v. Director, OWCP*, 187 F.3d 384 (4th Cir. 1999). Unlike Dr. Rasmussen's definitive opinion here, Dr. Rasmussen's opinion in *U.S. Steel Mining* "merely suggested" a causal connection between pneumoconiosis and the miner's death; therefore, the Court properly reversed the ALJ's reliance on the doctor's speculative opinion as the sole evidence to support an award. 187 F.3d at 390-91. The Court's ruling was fact-specific and did not, as Long implies, raise questions concerning the credibility of all medical opinions (continued...)

enough evidence to support the ALJ's decision to credit Dr. Rasmussen's disability causation opinion. *See Williams*, 453 F.3d at 622; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (holding that the miner "was not required to demonstrate that coal dust was the *only* cause of his current respiratory problems."). The ALJ also permissibly found that Dr. Rasmussen's opinion was bolstered by Dr. Robinette, who credibly diagnosed Stiltner's exacerbating, secondary respiratory impairment as "at least partially related to his occupational pneumoconiosis." JA 229.

c. The ALJ properly weighed Long Construction's evidence.

The ALJ then considered the contrary medical opinion evidence and reasonably found that Dr. Rasmussen's better-explained and documented disability-causation opinion, as supported by Dr. Robinette, outweighed the contrary medical opinions. Long argues that the ALJ erred in not crediting Dr. Naeye's opinion that the pneumoconiosis observed on biopsy was too minimal to cause any disability. Petitioner's Brief at 35-36. Employer's contention misses the mark. Dr. Naeye's opinion that "the presence of pneumoconiosis in the tissue was so slight that it could not possibly cause an impairment" was based on slides of tissue collected from Stiltner's lung and lymph nodes in 1995. JA 6. The ALJ did

(...continued)
authored by Dr. Rasmussen. JA 41.

not “mechanically discount[]” Dr. Naeye’s opinion “merely because it was based on earlier evidence.” Petitioner’s Brief at 35. Rather, the ALJ sensibly concluded that an opinion based solely on Stiltner’s condition in 1995 was less probative of the cause of Stiltner’s present, worsening pulmonary impairment than other medical opinions based on a wider array of much more recent tests. JA 64. Likewise, the ALJ permissibly discounted Dr. Forehand’s 1999 opinion, which did not diagnose pneumoconiosis and did not address the cause of the additional, disabling obstruction that developed in Stiltner’s right lung. *Id.*¹⁴

The ALJ also permissibly discounted Dr. Fino’s opinion on the cause of the additional obstruction because Dr. Fino provided inconsistent opinions on the existence of that additional obstruction. JA 62. Moreover, Dr. Fino’s conclusion

¹⁴ Long contends, in passing, that the ALJ erred in finding Stiltner to be totally disabled due to pneumoconiosis because Dr. Forehand previously opined that Stiltner was totally disabled due to his pneumonectomy and smoking. Petitioner’s Brief at 21-22. Even assuming Dr. Forehand’s opinion is correct, the argument rests on a faulty assumption. A claimant who is disabled due to a non-occupational respiratory condition will nevertheless be entitled to black lung benefits if pneumoconiosis “[h]as a material adverse effect on the miner’s respiratory or pulmonary condition,” or “[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.” 20 C.F.R. § 718.204(c)(1)(i), (ii) (2009). As the ALJ determined—and Long has not challenged this finding—the medical evidence establishes that, since the pneumonectomy, Stiltner has developed an additional, non-cancerous obstruction in his remaining right lung and that this additional pulmonary obstruction has worsened his respiratory disability. JA 67. Thus, if the ALJ properly determined that the medical evidence demonstrates that Stiltner’s additional, disabling obstruction is significantly related to his pneumoconiosis, it is a compensable disability.

that Stiltner's pneumoconiosis did not substantially contribute to his current pulmonary disability was based on pulmonary function tests administered in 1983, four years before Stiltner left coal mining. JA 197. As the ALJ permissibly concluded, this suggests an assumption by Dr. Fino that Stiltner's pneumoconiosis could not progress in the interim. JA 62. In this respect, Dr. Fino's opinion is at odds with the regulatory definition of pneumoconiosis. 20 C.F.R. § 718.201(c) (2009) (pneumoconiosis is "a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure").

Long objects to this characterization, correctly pointing out that Dr. Fino did not explicitly rule out the possibility that pneumoconiosis is a latent and progressive disease. Petitioner's Brief at 24. If so, Dr. Fino's discussion of the 1983 pulmonary function test results is something of a non sequitur, which hardly strengthens Long's claim that the ALJ committed reversible error by not crediting Dr. Fino more heavily. Further, the ALJ permissibly discounted Dr. Fino's opinion on disability causation on the ground that it was based on the erroneous belief that Stiltner did not have legal pneumoconiosis. *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (when a doctor has found claimant does not have pneumoconiosis and the ALJ has found to the contrary, such medical opinions can carry little weight on disability causation).

Contrary to Long's contention, the ALJ did not question Dr. Castle's

opinion that the pneumonectomy contributed to Stiltner's disability and was caused by smoking rather than his work as a coal miner. Petitioner's Brief at 29-35. The ALJ properly focused on Dr. Castle's opinion concerning the cause of Stiltner's second impairment—the non-cancerous obstruction in his right lung. JA 65. The ALJ permissibly concluded that Dr. Castle failed to adequately address the cause of that obstruction. *Compton*, 211 F.3d at 212 (“An ALJ may choose to discredit an opinion that lacks a thorough explanation . . .”). Dr. Castle limited his inquiry to whether clinical pneumoconiosis could cause that obstruction. JA 153-54. Dr. Castle excluded coal dust exposure as a cause of Stiltner's additional pulmonary obstruction because “there were no changes in the remaining right lung indicating coal workers' pneumoconiosis radiographically” and because Dr. Naeye diagnosed only “minimal” pneumoconiosis based on the 1995 biopsy slides. JA 153. The ALJ permissibly determined that Dr. Castle did not fully and properly consider that Stiltner might have legal pneumoconiosis as credibly diagnosed by Drs. Rasmussen and Robinette. JA 65. Therefore, the ALJ properly accorded less weight to Dr. Castle's opinion on disability causation. *Toler*, 43 F.3d at 116.

In sum, there is no basis to set aside the ALJ's decision. He fulfilled his duty to render findings of fact and conclusions of law and to provide an adequate explanation of what he did and why he did it. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998). The ALJ discussed all the evidence of

record and sufficiently explained his reasons for crediting Drs. Rasmussen and Robinette, who concluded that coal dust exposure was a contributing cause to Stiltner's pulmonary disability, and for giving less weight to opinions advancing the contrary view. The ALJ's conclusion that pneumoconiosis is a significant cause of Stiltner's additional, disabling obstructive impairment is both reasonable and supported by substantial evidence, and should not be disturbed by this Court. *Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001) ("The ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability.").

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's award of benefits to Estil Stiltner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 9,099 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010, copies of the Director's brief were served electronically and by mail, postage prepaid, on the following:

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