No. 11-4379

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PEABODY COAL COMPANY,

Petitioner

v.

CAROLYN F. BELT, widow of BILLY BELT (deceased)

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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STATEMENT REGARDING ORAL ARGUMENT

Petitioner has requested oral argument. The Director does not agree that this case involves an important legal issue and believes oral argument is unnecessary. *See* Fed. R. App. P. 34(a)(2)(C); Sixth Circuit Rule 34(a).

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a claim filed by Billy Belt (the miner) in 2004 for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944. The miner died in August 2011 and his widow, Carolyn F. Belt, now pursues his claim.

Administrative Law Judge Donald S. Mosser (the ALJ) issued a decision on June 30, 2010, awarding benefits to the miner and ordering Peabody Coal

Company (Peabody Coal or the company), the miner's former coal mine employer, to pay them. The company appealed this decision to the Benefits Review Board (BRB) on July 14, 2010. The BRB 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 BRB.

The BRB affirmed the ALJ's decision on June 8, 2011, and denied Peabody Coal's timely motion for reconsideration on October 25, 2011. Peabody Coal then petitioned this Court for review on December 15, 2011. The Court has jurisdiction over the company's 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

In order to be entitled to benefits under the BLBA, a miner must establish, *inter alia*, that he suffers from pneumoconiosis. 30 U.S.C. § 901(a); 20 C.F.R. § 725.202(d)(2). Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a). "Clinical pneumoconiosis" refers to a cluster

of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs," 20 C.F.R. § 718.201(a)(1), and is generally diagnosed by chest x-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). In contrast, "legal pneumoconiosis" is a broader category referring to "any chronic lung disease or impairment . . . arising out of coal mine employment," 20 C.F.R. § 718.201(a)(2), and may be diagnosed by a physician "notwithstanding a negative X-ray," 20 C.F.R. § 718.202(a)(4).

1. Whether the ALJ properly credited the opinions of Drs. Cohen and Houser (diagnosing legal pneumoconiosis), where the doctors have excellent credentials, physically examined the miner, performed all the relevant tests, and relied on medical treatises and scientific studies in forming their opinions.

2. Whether the ALJ properly discredited the opinions of Drs. Repsher and Fino (diagnosing no pneumoconiosis) based upon their assumption – contrary to the implementing regulations – that legal pneumoconiosis cannot be diagnosed without positive X-ray evidence of the disease.

STATEMENT OF THE CASE

The miner filed a claim for benefits under the BLBA in 2000, which the Department denied in 2001 because the evidence failed to establish any of the

elements of entitlement. Director's Exhibit No. (DX.) 1.[1] The miner filed his present claim for benefits in May 2004.[2] DX.2. Following a hearing, Administrative Law Judge Mosser awarded benefits on June 30, 2010, and ordered Peabody Coal Company (Peabody Coal or the company), the miner's last coal mine employer, to pay them.

Peabody Coal appealed this award to the BRB. CR.148. The BRB affirmed the award on June 8, 2011, A. 9, CR.32, and denied Peabody Coal's motion for reconsideration on October 25, 2011, A.8, CR.1. The company thereafter timely petitioned this Court for review. A.1.

STATEMENT OF THE FACTS

The miner was employed in coal mine work for at least twenty-five years, ending in January 2000. A.21. Most of his work occurred underground, *id.*, where he worked as a mechanic and welder, Claimant's Exhibit No. (CX.) 4 at 9. He

[1] The Index of Documents in the Certified Case Record (CR.), submitted January 24, 2012, by BRB Clerk Thomas O. Shepherd, does not give the page number for the ALJ's decision or provide separate entries for the hearing exhibits, hearing transcript, or administrative proceedings. Appendix (A.) 6. The Director therefore has not provided separate references to the Certified Case Record for these documents.

[2] The recent amendments to the BLBA apply to claims filed after January 1, 2005. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010). Because the miner's claim was filed in 2004, the amendments are not applicable.

smoked a pack of cigarettes a day for approximately forty years, ending for the most part in 1999. A.20. He died in August 2011 at the age of sixty-four.

A. Relevant Medical Evidence

In order to be entitled to benefits under the BLBA, a miner must satisfy four criteria, that: 1) he suffers from pneumoconiosis (clinical or legal); 2) his pneumoconiosis arose out of coal mine employment; 3) he has a totally disabling respiratory condition; and 4) his pneumoconiosis contributed to his disability. 30 U.S.C. § 901(a); 20 C.F.R. § 718.1(a). There is presently no dispute that the evidence fails to establish clinical pneumoconiosis: the weight of the chest X-ray readings is negative for pneumoconiosis, and the one CT-scan of record was read as negative for the disease. Consequently, this medical evidence section does not set forth the X-ray and CT-scan readings.

There is also no dispute that the miner suffered from a totally disabling respiratory condition prior to his death. This section therefore does not set forth the results of the various pulmonary function studies and blood gas analyses, which are primarily used to determine the presence of respiratory disability. *See* 20 C.F.R. § 718.204(b)(1)-(2). The medical evidence discussed in this section is limited to that addressing the cause of the miner's respiratory disability: if coal mine employment contributed to the miner's disability, then both legal

pneumoconiosis and disability-causation are established, and the miner is entitled to benefits.

Dr. V. Simpao examined the miner in June 2004 at the Department's request.[3] DX.13. 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. Simpao diagnosed coal workers' pneumoconiosis based upon a positive X-ray reading. He also determined that the miner's respiratory condition was totally disabling and that the miner's many years of coal mine work was "medically significant in his pulmonary impairment." *Id.*

Dr. W. Houser, a Board-certified internist and pulmonologist, began treating the miner in June 2005 at the request of the miner's regular physician and saw the miner three times over eight months. CX.4. Dr. Houser physically examined the miner, performed pulmonary function testing, and reviewed an X-ray read as negative for pneumoconiosis. He determined that the miner had totally disabling chronic obstructive pulmonary disease (COPD) based upon the pulmonary function study results, and explained that the COPD was due both to

[3] Dr. Simpao also examined the miner in 2000 as part of the miner's first claim. DX.1. The Department provided these examinations 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.

smoking and the miner's exposure to dust and welding fumes as a coal mine worker.[4] CX.4 at 2, 4, 10. In explanation of his causation determination, Dr. Houser stated that the official statement of the American Thoracic Society provides that "studies have confirmed a relationship between dust exposure and degree of emphysema independent of cigarette smoking"; the "effect of occupational exposures appears consistent with that of cigarette smoking"; and "[i]n heavily exposed workers, the effect of dust exposure may be greater than that of cigarette smoking alone." CX.4 at 2.

Dr. R. Cohen, who is Board-certified in internal medicine, pulmonary medicine, and critical care medicine, and who is also a B-reader,[5] CX.5 at 5-6, examined the miner in July 2008 at the miner's request. A.41. He recorded smoking, work and health histories; read an X-ray as positive 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 an October 2009 report, Dr. Cohen stated that

[4] Chronic airway obstruction includes emphysema and chronic bronchitis. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1298 (30th ed. 2003).

[5] 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).

the miner had coal workers' pneumoconiosis based, *inter alia*, upon the positive X-ray; he also diagnosed severe obstruction, diffusion impairment, and gas exchange abnormalities due to coal mine work and cigarette smoking. A.44. Dr. Cohen concluded that the miner's respiratory condition was totally disabling. A.46.

In discussing the cause of the miner's severe obstructive impairment, Dr. Cohen referenced twenty-four medical studies. A.47-48. He explained that, "[j]ust as there are epidemiological studies confirming that cigarette smoking causes obstructive lung disease, there are numerous findings of modern medical and scientific studies that confirm the link between occupational exposure to coal dust and obstructive lung disease, including chronic bronchitis and emphysema." A.45. He observed that an obstructive impairment may be due to coal mine dust exposure even absent an X-ray positive for pneumoconiosis; that, according to one study, "the effect of one year of underground mining is roughly equivalent to one year of cigarette smoking"; and that "[c]entrilobular emphysema is the most common type of emphysema associated with coal mine dust exposure and cigarette smoking." A.45-46. In view of such literature and the miner's medical data and histories, the doctor concluded that both smoking and dust exposure caused the miner's totally disabling COPD. A.46.

Peabody Coal deposed Dr. Cohen in April 2010. A.49. He again explained that both smoking and coal dust exposure were significant contributors to the

miner's impairment, with their contribution being approximately seventy percent and thirty percent, respectively. A.72-73, 75, 77-78, 80. Further, he stated that both irritants "add on to each other." A.75. Finally, Dr. Cohen explained that, if both exposures are substantial, as in this case, there was "no medical test" to distinguish the causes because they "cause similar types of impairments." A.84, 91.

Dr. L. Repsher, a Board-certified internist and pulmonologist and B-reader, examined the miner in January 2005 at Peabody Coal's request. A.109. He recorded smoking and work histories, performed pulmonary function testing and blood gas analyses, and read an X-ray as negative for pneumoconiosis. While acknowledging that the pulmonary function testing produced invalid results, Dr. Repsher nonetheless concluded that the miner had no pneumoconiosis or any impairment due to coal mine dust exposure because the miner's X-ray was negative, there was no evidence of pneumoconiosis by biopsy or autopsy, the blood gas analysis was not qualifying (*i.e.*, did not establish total respiratory impairment by regulation), and the pulmonary function testing showed only mild COPD. A.110-11.

In April 2010, Dr. Repsher provided more reasons for his finding that coal mine dust exposure did not cause the miner's COPD: approximately thirteen percent of chronic smokers develop disabling COPD, while the vast majority of

miners have no loss in FEV_1 value; the miner's FEV_1 value was reduced out of proportion to his FVC value, which was characteristic of COPD related to smoking rather than to coal mine dust exposure; and coal mine dust's contribution to the miner's respiratory impairment was not "clinically significant."[6] A.126-27.

Dr. G. Fino, a Board-certified internist and pulmonologist, prepared a report in May 2006 at Peabody Coal's request in which he reviewed Dr. Repsher's 2005 examination results and the DOL-sponsored medical examination results obtained by Dr. Simpao in 2001 (during the miner's first claim) and 2004 (during the miner's present claim). A.112. At the outset, he cited and discussed a number of medical studies and textbooks discussing the cause of COPD, some he agreed with, some he did not. A.117-18. He agreed with a study's conclusion that "emphysema due to coal workers' pneumoconiosis was directly related to clinical coal workers' pneumoconiosis," A.118; *see also* A.120 ("[I]t was clinical pneumoconiosis that

[6] "The FEV (Forced Expiratory Volume) measures the amount of air exhaled in one second on maximum effort." *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 n.6 (7th Cir. 1988). "The FVC, or forced vital capacity, measures the maximum volume of air that forcefully can be expelled from the lungs after inspiring maximally." *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 822 n.5 (4th Cir. 1995). "The FVC . . . requires the patient to take a deep breath and then blow air out as rapidly and forcibly as possible. The FEV is taken from the first second of the FVC." *Dotson*, 846 F.2d at 1138 n.7.

correlated with the amount of emphysema.") He further observed that a miner's reduction in the FEV_1 value

> could be clinically significant if there was moderate or profuse pneumoconiosis present because the amount of pneumoconiosis present correlates quite well with the amount of emphysema present. Therefore it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation.

A.120. Dr. Fino concluded that the miner's emphysema was totally disabling and that it was due solely to smoking. A.120-21.

In 2010, Dr. Fino reviewed, *inter alia*, the Cohen and Houser reports. A.122. He disagreed with Dr. Cohen's conclusion that the miner's emphysema was due in part to coal mine dust exposure, observing that, even in one of Dr. Cohen's cited articles, "it is acknowledged that only 6% to 8% of coal miners have a significant reduction in lung function as a result of coal dust inhalation." A.125.

B. Relevant Decisions Below

ALJ Award, June 30, 2010 (A.18)

Because the miner's present claim followed the final denial of a prior claim, the ALJ first considered whether the evidence developed since the denial of the prior claim established a change in one of the conditions of entitlement, as required by 20 C.F.R. § 725.309(d); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 609 (6th Cir. 2001) (discussing subsequent claims). The ALJ found that the miner now had a totally disabling respiratory condition, an element of entitlement

previously decided against him. The ALJ then considered whether the evidence of record proved the remaining elements of entitlement. *See supra* at 5 (listing elements of entitlement).

The ALJ first considered whether the miner suffered from clinical pneumoconiosis, 20 C.F.R. § 718.201(a)(1). He determined that, while there was both positive and negative X-ray evidence of that condition, the weight of the evidence was negative. A.30. The ALJ then turned to whether the medical opinion evidence proved legal pneumoconiosis, 20 C.F.R. § 718.201(a)(2). On this issue, the ALJ had before him the medical opinions of Drs. Simpao, Houser and Cohen, who diagnosed legal pneumoconiosis (*i.e.*, a respiratory condition due at least in part to coal mine employment), and the contrary opinions of Drs. Repsher and Fino, who reported that coal mine employment contributed in no part to the miner's respiratory impairment.

The ALJ discredited Dr. Simpao's opinion because it was unexplained and appeared to be based simply on the fact that the doctor read an X-ray as positive for pneumoconiosis. A.31. Turning to Dr. Houser's opinion, the ALJ found the opinion well-documented as it was based on three separate examinations, objective testing, claimant's symptoms, and treatment records. *Id*. The ALJ further determined that the opinion was well-reasoned because the doctor explained that the clinical testing and scientific literature supported his diagnoses. *Id*. The ALJ

accordingly gave "probative weight" to Dr. Houser's opinion that smoking and coal mine dust exposure both contributed to the miner's obstructive impairment and disability. *Id*.

The ALJ then considered Dr. Cohen's opinion. A.32. He first found that the doctor's diagnosis of clinical pneumoconiosis based upon a positive X-ray reading was undermined by the ALJ's finding that the weight of the X-ray readings was negative. A.15. The ALJ determined, however, that the doctor's diagnosis of legal pneumoconiosis was both documented and well-reasoned. A.32-33. The ALJ observed that Dr. Cohen considered the miner's symptoms, medical and employment histories, and objective test results, and "thoroughly discussed" the scientific studies that supported his conclusion that the miner's COPD was due to both coal mine dust exposure and smoking. A.32. The ALJ further noted that the doctor's opinion was 'consistent with the Department of Labor's prevailing view regarding obstructive impairment and legal pneumoconiosis," and that the Department of Labor had relied on many of these same scientific studies in promulgating its revised definition of pneumoconiosis. A.33. The ALJ thus accorded Dr. Cohen's opinion "significant probative weight." *Id.*

The ALJ then considered the contrary opinions of Drs. Repsher and Fino. The ALJ explained that both doctors had concluded that the miner's COPD was not due to coal mine dust exposure because there was no objective evidence of

clinical pneumoconiosis. A.33-34. In addition, the ALJ pointed out that Dr. Repsher believed that a miner with simple pneumoconiosis would have normal lung function and that the effect of coal mine dust exposure was insignificant when compared with the effects of smoking. *Id*.

The ALJ determined that the opinions of Drs. Fino and Repsher were undermined by the fact that the Department and the BRB had "made it clear" that a miner could have legal pneumoconiosis without first proving clinical pneumoconiosis, and cited the preamble to the regulatory definition of pneumoconiosis in support. A.34. The ALJ found further fault with Dr. Repsher's opinion: the doctor found no relationship between the miner's impairment and his coal dust exposure because the FEV_1 and FVC values did not decline proportionally, yet the doctor admitted that the study results he relied on were invalid. *Id.* The ALJ thus found both opinions to be insufficiently reasoned. *Id*.

In view of the faults in the opinions of Drs. Repsher and Fino, and that Dr. Cohen, who was well-qualified with Board-certification in internal and pulmonary medicines, provided an opinion that was best-reasoned and documented and supported by Dr. Houser's opinion, the ALJ concluded that the miner suffered from legal pneumoconiosis. A.35-36. He then considered the remaining elements of entitlement: whether the miner's respiratory condition was totally disabling, and whether the miner's legal pneumoconiosis contributed to that disability. A.36.

The ALJ found total respiratory disability based upon the pulmonary function study results and the doctors' opinions. A.37-38. Finally, the ALJ found disability-causation for the same reasons he credited and discredited the medical opinion evidence on the issue of legal pneumoconiosis. A.39. Accordingly, the ALJ awarded BLBA benefits.

BRB Affirmance, June 8, 2011 (CR.32; A.9)

On appeal, Peabody Coal argued that ALJ erred in crediting Dr. Cohen's opinion and discrediting those of Drs. Fino and Repsher. In particular, Peabody Coal asserted that the ALJ erred in weighing the evidence by referring to the preamble to 20 C.F.R. § 718.201, the regulatory definition of pneumoconiosis. The BRB rejected Peabody Coal's preamble argument, observing that "the administrative law judge permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment." A.13. The BRB also ruled that, contrary to Peabody Coal's assertions, it was proper for the ALJ to discredit Dr. Repsher's opinion because it was based upon invalid pulmonary function study results, and to discredit Dr. Fino's opinion because the doctor's "view that the presence of legal pneumoconiosis is tied to the degree of clinical pneumoconiosis that is present . . . was contrary to the premises of the regulations and the views accepted by the

Department of Labor." A.14-15. Finally, the BRB rejected Peabody Coal's assertion that the ALJ had shifted the burden of proof to the company. A.15. Rather, the BRB found that the ALJ had properly weighed the evidence and determined that the opinions of Drs. Cohen and Houser outweighed the contrary opinions of Drs. Fino and Repsher. A.15. Accordingly, the BRB affirmed the ALJ's award of benefits.

SUMMARY OF THE ARGUMENT

The ALJ's weighing of the conflicting medical opinions is supported by substantial evidence. The ALJ reasonably found persuasive the opinions of Drs. Cohen and Houser that the miner's respiratory impairment was due to both smoking and coal mine work. Both doctors – eminently-credentialed specialists – based their diagnoses on physical examination of the miner, symptoms, medical and work histories, objective testing, and pertinent medical and scientific literature.

In contrast, the ALJ reasonably interpreted the opinions of Drs. Fino and Repsher as stating that the miner did not have legal pneumoconiosis because there was no objective evidence of clinical pneumoconiosis. The ALJ then reasonably discredited these opinions because legal pneumoconiosis may be established under 20 C.F.R. § 718.202(a)(4) "notwithstanding a negative X-ray." Moreover, the ALJ reasonably discredited Dr. Repsher's opinion because the doctor relied on invalid test results.

Peabody Coal asserts that the ALJ "made all of the dispositive evidentiary determinations based upon whether the evidence, in the ALJ's opinion, was compatible with statements in the preamble [to the regulatory definition of pneumoconiosis at 20 C.F.R. § 718.201(a)]." Opening Brief (OB.) 10. The company then spends its entire brief explaining why reliance on the preamble is impermissible. Peabody Coal's argument, however, has one fatal flaw: the ALJ did not, in fact, rely upon the preamble in weighing the doctors' opinions. In any event, it was within the ALJ's discretion to refer to and rely on the preamble in assessing the credibility and persuasiveness of the medical opinion evidence.

STATEMENT OF THE STANDARD OF REVIEW

The Court reviews the ALJ's decision "to determine whether it is supported by substantial evidence and is consistent with applicable law." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 489 (6th Cir. 2003). "When the question is whether the ALJ reached the correct result after weighing conflicting medical evidence, [the Court's] scope of review is exceedingly narrow. Absent an error of law, findings of fact and conclusions flowing therefrom must be affirmed if supported by substantial evidence." *Id.* Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* "As long as the ALJ's conclusion is supported by the evidence, [the Court] will not reverse 'even if the facts permit an alternative conclusion.'" *Id.* (quoting *Youghiogheny & Ohio Coal*

Co. v. Webb, 49 F.3d 244, 246 (6th Cir. 1995)). The Court exercises plenary review with respect to questions of law. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998).

ARGUMENT

I.

The ALJ's Weighing of the Conflicting Medical Opinions is Supported by Substantial Evidence.

In order to be entitled to benefits, a miner must prove, *inter alia*, that he has pneumoconiosis. 30 U.S.C. § 901(a); 20 C.F.R. § 718.1; *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989). "Th[e] definition [of pneumoconiosis] includes both medical, or 'clinical', pneumoconiosis and statutory or 'legal' pneumoconiosis." 20 C.F.R. § 718.201(a). The "clinical" form of the disease, the form "recognized by the medical community as pneumoconioses," is "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); *Adams*, 886 F.2d at 826. Clinical pneumoconiosis is often termed "coal workers' pneumoconiosis" and typically reveals itself on X-ray. *Freeman United Coal Mining Co. v. Director, OWCP*, 957 F.2d 302, 303 (7th Cir. 1992).

In contrast, the "legal" form of the disease consists of any lung disease or impairment arising out of coal mine employment. 20 C.F.R. § 718.201(a)(2). This

"legal" form "encompasses a wider range of affliction than does the more restrictive medical definition of pneumoconiosis." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575 (6th Cir. 2000). "A claimant may establish the existence of legal pneumoconiosis 'if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds the miner suffers or suffered from pneumoconiosis.'" *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) quoting 20 C.F.R. § 718.202(a)(4); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713 (6th Cir. 2002) (holding that claimant may establish legal pneumoconiosis notwithstanding negative X-ray readings, and an ALJ may credit physicians' opinions on legal pneumoconiosis despite disagreeing with their X-ray readings).

Although the ALJ here found that the X-ray evidence failed to establish clinical pneumoconiosis, he went on to hold, pursuant to section 718.202(a)(4), that the medical opinions established legal pneumoconiosis.[7] In its opening brief, Peabody Coal alleges that the ALJ erred in finding legal pneumoconiosis and asks the Court to reverse the award. The Director disagrees with the company's assessment of the ALJ's weighing of the evidence. The ALJ reasonably weighed the evidence; the award is correct and should be affirmed.

[7] This holding also established disability-causation (the fourth criterion, *see supra* at 5) because the pulmonary impairment in question was totally disabling.

1. The ALJ properly credited the opinions of Drs. Cohen and Houser.

Drs. Cohen and Houser reported that the miner's COPD, his emphysema, was due to both his twenty-five years of coal mine employment and his forty-year smoking habit. A.46, 72-73, 75, 77-80, 99; CX.4 at 2, 4, 10. The ALJ credited these doctors' reports because the doctors had excellent credentials, examined the miner (three times by Dr. Houser), took relevant, accurate histories, performed the relevant tests, which supported their diagnoses, and cited to medical studies and treatises supporting their conclusions. A. 32-33, 36. These are proper bases for crediting a medical opinion. *Jericol Mining*, 301 F.3d at 712; *Cornett*, 227 F.3d at 576; *Director, OWCP v. Rowe* , 710 F.2d 251, 255 (6th Cir. 1983).

Peabody Coal asserts that the ALJ wrongly credited Dr. Cohen's opinion for two reasons: first, the doctor relied on "unproven general assumptions" and nothing "specific" to the miner's case; and second, because the doctor supported his opinion with many of the same medical and scientific studies that the Department of Labor relied on in its preamble to black lung regulations. OB.17, 20.[8] Peabody Coal's assertions of error are meritless.

[8] Peabody Coal does not challenge the ALJ's crediting of Dr. Houser's opinion. Thus, because the ALJ properly discredited the contrary opinions of Drs. Fino and Repsher (Argument I.2., *infra*), the award of benefits would stand on Dr. Houser's opinion even if this Court were to determine that the ALJ's weighing of Dr. Cohen's opinion is in error.

At the outset, it is clear that Peabody Coal is simply asking this Court to reweigh the evidence and substitute its own credibility findings for the ALJ's. This it may not do. *Crockett*, 478 F.3d at 355 ("[W]hether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.") (internal quotation marks omitted); *Wolf Creek Collieries v. Director*, OWCP, 298 F.3d 511, 522 (6th Cir. 2002) (same); *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).

In any event, Peabody Coal's characterization of Dr. Cohen's opinion as not specific to the miner is plainly wrong. For example, the doctor's report concludes, "[b]ased on my review of the literature *and consideration of the objective and historical data for Mr. Belt,* it is my opinion that two factors caused his disabling lung disease. His smoking history and his occupational exposure both caused his chronic obstructive lung disease." A.46 (emphasis added); *see also* A.44-45 (Dr. Cohen describing and explaining the significance of the miner's symptoms, histories, and test data); 74-75, 78, 81, 95-97 (same). The ALJ was therefore correct in stating that Dr. Cohen found coal-dust and tobacco smoke-induced lung disease based on the miner's symptoms, histories, and test results. A.32.

Likewise, Peabody Coal's complaints about the doctor's reliance on "unproven assumptions" are instead the doctor's description of the findings of scientific studies that helped inform his expert medical opinion in this case. A.70-71 (describing scientific literature showing that smoking and coal-dust exposure cause similar harmful effects and pointing out the absence of data suggesting the possibility of resistance to one toxin but not the other).[9] It is certainly permissible for a medical expert testifying in a black lung case to examine, use, or rely on the findings of relevant scientific literature. *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) ("[T]he ALJ had sensible reasons for giving more weight to Dr. Cohen's report. First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD."); *Island Creek Coal v. Garrett*, 2012 WL 340314, at *2 (6th Cir. 2012) (unpublished) (holding that pulmonary function tests, "when combined with the x-rays, numerous physical examinations and [the doctor's] discussion of pertinent medical literature, gave the ALJ sufficient grounds to accept [the doctor's] conclusion as correct."); *see also* A.117-119, 127-128 (use of

[9] Peabody Coal also complains that there was no support for Dr. Cohen's assumption that some small amount of coal mine dust would have been deposited in the miner's lungs. OB 22; A.82-83. Dr. Cohen, while acknowledging the absence of pathological data, based his conclusion on "epidemiology and physiology." A.83. In any event, Dr. Cohen's opinion does not rely on this assumption. Indeed, the nature of the deposition colloquy is speculative, *i.e.*, what Dr. Cohen would expect to find if pathological evidence were adduced.

medical literature by Peabody Coal's own medical experts, Drs. Fino and Repsher).

Finally, Peabody Coal complains of the ALJ's correct observation that the Department "cited and relied on many of [the] same scientific studies," A.33, as Dr. Cohen in its promulgation of the black lung regulations. OB.17, 21, 26. This passing reference, however, is only one reason of many given by the ALJ for finding Dr. Cohen's opinion credible and persuasive: as previously discussed, the ALJ credited the doctor's opinion because it was based upon accurate medical data and was supported and explained by scientific studies.[10] A.32. Moreover, Peabody Coal entirely ignores the ALJ's finding that Dr. Cohen's opinion was "bolstered" by the reasoned and documented opinion of Dr. Houser, another Board-certified internist and pulmonologist who likewise opined that both smoking and coal dust exposure caused the miner's pulmonary impairment, and whose opinion was discussed without reference to the preamble. A.31, 35. Dr. Houser, like Dr. Cohen, physically examined the miner, took accurate histories, and performed all the relevant tests. A.31. And, like Dr. Cohen, Dr. Houser interpreted his results with reference to scholarly literature. *Id*. Notably, Dr. Houser observed that the American Thoracic Society reported that smoking and

[10] As discussed in Argument II, *infra*, it was permissible for the ALJ to consider the preamble.

occupational exposures had similar effects, and that dust exposure could be even more damaging than smoking if the dust exposure were heavy. CX.4 at 2. Thus, it was within the ALJ's discretion to find the two opinions credible and persuasive as well as corroborative of each other.

2. The ALJ properly discredited the opinions of Drs. Fino and Repsher.

Both Drs. Fino and Repsher concluded that the miner's respiratory impairment was due solely to smoking, and that coal mine employment played no role in causing this impairment. They both opined that the miner's X-ray evidence was negative for pneumoconiosis and that smoking alone could have accounted for the miner's impairment. The ALJ determined that these opinions were "insufficiently reasoned" because their opinions "regarding legal pneumoconiosis [were] based on the absence of clinical coal workers' pneumoconiosis." A. 34. The ALJ's analysis is supported by substantial evidence.

Notably, Peabody Coal does not dispute that its doctors' causation opinions were based upon the fact that the miner did not have clinical pneumoconiosis.[11]

[11] Because Peabody Coal does not object to the ALJ's factual description of the opinions, the company has waived the issue. *See Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 852 (6th Cir. 2007) (concluding that a party waives any issue that it fails to present in opening brief). In any event, the ALJ reasonably described the opinions as putting significant emphasis on the lack of proof of clinical pneumoconiosis. *See Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (explaining that, unless a company's interpretation of a doctor's opinion is the only permissible one, the ALJ's contrary interpretation must be affirmed as supported by substantial evidence).

Rather, Peabody Coal's objection is that the ALJ relied on the preamble to discredit their opinions. OB.17. But the ALJ cited to the preamble for the innocuous and uncontroversial proposition that a miner can have legal pneumoconiosis in the absence of clinical pneumoconiosis. A.34 (citing 65 Fed. Reg. at 79939). This concept that a miner can have legal pneumoconiosis without suffering from clinical pneumoconiosis is axiomatic in black lung law. It is found in the statute, 30 U.S.C. § 923(b) ("[N]o claim shall be denied on the basis of the results of chest roentgenogram."); the regulations, 20 CFR §§ 718.202(a)(4) (a physician may find pneumoconiosis present "notwithstanding a negative X-ray"), 718.201(a) (definition of pneumoconiosis includes *both* clinical and legal pneumoconiosis); and the case law, *Crockett*, 478 F.3d at 356 (observing that a claimant may establish legal pneumoconiosis notwithstanding a negative X-ray); *Jericol Mining, Inc.*, 301 F.3d at 713 ("[C]laimant[] [has the] ability to establish legal pneumoconiosis notwithstanding negative x-ray readings."); *Bentley v. Peabody Coal Co.*, 124 F.3d 196, 1997 WL 560057, at *2 (6th Cir. 1997) ("Under 718.202(a)(4), negative x-ray evidence cannot be determinative of the question whether a claimant has legal pneumoconiosis," citing *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) ("[E]vidence that a claimant does not have clinical pneumoconiosis is not relevant to the issue of legal pneumoconiosis.")).

Indeed, a doctor who believes that a miner must prove the existence of clinical pneumoconiosis before legal pneumoconiosis is established has been considered hostile. *Black Diamond Coal Mining Co. v. BRB*, 758 F.2d 1532, 1534 (11th Cir. 1985) (agreeing with the BRB that a doctor's opinion that pneumoconiosis may not be diagnosed absent a positive X-ray is hostile to the BLBA); *Plesh v. Director, OWCP*, 71 F.3d 103, 113 n.15 (3d Cir. 1995) (favorably citing *Black Diamond*); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31-32 (1976) (observing that "significant evidence demonstrate[es] that x-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease").[12] Tellingly, Peabody Coal does not object to the *substance* of the preamble's proposition (nor can it).

The company's argument also ignores the fact that the ALJ gave other reasons for discrediting the opinions of Drs. Fino and Repsher. The doctors excluded coal mine work as a cause of the miner's impairment simply because smoking could have caused the whole impairment. As the ALJ reasonably observed, A.34, this basis does not explain why coal mine employment also could not have contributed to the miner's impairment. *See Cornett*, 227 F.3d at 576 (explaining that legal pneumoconiosis may be established even if coal mine

[12] While the ALJ did not characterize the opinions of Drs. Fino and Repsher as hostile, he reasonably found the opinions unpersuasive in light of their emphasis on the absence of clinical pneumoconiosis.

employment is not the sole cause of the impairment); 20 C.F.R. § 718.204(c)(1). Moreover, Peabody Coal fails to acknowledge that the ALJ permissibly discredited Dr. Repsher's opinion because he relied on a pulmonary function study that Dr. Repsher himself invalidated. A. 34; *Rowe*, 710 F.2d at 255 (6th Cir. 1983) ("[T]he 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."); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000) (affirming ALJ's discrediting of doctor's opinion based upon invalid study results).

In sum, the ALJ – the statutorily-appointed fact finder and assessor of credibility – properly discredited Drs. Fino's and Repsher's conclusions that the miner's coal mine work did not contribute to the miner's respiratory impairment.

II.

While the Court Need not Reach this Issue, it was Within the ALJ's Discretion to Refer to the Preamble to the Black Lung Regulations in Assessing the Credibility and Persuasiveness of the Medical Opinions.

As shown in Argument I, the preamble was not the driving force in the ALJ's crediting of the opinions of Drs. Cohen and Houser and discrediting the contrary opinions of Drs. Fino and Repsher, and the ALJ's weighing of the evidence easily passes muster under substantial evidence review. Consequently, this Court need not reach the issue of whether the ALJ permissibly used the

preamble in the weighing of the evidence.[13] Given Peabody Coal's misguided broadside against the preamble, however, the Director believes a response is necessary. To begin, an understanding of the preamble's history and purpose will put the issue in perspective.

1. Background to the preamble to 20 C.F.R. § 718.201 (defining pneumoconiosis).

The BLBA defines pneumoconiosis broadly as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). This definition was the source of the definition of "legal" pneumoconiosis, and the original implementing regulation at 20 C.F.R. § 718.201 (1999) mimicked the statute's language. *See Eastover Mining Co. v. Williams* 338 F.3d 501, 509 (6th Cir. 2003) (describing pneumoconiosis under section 718.201(1999)).

As these provisions were applied over the years, there was much litigation over exactly what type of lung disease may be considered due to coal mine employment. While there was no dispute (or very little) in the medical community that chronic restrictive lung disease could arise from coal mine employment and therefore be designated as legal pneumoconiosis, there arguably was a question

[13] The issue of the use of the preamble to section 718.201(a) is more directly addressed in *Little David Coal Co. v. Billy Collins et al.*, 6th Cir. No. 11-3574 (briefing completed).

whether chronic obstructive disease could. Certain physicians reported in various black lung cases that coal dust exposure never causes chronic obstructive lung disease; consequently, in their view, a miner's COPD could never meet the legal definition of pneumoconiosis.

These doctors provided such opinions despite the fact that this Court, and many others, accepted that COPD may be considered legal pneumoconiosis (if arising out of coal mine employment). *See, e.g., Peabody Coal Co. v. Holskey*, 888 F.2d 440, 442 (6th Cir. 1989); *see also Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368 (11th Cir. 1997); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 315 (3d Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP*, 957 F.2d 302, 303 (7th Cir. 1992); *Consolidation Coal Co. v. Hage*, 908 F.2d 393, 395 (8th Cir. 1990); 65 Fed. Reg. 79,943-44 (Dec. 20, 2000) (additional case citations provided).

To avoid inconsistent results and claim-by-claim reviews of the issue, the Department in 1997 proposed changing the regulation to prevent the categorical rejection of coal dust exposure as a possible cause of COPD. *See* 62 Fed. Reg. 3343 (Jan. 22, 1997); *see also* 65 Fed. Reg. 79,938 (Dec. 20, 2000). The proposed rule provided that:

> "Legal pneumoconiosis" includes any chronic 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 pulmonary disease arising out of coal mine employment.

62 Fed. Reg. 3376 (Jan. 22, 1997) (emphasis added).

The proposed change resulted in both favorable and unfavorable comments. 64 Fed. Reg. 54,978-79 (Oct. 8, 1999); 65 Fed. Reg. 79,937-44 (Dec. 20, 2000). Individuals providing unfavorable comments asserted that chronic obstructive pulmonary disease – in particular, emphysema – never arose from coal dust exposure, or at least not unless the miner had complicated pneumoconiosis.[14] *See* 65 Fed. Reg. 79,937-44 (Dec. 20, 2000). In support, they argued that the scientific studies relied upon by the Department in the proposed rule were not valid or were misinterpreted, and that any obstruction resulting from coal dust exposure was not "clinically significant." *Id.*

After two hearings, two comment periods, painstaking review of the submitted comments, and consultation with the National Institute for Occupational Safety and Health ("NIOSH"), (the Department's statutory consultant, 30 U.S.C. § 902(f)(1)(D)), the Department concluded the relevant scientific data showed that coal mine dust exposure can cause significant chronic obstructive pulmonary disease, including emphysema, and can do so even absent complicated

[14] "Complicated" pneumoconiosis, sometimes referred to as progressive massive fibrosis or severe fibrosis, is a severe form of coal workers' pneumoconiosis. A miner suffering from that disease is irrebuttably presumed to be totally disabled by it. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999).

pneumoconiosis. 65 Fed. Reg. 79,938-43 (Dec. 20, 2000). With regard to emphysema, the Department noted:

> Drs. Fino and Bahl find no scientific support that clinically significant emphysema exists in coal miners without progressive massive fibrosis [*i.e.*, complicated pneumoconiosis]. . . . but the available pathologic evidence is to the contrary. . . . Centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers.

65 Fed. Reg. 79,941 (Dec. 20, 2000) (study and rulemaking record citations omitted).

The proposed rule became effective January 19, 2001, and is codified at 20 C.F.R. § 718.201(a). The Department gave the provision retroactive effect (*i.e.*, made it applicable to all claims pending on the January 19, 2004, effective date) because the changes were consistent with prior court decisions, all of which accepted that legal pneumoconiosis may include COPD. The revised definition of pneumoconiosis was upheld both as to substance and retroactive effect. *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d. 849, 869 (D.C. Cir. 2002); *see also Nat'l Mining Ass'n v. Dep't of Labor*, 160 F.Supp 2d 47, 72-73 (D.D.C. 2001), *aff'd and rev'd in part*, 292 F.3d 849 (rejecting challenge to DOL's authority to define pneumoconiosis).

2. The ALJ properly referred to the regulatory preamble in weighing the medical opinions.

As demonstrated above, the preamble represents an authoritative statement of the Department's evaluation of the conflicting medical and scientific evidence and literature on the relationship between coal mine dust exposure and COPD. As such, an ALJ is well within his factfinding powers to consult it. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 495-499 (1981) (explaining the effects of inhalation of cotton dust by reference to the agency preamble); *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615-617 (1980) (describing the effects of exposure to benzene by reference to the agency preamble); *cf Gunderson v. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("The ALJ's task is not to resolve general scientific controversies, but instead to determine the facts of the case at hand and apply the law accordingly.").

This Court and the Seventh and Third Circuit Courts of Appeals have approved the use of the preamble in evaluating physicians' opinions in BLBA claims, as has the Benefits Review Board. *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757, 760 (6th Cir. 2007) (finding ALJ justified in discrediting medical opinions relying on scientific "studies that were antithetical to the Act"); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (describing ALJ's "sensible" decision to discredit doctor's opinion conflicting with scientific consensus on clinical significance of coal dust-induced COPD, as

determined by the Department in its regulatory preamble); *Helen Mining Co. v. Director OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) ("The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."); *Groves v. Island Creek Coal Company*, 2011 WL 2781446 at *3, BRB No. 10-0592 BLA (Ben. Rev. Bd. (MB) June 23, 2011) ("[A]n administrative law judge has the discretion to examine whether a physician's reasoning is consistent with the conclusions contained in medical literature and scientific studies relied upon by DOL in drafting the definition of legal pneumoconiosis.").[15]

These cases reflect the well-established principle that a reviewing court must generally be at its most deferential when examining an administrative agency's determination of scientific or technical matters within its area of expertise. *See Balt. Gas & Elec. Co. v. Nat. Resources Def. Council*, 462 U.S. 87, 103 (1983); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989). And the Supreme Court has recognized that this principle applies to the federal black lung program, "a complex and highly technical regulatory program" in which the identification and classification of relevant "criteria necessarily require significant expertise and

[15] Peabody Coal attempts to distinguish these cases on the ground that the ALJs in those cases found the doctors' opinions inconsistent with the black lung regulations as well as the preamble. OB.23-24. Peabody Coal fails to recognize, however, that its doctors' opinions here are likewise inconsistent with sections 718.201 and 718.202(a)(4). *Supra* at 24-25.

entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *accord*, *Midland Coal Co.*, 358 F.3d at 490 ("[W]e see no reason to substitute our scientific judgment, such as it is, for that of the responsible agency.").[16]

Moreover, Peabody Coal's arguments based on the Administrative Procedure Act are irrelevant. Contrary to the company's understanding, the preamble does not represent a legislative rule, which by definition is binding and has the force and effect of law. *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569, 580 n.8 (6th Cir. 2003) (identifying characteristics of substantive and interpretative rules). It was within the ALJ's *discretion* to refer to the findings in the preamble, but he was not required to do so. And the language of the ALJ's decision itself shows the ALJ was aware of this, for he merely observed in passing that some of the studies Dr. Cohen relied upon were the same used by the Department in arriving at its

[16] Peabody Coal's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), OB.17, is misplaced. The preamble in question in *Wyeth* addressed a legal issue – the preemptive effect of Federal Drug Administration (FDA) regulations on state law remedies – rather than a scientific or technical one. An agency discussion of preemption, which is a matter for judicial decision, *id*. at 577, is hardly akin to evaluating conflicting medical and scientific literature on the various effects of coal dust exposure. A discussion on legal doctrine, therefore, is not entitled to the same heightened deference that an agency's evaluation of scientific or technical matters is. Further, in *Wyeth* the FDA's determination was "at odds with . . . Congress' purposes" and "revers[ed] the FDA's own longstanding position without providing a reasoned explanation[.]" *Id*. None of these facts are true of the regulatory preamble at issue in this case.

statutory definition of pneumoconiosis. A.33. While the ALJ cited to the preamble for the proposition that a miner can have legal pneumoconiosis without clinical pneumoconiosis, if there was any constraint, it arose not from the preamble but rather from the regulations and the BLBA. *See supra* at 5.

In addition, again contrary to the company's understanding, OB.26, the preamble does not modify the regulatory definition of pneumoconiosis, 20 C.F.R. § 718.201. Rather, the preamble provides the underlying medical and scientific support for that regulation, and the preamble's evaluation of the medical science has already withstood an industry challenge to it in court. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d. 849, 869 (D.C. Cir. 2002); *see also Nat'l Mining Ass'n v. Dep't of Labor*, 160 F.Supp 2d 47, 72-73 (D.D.C. 2001), *aff'd and rev'd in part*, 292 F.3d 849 (rejecting challenge to DOL's authority to define pneumoconiosis).[17] Finally, even assuming Peabody Coal is correct that the ALJ violated the APA by taking official notice of the preamble, the company failed to request an opportunity to respond to the ALJ's use of the preamble, as required by the APA. 5 U.S.C. § 556(e) ("When an agency decision rests on official notice of

[17] Peabody Coal, as a member of the general public, was on notice of the rulemaking and had the opportunity to comment on the medical science developed during the rulemaking period. In fact, the objected-to studies were part of the rulemaking record. *See* 65 Fed. Reg. 79937-79945 (identifying record exhibit number for each study).

material fact not appearing in the evidence in the record, a party is entitled, *on timely request*, to an opportunity to show to the contrary.") (emphasis added).

In sum, it is apparent that Peabody Coal is still unwilling to accept the revised definition of pneumoconiosis. The company calls the preamble a "political document" and the science behind it "false." OB.11, 27. But the Department was required to resolve the conflicting medical and scientific studies and come to conclusions regarding the effects of coal mine dust exposure. Having reasonably done so, there is no reason why an ALJ cannot look to and rely on those findings.

CONCLUSION

The Court should affirm the ALJ's award of benefits to the miner.

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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 8955 words, as counted by Microsoft Office Word 2003.

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I hereby certify that on April 30, 2012, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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