

No. 09-2297

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

CONSOLIDATION COAL COMPANY

Petitioner

v.

WILLIAM F. KUSCH, SR. and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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On Petition for Review of an Order of the Benefits
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BRIEF FOR THE FEDERAL RESPONDENT

**STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION**

Consolidation Coal Corporation (Consol) petitions this Court for review of a final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's award of federal black lung benefits to William Kusch (Joint Appendix (JA) 15A). The Court has jurisdiction over Consol's petition for

review under section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the Act), 30 U.S.C. § 932(a). The injury in this case, within the meaning of section 21(c), occurred in Pennsylvania, where Mr. Kusch worked as a coal miner (JA 16A). *See Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989) (injury occurs where miner is exposed to coal dust). Consol's petition for review is timely because it was filed on December 29, 2008, within 60 days of the Board's October 30, 2008 decision (JA 15A, 27A).¹ 33 U.S.C. § 921(c).

The Board, in turn, had jurisdiction to review the ALJ's decision under section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as incorporated. The ALJ awarded benefits on September 28, 2007 (JA 1A). Consol filed a timely notice of appeal with the Board on October 7, 2007. *See* 33 U.S.C. § 921(a) (providing thirty-day period for appeal of administrative law judge decisions). Accordingly, this Court has jurisdiction over Consol's petition for review.

¹ Consol filed its petition with the U.S. Court of Appeals for the Fourth Circuit, which granted Consol's motion to transfer the appeal to this Circuit on April 8, 2009.

STATEMENT OF THE ISSUES²

Every miner who files a claim for black lung benefits has a statutory right to a complete pulmonary evaluation provided by the Department of Labor. 30 U.S.C. § 923(b). Under the implementing regulations, an evaluation is complete when it credibly addresses the conditions of entitlement – whether (1) the miner has a chronic lung disease; (2) the disease arose out of coal mining; (3) the miner is totally disabled; and (4) his coal-mine-related lung disease contributed to his disability – in a manner that permits the claim's resolution. When an administrative law judge determines that the evaluation is incomplete, the judge must correct the defect by allowing the parties to submit additional evidence or by remanding the case to the district director to develop the necessary evidence. This appeal presents the following issues:

A. Did the ALJ properly determine that Dr. Basheda's opinion, which was obtained by the Department of Labor, was insufficient to satisfy Mr. Kusch's right to a complete pulmonary evaluation because it did not adequately resolve the cause of the miner's lung disease and disability?

B. Did the ALJ abuse his discretion in striking Dr. Basheda's incomplete report from the record and remanding the case for a new pulmonary evaluation?

² Although the private parties will address additional issues related to the merits of Mr. Kusch's claim, the Director has limited his response to the procedural issues raised on appeal.

C. Should Consol be dismissed from the case and liability transferred to the Black Lung Disability Trust Fund because of the Department's and the ALJ's alleged mishandling of the claim, even though Consol was not prejudiced by the claim proceedings?

STATEMENT OF THE CASE

Mr. Kusch filed a claim for federal black lung benefits on July 5, 2001. An Office of Workers' Compensation Programs district director awarded benefits to Mr. Kusch, payable by Consol. Consol requested a formal hearing. Administrative Law Judge Lesniak held the hearing, and then remanded the claim to the district director for a new pulmonary evaluation (JA 543, 580). The Benefits Review Board (the Board) dismissed Consol's appeal as premature.

The district director obtained the new pulmonary evaluation, and then returned the case to the Office of Administrative Law Judges (OALJ) (JA 56). Administrative Law Judge Leland (the ALJ) held a formal hearing on January 8, 2007. He issued a decision awarding benefits to Mr. Kusch on September 28, 2007 (JA 585, 1A). The Board affirmed the award on October 30, 2008 (JA 15A). Consol then petitioned the Fourth Circuit for review; that court later transferred the petition to this Court (JA 116).

STATEMENT OF THE FACTS

Shortly after Mr. Kusch applied for benefits, the district director arranged for Dr. Stephen Basheda to examine and test him in accordance with section 413(b) of the Act, 30 U.S.C. § 923(b) (JA 1).³ In his report dated August 30, 2001, Dr. Basheda recorded Mr. Kusch's family, medical and smoking histories; his complaints and symptoms; clinical examination findings; and the results of a chest x-ray, a pulmonary function study and an arterial blood gas test. Dr. Basheda diagnosed moderate obstructive lung disease (JA 4). Commenting on the cause of the lung disease, he noted "smoking" and "coal dust," and concluded that "[t]he finding may be related to smoking/coal dust" (JA 4).⁴ He also noted that Mr. Kusch experienced intermittent increased symptoms with exposures in certain

³ The Department-sponsored pulmonary evaluation is often referred to as the "413(b) evaluation" or "413(b) examination."

⁴ The regulations define pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). The definition includes both "clinical" pneumoconiosis – which "consists of those diseases recognized by the medical community as pneumoconioses," 20 C.F.R. § 718.201(a)(1) – and "legal" pneumoconiosis, a broader category that "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). "Arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Mr. Kusch's claim involves legal pneumoconiosis.

environments and that his lung disease included a "significant Asthmatic component" (JA 4).

The district director asked Dr. Basheda to clarify his opinion in three respects: (1) whether the obstructive lung disease he diagnosed could be pneumoconiosis, which the Act defines broadly as any chronic lung disease or pulmonary impairment arising out of coal mine employment; (2) if yes, is Mr. Kusch's lung disease related to his 34 years of coal mining; and (3) if yes, whether the low pulmonary function results his testing revealed are related to pneumoconiosis.⁵ (Director's Exhibit 11). Dr. Basheda summarily responded that "Mr. Kusch has obstructive lung disease that may be related to his 34 years in the coal mining industry. The obstructive lung disease can occur in the absence of radiographic findings of pneumoconiosis. Therefore, the severe airway obstruction seen on his pulmonary tests from July 25, 2001 could certainly be related to coal dust exposure." (JA 5).

In defense of the claim, Consol submitted Dr. Joseph Renn's opinion to the district director for consideration. Dr. Renn examined Mr. Kusch on November

⁵ Because Mr. Kusch's claim involves legal pneumoconiosis, *see supra*. n.4, the disability causation issue is closely linked to the existence-of-pneumoconiosis question. If Mr. Kusch establishes that his disabling chronic obstructive lung disease arose out of his coal mine employment, he has proved two conditions of entitlement: pneumoconiosis, and total disability due to pneumoconiosis.

28, 2001, and concluded that he was totally disabled due to extrinsic allergic asthma unrelated to coal dust exposure (JA 6-11).

Based upon her review of this evidence, the district director found Kusch entitled to benefits. (Director's Exhibit 26). Consol objected and, at the company's request, the district director forwarded the claim to the OALJ for hearing (Director's Exhibit 30).

Both private parties continued to develop additional medical evidence. Mr. Kusch obtained Dr. Celko's opinion (JA 103). Dr. Celko examined Mr. Kusch and reviewed the medical reports from Drs. Basheda and Renn in his September 27, 2002 report. He concluded that coal dust exposure aggravated Mr. Kusch's pulmonary problems. Consol submitted Dr. Fino's report. Dr. Fino examined Mr. Kusch on October 10, 2002, and concluded that he was totally disabled due to asthma and smoking, and that his condition was unrelated to his coal dust exposure (JA 346-51).

Prior to the hearing, Mr. Kusch filed a motion with Judge Lesniak asking him to remand the case to the district director for a new pulmonary evaluation. He argued that Dr. Basheda's opinion was insufficient to satisfy the Director's statutory obligation to provide him with a complete pulmonary evaluation under Section 413(b) because the physician did not render an opinion on each condition of entitlement (JA 45). Mr. Kusch's counsel reiterated these points at the hearing, and

stated that he had attempted to contact Dr. Basheda on numerous occasions (in writing and by telephone) to ask him to clarify his conclusions, but Dr. Basheda had not responded (JA 550-551).

Consol opposed the motion, arguing that Dr. Basheda's report was complete and that if the case were remanded, Consol would be denied due process because it would lose "the opportunity to obtain summary decision" based on the absence of evidence capable of establishing Mr. Kusch's entitlement to benefits (Director's Exhibit 40).⁶ At the hearing, Consol's counsel argued that Dr. Basheda's opinion was complete because (1) he had conducted all required tests and offered an opinion on disease and disability causation (i.e. that coal dust exposure "could have" had an impact); and (2) the report was sufficient to resolve the claim because the physician's failure to diagnose pneumoconiosis led to a denial of benefits (JA 557-560). Consol's counsel also stated that he had earlier noticed depositions of Dr. Basheda but had postponed them, apparently because Mr. Kusch's counsel had just entered the case around the same time (JA 566-567).

In an attempt to resolve the dispute, Judge Lesniak asked the parties whether they would be willing to depose Dr. Basheda post-hearing (JA 567). Mr. Kusch's

⁶ The Director initially opposed Mr. Kusch's motion, but upon further reflection agreed that Dr. Basheda's opinion was incomplete because it did not resolve what caused the miner's lung disease and respiratory disability (Director's Exhibit 45, 47).

counsel consented, but Consol's counsel did not (JA 567-68). Consol's counsel argued that the time for taking depositions had passed and he did not want to risk deposing Dr. Basheda (JA 571).

Judge Lesniak granted Kusch's motion on May 27, 2003. He found that Dr. Basheda's opinion is "equivocal and fails to address relevant conditions of entitlement." (JA 581). He further reasoned that "the opportunity that ought to be afforded the claimant [for a complete pulmonary evaluation] trumps all other considerations and/or objections stated by the employer." (JA 581). Striking Dr. Basheda's opinions from the record, the judge remanded the case to the district director "with instructions to provide [Mr. Kusch] a complete pulmonary evaluation including a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study pursuant to 20 C.F.R. § 725.406(a)." (JA 581).

Pursuant to Judge Lesniak's remand order, the district director obtained a new opinion, this time from Dr. Rasmussen. Dr. Rasmussen examined Kusch on June 2, 2004 (JA 89). He recorded Kusch's employment, family, medical and smoking histories; his complaints and symptoms; the clinical examination findings; a chest x-ray reading; and ventilatory study and arterial blood gas tests results. Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) due to coal dust exposure and smoking, and asthma (JA 92). Dr. Rasmussen concluded that

Mr. Kusch is disabled due to "a coal mine dust induced chronic lung disease which is at least in part responsible for his pulmonary impairment." (JA 92). The district director then returned the case to the OALJ for further action (Director's Exhibit 57).

The private parties developed additional medical evidence as well. Kusch submitted Dr. Parker's opinion. In two reports dated April 29, 2005 and May 2, 2005, Dr. Parker concluded that Mr. Kusch was totally disabled due to smoking and coal dust exposure (JA 127, 135). When deposed in 2006, Dr. Parker answered questions from Mr. Kusch and Consol, testifying that the miner was totally disabled due to smoking and coal dust exposure (JA 194-195). Mr. Kusch also deposed Dr. Celko in 2007; Dr. Celko answered questions from Mr. Kusch and Consol, and reiterated that he considered Mr. Kusch totally disabled due to smoking and coal dust exposure (JA 281).

Consol deposed Drs. Rasmussen and Renn. In 2005, Consol questioned Dr. Rasmussen regarding the opinions from Drs. Renn and Fino (JA 377). Dr. Rasmussen testified that Mr. Kusch has asthma; identified asthma, smoking and coal dust exposure as Mr. Kusch's risk factors; and concluded that coal dust was a "significant contributing cause" of Mr. Kusch's impairment, although he admitted the possibility that coal dust exposure had not contributed to the impairment (JA 379, 409, 419-420).

Consol deposed Dr. Renn in 2007 (JA 466). He stated that he had reviewed Dr. Fino's testimony, as well as the reports from Drs. Fino, Celko, Rasmussen and Parker (JA 470-71). He criticized Dr. Parker's opinion (JA 473-75, 477-80, 492-93), and Dr. Rasmussen's reliance on a particular medical study (JA 486-88, 533, 536-38). Dr. Renn reiterated his initial diagnosis of "extrinsic allergic asthma," and concluded that Kusch was unable to perform heavy manual labor but did not have any condition related to dust exposure (JA 471, 476).

Dr. Fino testified at the 2007 hearing held by ALJ Leland (JA 585). He stated that he had reviewed the tests administered by Drs. Rasmussen and Parker, and he fully critiqued Dr. Rasmussen's opinion (JA 637).⁷ Based on the normal diffusing capacity revealed on Dr. Rasmussen's tests, Dr. Fino testified that Mr. Kusch "does not have destruction of lung tissue. He does not have emphysema due to smoking or due to coal mine dust." (JA 638). Dr. Fino also relied on the pulmonary function and exercise arterial blood gas tests administered by Dr. Rasmussen and the late onset of Mr. Kusch's impairment to diagnose asthma (JA 667-68, 686).

⁷ Dr. Fino addressed many aspects of Dr. Rasmussen's opinion: his opinion that a history of acute exacerbation is needed to diagnose asthma (JA 642-43); that Mr. Kusch suffered an oxygen transfer impairment (JA 684); the significance of exercise arterial blood gas tests generally and in Mr. Kusch's case in particular (JA 669-670); his view of industrial bronchitis (JA 691); and his list of Kusch's complaints and symptoms (JA 690-91).

With this evidence before him, Administrative Law Judge Leland awarded benefits to Mr. Kusch on September 28, 2007 (JA 1A). He found that the diagnoses from Drs. Celko, Parker and Rasmussen, linking Mr. Kusch's lung disease and disability to his coal-mine-dust exposure, established both disputed conditions of entitlement: pneumoconiosis and total disability due to the disease (JA 8A-10A). He found the contrary opinions from Drs. Renn and Fino unreasoned (JA 10A-11A).

On appeal before the Board, Consol argued, *inter alia*, that it should be dismissed from the case. The company contended that because Dr. Basheda's opinion met the Department's obligation to provide a complete pulmonary evaluation, Dr. Rasmussen's opinion, upon which the ALJ relied to award benefits, should not have entered the record (Consol bf. at 45-46, Feb. 7, 2008).⁸ This, according to Consol, caused undue prejudice requiring its dismissal. The Board affirmed the award of benefits, rejecting Consol's argument that it had been prejudiced. The Board held that Judge Lesniak had properly exercised his discretion in finding Dr. Basheda's opinion insufficient on a condition of entitlement and remanding the case for a new pulmonary evaluation as a result (JA 24A). The Board further held that Consol had not been prejudiced because "the

⁸ In its brief to the Board, Consol seemed to believe that Dr. Parker, not Dr. Rasmussen, had provided the new pulmonary evaluation under section 413(b). The Board generously applied Consol's argument to Dr. Rasmussen's opinion.

record reflects that employer responded to Dr. Rasmussen's opinion and was given a 'fair opportunity to mount a meaningful defense.'" (JA 24A (quoting *C&K Coal Co. v. Taylor*, 165 F.3d 254, 259 (3d Cir. 1999))).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. The Director is unaware of any other case or proceeding, whether completed, pending or about to be presented before this or any other agency, in any way related to this case.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews the Board's decision to determine whether an error of law has been committed and whether the Board has adhered to its statutory scope of review. *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997). Whether Dr. Basheda's opinion constituted a complete pulmonary evaluation under section 413(b) of the Act (Issue A) and whether Consol was denied due process in Mr. Kusch's claim proceedings (Issue C) are questions of law and subject to plenary review by the Court. *Director, OWCP v. Barnes & Tucker Co.*, 969 F.2d 1524, 1527 (3d Cir. 1992). Whether Judge Lesniak acted within his discretion in striking Dr. Basheda's opinion from the record and ordering the district director to provide a new pulmonary evaluation (Issue B) is reviewed under an arbitrary and capricious standard. *See, e.g., Doroshov v. Hartford Life and Accident Insurance Co.*, 574 F.3d 230, 233 (3d Cir. 2009) ("When the administrator has discretionary

authority to determine eligibility for benefits . . . the decision must be reviewed under an arbitrary and capricious standard").

SUMMARY OF THE ARGUMENT

Section 413(b) of the Act, as implemented by 20 C.F.R. § 725.406(a), requires the Department to provide miners who apply for benefits with a complete pulmonary evaluation. To be complete, the evaluation must address each condition of entitlement necessary for the factfinder to reach a decision. Here, contrary to Consol's argument, ALJ Lesniak properly found Dr. Basheda's opinion insufficient under section 413(b) because it was incomplete: his report did not resolve whether Mr. Kusch's pulmonary disease or impairment was causally related to his coal mine employment (JA 4).

Having reached this conclusion, Judge Lesniak acted within his discretion in striking Dr. Basheda's incomplete report from the record and remanding the case to the district director for a new pulmonary evaluation. When a judge determines that the Department-sponsored pulmonary evaluation is defective, the regulations vest the judge with authority to have the parties cure the defect or to remand the claim so that the district director can develop curative evidence. 20 C.F.R. § 725.456(e). Because Consol refused to depose Dr. Basheda post-hearing, Judge Lesniak reasonably resorted to the remaining procedural option and remanded the case. Moreover, given the difficulty in obtaining an adequate opinion from Dr. Basheda,

Judge Lesniak permissibly exercised his discretion when he determined that a new pulmonary evaluation, rather than an additional statement from Dr. Basheda or a new report based on the test results collected by Dr. Basheda, was warranted.

Finally, no flaws in this claim's proceedings warrant dismissing Consol from this case and transferring liability for Mr. Kusch's claim to the Black Lung Disability Trust Fund.⁹ To establish a denial of due process, Consol must show it lost the opportunity to present an effective defense. Procedural glitches or delays in a claim's processing alone are insufficient to give rise to a due process claim. Here, Consol participated in the proceedings at all adjudication levels and had a full opportunity to develop both evidence and arguments in defense of Mr. Kusch's claim. The Court should reject its request to be dismissed.

⁹ The Black Lung Disability Trust Fund is administered by the Director, Office of Workers' Compensation Programs, and is available to pay benefits in the absence of a liable coal mine operator. 26 U.S.C. § 9501; *C & K Coal Co. v. Taylor*, 165 F.3d 254, 258-59 (3d Cir. 1999).

ARGUMENT

A miner seeking benefits under the Act has a fundamental right to a Department-sponsored complete pulmonary evaluation

Section 413(b) of the Act commands: "Each miner who files a claim for benefits under this title shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b). The importance of this requirement is reflected in the Secretary of Labor's regulations. The regulations specifically acknowledge the Department's obligations regarding a complete pulmonary evaluation in three places. First, in defining the Department's general obligation to develop evidence, the regulations both direct the Office of Workers' Compensation Programs to "develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits" and to provide a miner claiming benefits with a complete pulmonary evaluation. 20 C.F.R. § 718.101(a).

The regulations reiterate this duty in the context of the rules governing adjudications of claims by district directors:

The Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner. A complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.

20 C.F.R. § 725.406(a). In the event the Department-sponsored "medical examination or test . . . does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits," the regulation instructs the district director to "schedule the miner for further examination and testing." 20 C.F.R. § 725.406(c).

Finally, the regulations obligate an administrative law judge who determines that the Department-sponsored pulmonary evaluation is incomplete to take corrective action:

If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to § 725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement (see § 725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. § 725.456(e).¹⁰

Thus, the regulations define what a Department-sponsored pulmonary evaluation must include and prescribe procedures to correct any problems with that evaluation at the two claim-processing levels where facts are developed – the

¹⁰ The referenced "conditions of entitlement" a miner must prove include: (1) he has pneumoconiosis; (2) the pneumoconiosis arose at least in part out of coal mine employment; (3) he has a total respiratory disability; and (4) his pneumoconiosis contributes to the disability. 20 C.F.R. § 725.202(d)(2)(i)-(iv).

district director and OALJ levels. If the district director incorrectly accepts an evaluation as complete, the miner is not penalized. Instead, the regulations direct the administrative law judge to correct the error either by allowing the parties to develop evidence before him or remanding the case to the district director for further development.

The importance of this right cannot be overstated. In some cases the Department-sponsored examination is a miner's only opportunity to be evaluated by a physician not chosen by the coal mine operator. *See* 64 Fed. Reg. 54989 (October 8, 1999) (noting that a complete pulmonary evaluation that complies with the Department's standards "can involve costs that are beyond the reach of some claimants."). Consequently, the evaluation must be complete, and the medical conclusions must be clear, if it is to have any value. The Department simply has not met its statutory obligation if it does not provide the miner with a "credible opinion addressing a necessary element of a claimant's entitlement." *Cline v. Director, OWCP*, 917 F.2d 9, 11 (8th Cir. 1990).

This is not to say that the Department must obtain an evaluation that supports the miner's entitlement to satisfy its 413(b) obligation. As even Mr. Kusch acknowledged (JA 550, 561), the Department's obligation extends to providing a report that competently addresses the relevant conditions of entitlement, not to providing a report that proves a miner is in fact entitled to

benefits. Instead, the Department-sponsored evaluation is intended "to provide each claimant with a realistic appraisal of his condition[.]" 65 Fed. Reg. 79922 (December 20, 2000).

A. Judge Lesniak correctly determined that Dr. Basheda's opinion did not satisfy the Department's statutory obligation to provide a complete pulmonary evaluation because he did not address the cause of Mr. Kusch's lung disease and disability in a manner sufficient to resolve the claim.

Judge Lesniak properly determined that Dr. Basheda's opinion did not adequately address the conditions of entitlement and thus did not satisfy the Department's obligation under section 413(b) to provide a complete pulmonary evaluation. Dr. Basheda diagnosed a moderate obstructive lung disease, listed "smoking" and "coal dust" as etiologies, and then noted that "[t]he finding may be related to smoking/coal dust" (JA 4). He added that Mr. Kusch had intermittent increases in symptoms depending on his environment, and his impairment included a "significant Asthmatic component." (JA 4). When the district director asked Dr. Basheda to clarify his opinion specifically with regard to the cause of Mr. Kusch's lung disease and impairment, Dr. Basheda replied that Kusch "has obstructive lung disease that may be related to his 34 years in the coal mining industry," and that "the severe airway obstruction . . . could certainly be related to coal dust exposure." (JA 5).

As Judge Lesniak concluded, Dr. Basheda's opinion "is equivocal and fails to address relevant conditions of entitlement." (JA 581). Dr. Basheda did not

meaningfully resolve whether Kusch's coal dust exposure contributed to his lung disease or impairment, both necessary conditions of entitlement. 20 C.F.R. § 725.202(d)(2)(i), (iv). Instead, he stated, first, that Mr. Kusch's pulmonary impairment "may be related to smoking/coal dust," and, second, that it "could certainly be related to coal dust exposure." (JA 4, 5). An opinion that something is possible, as opposed to more likely than not, is really no opinion at all. *U.S. Steel Mining Co., Inc. v. Director, OWCP*, 187 F.3d 384, 389-90 (4th Cir. 1999) (reversing ALJ's decision to credit speculative doctor's opinion that "it is possible" pneumoconiosis contributed to miner's death). Dr. Basheda named the potential exposures that could have caused the miner's lung problems – smoking and coal dust – but never expressed an educated medical opinion on whether he believed that Kusch's coal dust exposure did in fact contribute. Nor did Dr. Basheda state that he was unable to offer such an opinion due to medical impossibility. He simply did not answer the question. Judge Lesniak thus properly found his opinion insufficient to satisfy the Department's obligation to provide a complete pulmonary evaluation under section 413(b).

Consol relies on *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009), to argue that Dr. Basheda's opinion was sufficiently complete for section 413(b) purposes. *Greene* is of limited relevance here because it concerns whether the Department-sponsored opinion must be reasoned, not whether the

opinion must address each condition of entitlement. Indeed, the *Greene* court found that the doctor who performed the section 413(b) evaluation there "conducted all the necessary tests on Greene and *his report addressed all the elements of entitlement*, even if lacking in persuasive detail." *Greene*, 575 F.3d at 641 (footnote omitted; emphasis added).

Unlike the section 413(b) doctor in *Greene*, Dr. Basheda did not address each condition of entitlement. Dr. Basheda's opinion is insufficient under section 413(b) not because it is unreasoned, but because it is incomplete. *Greene* does not fit the facts of this case.

B. Judge Lesniak acted within his discretion in striking Dr. Basheda's opinion from the record and remanding the claim for a new pulmonary evaluation.

Alternatively, Consol argues that ALJ Lesniak abused his authority by remanding the claim for a new pulmonary evaluation rather than asking Dr. Basheda to elaborate on his causation opinion a second time. Consol contends that since the objective tests were valid, there was no need to obtain a new pulmonary evaluation to replace Dr. Basheda's opinion. Consol's argument is without merit.

Administrative law judges have considerable authority to resolve procedural issues that arise in the cases before them. 20 C.F.R. § 725.351(b); *see generally North American Coal Co. v. Miller*, 870 F.2d 948, 951 (3d Cir. 1989) ("While the conduct of a hearing is within the sound discretion of the administrative law judge, the judge is obliged, above all, to ensure that all parties have the opportunity to

fully present their case by way or argument, proof and cross-examination of the witness") (citation omitted); *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 162 (3d Cir. 1986) (an ALJ's "discretion includes the power to make reasonable, nonarbitrary decisions regarding the admission or exclusion of evidence for procedural reasons," and, holding, in affirming ALJ's ruling, "In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency"). With regard to any pulmonary evaluation offered by the Department, the judge is charged with determining whether the report and testing are sufficient and has an obligation to correct any deficiency detected. 20 C.F.R. § 725.456(e). If the 413(b) evaluation is insufficient, the regulations lay out two broad procedural paths for the judge to follow: the judge may (1) allow the parties to develop the evidence before terminating the hearing process; or (2) remand to the district director to develop the evidence. Which option the judge chooses is explicitly left to his or her sound discretion. *Id.*

Here, Consol resisted Judge Lesniak's first option: it flatly refused to depose Dr. Basheda post-hearing. (JA 567-68). Mr. Kusch was willing to follow this path, even if Dr. Basheda ultimately resolved the outstanding questions in an unfavorable manner. But Consol did not want to "risk" deposing the physician and potentially jeopardizing the outcome of any motion for summary judgment it might file (JA 567-68, 571).

Having failed to gain Consol's agreement to develop evidence while the case remained pending at OALJ, Judge Lesniak was left with the second option: remanding the case to the district director. Consol objects to the judge's "unfettered" remand, claiming that he did not limit the remand with "instructions to develop only such additional evidence as is required." 20 C.F.R. § 725.456(e). The point Consol misses is that Judge Lesniak *did* include instructions: he instructed the district director to conduct a new pulmonary evaluation. In doing so, Judge Lesniak properly exercised his discretion.

Both stated and unstated reasons support Judge Lesniak's discretionary determination. In his remand order, Judge Lesniak noted that the district director had asked Dr. Basheda to clarify his opinion and that, given a second opportunity, the physician failed to comply (JA 580-81). The judge was also aware that Mr. Kusch's counsel had made repeated attempts to contact Dr. Basheda, all to no avail (JA 550-51). And Consol had already rebuffed Judge Lesniak's suggestion for deposing Dr. Basheda post-hearing.

Given these circumstances, Judge Lesniak simply had no expectation that Dr. Basheda's third opinion would be any more clear or specific than his first two.

He therefore permissibly instructed the district director to provide Mr. Kusch with a new pulmonary evaluation.¹¹

C. Because Consol was not prejudiced by the claim's proceedings, its due process arguments should be rejected.

Finally, Consol argues that it should be dismissed and liability for Mr. Kusch's benefits transferred to the Black Lung Disability Trust Fund because the Department and the ALJ mishandled the claim procedurally. In support, Consol points to the Department's failure to correct any error in Mr. Kusch's 413(b) evaluation prior to forwarding the case to OALJ. Consol also contends that its medical evidence was rendered less persuasive by Judge Lesniak's remand because it was older than Dr. Rasmussen's opinion. In Consol's view, the Department should bear the consequences for the delay resulting from the remand. None of these arguments justify releasing Consol from liability here.

Although not cast in "due process" terms, Consol's arguments are appropriately analyzed under that rubric.¹² To establish a procedural due process

¹¹ Judge Lesniak did not "permit[] the claims process to start over" by ordering new pulmonary testing (Pet. Bf. at 53). So long as Dr. Basheda's opinion was deficient, the case needed to be remanded regardless of whether new testing was administered. Moreover, the district director did not issue a new decision on Mr. Kusch's entitlement after obtaining Dr. Rasmussen's opinion, but merely returned the case to the OALJ.

violation, the coal mine company must demonstrate that it was denied a fair opportunity to defend itself. "Procedural due process, at a minimum, affords each [party] a 'full and fair hearing and judicial determination at which she may raise any and all [arguments.]'" *Berne Corp. v. Government of the Virgin Islands*, 570 F.3d 130, 138 (3d Cir. 2009) (quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981)); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 807-08 (4th Cir. 1998) (due process requires that parties have fair opportunity to defend themselves).

A fair hearing does not, however, equate to an error-free proceeding. As the Tenth Circuit explained recently, the Due Process Clause "is concerned with procedural outrages, not procedural glitches. Litigation is rarely pristine and is filled with risk: evidence gets lost, witnesses lie, judges err. The Due Process Clause does not protect against these missteps as such. Its interest is only in whether an adjudicative proceeding as a whole is sufficiently fair and reliable that the law should enforce its result." *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009). Thus, if Consol's "day in court" was fair, albeit imperfect, and the outcome reliable, then due process was achieved.

¹² Consol may have made this choice because the case law is not favorable. Tellingly, though, the cases Consol cites (Pet. Br. at 56) were all resolved on due process grounds.

Consol received timely notice of Mr. Kusch's claim and fully participated in all claim proceedings. It developed medical evidence prior to Judge Lesniak's remand, participated in the argument concerning whether Dr. Basheda had provided the required complete pulmonary evaluation, and developed additional medical evidence after the remand. This additional evidence included testimony from its own experts, Drs. Renn and Fino, who fully responded to Dr. Rasmussen's post-remand pulmonary evaluation and other evidence Mr. Kusch developed. Even more importantly, Consol deposed Dr. Rasmussen and thus had a full opportunity to cross-examine him on his assessment of Kusch's pulmonary status. Consol also participated in depositions of Kusch's experts, Drs. Parker and Celko. "[D]ue process requires . . . notice and opportunity," and Consol received both. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

Consol has pointed to nothing in the proceedings that even approaches the level of a due process violation. Consol broadly suggests that whenever an administrative law judge finds the Department's section 413(b) evaluation to be insufficient and remands the claim for a new evaluation, liability should transfer to the Trust Fund because the Department has not properly discharged its obligations under the statute. To be sure, the district director erred in accepting Dr. Basheda's opinion in this case. However, only those errors that are prejudicial result in a deprivation of due process. *C & K Coal Co. v. Taylor*, 165 F.3d 254, 259 (3d Cir.

1999). As demonstrated above, Consol was not prejudiced by the remand and thus was not denied due process.

Consol next alleges that it was prejudiced based on the chronology of the evidence because Dr. Rasmussen's examination and tests post-dated those administered by Drs. Renn and Fino. The flaw in this argument is obvious: Consol does not (and cannot) point to any part of the ALJ's award of benefits that is hinged on the evidence's timing. To the contrary, Consol's testifying medical expert, Dr. Fino, fully considered Dr. Rasmussen's opinion and in fact based his own conclusions in part on Dr. Rasmussen's objective test results. JA 637-38). Consol could also have asked the district director or the ALJ for an opportunity to reexamine and test Mr. Kusch had its medical experts believed additional information was necessary to inform their opinions. But Consol chose not to do so.¹³

Finally, Consol argues that its dismissal and transferring liability to the Trust Fund is an appropriate remedy given the delay occasioned by Judge Lesniak's remand. This argument is flatly contrary to this Court's controlling precedent. In

¹³ Consol's additional complaint that "Kusch was provided two pulmonary evaluations at no cost by the OWCP" overlooks the fact that Judge Lesniak struck Dr. Basheda's opinion from the record. (Pet. Bf. at 55). Although the ALJ considered the tests administered by Dr. Basheda, he did not rely on them in awarding benefits.

Taylor – a case in which "more than 23 years elapsed from the initial application to the date of the responsible operator determination" – the Court held that procedural delay alone does not deprive an operator of due process: "we will not hold that this delay, albeit inexcusable, *ipso facto* establishes a violation of C & K's due process rights." *Taylor*, 165 F.3d at 259. Rather, transferring liability from an operator to the Trust Fund "should only be invoked where prejudice other than mere delay has been demonstrated." *Id.* In Kusch's claim, the delay was a mere two years, and, as the Board concluded, Consol has not demonstrated that it has been otherwise prejudiced.

In sum, neither the unfortunate flaws in Dr. Basheda's section 413(b) evaluation, the remedial steps Judge Lesniak took to correct those flaws, nor the resulting delay in the claim adjudication process ultimately prevented Consol from defending its interests fully and fairly. The Court should reject Consol's request to be dismissed from liability for Mr. Kusch's claim.

CONCLUSION

The Court should reject Consol's arguments that Judge Lesniak erred in finding Dr. Basheda's opinion incomplete and in remanding the case for an entirely new pulmonary evaluation. The Court should also deny Consol's request to be dismissed from the case.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to Consol's request for oral argument.

COMBINED CERTIFICATES

I certify that:

1. this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,373 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);
2. this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in fourteen point Times New Roman;
3. the text of the electronic brief filed with the Court is identical to the text in the paper copies; and
4. a virus detection program (McAfee VirusScan Enterprise 8.0) has been run on the file and no virus was detected.

I also certify that on October 23, 2009, the date I filed the electronic brief, I:

1. mailed 10 paper copies of the brief to the Clerk of Court; and
2. served a copy of the brief through the Court's CM/ECF system and mailed 1 paper copy to the following:

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