No. 11-3926

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

A&E COAL CO.;
OLD REPUBLIC INSURANCE COMPANY

Petitioners

v.

JAMES ADAMS;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

A&E Coal Co. and its insurance carrier, Old Republic Insurance Company, (collectively, A&E or employer) petition this Court for review of a Benefits Review Board decision affirming an administrative law judge's award of James Adams's claim for benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C. §§ 901-944, as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). On December 11, 2009,

the ALJ awarded Adams federal black lung benefits. Appendix (App.) 18-43. A&E timely appealed to the Benefits Review Board on January 4, 2010. R 102-105;[1] *see* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On February 3, 2011, the Board issued a final order affirming the ALJ's award of benefits (the Order). App. 9-17. A&E timely sought reconsideration of the Board's order on March 7, 2011. R 4-22; *see* 20 C.F.R. § 802.407 (providing a thirty-day period for seeking reconsideration of a final Board order); 20 C.F.R. § 802.221 (when a time period ends on a non-business day, the end date is extended until the following business day). The Board issued an order denying A&E's motion for reconsideration of the February 2011 order on June 30, 2011 (the Reconsideration Order). App. 7-8. On August 25, 2011, A&E timely petitioned this Court to review the Board's Order and Reconsideration Order. App. 1-2; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions); 20 C.F.R. § 802.406 (a timely motion for

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[1] "R" refers to record materials not in the Petitioner's Appendix, but listed in the Board's consecutively paginated index. *See* App. 3-6.

reconsideration to the Board tolls the sixty-day period for a party to seek appellate review in the appropriate federal court).

This Court has jurisdiction over A&E's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) – Adams's exposure to coal dust – occurred in Kentucky, within the jurisdictional boundaries of this Court. *See Danko v. Director, OWCP*, 846 F.2d 366, 368 (6th Cir. 1988).

STATEMENT OF THE ISSUES

1. Does the Administrative Procedure Act forbid an ALJ from discounting expert testimony that contradicts the Department of Labor's evaluation of scientific and medical literature in the preamble to the Black Lung Benefits Act's implementing regulations?

2. Are the ALJ's assessments of the conflicting expert testimony and ultimate decision awarding BLBA benefits to Adams supported by substantial evidence?

STATEMENT OF THE CASE

1. Legal framework.

Former coal miners who are totally disabled by pneumoconiosis are entitled to federal black lung benefits. It is undisputed that claimant/respondent James

Adams is totally disabled by chronic obstructive pulmonary disease (COPD).[2] The disputed issue in this case is whether Adams's COPD is "significantly related to, or substantially aggravated by" his occupational exposure to coal mine dust. 20 C.F.R. § 718.201(b). If so, he suffers from totally disabling "legal pneumoconiosis" and is entitled to benefits. 20 C.F.R. § 718.201 (a)(2).

Compensable pneumoconiosis takes two forms, "clinical" and "legal." 20 C.F.R. § 718.201(a). "Clinical pneumoconiosis" refers to a cluster of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003) ("Clinical or medical pneumoconiosis is a lung disease caused by fibrotic reaction of the lung tissue to inhaled dust that is generally visible on chest x-ray films.") (citing *Usery v. Turner-Elkhorn Mining Co.,* 428

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[2] Chronic obstructive pulmonary disease, commonly abbreviated "COPD," is a lung disease characterized by airflow obstruction. The Merck Manual of Diagnosis and Therapy (19th ed. 2011). COPD "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended; Final Rule, 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000) ("the preamble"). The medical experts variously described or categorized Adams's COPD as, *e.g.*, "COPD" (Dr. Rasmussen, App. 124), "pulmonary emphysema" (Dr. Jarboe, App. 198), and "asthma" (Dr. Jarboe, *Id.*). For the reader's convenience, this brief generally replaces these various terms with the umbrella category, COPD.

U.S. 1, 6-7 (1976)). This cluster of diseases includes, but is not limited to, "coal workers' pneumoconiosis" as that term is commonly used by doctors. 20 C.F.R. § 718.201(a)(1). Clinical pneumoconiosis is generally diagnosed by chest x-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

"Legal pneumoconiosis" refers to "any chronic lung disease or impairment . . . arising out of coal mine employment" and specifically may include "any chronic restrictive or obstructive pulmonary disease." 20 C.F.R. § 718.201(a)(2); *see Eastover Mining*, 338 F.3d at 509 ("Legal pneumoconiosis includes all lung diseases meeting the regulatory definition of any lung disease that is significantly related to, or aggravated by, exposure to coal dust."); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996) ("COPD, if it arises out of coal-mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis."). A disease arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Moreover, pneumoconiosis is "recognized as a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

2. Course of the proceedings below.

James Adams filed his first claim for federal black lung benefits in 1988,

which was denied. DX 1; 20.[3] Adams filed the claim at issue in this appeal, his second, on December 5, 2007.[4] DX 3. After a formal hearing, ALJ Robert B. Rae awarded benefits, finding that Adams was totally disabled by legal pneumoconiosis. App. 41-42. A&E appealed to the Board, which affirmed the award and denied A&E's subsequent motion for reconsideration. App. 7, 17. A&E then petitioned this Court for review. App. 1.

STATEMENT OF THE FACTS

1. Adams's work, smoking, and health histories.

Adams began working as a coal miner at 18, and spent 17 years in the mines before leaving in 1988 because he could no longer breathe properly. App. 20, 38; Tr. 20 .[5] Adams spent the majority of his coal mine employment working underground as a coal drill operator or a cutting machine operator. App. 21; Tr. 13-20. He also was a regular cigarette smoker for somewhere between twenty and

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[3] DX refers to indexed, but separately paginated exhibits that were submitted to the ALJ by the Director. *See* App. 6.

[4] Under the BLBA, if a miner's claim for benefits has been denied and over a year has passed, he may file a subsequent claim for benefits. 20 C.F.R. § 725.309(d). Before a subsequent claim may be considered on its merits, however, the claimant must demonstrate that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final." *Id*.

[5] Tr. refers to the indexed, but separately paginated transcript of the ALJ hearing. *See* App. 6.

thirty-eight years, ranging from one-half to a little more than a pack per day. App. 21, 122, 126; Tr. 22-23.

2. The relevant medical evidence.[6]

This appeal centers on the ALJ's evaluation of testimony by two medical experts: Dr. Donald L. Rasmussen, who testified that Adams's COPD arose, in part, out of his coal mine employment, and Dr. Thomas M. Jarboe, who attributed Adams's COPD solely to smoking and asthma unrelated to coal dust inhalation. Petitioner's Br. at 19.

a. Dr. Rasmussen.

Dr. Rasmussen examined Adams in January 2008.[7] App. 135. Dr. Rasmussen recorded Adams as having a 20-year work history of underground coal mining ending in 1988, and a 38-year smoking history at a rate of a pack of cigarettes a day ending in 2000. App. 121-22, 124. Dr. Rasmussen conducted

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[6] Because only the etiology of Adams's totally disabling COPD is at issue on appeal, most of the medical evidence is not directly relevant. Thus, the results of various x-ray readings, which are primarily used to diagnose clinical pneumoconiosis, and pulmonary function and arterial blood gas tests, which are primarily used to determine whether a claimant is totally disabled, are not discussed except to the extent they are relied on in a physician's narrative opinion. *See* 20 C.F.R. §§ 718.201, 718.202(a)(1).

[7] The Department provided this examination to fulfill its statutory duty to afford a claimant-miner "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b).

medical testing and reported that the chest x-rays showed "[n]o classifiable pneumoconiosis," the pulmonary function test results revealed a "[m]oderate, partially reversible obstructive ventilatory impairment," and the arterial blood gas study results were normal. App. 123. Based on these results, his examination, and Adams's occupational and smoking histories, Dr. Rasmussen diagnosed "legal pneumoconiosis, (i.e. COPD caused in part by coal mine dust) which contributes to his loss of lung function." App. 127. The doctor attributed the cause of the disabling lung disease to a combination of coal dust exposure and smoking. *Id.*

Dr. Rasmussen issued a supplemental report on March 14, 2008, after learning that Adams worked as a miner for seventeen, as opposed to, twenty years. App. 119-120. Dr. Rasmussen noted that seventeen years is sufficient time for a miner to develop either clinical or legal pneumoconiosis and reconfirmed his opinion that Adams has legal pneumoconiosis – COPD resulting from both smoking and coal mine dust exposure. *Id.*

During a deposition conducted on February 23, 2009, Dr. Rasmussen again affirmed his belief that Adams has "a significant respiratory impairment," a chronic dust disease of the lung," and that Adams's coal mine dust exposure was a "significant cause" of his chronic dust disease of the lung. App. 72-73. Dr. Rasmussen explained that smoking and mine dust exposure can cause identical pulmonary changes and impairments, App. 94-95, which made it impossible to

precisely calculate how much of Adams's impairment resulted from smoking and how much resulted from coal mine dust, App. 101. Dr. Rasmussen believed, however, that exposure to both presents an additive risk of impairment. App. 102. Dr. Rasmussen also noted he could not rule out Adams having asthma, but that if Adams did have asthma, "both his smoking and his mine dust could have aggravated his asthma." App. 78-79.

Dr. Rasmussen wrote a final supplemental report on March 16, 2009. App. 45-48. In it he criticized the deposition testimony of Dr. Jarboe and cited, *inter alia*, medical studies that explained why Dr. Jarboe was incorrect in ruling out coal mine dust as a material co-contributor to Adams's pulmonary disability.

b. Dr. Jarboe.

Dr. Jarboe examined Adams in April 2008 at A&E's request. App. 201. Dr. Jarboe recorded Adams as having a twenty-year coal-mine-work history and a twenty-five to thirty-year pack per day cigarette-smoking-history. App. 201-02. Based on a chest x-ray that he found was negative for pneumoconiosis and pulmonary function studies he found indicated "moderately severe airflow obstruction, marked hyperinflation of the lungs and reduction in diffusing capacity," Dr. Jarboe diagnosed Adams with "pulmonary emphysema" and "chronic asthmatic bronchitis." App. 204. Dr. Jarboe concluded, "I do not feel a diagnosis of legal pneumoconiosis can be made in this case." App. 205.

Accordingly, Dr. Jarboe maintained Adams was "totally and permanently disabled from a respiratory standpoint" as a "result of cigarette smoking and asthma." App. 207. He stated the evidence "does not support the fact that the inhalation of coal mine dust caused, contributed to or substantially aggravated the impairment present in this case." App. 207. In support of his findings regarding etiology, Dr. Jarboe cited the following: (1) "inhalation of coal mine dust does not cause reversible airway disease," App. 205; (2) "hyperinflation of the magnitude seen in this case should be associated with some demonstrable dust retention, that is, some nodulation" on the chest x-ray, App. 206; (3) medical literature indicates that a "disproportionate reduction of FEV1 compared to FVC"[8] as seen in Adams's pulmonary function tests, "is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation," App. 205.

In a supplemental report, prepared after examining more of Adams's records and dated September 1, 2008, Dr. Jarboe reiterated his belief that Adams's "exposure to coal dust did not cause or significantly aggravate the airflow obstruction present." App. 200. He again noted that the lack of "evidence of dust

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[8] FEV1 and FVC values are measurements taken during a pulmonary function study. A pulmonary function study with FEV1, FVC, or a ratio of FEV1 to FVC that meet or fall below certain values can demonstrate total pulmonary disability under the BLBA. *See* 20 C.F.R. § 718.204(b)(2)(i); *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 471 n.1 (6th Cir. 2003).

deposition in [] Adams'[s] imaging studies" left him to "conclude that the most likely cause of the emphysema with its associated marked hyperinflation and airflow obstruction has resulted from [Adams's] cigarette smoking." App. 199.

During a deposition taken on February 25, 2009, Dr. Jarboe again stated that for the reasons articulated in his reports, he believed Adams's respiratory impairment did not result from coal dust. App. 162. He noted his strong disagreement with Dr. Rasmussen's deposition testimony that one "can't tell the difference between cigarette smoke-induced airflow obstruction … and coal dust-induced emphysema or airflow obstruction," App. 151, but did agree that "the disease process" and pulmonary "end result" can be the same for smoking-induced or dust-induced lung disease, App. 150.

3. Summary of the decisions below.

a. The ALJ's decision and order awarding benefits.

The ALJ considered Adams's December 2007 claim and found he smoked for approximately twenty-five years. App. 19, 21. The parties stipulated to seventeen years of coal-mine employment. App. 20.

The ALJ considered all of the medical evidence and determined that Adams presented "uncontroverted evidence of total disability – a material change in condition based upon a showing of an element previously decided against him." App. 36; *see* 20 C.F.R. § 725.309(d); *Tennessee Consol. Coal Co. v. Director,*

OWCP, 264 F.3d 602 (6th Cir. 2001). The ALJ found the only issue before him was the causation of Adams's totally disabling COPD, i.e., whether Adams's COPD was legal pneumoconiosis. App. 37, 40-41; *see* 20 C.F.R. §§ 718.201; 718.204(a). Assessing the two physicians' opinions, the ALJ first concluded Dr. Rasmussen credibly found that Adams suffers from COPD due to both smoking and coal mine dust exposure and hence suffers from legal pneumoconiosis. App. 38. The ALJ thought Dr. Rasmussen's opinion was well-reasoned because "he accounts for all of the medical evidence, his opinions are consistent with the regulations, and he does not irrationally rule out factors in his causation analysis." *Id.* The ALJ found Dr. Rasmussen's opinion to be well-documented because he provided "ample medical authority in support of his opinions that is in harmony with the current regulations." *Id.*

In contrast, the ALJ found Dr. Jarboe's opinion that Adams – "suffers a respiratory impairment because of his smoking history and not his intense and prolonged exposure to coal dust" – to be "not very credible." App. 40. He found it irrational for Dr. Jarboe to rule out Adams's exposure to coal dust as a contributing factor in his respiratory impairment based on the absence of radiographic evidence or dust given that the regulations specifically provide that a miner can prove pneumoconiosis absent radiographic evidence and Dr. Jarboe agreed it was possible to do so. App. 38; *see* 20 C.F.R. §§ 718.201; 718.202.

It was Dr. Jarboe's position that Adams's "hyperinflation of the lungs, a disproportionately reduced FEV1, [and] reversible airflow obstruction indicative of asthma" enabled him to tell that Adams's COPD was caused only by smoking. App. 39. The ALJ found that the studies Dr. Jarboe relied on to support that position, have all been specifically discredited in the black lung regulations. *Id.*; *see* 65 Fed. Reg. at 79938-46. He also noted that Dr. Jarboe's position seemed inexplicable when matched against the credible scientific data presented by Adams. App. 39. As an example, the ALJ explained that at deposition Dr. Jarboe agreed that the average decline in the FEV1 in pack-per-day smokers is 5 milliliters per year. *Id.* Dr. Jarboe also agreed Adams's FEV1 loss should have been no more than 150 milliliters, if he had smoked for thirty years, as opposed to the 2,710 milliliter FEV1 loss he did suffer. *Id.* Without citing any support for his conclusion, Dr. Jarboe stated that the discrepancy resulted not from coal mine dust, but because after age forty, Adams could have suffered a loss of up to 60 milliliters per year due to smoking alone. *Id.* The ALJ found this explanation lacking given that even using the "generous figure of 60 milliliters/year … Claimant would have had to have been smoking for 45 years (after the age of 40) in order to have suffered the FEV1 loss that he suffers due to his emphysema, assuming that his loss is due to smoking alone" – not merely the few years after age forty that he did smoke. App. 39-40.

Finally, the ALJ credited Dr. Rasmussen's opinion including Dr. Rasmussen's explanation of the flaws in Dr. Jarboe's opinion. App. 40. Accordingly, the ALJ found that Adams had legal pneumoconiosis, i.e., COPD "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." App. 40 (quoting 20 C.F.R. § 718.201(b))

The ALJ found that Adams's diagnosis of legal pneumoconiosis is "corroborated by the progression of his impairment." App. 40. Already having credited Dr. Rasmussen's opinion regarding the cause of Adams's totally disabling pulmonary impairment, and having discredited that of Dr. Jarboe, the ALJ found Adams was totally disabled by legal pneumoconiosis and therefore entitled to benefits. App. 40-42.

b. The benefits review board's decision.

On appeal to the Board, A&E challenged the ALJ's weighing of the medical evidence. App.11. The Board held "Dr. Rasmussen's opinion is legally sufficient to establish the existence of legal pneumoconiosis, because it identifies coal mine dust exposure as contributing, 'at least in part,' to claimant's COPD." App. 13. The Board likewise found substantial evidence supported the ALJ's determination that Dr. Rasmussen's opinion was well-reasoned because he "adequately explained the bases for his diagnosis of legal pneumoconiosis." *Id.*

The Board held the ALJ permissibly discounted Dr. Jarboe's opinion "that

coal dust deposition could not be a cause of claimant's COPD because his x-rays did not reflect nodules due to coal dust, as it was contrary to the premises underlying the regulations." App. 14. The Board found it rational for the ALJ to reject Dr. Jarboe's positions that had been discredited in the regulations. App. 15. The Board explained that contrary to the Employer's arguments, the ALJ did not treat the preamble as evidence or use it to create a presumption that all obstructive lung disease is pneumoconiosis, but rather "permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment." App. 15. The Board also rejected the Employer's argument that the ALJ substituted his opinion for that of Dr. Jarboe's or that he discounted Dr. Jarboe's opinion by assuming pneumoconiosis is a latent and progressive disease. App. 15. The Board therefore affirmed the ALJ's award of benefits to Adams. App. 17.

The Board summarily denied A&E's subsequent motion for reconsideration. App. 7.

SUMMARY OF THE ARGUMENT

A&E's primary argument is that the ALJ violated the Administrative Procedure Act by discrediting its medical expert because his opinion contradicted the Department of Labor's conclusions on certain medical and scientific issues as

expressed in the preamble to the BLBA's implementing regulations. A&E produces no authority for this remarkable claim, which is contrary to established practice in the federal black lung program and administrative law generally.

The remainder of A&E's brief presents only substantial evidence issues. A&E challenges the ALJ's interpretation of its expert's opinion and the ALJ's decision to credit Dr. Rasmussen. But such credibility determinations are the ALJ's to make. Perhaps a different ALJ might have found Dr. Jarboe more persuasive than Dr. Rasmussen. That, however, does not change the fact that this ALJ's reading of the expert opinions is supported by substantial evidence and should be affirmed.

ARGUMENT

The ALJ's ruling that Adams suffers from a totally disabling pulmonary disease caused, in part, by his exposure to coal mine dust is in accord with the APA and supported by substantial evidence.

1. Standard of review.

A&E's challenge to the ALJ's reliance on the preamble presents a question of law subject to de novo review. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

The ALJ's credibility determinations and weighing of the evidence must be affirmed if supported by substantial evidence, *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997), "even if the facts permit an alternative conclusion," *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995). Substantial evidence means evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

2. In considering the credibility of a medical expert's testimony, an ALJ is permitted to consider the preamble to the BLBA's implementing regulations, which provides the Department of Labor's rationale for the regulations and evaluation of the medical and scientific literature on black lung disease.

A&E's primary argument is that an ALJ cannot discount a medical expert's testimony because it is contrary to the Department of Labor's evaluation of relevant scientific and medical issues in the preamble to the BLBA's implementing regulations without violating the Administrative Procedure Act. Petitioner's Br. at 22-29. A&E argues that the ALJ arbitrarily created a "consistency with the preamble" rule to diminish the credibility of its physicians and, thus, violated its due process rights and the Administrative Procedure Act, 5 U.S.C. § 556(d). But the ALJ created no such rule, and committed no error in considering the preamble when assessing the credibility of the various medical opinions.

Using full notice-and-comment procedures, the Department employed its rulemaking authority to resolve the scientific question whether coal dust exposure

can cause obstructive pulmonary impairment. 30 U.S.C. § 936(a); *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004); *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002). The answer, yes, is plainly reflected on the face of the regulation defining legal pneumoconiosis, which "includes, but is not limited to, any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2) (emphasis added). Any medical expert who testifies that coal dust exposure cannot cause obstructive disease is expressing an opinion contrary not only to the regulatory preamble, but also to the regulation itself.

The regulatory preamble presents and assesses the medical and scientific literature supporting the Department's conclusion that exposure to coal mine dust can cause chronic obstructive pulmonary disease (COPD). 65 Fed. Reg. at 79937-45. Moreover, it identifies the Department's reliance on a comprehensive study by the National Institute for Occupational Safety and Health (NIOSH) as support for the proposed revision to clarify that the definition of "pneumoconiosis" encompasses obstructive lung disorders arising from occupationally-related pathologies. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3343 (Jan. 22, 1997) (citing National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust* § 4.2.2. *et seq.*

(1995)).[9] NIOSH, the statutory advisor to the black lung benefits program, 30 U.S.C. § 902(f)(1)(D), and an expert in the analysis of occupational disease research, reviewed the Department's proposed revisions and concluded that "NIOSH scientific analysis supports the proposed definitional changes." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 64 Fed. Reg. 54966, 54979 (Oct. 8, 1999).

In addition to explaining the basis for the Department's position, the preamble responds to commenters, including medical experts, who denied the possibility that coal dust can cause COPD. 65 Fed. Reg. at 79938-42. The preamble also addresses medical literature on the interrelationship between coal dust exposure and smoking as causes of COPD, crediting studies finding the risks of smoking and dust exposure to be additive. *Id.* at 79939-41. Again, the Department relied on NIOSH's comprehensive review of the available medical and scientific evidence published in 1995 and on NIOSH's favorable response to the Department's proposed revisions to support its position. *Id*. at 79939, 79943.

It is perfectly reasonable for an ALJ to consult the preamble as an authoritative statement of the Department's evaluation of conflicting medical and

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[9] The complete referenced NIOSH publication is available on its website at http://www.cdc.gov/niosh/docs/95-106.html.

scientific literature on these issues. And it is similarly reasonable for an ALJ to give less weight to the testimony of medical experts who contradict, or rely on sources that contradict, that evaluation. That is all the ALJ did in this case. App. 38-39.

A&E claims that this violates the APA, but the Seventh and Third Circuit Courts of Appeals have approved using the preamble in this manner, as has the Benefits Review Board. *Consol. Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (describing ALJ's "sensible" decision to discredit physician's opinion conflicting with scientific consensus on clinical significance of coal dust-induced COPD, as determined by Department of Labor in preamble); *Helen Mining Co. v. Director OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) ("The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."); *Ethel Groves v. Island Creek Coal Company*, 2011 WL 2781446 at *3, BRB No. 10-0592 BLA (DOL Ben. Rev. Bd. June 23, 2011) ("an administrative law judge has the discretion to examine whether a physician's reasoning is consistent with the conclusions contained in medical literature and scientific studies relied upon by DOL in drafting the definition of legal

pneumoconiosis.”).[10]

These cases reflect the well-established principle that a reviewing court must generally be at its most deferential when examining an administrative agency’s determination of scientific or technical matters within its area of expertise. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The Supreme Court has recognized that this principle applies to the federal black lung program, “a complex and highly technical regulatory program,” in which the identification and classification of relevant “criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *accord*, *Midland Coal Co.*, 358 F.3d at 490 (“we see no reason to substitute our scientific judgment, such as it is, for that of the responsible agency”). A&E’s position – which would positively forbid an ALJ from considering the Secretary of Labor’s evaluation of the

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[10] A&E attempts to differentiate *Consolidation Coal* and *Helen Mining* by stating those ALJs’ reliance on the preamble was not central to their decisions or those of the courts of appeals. Petitioner’s Br. at 24-24. Even if this argument were correct, it does not serve to differentiate those cases, but rather more squarely align them with this case. Here, the ALJ gave little weight to Dr. Jarboe’s opinion for a variety of reasons, only one of which was its inconsistency with the preamble. App. 38-41. He gave multiple reasons for crediting Rasmussen’s opinion as well. *Id*.

scientific literature on black lung disease – turns this well-established principle on its head.

The case A&E primarily relies upon for its view that the preamble is off limits, *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249 (4th Cir. 2011), stands for nothing of the sort. In *Home Concrete*, the Fourth Circuit rejected the IRS's attempt to rely on a policy position set forth in the preamble to a regulation which extended a statutorily proscribed six-year limitations period. *Id*. at 257-58. First, setting a statute of limitations is hardly akin to evaluating conflicting medical and scientific literature on the various effects of coal dust exposure. It is therefore not entitled to the same heightened deference that an agency's evaluation of scientific or technical matters is. Second, and more fundamentally, the statement in the IRS preamble at issue in *Home Concrete* was contrary to the language of the statute. As Judge Wilkerson stated in his concurrence, "[w]hat the IRS seeks to do in extending the statutory limitations period goes against what I believe are the plain instructions of Congress, which have not been changed, and the plain words of the Court, which have not been retracted." *Id*. at 259. In contrast, the preamble at issue here does not conflict with the BLBA, which defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

A&E's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), founders on the same shoals. Like *Home Concrete*, the preamble in question in *Wyeth* addressed a legal issue – the preemptive effect of FDA regulations on state law remedies – rather than a scientific or technical one. *Id*. at 577 ("agencies have no special authority to pronounce on pre-emption absent delegation by Congress"). It was also, again like *Home Concrete*, "at odds with what evidence we have of Congress' purposes" and, to top it off, "revers[ed] the FDA's own longstanding position without providing a reasoned explanation[.]" *Id.* None of these facts are true of the regulatory preamble at issue in this case.

A&E briefly argues that the ALJ's consideration of the preamble violated the APA because it was not part of the formal case record. Petitioner's Br. at 24-25. A&E cites no authority for the proposition that considering a regulatory preamble published in the Federal Register violates the APA. As explained above, at least two courts of appeals have approved of ALJ decisions using the preamble in just this way. *Consol. Coal Co.*, 521 F.3d at 726; *Helen Mining Co.*, 650 F.3d at 257l *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7 (7th Cir. 2001) ("During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino [denying that coal dust inhalation causes significant obstructive lung disease] and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial

weight of the medical and scientific literature.'") (quoting 65 Fed. Reg. at 79939). The ALJ's consideration of the preamble in this case was similarly appropriate.

3. Substantial evidence supports the ALJ's award of benefits.

In evaluating whether there is substantial evidence to support an ALJ's finding, "an appellate tribunal may not reweigh the evidence or make credibility determinations" or "evaluate and resolve conflicting medical evidence." *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1120-21 (6th Cir. 1987). When an ALJ explains his reasoning and does not rely on an impermissible basis, this Court must defer to his discretion and judgment in assessing the conflicts in the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). When medical testimony conflicts, the question "'of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.'" *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989) (quoting *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir. 1985)). The ALJ must, however, adequately explain the reasons for his decision. *See Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984). Here, the ALJ adequately explained his reasons for crediting Dr. Rasmussen's opinion over Dr. Jarboe's contrary view.

a. The ALJ's decision to credit Dr. Rasmussen's opinion as establishing the presence of legal pneumoconiosis and disability due to pneumoconiosis is supported by substantial evidence.

Dr. Rasmussen diagnosed Adams as being totally disabled by a respiratory

obstruction that was caused, in part, by Adams's exposure to coal mine dust. App. 127. The ALJ permissibly determined that Dr. Rasmussen provided a reasoned medical opinion, which was documented by Adams's physical examination, smoking history, employment history, and medical treatises/authorities. App. 38.

A&E's only specific allegation of error concerning the ALJ's assessment of Dr. Rasmussen's report is that the doctor's causation opinion is too speculative. Petitioner's Br. at 30-34. It contends that Dr. Rasmussen's etiology conclusion is essentially identical to the one this Court rejected in *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665 (6th Cir. 2010). The comparison is not well-founded. *Tamraz*, a products liability case, turned on the cause of a welder's Parkinson's disease. The Court held that the district court erred in allowing a neurologist to present a purely speculative opinion that manganese exposure could have caused the welder's Parkinson's: the neurologist speculated that the welder was exposed to fumes presumably containing manganese, that manganese exposure theoretically could trigger Parkinson's disease, that this welder may have had genes predisposing him to Parkinson's and, therefore, the manganese exposure induced the welder's Parkinson's by triggering his genetic pre-disposition. *Id*. at 670. The Court rejected the doctor's hypothesizing as based on multiple "leap[s]of faith" – especially his claim that manganese exposure can cause Parkinson's, which had no scientific support. *Id*. In contrast, as set forth in the preamble, credible scientific

evidence supports the Department of Labor's conclusion that there is a link between coal dust exposure and the development of obstructive lung disease in coal miners independent of cigarette smoking. 65 Fed. Reg. at 79939. Dr. Rasmussen's opinion is therefore entirely unlike the testimony rejected in *Tamraz*.

Dr. Rasmussen adequately explained his reasons for attributing Adams's COPD to both smoking and coal dust exposure. The ALJ permissibly found Dr. Rasmussen's explanation convincing because it was based on his examination of Adams, objective testing, his medical expertise treating pulmonary disease in coal miners, and because it was consistent with well-documented medical opinions and literature as well as with the regulatory definition of legal pneumoconiosis. App. 30-31, 34, 38, 40. Accordingly, the ALJ properly concluded that Dr. Rasmussen's opinion, corroborated by the progression of Adams's pulmonary impairment, credibly established that Adams suffers from legal pneumoconiosis. App. 40; *see* 20 C.F.R. § 718.201(c); *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 482 (6th Cir. 2009). For the same reasons, the ALJ properly concluded that Dr. Rasmussen's opinion credibly demonstrates that Adams is totally disabled due to pneumoconiosis. App. 41.

b. The ALJ rationally discounted Dr. Jarboe's opinion.

The ALJ also sufficiently explained his reasons for according less weight to Dr. Jarboe's opinion. First, Dr. Jarboe conceded that – in accordance with the

regulations and the preamble – a miner can have legal pneumoconiosis in the absence of x-ray evidence. Nonetheless, Dr. Jarboe concluded that Adams's 20-year coal dust exposure played no role in causing his totally disabling COPD primarily because there was no x-ray evidence of dust in his lungs. App. 170-73, 206. It was rational for the ALJ to discount Dr. Jarboe's opinion for failing to explain why Adams was not of the category of miners suffering from COPD without showing signs of pneumoconiosis on x-ray. App. 38. Moreover, in light of the regulatory preamble addressing the additive effect coal dust exposure may have on the development of obstructive impairment, Dr. Jarboe's failure to consider whether coal mine dust exposure, along with smoking, could have been an aggravating factor worsening Adams's COPD properly troubled the ALJ. App. 39.

The ALJ's decision to give little weight to Dr. Jarboe's opinion is particularly reasonable because Dr. Jarboe's own diagnosis – that Adams's COPD was caused solely by smoking – is inconsistent with figures estimating the annual respiratory decline caused by smoking that Dr. Jarboe himself provided. App. 176-78. It is difficult to interpret Dr. Jarboe's testimony as consistent with either the statutory command that pneumoconiosis can exist in the absence of x-ray evidence or DOL's evaluation of the medical literature as expressed in the preamble to the BLBA's implementing regulations. But even if it were possible to interpret Dr.

Jarboe's statements differently, the ALJ's interpretation of those statements is plainly permissible, and such credibility determinations are the ALJ's to make. *See Midland Coal Co.*, 358 F.3d at 492 (Stating that in order to reverse "on substantial evidence review we would have to find that the [petitioner's] interpretation [of a doctor's testimony] was the only permissible one, not that it was one of several."); *see generally Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 (6th Cir.1985) (The Court may not set aside the ALJ's findings, "even if [the court] would have taken a different view of the evidence were we the trier of facts."). The ALJ provided a valid and sufficiently explained reason for according little weight to Dr. Jarboe's opinion. The Court should defer to it. *See Adams*, 816 F.2d at 1120.

c. Substantial evidence supports the ALJ's benefit award.

Taking all of these findings together, the ALJ acted well within his discretion in crediting Dr. Rasmussen's diagnosis and in giving little weight to Dr. Jarboe's contrary view. A&E has failed to demonstrate that the ALJ made a mistake in his assessment of the conflicting medical opinion evidence. *See Rowe*, 710 F.2d at 255 ("The determination as to whether [a physician's] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the factfinder to decide."). Weighing Dr. Rasmussen's opinion against Dr. Jarboe's less persuasive views, the ALJ reasonably concluded that Adams

established that his totally disabling COPD is due, in part, to coal dust exposure.

Therefore, the Court should affirm this award as supported by substantial evidence.

CONCLUSION

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

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 6,508 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2011, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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