No. 11-4309

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RILEY COLLINS,

Petitioner

v.

WHITAKER COAL CORPORATION

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a claim filed by Riley Collins (the miner) in 2001 for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944. Mr. Collins died in 2006, and his widow, Patty Sue Collins, now pursues his claim.

After various administrative proceedings, Administrative Law Judge Joseph E. Kane issued a decision on February 10, 2010, awarding benefits to the miner

and ordering Whitaker Coal Corporation (Whitaker Coal), the miner's former coal mine employer, to pay them. Whitaker Coal appealed this decision to the Benefits Review Board on March 1, 2010. The Board had jurisdiction over this appeal because section 21(a) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party thirty days to appeal an ALJ's decision to the Board.

The Board reversed ALJ Kane's decision and denied benefits on March 24, 2011. The Board issued a final decision on September 27, 2011, when it denied Mrs. Collins' and the Director, Office of Workers' Compensation Programs' timely motions for reconsideration. 20 C.F.R. § 802.407. Mrs. Collins petitioned this Court for review on November 28, 2011. The Court has jurisdiction over Mrs. Collins' petition because section 21(c) of the Longshore Act, 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. *See also* 20 C.F.R. § 802.406 (timely motion for reconsideration tolls the sixty-day appeal period). The injury, within the meaning of section 21(c), arose in Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. Did the Benefits Review Board err in finding that Dr. Baker's medical opinion was insufficient as a matter of law to establish that pneumoconiosis arising

out of coal mine employment contributed to the miner's totally disabling respiratory condition?

2. Did the ALJs permissibly discredit the opinions of Drs. Broudy and Dahhan, the only opinions contrary to that of Dr. Baker?

STATEMENT OF THE CASE

The miner filed his claim for black lung benefits in February 2001.[1] Director's Exhibit No. (DX) 2.[2] Following a hearing in November 2003, ALJ Thomas F. Phalen, Jr., awarded benefits, finding that the miner had a totally disabling respiratory condition and that pneumoconiosis arising out of coal mine employment contributed to that disability. Appendix (A.) 56. ALJ Phalen also determined that Whitaker Coal, the miner's last coal mine employer, was responsible for payment of these benefits.

Whitaker Coal appealed to the Benefits Review Board and argued, *inter alia*, that ALJ Phalen had improperly weighed the medical evidence. A.46. Finding

[1] The miner withdrew an earlier claim before it was adjudicated. *See* 20 C.F.R. § 725.306 (providing that a withdrawn claim is "considered not to have been filed").

[2] The Index of Documents in the Certified Case Record (CCR), submitted January 11, 2012, by Board Clerk Thomas O. Shepherd, does not contain separate entries for the hearing exhibits, hearing transcript, or administrative proceedings occurring before ALJ's Kane's February 2010 award of benefits. The Director therefore has not provided separate references to the Certified Case Record for these documents.

merit to some of the company's arguments, the Board vacated the award and remanded the case for further consideration. A.46.

On remand, ALJ Joseph E. Kane (upon the unavailability of ALJ Phalen) awarded benefits, finding that the miner's pneumoconiosis contributed to his totally disabling respiratory condition. CCR 165; A.25. Upon Whitaker Coal's appeal, the Board reversed the award, finding that the medical evidence relied upon by ALJ Kane – specifically, the medical opinion of Dr. Baker – was insufficient as a matter of law to establish that the miner's pneumoconiosis contributed to his totally disabling respiratory condition. CCR 46; A.13. Following the Board's denial of motions for reconsideration filed by Mrs. Collins and the Director, OWCP, CCR 1; A.11, Mrs. Collins petitioned this Court for review, A.1.

STATEMENT OF THE FACTS

The miner was employed in coal mine work for nineteen years, ending in 1992. A.58. He explained that safety rules concerning dust exposure were either nonexistent or ignored during his employment. ALJ hearing transcript at (HT) 14, 23. He described the coal dust exposure in one job as being so extreme he was unable to see the person in front of him. HT 23. The miner smoked cigarettes for over thirty years, ending around 2002. He described the daily amounts as varying

from one-half packs to two packs. HT 24-25; DX 18; Employer's Exhibit Nos. (EX) 3, 9-10. He died in January 2006 at the age of fifty-nine.

A. Relevant Medical Evidence[3]

Chest X-ray Interpretations

Exhibit Number[4]	X-ray Date	Reading Date	Physician/ Qualifications[5]	Interpretation
DX 11	4/12/94	4/12/94	Myers	1/1 [positive]
DX 12	6/19/95	6/19/95	Sundaram	1/1 [positive]
DX 18	5/21/01	5/21/01	Baker	1/0 [positive]
DX 18	5/21/01	6/14/01	Sargent/Bd-certified radiologist/B-reader	Read for film quality only

[3] There is presently no dispute that the miner had a totally disabling respiratory condition prior to his death (the question here is the cause of that condition). Consequently, the results of the various pulmonary function studies and blood gas analyses – which may be used to establish total respiratory disability by regulation, 20 C.F.R. § 718.204(b)(1)-(2) – are not set forth in this summary of the relevant medical evidence. The results of this testing, however, do demonstrate total respiratory disability under the regulation.

[4] "CX" refers to the miner's exhibits.

[5] In this column, "Bd-certified radiologist" denotes a radiologist who is certified "in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association." 20 C.F.R. § 718.202(a)(1)(ii)(C). A "B-reader" is "a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification [required by section 20 C.F.R. § 718.102(b)] for interpreting chest roentgenograms for pneumoconiosis and other diseases." 20 C.F.R. § 718.202(a)(1)(ii)(E).

DX 22	5/21/01	7/3/01	Scott/Bd-certified radiologist/B-reader	[negative]
CX 2	5/21/01	9/9/03	Alexander/Bd-certified radiologist/B-reader	1/1 [positive]
EX 3 EX 8	11/28/01	11/27/01 [sic] 10/27/03	Broudy/B-reader	[negative]
CX 4	11/28/01	9/9/03	Alexander/Bd-certified radiologist/B-reader	1/1 [positive]
EX 9	10/30/03	10/30/03	Dahhan/B-reader	[negative]

Medical Opinions

Dr. Baker, a Board-certified internist and pulmonologist, examined the miner in May 2001 at the Department's request.[6] A.84, 111. The doctor physically examined the miner, read a chest X-ray as positive for pneumoconiosis, and performed pulmonary function testing and blood gas analysis. He also recorded the miner's medical, work, and smoking histories. Dr. Baker diagnosed 1) coal workers' pneumoconiosis based upon the positive X-ray reading and the miner's coal dust exposure; 2) severe chronic obstructive pulmonary disease (COPD) based upon the pulmonary function study results showing a FEV_1 value

[6] The Department provided this examination in order to fulfill its statutory duty to give the claimant-miner "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b); *see also* 20 C.F.R. § 725.406.

of only twenty-four percent of expected, A.118; and 3) severe hypoxemia based upon the results of arterial blood gas analysis.[7] A.87-88. Dr. Baker reported that the miner's coal workers' pneumoconiosis was due solely to coal mine employment, and the severe COPD and hypoxemia were due to both coal mine employment and cigarette smoking. *Id.* He concluded that the miner's respiratory condition was totally disabling and that all of the diagnosed conditions contributed "fully" to that disability. *Id.*

In response to a written question posed by the miner's attorney as to whether, assuming a negative X-ray, the miner had "an occupational lung disease . . . caused by his coal mine employment," Dr. Baker stated: "Pts [Patient's] [sic] may have effect [sic] of coal dust exposure with COPD as only symptom. Coal dust exposure is a cause of COPD." A.83. When asked to provide the objective evidence relied upon in forming his opinion, Dr. Baker listed: "abn [abnormal] PFTs [pulmonary function tests], ABGs [arterial blood gas analyses], CXR [chest X-ray] and history of OD [obstructive disease]." *Id.*

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[7] The "FEV_1 value measures the amount of air an individual is able to exhale during the first second of pulmonary function testing. Johns Hopkins Medicine, "Pulmonary Function Laboratory," at http://www.hopkinsmedicine.org/pftlab/pftests.html.

Dr. A. Dahhan, a Board-certified internist and pulmonologist and B-reader, examined the miner in May 2001 and October 2003 at Whitaker Coal's request. DX 20; EX 4. He physically examined the miner, performed pulmonary function testing and blood gas analysis, read his own-administered X-ray as negative for pneumoconiosis, reviewed X-rays read as negative for pneumoconiosis by other doctors, and reviewed pulmonary function study results administered by other doctors. *Id.* Dr. Dahhan also reviewed the clinical notes of Dr. Chaney, the miner's treating physician. EX 4. In his reports and during two depositions, Dr. Dahhan opined that the miner had a totally disabling respiratory condition due solely to smoking, and that the miner suffered from neither clinical nor legal pneumoconiosis.[8] DX 20; EX 4, 5, 9, 10.

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[8] "'Clinical pneumoconiosis' [or medical pneumoconiosis] consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 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)-(a)(2).

In contrast, "'[l]egal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive lung disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306 (6th Cir. 2005) (quoting *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000), that "[l]egal pneumoconiosis is a much broader category of diseases, which includes but is not limited to medical . . . pneumoconiosis").

Dr. Dahhan indicated that the miner did not suffer from "clinical pneumoconiosis" because the X-ray readings were negative for pneumoconiosis. DX 20; EX 10 at 10, EX 10 (attachment 3). And he explained that the miner did not suffer from "legal pneumoconiosis" for various reasons: the miner's condition was obstructive in nature, the miner had not been exposed to coal dust since 1992, and the miner responded positively to the administration of bronchodilators whereas COPD due to coal dust exposure cannot show improvement.[9] DX 20; EX 4, 5 at 12; EX 10 (attachment 3); EX 20. Dr. Dahhan also explained that the miner's respiratory condition took the form of emphysema, and that only focal emphysema, which the miner did not have, was caused by coal dust exposure. EX 5 at 11; EX 10 at 15. Without specifically stating that the miner suffered from centrilobular emphysema, Dr. Dahhan opined that centrilobular emphysema was

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[9] A bronchodilator is "an agent that causes expansion of the lumina of the air passages of the lungs." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 253 (30th ed. 2003). Administration of a bronchodilator may cause a slight reversibility of an airway obstruction and thereby improve lung function. THE MERCK MANUAL 576 (17th ed. 1999). A physician must report both pre- and post-bronchodilator results when performing pulmonary function testing in connection with a black lung claim. 20 C.F.R. § 718.103(a)(8).

never due to coal dust exposure. EX 10 at 15-16.[10]

Finally, when asked in deposition concerning the cause of the miner's respiratory impairment, Dr. Dahhan reported that medical studies showed a "hypothetical loss of FEV_1 that can be attributed to the miner's years of exposure to coal dust," but discounted the studies as "based on theoretical calculations." DX 5 at 17.

Dr. Bruce Brody, a Board-certified internist and pulmonologist and B-reader, examined the miner in November 2001 at Whitaker Coal's request. DX 21; EX 8. He took smoking, work and health histories, and an X-ray he read as negative for pneumoconiosis; administered pulmonary function testing showing severe obstructive disease and impairment even after use of a bronchodilator; and performed blood gas analysis showing severe hypoxemia. *Id.* In two medical reports and at deposition, Dr. Broudy concluded that the miner had a totally disabling respiratory condition due solely to smoking. EX 1, 3, 8. Like Dr. Dahhan, Dr. Broudy concluded that the miner had neither clinical nor legal pneumoconiosis. *Id.*

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[10] Dr. Dahhan's May 2003 report (EX 10) reveals that, in arriving at his conclusions, he reviewed certain medical evidence that was not within the evidentiary limitations set forth by 20 C.F.R. § 725.414, namely, a negative reading by Dr. Scott of an August 21, 2000, X-ray, and medical reports by Drs. Broudy (Sept. 1995 at DX 13), Sundaram (June 1995 at DX 12), and Myers (April 1994 at DX 11).

In explanation, Dr. Broudy stated that the miner's respiratory condition was atypical of pneumoconiosis: it was obstructive; it improved with bronchodilators; it became worse after the miner left coal mine work; and it was too severe in the absence of an X-ray positive for either simple or complicated pneumoconiosis. EX 1; EX 3 at 14-15; EX 8. When asked in deposition if he could tell whether the miner's FEV_1 reduction was due to smoking rather than coal dust exposure, he responded in the affirmative, stating that, if the miner had not smoked, he would not have had the reduced FEV_1 value. EX 3 at 20. Dr. Broudy added that "no one has really done a prospective study to indicate the real loss of [FEV_1] function due to coal-dust exposure." EX 3 at 21. Finally, the doctor admitted that he could not "rule out" coal dust as a contributor to the miner's impairment. EX 3 at 19.

Dr. George Chaney, a family practitioner, was the miner's treating physician for fifteen to sixteen years. CX 1 at 4. The record contains his office notes from January 12, 1995, to April 24, 2001, many of which record the miner's difficulty with COPD and pneumoconiosis and provide the miner's work and smoking histories. DX 14. In response to a questionnaire provided by the miner's attorney, Dr. Chaney opined that the miner's pulmonary disability was due to coal mine dust, relying on the "medical literature, history, physical examination, CXR [chest X-ray], and pulmonary function tests." *Id.*

At deposition, Dr. Chaney stated that the miner's respiratory condition, COPD, was totally disabling and that it was due to smoking and coal dust exposure. CX 1 at 13, 15-17, 19. He explained that it was possible for coal dust exposure to contribute to COPD even if there is no X-ray evidence of pneumoconiosis. CX 1 at 11, 20. Further, he explained that it was not medically possible to determine which part of the miner's COPD was due to coal dust exposure and which was due to smoking. CX at 16, 17.

B. Relevant Decisions Below

Award, Jan. 18, 2005, by ALJ Phalen (A.56)

ALJ Phalen issued a decision awarding benefits in January 2005. A.56. He first determined that the miner had nineteen years of coal mine employment and a sixty-two pack-year smoking history. A.59. The ALJ then considered the medical evidence.[11] He found that the weight of the chest X-rays was positive for clinical pneumoconiosis pursuant to 20 C.F.R. § 718.201(a)(1): the April 1994 and June 1995 X-rays were read as positive; the October 2003 X-ray was read as negative; the May 2001 X-ray was inconclusive since the readings of the better-credentialed

[11] The ALJ considered only the evidence that was admissible under the evidentiary limitations set forth at 20 C.F.R. §§ 725.2(c), 725.414. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (upholding regulatory evidentiary limitations, with one exception not relevant here); *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278 (4th Cir. 2007) (same).

doctors were split; and the November 2001 X-ray was positive based upon the reading of the better-credentialed doctor. A. 71-72.

Next, ALJ Phalen found that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. § 718.201(a)(2). He gave little weight to Dr. Chaney's diagnosis of pneumoconiosis because the doctor failed to identify the specific test results he relied upon. A.74. The ALJ then gave full weight to Dr. Baker's opinion because the doctor was a Board-certified internist and pulmonologist and his objective testing supported his conclusion. *Id.* Next, the ALJ gave no weight to Dr. Broudy's opinion because the doctor's diagnosis of no clinical pneumoconiosis was based upon the doctor's negative reading of an X-ray that was later read as positive by a better-credentialed doctor. The ALJ also observed that Dr. Broudy found no legal pneumoconiosis simply because, given the seriousness of the miner's respiratory impairment, the doctor expected X-ray evidence of complicated pneumoconiosis.[12] The ALJ viewed this basis as nothing more than a statement concerning the weight of the X-ray evidence rather than a medical report offering an opinion on legal pneumoconiosis. A.75. Finally, the ALJ gave Dr. Dahhan's opinion no weight because the doctor relied on

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[12] "Complicated pneumoconiosis" is the more serious form of pneumoconiosis. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 684 n.1 (1991). A miner who can prove he suffers from complicated pneumoconiosis arising out of coal mine employment is irrebuttably presumed to be totally disabled by pneumoconiosis arising out of coal mine employment. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.204.

unidentified pulmonary function studies as well as other medical evidence not admitted into the record. *Id.* Having credited the opinion of Dr. Baker and discredited those of Drs. Dahhan and Broudy, the ALJ concluded that the medical evidence established that the miner also suffered from legal pneumoconiosis. A.76.

ALJ Phalen then concluded that the miner's pneumoconiosis arose out of coal mine employment based upon the miner's nineteen years of coal mine work and 20 C.F.R. § 718.203(b), which rebuttably presumes that a miner's pneumoconiosis is due to coal mine employment if the miner was employed in coal mine work for ten or more years.

Finally, ALJ Phalen found total disability and disability-causation established by pulmonary function studies and blood gas analyses establishing total respiratory disability by regulation, 20 C.F.R. § 718.204(b)(2)(i)-(ii), and by Dr. Baker's opinion, supported by Dr. Chaney, diagnosing total respiratory disability due to pneumoconiosis. A.76-79. ALJ Phalen gave no weight to Drs. Broudy and Dahhan on the issue of disability-causation in light of the criticisms rendered against the two opinions under the legal pneumoconiosis analysis. A.79. Having found that the evidence satisfied the entitlement criteria, the ALJ awarded benefits.

Board Remand Order, Jan 27, 2006 (A.46)

The Board remanded for the ALJ to reweigh the medical evidence of clinical and legal pneumoconiosis.[13] Turning first to the X-ray evidence, the Board determined that the ALJ erroneously found clinical pneumoconiosis merely because there were five positive readings versus four negative readings. A.52-53. The Board criticized the ALJ's unexplained analysis because it resulted in the positive readings of Drs. Sundarum and Myers being given the same weight as the negative readings of better-credentialed doctors. A.53.

The Board next affirmed ALJ Phalen's discrediting of Dr. Dahhan's opinion (no clinical or legal pneumoconiosis and no disability-causation) because the ALJ accurately determined that the doctor relied upon unidentified study results as well as evidence not admitted into the record. A.52.

Finally, the Board concluded that the ALJ erred in discrediting Dr. Broudy's opinion. A.53. The Board determined that the ALJ had mischaracterized Dr. Broudy's opinion because the doctor's diagnosis of no legal pneumoconiosis was not based solely upon the lack of an X-ray showing of complicated pneumoconiosis. *Id.* The Board also observed that the ALJ had failed to weigh

[13] Whitaker Coal also raised a number of procedural issues including the timeliness of the miner's claim. A.48-52. The Board's remand directed the ALJ to consider whether medical reports written in 1994 and 1995 and communicated to the miner's attorney were sufficient to trigger the three-year time limitation (and thereby bar the instant claim). A.47. On remand, ALJ Kane found the miner's claim timely filed, A.27-28, and the Board affirmed, A.17-18.

Dr. Broudy's opinion against that of Dr. Baker. A.54. The Board therefore remanded the case for further review of Dr. Broudy's opinion and its weighing against Dr. Baker's contrary opinion. *Id.*

Whitaker Coal timely sought reconsideration of the Board's rejection of its procedural arguments. The Board denied the motion. A.37.

Award, Feb. 10, 2010, by ALJ Kane (CCR 165; A.25)

Administrative Law Judge Joseph E. Kane (assigned the case upon the unavailability of ALJ Phalen), first considered the X-ray evidence. CCR 169; A.29. Finding the November 2001 X-ray positive, the October 2003 negative, and the May 2001 inconclusive, he determined that the positive readings of the 1994 and 1995 X-rays, while provided by less credentialed doctors, were sufficient to bolster the positive November 2001 X-ray. He thus found that the miner had established by a preponderance of the evidence the existence of clinical pneumoconiosis. CCR 170; A.30.

Turning to the medical opinion evidence, ALJ Kane concluded that Dr. Chaney's opinion diagnosing pneumoconiosis and disability-causation was entitled to little weight because the doctor had an inaccurate smoking history – two packs a day for five years and one-half pack a day for twenty-two years – and because the doctor failed to identify the specific medical data he relied upon. CCR 171; A.31. In contrast, the ALJ gave Dr. Baker's diagnosis of clinical pneumoconiosis full

weight because it was consistent with the weight of the X-ray evidence. CCR 171-72; A.31-32. He also gave the doctor's diagnosis of legal pneumoconiosis full weight because the doctor had correct smoking and work histories, had physically examined the miner, and had performed pulmonary function testing and blood gas analysis. *Id.*

ALJ Kane then weighed Dr. Baker's opinion against that of Dr. Broudy.[14] CCR 172-73; A.32-33. He found Dr. Broudy's diagnosis of no clinical pneumoconiosis fatally undermined because the weight of the X-rays was positive for pneumoconiosis and any X-ray the doctor believed was negative was read as positive by better-credentialed doctors. CCR 172; A.32. In addition, ALJ Kane found Dr. Broudy's diagnosis of no legal pneumoconiosis unpersuasive because the doctor's reasons – the miner's impairment occurred long after coal mine employment, was obstructive in nature, and improved with the use of bronchodilators – were inconsistent with 20 C.F.R. § 718.201, which provides that pneumoconiosis may be a progressive disease and may be obstructive in nature. Moreover, the ALJ faulted the doctor for failing to explain the cause of the miner's residual disability even after using a bronchodilator. CCR 172-73; A.32-33.

ALJ Kane therefore determined that, based upon the X-ray evidence and Dr. Baker's opinion, the miner had established both clinical and legal pneumoconiosis.

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[14] ALJ Kane did not consider Dr. Dahhan's opinion because the Board affirmed ALJ Phalen's prior discrediting of it. CCR 172; A.32.

CCR 172-73; A.32-33. The ALJ then found that Dr. Baker's opinion established that the miner's disability was due to pneumoconiosis because Whitaker Coal no longer contested that the miner's condition was totally disabling and because Dr. Broudy's contrary opinion concerning the cause of this disability was undermined by the doctor's mistaken belief that the miner did not suffer from either clinical or legal pneumoconiosis. CCR 173-74; A.33-34. Accordingly, ALJ Kane awarded benefits.

Board Reversal, Mar. 24, 2011 (CCR 46; A.13)

The Board considered ALJ Kane's weighing of the medical evidence. Declining to reconsider its prior affirmance of ALJ Phalen's discrediting of Dr. Dahhan's diagnosis, CCR 53 n.16; A.20 n.16, the Board instead addressed Whitaker Coal's assertion that ALJ Kane had erred in crediting the opinion of Dr. Baker on the issue of clinical and legal pneumoconiosis. CCR 54; A.21. The Board agreed with Whitaker Coal, finding that Dr. Baker's opinion was insufficient as a matter of law to establish pneumoconiosis because the opinion was not explained: "Dr. Baker's report does not contain an explanation for his conclusions that claimant had coal workers' pneumoconiosis, and that claimant's COPD and hypoxemia were caused by coal dust exposure." CCR 55; A.22 (citing *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*)). The

Board therefore reversed ALJ Kane's finding of pneumoconiosis.[15] CCR 55; A.22. And because the ALJ's finding of disability-causation was based upon his finding of both clinical and legal pneumoconiosis, the Board reversed the ALJ's finding of disability-causation as well. *Id.* The Board therefore denied the claim. CCR 56; A.23.

The Board thereafter denied without explanation Mrs. Collins' and the Director's motions for reconsideration of its evaluation of the medical evidence. CCR 1; A.11.

SUMMARY OF THE ARGUMENT

Dr. Baker is a highly credentialed doctor who physically examined the miner, recorded his medical and employment histories, ran blood gas and pulmonary function studies, and reviewed a chest X-ray; and he recorded all of his findings in a medical report. Dr. Baker concluded that the miner had both clinical and legal pneumoconiosis arising out of coal mine employment, and that the miner's undisputed total respiratory disability was due, along with the miner's smoking habit, to these pneumoconioses.

ALJ Kane – the statutorily-appointed fact finder and assessor of credibility – found Dr. Baker's recorded histories accurate, the study results valid, the positive

[15] The Board did not review ALJ Kane's weighing of the X-ray evidence since any error would be harmless in light of its rejection of Dr. Baker's opinion. CCR 11 n.20; CCR 56; A.23 n.20.

X-ray reading supported by the weight of the X-rays of record, and the doctor's opinion supported by the underlying documentation. Because the ALJ found the contrary evidence to be entitled to little or no weight, he awarded benefits to the miner based upon Dr. Baker's opinion. The Board reversed, however, finding that Dr. Baker's opinion was insufficient as a matter of law because he failed to "explain" his conclusions.

The Board erred. This Court has never determined that a doctor's opinion connecting a miner's pulmonary condition to his coal mine employment must be "explained" beyond setting forth the documentation that supports the conclusion. In fact, this Court in *Wolf Creek Collieries v. Director,* OWCP, 298 F.3d 511, 522 (2002), rejected an employer's argument that an ALJ erred in crediting a medical opinion lacking "an articulate rationale." The Court explained that, whether a medical opinion is sufficiently reasoned is "essentially a credibility matter" within the ALJ's domain. Consequently, this Court should vacate the Board's reversal of ALJ Kane's permissible reliance on Dr. Baker.

Upon vacating the Board's reversal, the Court may either remand the case to the Board to allow it to review ALJ Kane's weighing of Dr. Broudy's opinion (the Board already affirmed ALJ Phalen's discrediting of Dr. Dahhan's opinion), or the Court itself may review both ALJs' weighing of the evidence under the substantial evidence standard. In the Director's view, the ALJs correctly discredited Drs.

Dahhan's and Broudy's opinions because the doctors' reasons for dismissing pneumoconiosis as a cause of the miner's disability were unpersuasive and fatally undermined by the doctors' mistaken assumption that the miner did not have clinical pneumoconiosis by X-ray. In addition, Dr. Dahhan reviewed medical data that was unidentified and outside the evidentiary record. In sum, because Dr. Baker's opinion proves the elements of entitlement and there is no credible contrary evidence, an award of benefits – whether issued by the Board or this Court – is the proper result.

STATEMENT OF THE STANDARD OF REVIEW

The Board's determination that a doctor's opinion is legally insufficient to establish entitlement under the BLBA is a question of law. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). Absent an error of law, the ALJ's findings and conclusions 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). "The test is not whether the Board's decision is supported by substantial evidence, but whether the Board was correct" in determining whether the ALJ's decision was or was not supported by substantial evidence. *Campbell v. Consolidation Coal Co.*, 811 F.2d 302-03 (6th Cir. 1987).

ARGUMENT

I.

The Board Erred in Finding Dr. Baker's Opinion Legally Insufficient to Establish that the Miner Had Both Clinical and Legal Pneumoconiosis.

In order to be entitled to black lung benefits, a miner must prove that 1) he suffers from pneumoconiosis arising out of coal mine employment; 2) he has a totally disabling respiratory condition; and 3) pneumoconiosis substantially contributes to his totally disabling respiratory condition. 30 U.S.C. § 901(a); 20 C.F.R. § 718.204(c)(1); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989). Section 718.204(c)(2) provides further that "the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report." 20 C.F.R. § 718.204(c)(2).

In the instant case, Dr. Baker, a Board-certified internist and pulmonologist, reported that the miner suffered from both clinical and legal pneumoconiosis, and that both types of pneumoconiosis contributed, along with the miner's smoking habit, to his total respiratory disability. His opinion was supported by that of Dr. Chaney, a family practitioner and the miner's treating physician.

ALJ Kane gave full weight to Dr. Baker's opinion because his diagnosis of clinical pneumoconiosis was consistent with the fact that the weight of the X-ray evidence was positive for the disease, and because he arrived at his diagnosis of

legal pneumoconiosis after physically examining the miner, taking accurate work and smoking histories, and administering valid pulmonary function testing and blood gas analysis. The Board, however, reversed, concluding that Dr. Baker's opinion was legally insufficient to establish pneumoconiosis, whether clinical or legal. In explanation, the Board stated that the doctor's opinion was not "reasoned" because it failed to explain how he arrived at his conclusion. The Board erred in considering Dr. Baker's opinion to be legally insufficient.

This Court's decision in *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983), is the seminal case in describing the contours of a "documented and reasoned" medical report. There, the Court explained that "the mere fact that an opinion is asserted to be based upon medical studies cannot by itself establish as a matter of law that it is documented and reasoned." *Rowe*, 710 F.2d at 255. "Instead," the Court explained, "the factfinder [must] . . . examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Id.*

Consistent with this standard, courts have affirmed fact finders who have discredited opinions as insufficiently documented and reasoned when: the doctor relies on little or no study results, *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 361 (6th Cir. 1985); the diagnosis is inconsistent with the doctor's underlying documentation, *Freeman v. Director, OWCP*, 781 F.2d 79, 81 (6th Cir. 1986); the

opinion relies on study results that are invalid or inconsistent with other more credible results, *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783 (7th Cir. 1994); *Fife v. Director, OWCP*, 888 F.2d 365, 368 (6th Cir. 1989); and the opinion is stated in qualified or equivocal language, *Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995).

But here, the Board did not find that Dr. Baker's opinion suffered from *any* of these infirmities. Rather, the Board determined that Dr. Baker's opinion was legally insufficient because the doctor did not "explain" *how* he arrived at conclusions that his underlying documentation *supported*. CCR 55; A.22. Such judicial second-guessing is clear error.

First, Dr. Baker did, in fact, "explain" his diagnosis of clinical pneumoconiosis – he stated that the miner's X-ray was positive for pneumoconiosis. Given that clinical pneumoconiosis is most often established by X-ray readings, *see* 20 C.F.R. § 718.202(a)(1), there can be no more direct "explanation" or support of the doctor's opinion than his statement that the X-ray he read was, in fact, positive for pneumoconiosis.

As to legal pneumoconiosis, *i.e.*, a respiratory condition arising out of coal mine employment, this Court has never held that a diagnosis of that condition – or of a diagnosis of disability-causation for that matter – must, as a matter of law, be accompanied by an explanation beyond that which the documentation supplies. In

fact, the Court has held to the contrary. In *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522 (6th Cir. 2002), the Court specifically rejected an employer's argument that an ALJ erred in crediting a medical opinion lacking "an articulate rationale," and explained that whether a medical opinion is sufficiently reasoned is "essentially a credibility matter" within the ALJ's domain. *See also Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) (affirming ALJ's credibility finding despite employer's allegation that the doctor's opinion was conclusory and not supported by the underlying documentation); *Smith v. Martin County Coal Corp.*, 233 Fed.Appx. 507, 511-12, 2007 WL 1544154 (6th Cir. 2007) (holding that unexplained medical opinion <u>may</u> be given less weight than contrary evidence); *Manning Coal Corp. v. Wright*, 257 Fed.Appx 836 (6th Cir. 2007) (observing that a medical opinion "could have . . . more clearly stated the interplay between his diagnosis of [the miner's] pulmonary impairment and [the miner's] ability to work," but stating that the standard "requires a sufficiently reasoned medical opinion—not perfection"); *Johnson v. Director, OWCP*, 83 Fed. Appx. 715, 717 (6th Cir. 2003) (holding ALJ <u>may</u> decline to credit a "conclusory statement . . . contrary to all the other evidence on the issue of disability," but not

holding ALJ is required to do so).[16]

This Court's decision in *Wolf Collieries* is consistent with decisions of the Fourth and Seventh Circuits, both of which have held that a reasoned medical report need not contain an "explanation." *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000) ("An ALJ may choose to discredit an opinion that lacks a thorough explanation, but is not legally compelled to do so."); *Nance v. Benefits Review Board*, 861 F.2d 68, 70-71 (4th Cir. 1998) (affirming ALJ's causation finding based on physician's checking the "yes" box that "whatever condition [the miner] has is related to dust exposure in [the miner's] coal mine employment"); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893 (7th Cir. 1990) (affirming ALJ's decision to credit documented but unexplained medical opinion, holding "[s]uch reports . . . minimally sufficient to support a claim for benefits"); *see also Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 448 (7th Cir. 1992) (reaffirming its *Poole* decision).

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[16] Citing *Martin County Coal* and *Milburn Colliery v. Hicks*, 138 F.3d 524, (4th Cir. 1998), Whitaker Coal argued before the Board that a doctor's opinion must articulate a valid scientific basis for a diagnosis in order to be legally sufficient. Petition for review and brief for Whitaker Coal, CCR 100, 102 (dated June 15, 2010). However, these decisions make clear that it is within the ALJ's *discretion* to give less weight to an opinion lacking detail, not that such opinions are legally insufficient and thus must be taken out of the ALJ's hands. *Martin County Coal*, 223 Fed. App. at 511; *Hicks*, 138 F.3d at 533 n.9. The distinction between a legally insufficient and arguably unimpressive medical opinion is the crux of the Board's error below.

Consequently, Dr. Baker's opinion is legally sufficient to establish pneumoconiosis, and the Board therefore erred in vacating ALJ Kane's crediting of Dr. Baker's opinion. Ironically, the Board's only cited support for its action was its decision in *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*), where the Board specifically held that it was within the ALJ's discretion whether to discredit a medical opinion for lack of an explanation. The Board erred in not following its own precedent or that of this Court.[17]

II.

<u>ALJs Phalen and Kane Reasonably Discredited the Opinions of Drs. Broudy and Dahhan, Respectively, that the Miner Did Not Suffer from Pneumoconiosis</u>.

Because the Board determined (mistakenly) that Dr. Baker's opinion was legally insufficient to establish pneumoconiosis, the Board reversed ALJ Kane's award without addressing whether ALJ Kane properly discredited the contrary opinion of Dr. Broudy.[18] This Court, therefore, may vacate the denial and remand the case to the Board for further review, or the Court itself may consider whether the ALJs' discrediting of the contrary evidence is supported by substantial evidence. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 355 (6th Cir.

[17] It is also worth noting that the Board declined to hold Dr. Baker's opinion legally insufficient the first time it was presented with the issue. A.53-54.

[18] The Board upheld ALJ Phalen's discrediting of Dr. Dahhan's opinion in its first opinion, A.51-52.

2007) (affirming ALJ's decision as supported by substantial evidence, even though Board did not substantively review that decision); *see also Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997) (explaining that the Board and this Court have the same scope of review: both determine if the ALJ's findings and conclusions are supported by substantial evidence). In either case, the Director asserts that ALJs Phalen and Kane properly discredited the opinions of Drs. Dahhan and Broudy, respectively.

ALJ Kane gave less weight to Dr. Broudy's opinion because the doctor's diagnosis of clinical pneumoconiosis was based upon a negative X-ray reading, whereas the ALJ had found the weight of the X-ray evidence to be positive. CCR 172; A.32. ALJ Kane also observed that the particular X-ray Dr. Broudy read as negative – the November 28, 2001 X-ray – was read as positive by Dr. Alexander, a better-credentialed doctor. *Id.* These are proper bases for discrediting a doctor's opinion. *Adams v. Peabody Coal Co.*, 886 F.2d 818, 826 (6th Cir. 1989) (holding ALJ properly rejected doctor's conclusion concerning etiology of a respiratory condition where the doctor mistakenly believed that the miner did not suffer from clinical pneumoconiosis).

Admittedly, ALJ Kane's affording little weight to Dr. Broudy's opinion of no clinical pneumoconiosis would not be affirmable if the basis of the discrediting – that the weight of the X-ray evidence was positive for pneumoconiosis – were

found in error. ALJ Kane, however, properly determined that the weight of the X-rays was positive for pneumoconiosis. In weighing the X-rays, the ALJ reasonably looked first to those read by the doctors with the better credentials, *i.e.*, the doctors who were Board-certified radiologists or B-readers or both. This resulted in the November 2001 X-ray being considered positive because the positive reading of Dr. Alexander (a Board-certified radiologist and B-reader) trumped the negative reading of Dr. Broudy (only a B-reader); the October 2003 X-ray being considered negative because it was read only by one doctor, Dr. Dahhan (a B-reader), and he reported it as negative; and the May 2001 X-ray being considered in equipoise because the doctors who were both Board-certified-radiologists and B-readers were split on the issue. Recognizing that this weighing did not resolve the dispute, ALJ Kane looked to the remaining two X-rays (April 1994) and (June 1995), which were read as positive by non-credentialed doctors. The ALJ determined that those positive readings tipped the scale to positive. This was a reasonable way to resolve the dispute. While the readings of doctors without "credentials" may be given less weight than the readings of better-credentialed doctors, neither the BLBA, its implementing regulations, or decisional law mandate that such readings be given no weight whatsoever. Consequently, ALJ Kane properly determined that the

weight of the X-ray evidence was positive for pneumoconiosis.[19]

ALJ Kane also gave less weight to Dr. Broudy's opinion of no legal pneumoconiosis because the doctor's reasons for finding smoking to be the sole cause of the miner's respiratory disability – the miner's condition was obstructive in nature and improved following bronchodilator treatment – were not persuasive. CCR 173; A.33. The ALJ observed that 20 C.F.R. § 718.201's definition of pneumoconiosis actually includes obstructive diseases arising out of coal mine employment, and the doctor's observations concerning improvement following bronchodilator treatment simply failed to explain the cause of the disability that remained following treatment. Again, these are valid reasons for an ALJ to give less weight to a medical opinion. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 497 (7th Cir. 2004) (affirming ALJ's discrediting of doctor's opinion where doctor's opinion was "affected by [the doctor's] subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions") (internal quotations omitted);

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[19] In any event, if the 1994 and 1995 X-ray readings are given no weight because the reviewing doctors were not credentialed, then arguably the October 2003 X-ray read negative by a doctor who is only a B-reader may be given less weight than the November 2001 X-ray read positive by a doctor who is both Board-certified radiologist and B-reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993) (explaining that the ALJ may give more weight to a doctor who is both a Board-certified radiologist and a B-reader than to a doctor who is just a B-reader). (The other X-ray read by dual qualified readers was found to be in equipoise.) This manner of weighing would also result in a positive finding of pneumoconiosis by X-ray.

Crockett Colleries, Inc. v. Barrett, 478 F.3d 350, 356 (6th Cir. 2007) (holding ALJ properly rejected medical opinion that failed to explain why responsiveness to bronchodilator "necessarily eliminated a finding of legal pneumoconiosis").

That leaves Dr. Dahhan's opinion. ALJ Phalen gave it less weight because the doctor failed to identify the pulmonary function study results upon which he relied and because he relied on records and clinical findings not submitted into the record. A.75. These are valid bases to discredit a medical opinion. The fact finder cannot perform the *Rowe*-analysis of determining if the underlying documentation is accurate if it is not clear what that documentation is. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 710 (6th Cir. 2002) (explaining that the absence of dates or results of any tests "to support [the doctor's] views precludes the ALJ from relying upon [the doctor's] opinions"); *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 449 (7th Cir. 1992) (affirming ALJ's decision to give no weight to treating doctor who asserted the miner had pneumoconiosis but did not identify the documentation he relied upon). Further, a doctor's consideration of documentation not in the record – and therefore likely not in compliance with the evidentiary limitations – does violence to those limitations. *See generally Harris v. Old Ben Coal Co.*, 23 Black Lung Rep. 1-98 (Ben. Rev. Bd. 2006) (*en banc*) (explaining how doctor's opinion may not consider evidence in excess of the evidentiary limitations absent a showing of good cause).

Moreover, Dr. Dahhan's opinion has many of the faults ALJ Kane leveled against Dr. Broudy. In particular, Dr. Dahhan, like Dr. Broudy, mistakenly assumed the X-ray evidence was negative for pneumoconiosis where the ALJ found to the contrary. EX 4; CCR 169-170; A.29-30.

Consequently, ALJ Kane's discrediting of Dr. Broudy's opinion and ALJ Phalen's discrediting of Dr. Dahhan's opinion are supported by substantial evidence and should be affirmed, whether by this Court or by the Board on remand.

If the Court or the Board disagrees and finds error in the ALJ's decision to discredit Drs. Dahhan's and Broudy's opinions, the case should be remanded to ALJ Kane for further consideration. On remand, the ALJ may consider additional bases for discrediting those opinions. Notably, Dr. Dahhan stated that only focal emphysema is due to coal mine dust, and specifically eliminated coal mine dust as a cause of centrilobular emphysema. This is contrary to the Department of Labor's determination, as set forth in the preamble to the definition of legal pneumoconiosis, 20 C.F.R. § 718.201(a)(2), that "[c]entrilobular emphysema (the predominant type observed) was [s]ignificantly more common among the coal workers." 65 Fed. Reg. 79,941 (Dec. 20, 2000).

And Dr. Dahhan reported that any reduction in FEV_1 value due to coal mine dust was only "hypothetical," and only "based on theoretical calculations." Yet, in

the same preamble the Department rejected the opinion of those doctors who similarly believed that the COPD related to coal mine employment is not "clinically significant"; the Department explained that a doctor who opines that coal mine employment's contribution to COPD is not "clinically significant" is "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed. Reg. 79,399 (Dec. 20, 2000). *See Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) (holding that "[t]he ALJ's reference to the preamble to the regulations unquestionably supports the reasonableness of" the ALJ's weighing of the medical evidence); *Consolidation 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 the Department in the preamble).[20]

Dr. Broudy's opinion also runs afoul of the preamble. The doctor reported that "no one has really done a prospective study to indicate the real loss of [FEV_1] function due to coal-dust exposure," EX 3 at 21, yet the preamble reports that medical studies show a significant reduction in the FEV_1 value related to coal mine employment. *See* 65 Fed. Reg. 79,399 (Dec. 20, 2000).

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[20] The ALJ's use of the preamble in reviewing medical opinions concerning the existence of pneumoconiosis is presently before the Court in *Little David Coal Co. v. Billy Collins*, No. 11-3574 (briefing completed).

These additional defects in the opinions of Drs. Dahhan and Broudy are significant. They need not be considered, however, should the Court determine that the reasons given by the ALJs to discredit the doctors' opinions are supported by substantial evidence.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court vacate the Board's reversal of ALJ Kane's award of benefits.

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 8,560 words, as counted by Microsoft Office Word 2003.

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