No. 11-2033

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VALLEY CAMP COAL COMPANY,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, SHIRLEY DOBRZYNSKI, O/B/O, EDWARD DOBRZYNSKI,

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 JURISDICTION

This case involves a lifetime claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-44, filed by Edward Dobrzynski on November 2, 2000. Mr. Dobrzynski died while this claim was pending. His widow, Shirley Dobrzynski, is pursuing the claim on his behalf.

Administrative Law Judge Alice M. Craft had jurisdiction to

adjudicate the claim under Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d).[1] She issued a Decision and Order Awarding Benefits on Modification on February 25, 2010. J.A. 308-356. Petitioner Valley Camp Coal Company filed a timely appeal of that order to the United States Department of Labor Benefits Review Board on March 23, 2010, within the 30-day period prescribed by section 21(a) of the Longshore Act, 33 U.S.C. § 921(a). The Board had jurisdiction to review the ALJ's order pursuant to Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3). The Board affirmed the ALJ's order in its entirety in a final July 29, 2011 order. J.A. 360-377.[2]

Valley Camp petitioned this Court for review on September 23, 2011. This Court has jurisdiction to review the Board's order pursuant to Section 21(c) of the Longshore Act, 33 U.S.C. § 921(c). The appeal is timely because it was filed within 60 days of the Board's July 29, 2011 order as required by Section 21(c). And the

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[1] The BLBA incorporates sections 19 and 21 of the Longshore Act. 30 U.S.C. § 932(a).

[2] "J.A." refers to the Joint Appendix.

"injury" within the meaning of Section 21(c), Mr. Dobrzynksi's exposure to coal mine dust -- occurred in West Virginia.

STATEMENT OF THE ISSUES

1. Valley Camp's appeal relates to Mrs. Dobrzynski's request for modification of a denial of her husband's claim. In granting modification, the ALJ examined the factors established by this Court in *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) and determined that modification was proper. Did the ALJ abuse her discretion where the modification request was timely, there was no evidence of improper motive or lack of diligence in seeking modification, the factual accuracy of the prior denial was suspect, and modification of the denial was not futile?

2. Did the ALJ impermissibly refer to the medical and scientific determinations in the preamble to the black lung regulations in evaluating the medical opinions?[3]

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[3] Valley Camp also asserts that the ALJ's weighing of the medical opinion evidence is not supported by substantial evidence. Mrs. Dobrzynski will fully address this issue in her response brief, and the Director will not address the argument here, other than to state his agreement with the decisions below.

COMBINED STATEMENT OF THE FACTS AND CASE

The issues we address are primarily procedural in nature. Thus, we will summarize the relevant procedural history, but not the medical evidence of record, except where relevant to the issues identified above.

A. Elements of entitlement.

Coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment are entitled to BLBA benefits. It is undisputed that Mr. Dobrzynski suffered from chronic obstructive pulmonary disease (COPD) that totally disabled him from performing his former work as a miner. At issue is whether the medical opinion evidence establishes that his disabling COPD was "legal pneumoconiosis" as defined by 20 C.F.R. § 718.201.

"Legal pneumoconiosis" refers to "any chronic lung disease or impairment … arising out of coal mine employment" and specifically includes "any chronic restrictive or obstructive pulmonary disease." 20 C.F.R. § 718.201(a)(2); *see Gulf & W. Indus. v. Ling*, 176 F.3d 226, 231 (4th Cir.1999) ("The regulations detail the breadth of what is frequently called "legal" pneumoconiosis…."); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n. 2 (4th Cir. 1996) ("COPD, if it

arises out of coal-mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis.").

A respiratory disease arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Moreover, pneumoconiosis, both clinical and legal, is "recognized as a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

The medical and scientific basis for the regulatory definition of pneumoconiosis, 20 C.F.R. § 718.201, is found in the preamble to the black lung regulations. As relevant here, the preamble demonstrates that exposure to coal mine dust may cause COPD, may substantially aggravate COPD, and may have deleterious effects first detectable following cessation of exposure. 65 Fed. Reg. 79920, 79939-43 (Dec. 20, 2000); 62 Fed. Reg. 3338, 3343-44 (January 22, 1997).

B. Modification.

A modification proceeding allows a district director to

reconsider at any time prior to one year after a claim is rejected whether there has been a change in condition or a mistake in a determination of fact regarding the elements of entitlement.[4] 20 C.F.R. § 725.310 (2000).[5] When modification is granted, the "new compensation order . . . may terminate, continue, reinstate, increase, or decrease . . . compensation, or award compensation." 33 U.S.C. § 922.

In *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007), this Court identified several factors for determining whether modification would render justice under the Act. These factors include the motive and diligence of the requesting party, the accuracy of the prior decision being modified, and whether a

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[4] The Longshore Act and prior implementing regulations identify the "district director" as a "deputy commissioner." *Compare* 20 C.F.R § 725.101(a)(16) with 33 U.S.C. § 919.

[5] Because Mr. Dobrzynski filed his claim before January 19, 2001, the modification rule in effect in 2000 applies. 20 C.F.R. 20 C.F.R. 725.2(c). Regulatory citations are to the 2010 version of the Code of Federal Regulations, unless otherwise noted. For purposes of this appeal, the two rules do not differ.

favorable ruling would be futile. *Id.* at 132-33.[6]

C. Prior proceedings.

Mr. Dobrzynski filed three claims for benefits during his lifetime. The district director denied his first claim because Mr. Dobrzynski did not establish the existence of pneumoconiosis or that he was totally disabled. J.A. 361, n.1. Mr. Dobrzynski then filed a second claim, which the district director denied for the same reasons. *Id.*

Mr. Dobrzynski filed the present claim in November 2000. J.A. 361, n.1. ALJ Thomas F. Phalen found that, although Mr. Dobrzynski proved his COPD was totally disabling, he did not establish that coal dust exposure substantially contributed to the condition. *Id.* The ALJ found the conflicting medical opinion evidence on the cause of the COPD to be equally persuasive, and

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[6] The employer petitioned this Court for review of the Board's decision on remand in *Sharpe*. Oral argument was held in January 25, 2012.

thus, Mr. Dobryznski failed to carry his burden of proof. *Id.*[7]

The Board affirmed the ALJ's decision. J.A. 124-131 (*Dobrzynski v. Valley Camp Coal Co.*, BRB No. 06-0364 BLA (January 30, 2007) (unpub.)) It found "reasonable" the ALJ's weighing of the conflicting medical opinions regarding the cause of Mr. Dobrzynski's COPD as well as his determination that the opinions were equally persuasive. *Id.*

D. The current proceeding.

Mrs. Dobrzynski filed her modification request on behalf of Mr. Dobrzynski on January 29, 2008. J.A. 136-37. In support, Mrs. Dobrzynski offered a new medical report authored by Dr. David Hinkamp, J.A. 132-135, and deposition testimony from Dr. Robert Cohen, who had previously submitted a medical report. J.A. 224. This new evidence focused on the cause of Mr. Dobrzynski's COPD in order to demonstrate that the ALJ's adverse determination on causation was a mistake.

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[7] The physicians in this case have also identified smoking as a contributing cause of Mr. Dobrzynski's COPD. ALJ Phalen found that Mr. Dobrzynski had at least 13 years of coal mine employment (cont'd. . .)

1. The ALJ finds modification proper.

Before Administrative Law Judge Alice M. Craft, Valley Camp argued that the modification request, coming one day before the statutory deadline and based on evidence that could have been previously developed, was suspect and should be barred "under the principles enunciated in *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007)." J.A. 311. Valley Camp further argued that the Board's affirmance of the ALJ's prior denial precluded modification as a matter of law. J.A. 312.

The ALJ rejected both arguments. First, examining the factors for evaluating modification this Court set out in *Sharpe*, the ALJ found that Mrs. Dobryznski's modification request was timely and Valley Camp's allegation of suspect motive was "mere supposition." J.A. 312. The ALJ ruled that nothing "in the record suggests that the Claimant seeks to thwart a good faith defense, as opposed to pursuing the Miner's claim in good faith." *Id.* In addition, the ALJ found no legal support, *inter alia*, in the modification regulation, 20

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and a smoking history of 34-51 pack years. J.A. 90.

C.F.R. § 725.310, for Valley Camp's contention that an appellate body's affirmance of the decision being modified prevents modification. *Id.* Accordingly, the ALJ concluded that "modification [was] proper under the Act." *Id.*

2. The ALJ uses the preamble as part of her evaluation of the medical opinions.

Having found modification proper, the ALJ weighed all the medical opinion evidence on causation, including the newly submitted evidence. J.A. 313-353. The ALJ concluded that the causation evidence was no longer in equipoise and that the greater weight now tipped in favor of a diagnosis of legal pneumoconiosis. J.A. 350. In reaching that conclusion, the ALJ determined that the medical opinions diagnosing legal pneumoconiosis were made by experts with excellent credentials, and were more complete, better reasoned, and better supported by the underlying objective testing. J.A. 350. Conversely, the ALJ found that the medical opinions attributing the COPD solely to smoking were inadequately explained, inconsistent with the underlying data, and inconsistent with the preamble conclusions that pneumoconiosis can be latent and progressive, that coal dust exposure and smoking have additive

effects, that coal dust exposure and smoking cause lung damage through similar mechanisms, and that coal dust exposure can cause clinically significant COPD. J.A. 346-349, 350. Accordingly, the ALJ awarded benefits. *Id.*

3. The Board affirmance.

The Board affirmed the ALJ's decision allowing modification, her use of the preamble to evaluate the medical opinions, and her award of benefits. The Board held that the ALJ acted within her discretion in rejecting Valley Camp's "mere assertion" that the modification request was suspect simply because it was filed on the statutory deadline. J.A. 364. The Board further rejected Valley Camp's argument that "finality considerations" prevent Mrs. Dobryznski from correcting "tactical errors" made in the earlier litigation. It explained that a "modification request cannot be denied out of hand . . . on the basis that the evidence may have been available at an earlier stage in the proceeding." *Id.* Accordingly, the Board held that the ALJ properly considered the *Sharpe* factors before granting modification. J.A. 365.

The Board similarly rejected Valley Camp's assertion that the ALJ improperly relied on scientific and medical determinations in

the preamble to the black lung regulations in assessing the credibility of the conflicting medical opinions. J.A. 370. The Board noted that it has consistently held that "the extent to which a medical opinion accords with accepted scientific evidence, as recognized by the DOL in the preamble to the revised regulations, is a valid criterion for an administrative law judge to consider in weighing an opinion." J.A. 373, citations omitted.

The Board also disagreed with Valley Camp that the ALJ had created a new legal presumption that all COPD is legal pneumoconiosis or had otherwise required Valley Camp "to rule out all the potential causes of a miner's obstructive impairment." J.A. 371. Rather, the Board held that the ALJ had acted within her discretion in determining that Valley Camp's experts had failed to "adequately address the etiology of claimant's obstructive impairment" or to account for the underlying test results. *Id.* Having approved of the ALJ's weighing of the medical opinion evidence, the Board affirmed the award as based on substantial evidence. J.A. 371-74.

SUMMARY OF THE ARGUMENT

The ALJ did not abuse her discretion in granting Mrs.

Dobrzynski's request for modification. The ALJ considered the relevant factors established in *Sharpe* and reasonably found modification proper.

On the merits, the ALJ permissibly referred to the preamble to the Department of Labor's implementing regulations in assessing the credibility of the medical opinion evidence. The regulatory preamble chronicles the scientific and medical evidence amassed during the rulemaking and explains the agency's medical and scientific findings underlying the regulations. The regulation at issue here, the regulatory definition of pneumoconiosis, is based, *inter alia*, on the scientific findings in the preamble that exposure to coal mine dust may cause COPD, may substantially aggravate COPD, and may have deleterious effects first detectable following cessation of exposure. Any medical expert who adverts that coal dust exposure does not do these things is expressing an opinion that is contrary not only to the regulatory preamble, but to the regulation itself. The ALJ thus reasonably consulted the preamble in evaluating the medical opinions to assure their consistency with the regulation.

Finally, Valley Camp contends that the ALJ inverted the

burden of proof by creating presumptions that all COPD is legal pneumoconiosis and that smoking and coal dust exposure are always additive risks for developing COPD. But a simple review of the ALJ decision refutes this. The ALJ explicitly placed on Mrs. Dobrzynski the burden of proving by a preponderance of the evidence that the miner's COPD was coal-dust related and not caused exclusively by smoking.

ARGUMENT

A. Modification was proper.

1. Standard of review.

The grant or denial of a modification request is reviewed under an abuse-of-discretion standard. *Sharpe*, 495 F.3d at 130-32. Under it, the Court "will reverse if the decision was 'guided by erroneous legal principles, or if the adjudicator committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* at 130 (quotation omitted).

2. The ALJ committed no abuse of discretion -- the *Sharpe* factors overwhelmingly favor modification.

Pursuant to 20 C.F.R. § 725.310 (2000), "upon the request of

any party on grounds of a change in conditions or because of a mistake in a determination of fact," the district director may "before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." Modification of a denial of a black lung award, however, "does not automatically flow from a mistake in an earlier determination of fact." *Sharpe*, 495 F.3d at 132.

Sharpe directs the ALJ to determine whether reopening a case will render justice under the Act. *Id.* In considering whether a modification request will render justice under the Act, *Sharpe* further directs an ALJ to consider, among other things, the accuracy of the prior decision, the diligence and motive of the party seeking modification, and the possible futility of modification. *Id.* at 134.

The ALJ considered the *Sharpe* factors here, and she did not abuse her discretion in granting modification. First, she observed that Mrs. Dobrzynski filed the modification request within one year, albeit at the deadline (reasonable diligence). Second, she found that the modification request was not futile or intended to impact an associated claim. Rather, the ALJ determined that it was made for the simple reason of turning a denial into an award (proper

motive). *See* J.A. 312; *cf. Sharpe*, 495 F.3d at 134.[8]

The only rationale that Valley Camp puts forth regarding timing and motive is Mrs. Dobrzynski's filing for modification on the last day possible. But Valley Camp does not explain why such a timely request is "suspect," or more to the point here, how the ALJ abused her discretion in finding Valley Camp's bare allegation "mere supposition." J.A. 312.

Employer also claims that modification cannot correct "tactical errors" in the earlier litigation and that finality considerations prevent the submission of evidence that could have been developed previously.[9] But the cases it relies on, *Zeigler Coal Co. v. Director*,

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[8] Although new evidence is not required to pursue modification, Mrs. Dobrzynski submitted newly-developed medical opinion evidence indicating that the claim had been wrongly denied, J.A. 136, thereby calling into question the accuracy of prior decision. *Cf. Sharpe*, 495 F.3d at 134.

[9] Employer does not identify these supposed "tactical errors." To the contrary, it states that the miner exercised "reasonable diligence" in presenting his case to ALJ Phalen. Pet. Br. 31. Any claim of "tactical error" seems especially unwarranted here because ALJ Phalen found the medical opinion evidence to be "in equipoise" and denied the claim based on the allocation of the burden of proof.

OWCP, 312 F.3d 332 (7th Cir. 2002) and *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775 (11th Cir. 1985), have no relevance here.

Zeigler concerned the preclusive effect of a living miner's claim on a later survivor's claim, which are separate claims of entitlement. Treating the employer as bound in the later claim by the prior finding of pneumoconiosis was "a straightforward application of offensive nonmutual issue preclusion." 312 F.3d at 334. In that circumstance, the Court explained (as black letter collateral estoppel law) that the possibility of an incorrect result was no reason to disturb the earlier finding. *Zeigler*, 312 F.3d at 334. But that rationale has no place here, because under modification (which applies only to the *same* claim), the possibility of an incorrect determination *is precisely* a reason for granting the request. *Sharpe*, 495 F.3d at 134; *see also O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted").

Verderane concerned an employer's attempt to use the modification process to obtain section 8(f) relief under the Longshore Act, which limits an employer's liability when hiring disabled workers. A request for section 8(f) relief, however, must be raised at the initial hearing (which the employer failed to do) or it is waived. *Verderane*, 772 F.2d at 779. The Eleventh Circuit held that the employer could not use modification to circumvent waiver because it could not establish either prong for modification – there had been no change of condition and the ALJ had not made an erroneous factfinding regarding section 8(f) (since employer had not raised the issue). *Id.* In addition, the court found that the modification request went beyond the statutory purpose of Longshore Act 33 U.S.C. § 922, emphasizing that the employer had known of the facts supporting a section 8(f) claim, but had voluntarily chosen not to seek the relief as a matter of litigation strategy. *Id.* at 779-80. By contrast here, the question of the etiology of the miner's COPD has been diligently litigated throughout this case, *supra* n. 9, and Mrs. Dobrzynski has established a mistake of fact.

Finally, Valley Camp's tactical-error argument goes too far. By

disallowing modification based on evidence that was previously available, Valley Camp in effect reads the "mistake of fact" prong out of modification. The argument implies that only evidence that could *not* have been previously developed may be submitted, and logically, the only evidence that meets that criterion is evidence demonstrating a new (or change of) condition, the second prong of modification.

In sum, the ALJ reasonably considered the appropriate modification factors in permitting modification.

B. A factfinder may consider the preamble to DOL's implementing regulations in assessing the evidence.

1. Standard of review.

To the extent that Valley Camp's challenge to the ALJ's use of the preamble presents a question of law, it is reviewed de novo. *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 948-49 (4th Cir. 1997). The Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Doss v. Director, OWCP*, 53 F.3d 654, 658 (4th Cir. 1995). The ALJ's factual findings are reviewed for substantial evidence. *Wilson v. Benefits Review Board,* 748 F.2d

198, 199-200 (4th Cir.1984).

2. The ALJ properly referred to the preamble in assessing the credibility of the medical opinions.

According to Valley Camp, the ALJ misunderstood the preamble and implementing regulations and thus impermissibly concluded that *all* COPD is legal pneumoconiosis and that smoking and coal dust exposure are *always* additive risks for developing COPD. *Id.* at 35-42. And in so doing, employer contends, she erred in "creat[ing] a presumption of legal pneumoconiosis in every miner with obstructive lung disease," Pet. Br. at 42, which she then used to improperly discredit employer's doctors. *Id.*

But a simple review of the record demonstrates that the ALJ did none of those things. Instead, she explicitly stated that Mr. Dobrzynski was not entitled to a presumption that his COPD was legal pneumoconiosis and that she continued to bear the burden of establishing by a preponderance of the evidence that his COPD was coal-dust related and not caused exclusively by his smoking. *See e.g.* J.A. 336, n.40; 341; 349; 350. In considering whether Mrs. Dobrzynski met that burden, the ALJ reasonably referred to the medical and scientific determinations in the preamble to assess the

credibility of the medical opinions. The ALJ's finding that employer's doctors disagreed with the preamble findings was one reason, but not the only reason, that ALJ permissibly accorded their reports less weight.[10] (A complete discussion of the ALJ's weighing of the medical reports and resulting award is presented in Mrs. Dobryznski's response brief.)

Valley Camp also questions as a general matter whether an ALJ may *ever* rely on the preamble to evaluate the credibility of medical opinions. Pet. Br. 39. The preamble, however, 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 her factfinding powers to consult it.

In promulgating wide-ranging revisions to the black lung regulations in 2000, the Department, employing full notice-and-

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[10] The ALJ explained that the employer's doctors' opinions were inconsistent with the preamble conclusions that pneumoconiosis can be latent and progressive, that the risk of coal dust exposure and smoking is additive, that coal dust and smoking-induced emphysema occur through similar mechanisms, and that coal dust (cont'd. . .)

comment procedures, used its delegated authority to resolve numerous scientific questions regarding the effects of coal dust exposure. Among the issues the Department addressed was whether coal dust exposure can cause obstructive impairment, whether it can aggravate an obstructive impairment, and whether its effects may first arise after retirement. *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004); *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002).

The answers, yes, are plainly reflected on the face of the regulation defining pneumoconiosis. 20 C.F.R. §§ 718.201(a)(2) (legal pneumoconiosis "includes, but is not limited to, any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment") (emphasis added); 718.201(b) (pneumoconiosis includes a chronic respiratory disease "*substantially aggravated*" by coal dust exposure); 718.201(c) (pneumoconiosis "may be *first detectable* after cessation of coal mine dust exposure") (emphasis added). Any medical expert who testifies that coal mine dust

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exposure can cause clinically significant COPD. J.A. 341, 346-349.

exposure cannot cause these effects is expressing an opinion not only contrary to the regulatory preamble, but the regulation itself.

The explanation underlying these determinations is found in the regulatory preamble, which presents and assesses the medical and scientific literature supporting the Department's conclusions. 65 Fed. Reg. 79937-45 (Dec. 20, 2000). It also responds to commenters, who denied these affects. *Id.* at 79938-42. In particular, the preamble addresses the medical literature on the interrelationship between coal dust exposure and smoking as causes of COPD, crediting studies finding the risks of smoking and dust exposure to be additive, *id.* at 79939-41, as well as supporting the theory that dust and smoke-induced emphysema work through similar mechanisms. *Id.* at 79943.[11]

The Seventh and Third Circuit Courts of Appeals have approved of using the preamble in evaluating physicians' opinions,

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[11] Valley Camp does not dispute that coal mine dust exposure *may* cause COPD, a contentious issue during the rulemaking. Pet. Br. 36-39. *See also* 62 Fed. Reg. 3338, 3343-44 (January 22, 1997 (outlining scientific basis that pneumoconiosis may be first detected after cessation of coal mine dust exposure).

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

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).

The Supreme Court has recognized that this principle applies to the federal black lung program, "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *accord*, *Midland Coal Co.*, 358 F.3d at 490 ("we see no reason to substitute our scientific judgment, such as it is, for that of the responsible agency").[12]

It is therefore perfectly reasonable for an ALJ to consult the

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[12] Valley Camp's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), Pet. Br. 39 n. 17, is misplaced. The preamble in question in *Wyeth* addressed a legal issue – the preemptive effect of FDA regulations on state law remedies – rather than a scientific or technical one. 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. Moreover, the FDA's determination was "at odds with what evidence we have of Congress' purposes" and, to top it off, "revers[ed] the FDA's own longstanding position without providing a reasoned explanation[.]" Id. None of these facts are true (cont'd. . .)

preamble on these issues. It is similarly reasonable for an ALJ to give less weight to the testimony of medical experts who contradict, or rely on sources that contradict, that evaluation. And, as explained above, that is all the ALJ did in this case.

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of the regulatory preamble at issue in this case.

CONCLUSION

The Court should affirm the Board's award of benefits on Mr. Dobrzynski's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B). This brief contain contains 4,123 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, an electronic copy of the Director's brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

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