**No. 17-2085**

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

WESTMORELAND COAL COMPANY,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and VIDA M. BAIRD,

Respondents

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

# BRIEF FOR THE FEDERAL RESPONDENT


NICHOLAS C. GEALE
Acting Solicitor

MAIA S. FISHER
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

## TABLE OF CONTENTS

**Page:**

## TABLE OF CONTENTS (cont'd)

**Page:**

## TABLE OF CONTENTS (cont'd)

**Page:**

## TABLE OF AUTHORITIES

**Cases** **Page:**

## TABLE OF AUTHORITIES (cont'd)

**Cases:** **Page:**

## TABLE OF AUTHORITIES (cont'd)

**Cases:** **Page:**

## TABLE OF AUTHORITIES (cont'd)

**Cases:** **Page:**



**Constitutions:**



**Statutes:**

## TABLE OF AUTHORITIES (cont'd)

**Statutes:** **Page:**



**Regulations:**

## TABLE OF AUTHORITIES (cont'd)

**Regulations:** **Page:**

## TABLE OF AUTHORITIES (cont'd)

**Other:** **Page:**

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

---

**No. 17-2085**

WESTMORELAND COAL COMPANY,

Petitioner

v.

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

and

VIDA M. BAIRD,

Respondents

---

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

---

# BRIEF FOR THE FEDERAL RESPONDENT

This case involves a claim for lifetime disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Raymond Baird (a deceased former coal miner), and a claim for survivor's benefits filed by his widow, Vida M. Baird (who is also deceased). A Department of Labor (DOL) administrative law judge (ALJ) awarded both claims, and the Benefits Review Board affirmed that decision. Westmoreland Coal Company, Mr. Baird's former

employer, has petitioned the Court to review the Board's decision.[1] The Director, Office of Workers' Compensation Programs, responds in support of the decisions below.

## STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over this appeal under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). Westmoreland petitioned for review of the Board's July 19, 2017, decision on September 15, 2017, within the sixty-day limit prescribed by section 921(c). Moreover, the "injury" as contemplated by section 921(c)—Mr. Baird's exposure to coal-mine dust—occurred in Virginia, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ decisions in this case under 33 U.S.C. § 921(b)(3), as incorporated. Prior to Mr. Baird's death, an ALJ had denied his claim on December 8, 2009. Mr. Baird appealed that decision on December 18, 2009, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated.

[1] Westmoreland does not dispute that it is the coal-mine operator liable for the payment of benefits on these claims (the "responsible operator").

After the Board vacated the 2009 decision and remanded the case, an ALJ awarded both the lifetime and survivor claims on May 16, 2016. Westmoreland filed a timely notice of appeal with the Board on June 15, 2016. *See* 33 U.S.C. § 921(a), as incorporated.

## STATEMENT OF THE ISSUES

1. After Mr. and Mrs. Baird's claims were awarded by a district director, they were paid interim benefits from the Black Lung Disability Trust Fund (which is administered by the Director). Westmoreland requested an ALJ hearing. The Bairds died before the ALJ's decision (also awarding benefits to both claimants) was issued. If the claim awards are upheld, Westmoreland will have to reimburse the Trust Fund for the interim benefits it paid to the Bairds during their lifetimes.

The first question presented is whether this case remained justiciable based on the adverse interests of the Director and Westmoreland, notwithstanding the deaths of Mr. and Mrs. Baird.

2. The ALJ found that Mr. Baird was entitled to benefits based on findings that the miner had invoked a statutory presumption of entitlement for totally-disabled claimants who worked at least fifteen years in qualifying coal-mine employment,

and that Westmoreland failed to rebut the presumption. He awarded Mrs. Baird's survivor's claim because she was automatically entitled to benefits based on the award of her husband's claim.

The second question presented is whether the ALJ's findings are supported by substantial evidence and in accord with law.

## STATEMENT OF THE CASE

### I. Legal Background

*A. Justiciability*

The justiciability doctrine is rooted in the Constitution, which gives federal courts jurisdiction only over cases and controversies. U.S. Const. art. III, § 2, cl. 1. "A claim is justiciable if the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (internal quotations and citations omitted).[2]

[2] Article III's case or controversy clause does not, of course, directly apply to the proceedings below. For purposes of this case, we agree with Westmoreland's assumption that similar justiciability (cont'd . . .)

The justiciability question here is tied to the BLBA's adjudication system and the payment of interim benefits by the Black Lung Disability Trust Fund. Generally speaking, black lung litigation involves four stages. Claims are initially filed with a "district director" from the DOL's Office of Workers' Compensation Programs. After investigating the claim, the district director determines whether the claimant is eligible for benefits and, if so, the operator responsible for their payment. *See* 20 C.F.R. §§ 725.301-725.423. Any party may disagree with the district director's decision and request a hearing before an ALJ. 20 C.F.R. §§ 725.450-725.480. The ALJ's decision may be appealed to the Board, 20 C.F.R. § 725.481, and then to the court of appeals for the circuit in which the miner's injury occurred, 33 U.S.C. § 921(c); 20 C.F.R. § 725.482.

If the district director awards benefits but the responsible

---

(. . . cont'd)
principles apply to claims before ALJs and the Board. The Board has applied the justiciability concept in this manner, both here and in other cases. JA at 1104-05; *see*, *e.g.*, *Sanson v. Penn Coal Corp.*, BRB No. 11-0576 BLA, 2011 WL 3647670 *1 (Ben. Rev. Bd. Jul. 11, 2011) (dismissing appeal where no case or controversy remained).

operator declines to pay and instead requests a hearing, the Trust Fund is obligated to pay benefits to the claimant on an interim basis. 26 U.S.C. § 9501(d)(1)(a)(i), (ii); 20 C.F.R. §§ 725.420, 725.522(a). The Trust Fund also pays benefits if the responsible operator refuses to comply with an award of benefits by an ALJ, the Board, or a court. 26 U.S.C. § 9501(d)(1)(A)(ii); 20 C.F.R. § 725.522(a). If the award is ultimately upheld, the operator must reimburse the Trust Fund (with interest) for any interim benefits paid. 30 U.S.C. § 934(b)(1); 20 C.F.R. § 725.602(a). The Trust Fund can only enforce its right to reimbursement after the decision becomes final. 30 U.S.C. § 934(b)(1), (4).

The Director, as the Secretary of Labor's designee, is responsible for administering the BLBA. Secretary's Order 10-2009, 75 Fed. Reg. 58,834 (Nov. 13, 2009). "The Director thus has a direct financial interest in the outcome in cases . . . in which the Trust Fund has paid interim benefits." *Eastern Assoc. Coal Corp. v. Director, OWCP*, 578 Fed. Appx. 165, 168 (4th Cir. Jul. 3d, 2014) (citation and internal quotation omitted). And she is a party to every BLBA claim, whether the Trust Fund has a financial stake in the outcome or not. 30 U.S.C. § 932(k); 20 C.F.R. § 725.482(b).

*B. Entitlement*

Westmoreland challenges the ALJ's award of benefits on both the lifetime and survivor's claims. The BLBA provides lifetime compensation to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1; *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 133 (4th Cir. 2015). The BLBA contains several presumptions that ease claimants' burden of proving their case, including 30 U.S.C. § 921(c)(4)'s fifteen-year presumption.[3] Under Section 921(c)(4), miners with (1) more than fifteen years of qualifying coal-mine employment, and (2) a totally disabling pulmonary impairment are entitled to a presumption that they are totally disabled due to pneumoconiosis (and therefore entitled to benefits). *Id.; see also* 20 C.F.R. § 718.305(b)-(c).

If the fifteen-year presumption is invoked, the burden shifts to the responsible operator to rebut by one of two methods. First, the

[3] Congress had eliminated the Section 921(c)(4) presumption in 1981, but restored it in 2010. *See* Pub. L. 111-148, § 1556(a) (2010); *Bender*, 782 F.3d at 134. There is no dispute that the revived presumption applies to Mr. Baird's claim.

operator can prove that the miner does not have either legal pneumoconiosis (any chronic lung disease arising out of coal-mine employment) or clinical pneumoconiosis (any chronic lung disease recognized by the medical community as a fibrotic reaction to coal dust). 20 C.F.R. § 718.305(d)(1)(i); *Bender*, 782 F.3d at 134-35; *see* 20 C.F.R. § 718.201(a)(1), (2) (defining pneumoconiosis). Failing that, the operator can only rebut the presumption by proving that the miner's pneumoconiosis caused "no part" of his or her disability. 20 C.F.R. § 718.305(d)(1)(ii); *Bender*, 782 F.3d at 137-43. Absent the presumption, the miner would have to prove all elements of the claim by a preponderance of the evidence.

For certain survivor's claims (including Mrs. Baird's), the survivor is automatically entitled to benefits if the miner was awarded benefits on a lifetime claim. 30 U.S.C. § 932(*l*); *West Virginia CWP Fund v. Stacy*, 671 F3d 378, 388-89 (4th Cir. 2012). Otherwise the survivor must prove that the miner's death was due to pneumoconiosis in order to recover. *See* 20 C.F.R. § 718.205.

## II. Statement of the Facts

The facts relevant to the justiciability issue are set forth in the procedural history. Here, we will summarize the medical evidence relevant to the invocation and rebuttal of the Section 921(c)(4) presumption on Mr. Baird's lifetime claim.[4]

*A. Evidence on Total Disability (invocation of the presumption)*

Total disability can be established in several ways, including the three categories of disability evidence the ALJ considered here: pulmonary-function tests, arterial-blood-gas studies, and medical-opinion evidence. 20 C.F.R. § 718.204(b)(2)(i), (ii), (iv).

1. Pulmonary-Function Tests

The results of three pulmonary-function tests were submitted into evidence and considered by the ALJ:[5]

---

[4] Westmoreland does not contest the ALJ's finding that the medical evidence from Mr. Baird's prior claims is too old to retain any probative value. *See* JA 1041 n.19. Thus, we will only discuss the medical evidence from his current claim. The medical evidence from Mrs. Baird's claim is not relevant in this appeal because her award was based on her husband's successful lifetime claim rather than proof that pneumoconiosis caused his death.

[5] A pulmonary-function test measures pulmonary capacity, and is used in determining pulmonary disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i). A test must measure two values: the (cont'd . . .)

*February 2006*. This test was conducted by Dr. Baker. Joint Appendix (JA) 515. It produced an $FEV_1$ value of 1.34, an FVC value of 2.74, and an $FEV_1$/FVC ratio of 49. No MVV value was

---

(. . . cont'd)
$FEV_1$ (forced expiratory volume in one second) and the FVC (forced vital capacity), as well as compute the ratio of the $FEV_1$ and FVC values. *See Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 nn.6, 7 (7th Cir. 1988); 20 C.F.R. § 718.103(a); Part 718, App. B. Optionally, a third value (the MVV (maximum voluntary ventilation)), may also be recorded. 20 C.F.R. § 718.103(a).

A study is "qualifying" (*i.e.*, evidence of total disability) if it produces both 1) an $FEV_1$ value equal to or less than the values in the applicable regulatory tables, and 2) one of the following: an FVC value lower than the applicable table values, an MMV value lower than the applicable table values, or an $FEV_1$/FVC ratio of less than 55%. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 471 nn.1-2 (6th Cir. 2003); 20 C.F.R. Part 718, App. B. A "non-qualifying" study is one which produces values greater than those listed in the applicable tables in the regulations. A non-qualifying study by itself is not evidence of total disability (although a physician could rely on such a study in diagnosing total disability).

Studies are initially conducted without administration of a bronchodilator, a drug that expands the "air passages of the lung." *Dorland's Illustrated Medical Dictionary* 253 (32nd ed. 2012). A physician may conduct additional tests after the administration of a bronchodilator, but post-drug results (while arguably having some relevance to disease causation) are not determinative of disability where the pre-bronchodilator results are qualifying. *See* Standards for Determining Coal Miners' Total Disability or Death Due To Pneumoconiosis, 45 Fed. Reg. 13,677, 13,682 (Feb. 29, 1980) (Noting that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability[.]").

obtained and no bronchodilator was administered.

*November 2006*. This test was conducted by Dr. Castle. JA 605. Before administration of a bronchodilator, it produced an $FEV_1$ value of 1.35, an FVC value of 2.36, an $FEV_1$/FVC ratio of 57, and an MVV value of 27. After the administration of a bronchodilator, it produced an $FEV_1$ value of 1.69, an FVC value of 2.60, and an $FEV_1$/FVC ratio of 65. No post-bronchodilator MVV value was obtained.

*January 2008*. This test was conducted by Dr. Craven. JA 673. It produced an $FEV_1$ value of 1.45, an FVC of 2.32, an $FEV_1$/FVC ratio of 63, and an MVV value of 27.1.[6] No bronchodilator was administered.

Westmoreland does not contest that Dr. Baker's test and Dr. Castle's pre-bronchodilator results were qualifying.[7] The only disputed test is Dr. Craven's. Dr. Craven's test was qualifying if Mr.

---

[6] Dr. Craven appears to have measured the MVV only once. The regulations require either two or three measurements. 20 C.F.R. § 718.103(b); 20 C.F.R. Part 718, App. B.

[7] And the company effectively concedes that Dr. Castle's post-bronchodilator results are not relevant to the disability inquiry. *See* Pet. Br. 23, n.8.

Baird was 69" tall (the height found by the ALJ). At 68", the height listed by Dr. Craven, the $FEV_1$ value was less than the applicable table value, but the overall test was non-qualifying.[8]

2. Arterial Blood-Gas Studies

The results of two arterial blood-gas studies were submitted into evidence and considered by the ALJ:[9]

*February 2006*. This test was conducted by Dr. Baker. JA 520. It produced a $pCO_2$ of 40 and a $pO_2$ of 86. These values were non-qualifying, and the test results were interpreted as within normal limits.

*November 2006*. This test was conducted by Dr. Castle. JA

---

[8] If the single MVV measurement from Dr. Craven's test were considered, the test would be qualifying even at 68".

[9] An arterial blood-gas test measures the amount of oxygen ($pO_2$) and carbon dioxide ($pCO_2$) in a miner's blood (which is an indication of how well the miner's lungs are oxygenating his blood), and is used in determining pulmonary disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(ii). As with pulmonary-function tests, a study is "qualifying" (*i.e.*, evidence of total disability) if it produces values equal to or less than those in the applicable regulatory tables. *See* 20 C.F.R. Part 718, App. C. An initial test is conducted while the miner is a rest; an additional test may be conducted while he is exercising. 20 C.F.R. § 718.105(b). No exercise test was conducted on Mr. Baird.

603. It produced a $pCO_2$ of 41 and a $pO_2$ of 62.5. These values were non-qualifying, and the test results were interpreted as "normal for age and altitude."

3. Medical Opinions

The ALJ considered three medical opinions submitted into evidence that addressed Mr. Baird's disability:

*Dr. Baker*. Dr. Baker examined Mr. Baird in 2006. JA 505. Based on his examination and the pulmonary-function test he conducted, he concluded that Mr. Baird had a totally disabling pulmonary impairment. JA 509.

*Dr. Castle*. Dr. Castle also examined Mr. Baird in 2006. JA 596. Based on his examination and testing, he concluded that Mr. Baird had a mild to moderate respiratory impairment caused by non-occupational asthma, and that he was totally disabled by a combination of asthma, age and other non-pulmonary conditions. JA 601. He did not address whether Mr. Baird's pulmonary condition alone would be disabling. On subsequent deposition (JA 693), Dr. Castle testified that he was not sure if Mr. Baird would have had the pulmonary capacity to perform coal-mine employment if he was taking bronchodilators, but did not address whether Mr.

Baird could perform that work absent the drugs. JA 718-19.

*Dr. Rosenberg.* Dr. Rosenberg authored a report based on a review of Mr. Baird's medical records in 2008, and was deposed two times with respect to Mr. Baird's lifetime pulmonary status.[10] JA 679, 726, 857. He initially concluded that Mr. Baird was disabled in a "non-bronchodilator state," but that he would "achieve a ventilatory status above disability standards" with intensive drug therapy. JA 682-83. On subsequent deposition, he likewise testified that "if you looked at his overall situation, I guess it would be disabling with the kind of impairment that he could have at times." JA 874. He specifically noted that Mr. Baird's pre-bronchodilator results would still be indicative of total disability, even if the qualifying values were extrapolated beyond the maximum age (71) listed in the regulatory tables.[11] JA 737-38.

---

[10] Dr. Rosenberg later submitted a second report and was deposed a third time (JA 936, 999), but these principally address the cause of Mr. Baird's death, which is not at issue in this appeal.

[11] Mr. Baird was 87 when he was tested by Dr. Baker, 88 when tested by Dr. Castle, and 89 when tested by Dr. Craven.

*B. Evidence on the Existence of Pneumoconiosis and Disability Causation (rebuttal of the presumption)*

1. X-ray Readings[12]

The ALJ considered a total of ten readings (five positive for pneumoconiosis and five negative) of four different x-rays:

*March 2005*. Dr. Alexander, a B-reader and a board-certified radiologist,[13] read this x-ray as positive for pneumoconiosis (2/1 profusion[14]). JA 67. Dr. Wiot, also a B-reader and a board-certified

---

[12] X-rays are typically used to diagnose clinical pneumoconiosis. *See* 20 C.F.R. § 718.202(a).

[13] A "B-reader" is "a physician who has demonstrated proficiency . . . in the use of the [International Labour Organization Classification] for interpreting chest [x-rays] for pneumoconiosis . . . by . . . passing a specially designed proficiency examination." 20 C.F.R. § 718.202(a)(1)(ii)(E) (cross-referencing 42 C.F.R. § 37.51(b)(2)).

"Board certified" refers to certification in the practice of radiology by either the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.202(a)(1)(ii)(C).

[14] Profusion "refers to the concentration of . . . opacities in affected zones of the lung," and is categorized by comparison to a set of standard radiographs. *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* (Rev. Ed. 2011) at 3. An x-ray showing an opacity profusion of 1/0 or greater is sufficient to prove that a miner had pneumoconiosis. *See* 20 C.F.R. § 718.102(b); *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 982 n.6 (11th Cir. 2004).

radiologist, read it as negative. JA 59.

*February 2006*. Drs. Alexander and Baker (B-reader) read this x-ray as positive (1/1 and 1/0, respectively), JA 549, 513, while Drs. Wiot and Meyer (B-reader; board-certified radiologist) read the film as negative. JA 533-35.

*April 2006*. Dr. Miller (B-reader; board-certified radiologist) read this film as positive (2/1), JA 569-70, while Dr. Wiot read it as negative. JA 568.

*November 2006*. Dr. Ahmed (B-reader; board-certified radiologist) read this film as positive (JA 584-85), while Dr. Wiot read it as negative. JA 574-75.

Although Drs. Wiot and Meyer read all four x-rays as negative for pneumoconiosis, they admitted that all four were, in Dr. Wiot's words, "very abnormal." JA 58; *see JA* 534, 574. Both physicians noted irregular markings or shadows, mostly in Mr. Baird's lower lung zones, with some in the middle zones and relatively few in the upper zones. *Id*. They opined that these opacities did not suggest coal workers' pneumoconiosis because, according to them, that disease "invariably" begins in the upper lung zones with rounded opacities and Mr. Baird's x-rays showed irregular abnormalities,

primarily in the lower zones. *Id.*

2. Medical Opinions

The same three doctors who opined on Mr. Baird's disability also offered their opinions on whether the miner suffered from pneumoconiosis:

*Dr. Baker.* Dr. Baker, relying on his own x-ray reading, diagnosed Mr. Baird with clinical pneumoconiosis. JA 508-509. He also found that Mr. Baird had chronic obstructive pulmonary disease cause by coal dust exposure—*i.e.*, legal pneumoconiosis. *Id.*

*Dr. Castle.* Dr. Castle, relying upon the x-ray readings of Dr. Wiot, found that Mr. Baird did not have clinical pneumoconiosis. JA 598-99, 703-04. He agreed with Dr. Wiot that the absence of upper-zone rounded opacities precluded a finding of pneumoconiosis. JA 714-15. Dr. Castle did diagnose a mild to moderate pulmonary disability, which he attributed solely to non-occupational asthma. JA 598, 600-01, 721, 723-24. He specifically disavowed Mr. Baird's smoking history as a significant cause of his pulmonary condition. JA 708. He explained that he ruled out coal dust as a cause of Mr. Baird's lung condition because Mr. Baird's

pulmonary-function test improved (showed "reversibility") after the administration of bronchodilators. JA 722.

*Dr. Rosenberg.* Dr. Rosenberg also found, based on Dr. Wiot's readings, that Mr. Baird did not have clinical pneumoconiosis. JA 681-82. Like Dr. Castle, Dr. Rosenberg also opined that pneumoconiosis invariably begins with rounded opacities in the upper lung zones and concluded that, since the abnormalities on Mr. Baird's x-rays were irregular and primarily in the lower and middle zones, they could not be pneumoconiosis. JA 681-82, 732-38, 863, 866-72.

Also like Dr. Castle, Dr. Rosenberg found that Mr. Baird had a disabling pulmonary condition, solely attributable to non-occupational asthma (and with no apparent contribution from his remote smoking history). JA 682-83, 732, 869-70. Dr. Rosenberg explained that he could rule out coal dust as a cause of Mr. Baird's lung condition for two reasons: 1) he showed reversibility on Dr. Castle's pulmonary-function study after the administration of a bronchodilator, and 2) his $FEV_1$/FVC ratio was not "preserved" (*i.e.*, declined more steeply than his $FEV_1$ values. JA 683, 737-38, 740-41, 744, 864-65. According to Dr. Rosenberg, a preserved ratio is a

necessary hallmark of dust-induced lung disease. JA 683.

## III. Procedural History and Prior Decisions

### *A. The Course of the Claims Before 2016*

*The district director's award:* Mr. Baird filed the lifetime disability claim now at issue in 2005.[15] A DOL district director awarded the claim in 2007. JA 626. When Westmoreland declined to pay benefits on the claim, the Trust Fund began doing so on an interim basis. Director's Exhibit-Miner's Claim (DXM) 38;[16] *see* 20 C.F.R. § 725.522(a). According to the Director's internal records, the Trust Fund paid a total of $29,619.30 in interim benefits between 2007 and Mr. Baird's death in 2012.[17]

---

[15] He had previously filed claims in 1978, 1990, and 1998, all of which were ultimately denied. *See JA* 1-57.

[16] Exhibit numbers refer to evidence in the record compiled before the ALJ. There are different exhibit numbers for the lifetime and survivor's claims. We cite these exhibit numbers only when the evidence is not included in the Joint Appendix.

[17] The Director's records also indicate that an underpayment of $11,185.70 exists on Mr. Baird's claim, representing benefits due to Mr. Baird for the period after he filed the claim but before the 2007 district-director award. The Trust Fund is barred from paying benefits owed for periods prior to an initial determination of entitlement in most cases. *See* 26 U.S.C. § 9501(d)(1)(A)(ii). If the Court affirms the award of the lifetime claim, this amount will be (cont'd . . .)

*The ALJ's 2009 decision denying benefits:* Westmoreland requested a hearing on Mr. Baird's claim, which was held before an ALJ in 2008. JA 747. The ALJ denied Mr. Baird's claim in a decision issued in 2009. JA 815. The ALJ found that Mr. Baird worked as a miner for thirty-one years. JA 817. He further found, however, that Mr. Baird failed to prove either that he had pneumoconiosis, or that he had a totally disabling pulmonary disability and, accordingly, denied the claim.[18] JA 826-27; *see* 20 C.F.R. §§ 718.202, 718.204(b).

*The Board's 2010 decision vacating the ALJ's denial and remanding the case:* Mr. Baird (without counsel) appealed to the Board. DXM 67. In 2010, the Board vacated the ALJ's decision and remanded the case for further consideration. JA 831. With respect to pneumoconiosis, the Board held that the ALJ failed to consider portions of certain x-ray readings, and failed to address the scientific validity of the various medical opinions. JA 836-37.

---

(. . . cont'd)
payable by Westmoreland to any survivor that qualifies to receive the underpayment, if any exists. *See* 20 C.F.R. § 725.545.

[18] At that time, Congress had not yet restored the Section 921(c)(4) presumption.

With respect to total disability, the Board identified errors in the ALJ consideration of both the pulmonary-function studies and the medical-opinion evidence. JA 838-39. On the pulmonary-function study evidence, the ALJ failed to resolve conflicting evidence as to Mr. Baird's height (which affected whether the studies were qualifying). JA 838. On the medical opinions, he conflated the issues of disability and disability causation. JA 839. Thus, the Board remanded for further consideration. *Id.* The Board directed the ALJ to first address total disability and, if it was established, to consider the claim under 30 U.S.C. § 921(c)(4) (which Congress had recently restored). *Id.*

*Proceedings after the Board's remand:* While the case was pending on remand, Mr. Baird died in August 2012. JA 856. Mrs. Baird filed her survivor's claim two months later. JA 883. An ALJ then remanded Mr. Baird's claim to the district director for consolidation with Mrs. Baird's. JA 885. The district director awarded her claim under the automatic-entitlement provisions of 30 U.S.C. § 932(*l*) in 2013. JA 901. When Westmoreland declined to begin paying benefits on this claim, the Trust Fund began doing so on an interim basis, as it had done with Mr. Baird's claim.

Director's Exhibit-Survivor's Claim 24; *see* 20 C.F.R. § 725.522(a). According to the Director's internal records, the Trust Fund ultimately paid a total of $17,703.70 on Mrs. Baird's claim prior to her death.

Westmoreland requested a hearing on the consolidated lifetime and survivor's claims, but Mrs. Baird later requested (and Westmoreland agreed to) a decision on the record. Mrs. Baird apparently passed away in October 2015, although her death certificate is not of record in this case.

*B. The 2016 ALJ Decision*

The ALJ, who did not know of Mrs. Baird's death, issued a decision awarding benefits in both claims. JA 1019.[19] Following the Board's instructions from its 2010 remand order, the ALJ first resolved the conflicting evidence regarding Mr. Baird's height. JA 1025-28. The miner's height was recorded nineteen times in the

[19] The copy of the ALJ's decision in the JA is missing pp. 34-35. As a result, we will cite to those pages as "ALJ pp. 34-35." The entire decision is included in the original record sent to the Court by the Board and is also available on the internet at https://www.oalj.dol.gov/ Decisions/ALJ/BLA/ 2013/ BAIRD_VIDA_M_ WID_RAY_ v_WESTMORELAND_COAL_ CO_ 2013BLA05944_(MAY_16_2016)_ 173030_CADEC_ SD.PDF.

medical evidence, and those reports ranged from 67.25" to 70". JA 1026-27. The ALJ excluded one of the reports as an outlier and two because they were not recorded as part of a pulmonary function test. JA 1027. He then found that four of the remaining heights reflected a particularly "conscientious effort to take an accurate measurement" because they were recorded to a fraction of an inch. JA 1027-28. Unable to distinguish among those four tests, he averaged their results and concluded that Mr. Baird was 68.96" tall, which he later rounded to 69". JA 1027-28. The ALJ also found that Mr. Baird had a fifteen pack-year smoking history, but stopped smoking before 1950. JA 1028.

The ALJ then found that the pre-bronchodilator results of all three pulmonary-function tests were qualifying based on a height of 69".[20] JA at 1029-33. With respect to the medical opinion evidence, the ALJ found that both Drs. Baker and Rosenberg found that Mr. Baird was totally disabled based on his pre-bronchodilator state, that Dr. Castle did not offer an opinion as to the extent of the

[20] The ALJ noted that Dr. Castle's post-bronchodilator results were relevant to the cause of his lung condition, rather than the extent of his disability. JA 1031.

miner's pre-bronchodilator disability, and that no doctor opined that Mr. Baird had the respiratory capacity to do coal-mine work. JA 1033-41. Weighing all of the evidence together (including the two non-qualifying arterial-blood-gas studies), the ALJ found that Mr. Baird had a totally disabling pulmonary impairment. JA 1041. Because Mr. Baird also had thirty-one years of coal-mine employment, the ALJ found that he invoked the Section 921(c)(4) presumption. JA 1041-42; *see* 20 C.F.R. § 718.305(b).

Turning to rebuttal, the ALJ found that Westmoreland failed to rebut the presumption that Mr. Baird had pneumoconiosis. JA 1042-51; ALJ pp.34-35. With respect to clinical pneumoconiosis, the ALJ found the x-ray evidence to be in equipoise, and thus insufficient to rebut the presumption of clinical pneumoconiosis. JA 1045-46. He further found that "[e]ven if the x-ray evidence is viewed in the light most favorable to [Westmoreland,] it shows abnormal lungs and no explanation for those abnormalities," which is plainly insufficient to disprove the existence of clinical pneumoconiosis. JA 1047. He also discounted the negative findings on clinical pneumoconiosis by Drs. Castle and Rosenberg because they primarily relied on the x-ray readings (in

particular, Dr. Wiot's reading) that the ALJ had found insufficient to establish the absence of clinical pneumoconiosis. JA 1049, 1051. The ALJ specifically rejected the theory, espoused by Westmoreland's doctors, that x-ray opacities of coal workers' pneumoconiosis are necessarily rounded and "invariably" first appear in the upper lung zones. JA 1047 & n.25, 1051.

The ALJ also found that Westmoreland failed to disprove the existence of legal pneumoconiosis. JA 1047-51; ALJ pp.34-35. He discounted the opinions of Drs. Castle and Rosenberg principally because they both incorrectly relied on the partial reversibility shown on Dr. Castle's post-bronchodilator pulmonary-function testing as their basis for excluding dust exposure as a cause of his lung disease. JA 1049-50; ALJ p.34. The ALJ noted that even after the administration of bronchodilators by Dr. Castle, Mr. Baird still exhibited some degree of impairment, and neither Castle nor Rosenberg offered any explanation as to why coal dust was not a factor in this remaining, irreversible impairment. JA 1051; ALJ p.34. The ALJ also criticized Dr. Castle for relying on generalities and Dr. Rosenberg for failing to explain why coal dust could not have contributed to Mr. Baird's asthma. JA 1049-51;

ALJ p.34. Thus, he found that Westmoreland failed to rebut the presumption of pneumoconiosis in either its clinical or legal manifestations. ALJ p.35.

Because both Drs. Castle and Rosenberg wrongly assumed that Mr. Baird did not have pneumoconiosis, the ALJ gave their opinions no weight on disability causation, and thus concluded that Westmoreland failed to rule out pneumoconiosis as a cause of Mr. Baird's disability. ALJ 35; JA 1052. Hence, he awarded Mr. Baird's claim. JA 1052. Finally, based on the award of Mr. Baird's lifetime claim, the ALJ found that Mrs. Baird was automatically entitled to benefits under Section 932(*l*) on her survivor's claim. JA 1052-53. Westmoreland appealed the ALJ's decision to the Board. JA 1056.

*C. The 2017 Board Decision*

The Board affirmed the ALJ's decision. JA 1100. It rejected Westmoreland's contention that the case was not justiciable, holding that the adversity between the Director and Westmoreland (which resulted from the Trust Fund's payment of benefits on both claims) was sufficient to maintain justiciability. JA 1104-05.

The Board also held that Westmoreland failed to demonstrate any reversible error in the ALJ's evaluation of the pulmonary-

function study evidence, and that the company had not challenged the ALJ's finding that the medical-opinion evidence supported a finding of total disability. JA 1105-1109. It also affirmed the ALJ's findings that Westmoreland failed to disprove the existence of legal pneumoconiosis or to rule out pneumoconiosis as a cause of the miner's disability.[21] JA 1109-13. Thus, it affirmed the award of Mr. Baird's lifetime claim (JA 1113) and, based on that award, also affirmed the ALJ's finding that Mrs. Baird was automatically entitled to survivor's benefits under Section 932(*l*). JA 113-14. Westmoreland subsequently petitioned the Court for review. JA 1118.

## SUMMARY OF THE ARGUMENT

The Court should affirm the decisions of the ALJ and the Board. As an initial matter, this case was and is justiciable even though both Mr. and Mrs. Baird are deceased. The Trust Fund paid interim benefits on both claims before the Bairds passed away. If the awards are upheld, Westmoreland will have to reimburse the Trust Fund for those payments. The case is justiciable because of

[21] The Board did not reach the ALJ's clinical-pneumoconiosis finding. JA 1133, n.13.

the resulting adversity between the Director (who administers the Trust Fund) and Westmoreland. The absence of a living claimant makes no difference.

Moreover, the ALJ correctly awarded both Mr. Baird's lifetime claim and Mrs. Baird's survivor's claim. On Mr. Baird's claim, the ALJ properly found that the Section 921(c)(4) presumption had been invoked and that Westmoreland failed to rebut it. On invocation, both the medical-opinion evidence (no doctor found that Mr. Baird had the pulmonary capacity to return to coal-mine work) and the pulmonary-function studies (all of which showed some degree of impairment) provide substantial evidence supporting the ALJ's disability finding.

On rebuttal, the ALJ reasonably determined that the x-ray evidence was, at best, in equipoise and thus insufficient to rebut the presumption of clinical pneumoconiosis. And he permissibly concluded that the medical opinions offered by Westmoreland's experts (Drs. Castle and Rosenberg) were insufficient to rebut the presumption of legal pneumoconiosis because their conclusions were based on invalid assumptions or lacked adequate explanation. Because those same opinions incorrectly assumed that Mr. Baird

did not have pneumoconiosis, the ALJ rightly found they could not validly rule out pneumoconiosis as a cause of Mr. Baird's disability. Finding that the Section 921(c)(4) presumption had been invoked and not rebutted, the ALJ correctly awarded Mr. Baird's lifetime disability claim.

Finally, based on the award in her husband's claim, the ALJ properly found that Mrs. Baird was automatically entitled to survivor's benefits under 30 U.S.C. 932(*l*). Thus, the Court should affirm the awards on both claims.

## ARGUMENT

### I. Standard of Review

The issues addressed in this brief are both legal and factual in nature. The Court reviews legal questions *de novo*. *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 310 (2012) (citation omitted). In contrast, in reviewing an ALJ's factual findings, the Court's review is "limited," and it "ask[s] only whether substantial evidence supports the factual findings . . . ." *Hobet Mining, LLC, v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015) (internal quotation and citation omitted). The Court defers to the ALJ's judgment about the credibility of witnesses and his weighing of evidence. *Mingo Logan*

*Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

## II. This case is justiciable based on the adversity of interests between the Director and Westmoreland.

Westmoreland's primary argument is that the Bairds' claims became non-justiciable when the claimants died because no other claimant was substituted for them. This is plainly wrong. The Bairds are not the only parties with an interest in these claims adverse to Westmoreland's. The Director is also a party. And, as the Board correctly held, the Trust Fund's payment of interim benefits creates a sufficient adverse interest to make this case justiciable. The Court should reject Westmoreland's argument on that basis.

"A claim is justiciable if the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests . . . .'" *Miller*, 462 F.3d at 316 (quoting *Babbitt v. United Farm Wkrs. Nat. Union*, 422 U.S. 289, 298 (1979)). Here, there is a real controversy between Westmoreland (which opposes the award of benefits on both Mr. Baird's lifetime claim and his wife's survivor's claim) and the Director (who supports those awards). And Westmoreland and the Director have

adverse interests—the Director wants reimbursement for the interim benefits paid by the Trust Fund, and Westmoreland wants to avoid making that reimbursement.

The law and the facts here readily demonstrate the required adversity. As required by statute and regulation, the Trust Fund began paying interim benefits to both claimants when Westmoreland declined to pay after the district director initially awarded the claims. 26 U.S.C. § 9501(d)(1)(a)(i), (ii); 20 C.F.R. §§ 725.420, 725.522(a). According to the Director's internal records, the Trust Fund paid a total of $47,323.30 in benefits on the two claims. If the Court upholds the awards, Westmoreland will have to reimburse the Trust Fund for those payments (with interest). 20 C.F.R. § 725.602(a). But the Director can only sue to enforce that repayment obligation after the claims are finally determined (*i.e.*, after Westmoreland's appeals are exhausted). 30 U.S.C. § 934(b)(1); *Bethenergy Mines Inc. v. Director, OWCP*, 32 F.3d 843, 849 (3d Cir. 1994). Westmoreland, in contrast, has paid nothing, and seeks to maintain that status quo.

Westmoreland argues that the claims abated upon the Bairds' death unless another party (for example, an heir) was substituted in

their place. Pet. Br. 8. It cites several civil decisions for the "black letter requirement that when a party dies . . . the court is required to order substitution for the deceased party." *Id.* But none of these cases involve a situation like this one, where there is another party (the Director) already in the case with an independent financial interest in vindicating the deceased party's claim.[22] They are therefore of little relevance to this case.

More relevant are decisions directly addressing the impact of a claimant's death on the justiciability of federal black lung claims. And they all undermine Westmoreland's position. Indeed, this Court has held (albeit in an unpublished opinion) that where the Trust Fund has paid interim benefits to a claimant who subsequently dies, there is "a justiciable case or controversy [between the Director and the operator] *regardless of the interest (if any) retained by Claimant's beneficiaries in the benefits award.*"

---

[22] *Griffin v. Manning*, 36 A.D. 3d 530 (N.Y. 1st Dep't 2007) and *Cueller v. Betanes Food Corp.*, 24 A.D. 3d 201 (N.Y. 1st Dep't 2005), were personal injury actions. *Roberts v. Rowe*, 89 F.R.D. 398 (S.D.W.V. 1981) was a civil rights claim alleging excessive use of force by a police officer. None of them involved an independent third party analogous to the Director's role in the Bairds' claims.

*Eastern Associated Coal*, 578 Fed. Appx. at 166 n.1 (emphasis added; citations omitted).

The other courts that have considered this question have reached the same result. *See Midland Coal Co. v. Director, OWCP*, 149 F.3d 558, 560 n.1 (7th Cir. 1998), *overruled on other grounds*, *Saban v. U.S. Dep't of Labor*, 509 F.3d 376, 379 (7th Cir. 2007) (Even after the benefits claimant is deceased and the estate closed, a black lung case "is not moot because the Department of Labor may recover from [the operator] the interim benefits paid to [the claimant] if [the operator] is held liable.") (citing 30 U.S.C. § 934(b)); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1275 (7th Cir. 1993) (where miner and his widow both died while claim was pending, operator and the Director "remained interested parties because the Department paid benefits to [the miner] while [the operator's] appeals were pending," and operator would be obligated to reimburse Trust Fund); *Ispat/Inland, Inc. v. Director, OWCP*, 422 Fed. Appx. 153, 154 n.1 (3d Cir. Apr. 6, 2011) (Where the claimant is deceased but Trust Fund paid interim benefits, "the adversity between [the Director and the operator] presents us with a justiciable case or controversy regardless of whether the interest

retained by [the claimant's] estate (if such exists) would independently suffice to confer jurisdiction.") (citations omitted). *Accord, Old Ben Coal Co. v. Hilliard*, 292 F.3d 533, 538 n.4 (7th Cir. 2002) (Even assuming that the deceased miner's living spouse had no interest in the outcome of the case, "there is sufficient adversity among the remaining parties—the DOL and [the operator]—to sustain jurisdiction" where Trust Fund had paid interim benefits).[23] Thus, the Bairds' deaths simply had no impact on the justiciability of this case.

Westmoreland argues that this case is different because the claimants died before the ALJ's award. Pet. Br. 8 ("This is not a case in which the Claimant died after a final decision was made and while the case was on appeal."). But that is a distinction without a difference. The black lung program regulations make clear that the Director has an independent interest in black lung claims before an ALJ decision is issued. *See* 20 C.F.R. § 725.465(d) (forbidding ALJs from dismissing black lung claims without the Director's consent if

[23] Westmoreland puts significant effort into distinguishing *Hilliard* on the merits, Pet. Br. 9-11, but does not come to grips with (or even mention) the Seventh Circuit's justiciability determination.

the Trust Fund has paid interim benefits). And for good reason: the Trust Fund's obligation to pay interim benefits is triggered not only by an ALJ's award, but also by a district director's award. 20 C.F.R. § 725.522 ("If an operator . . . refuses to commence the payment of benefits within 30 days . . . of an initial determination of eligibility by the district director . . . , the fund shall commence the payment of such benefits."). And it is that payment of interim benefits that gives the Director a sufficient interest to continue to litigate the claims. Had the Bairds passed away before the district director's initial award, Westmoreland might well be correct that their claims should have been dismissed unless a substitute party was identified. But that is not what happened here.

The company's attempt to distinguish this case on the ground that the claimants died before the ALJ's award was issued is also difficult to reconcile with *Eastern Associated Coal.* There, as here, a district director awarded a miner's claim and the Trust Fund paid interim benefits when the operator requested a formal hearing. 578 Fed. Appx at 168. The miner died two days before the first ALJ decision, which was subsequently vacated by the Board. *Id.* On remand, the ALJ was advised that the miner's widow had remarried

and was no longer interested in pursuing the claim. *Id.* at 169. He nevertheless resolved the merits of the miner's claim and issued a second award of benefits that was affirmed by the Board. *Id.* at 170. The ALJ and Board rejected the employer's argument that the claim should be dismissed because the miner was dead and the widow was not pursuing it. This Court agreed, explaining that the claim could not be dismissed without the Director's consent under 20 C.F.R. § 725.465(d), and upholding that regulation as an appropriate means of defending the Trust Fund's financial interests. *Id.* at 172.

The same logic applies here. While Westmoreland argues that the ALJ and Board should have remanded the claims to identify a substitute party rather than dismiss them outright, *Eastern Associated Coal* makes clear that the Director's interest in the case was sufficient to render it justiciable at every point after the Trust Fund began paying interim benefits. Nor does the company point to any prejudice that it suffered as a result of this failure to remand. And it is hard to see how any prejudice could have arisen. A remand to identify a substitute party for the Bairds would have either resulted in no change (if no substitute party was identified) or

an additional party litigating against Westmoreland (if a substitute was found).[24] Thus, even if the ALJ or Board should have remanded the claims to the district director, the error was harmless. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621-22 and n.6 (4th Cir. 2006) (applying harmless-error rule in BLBA case).

In sum, the Trust Fund's payment of interim benefits to the Bairds gave the Director a substantial independent interest in the claims that was adverse to Westmoreland's and survived the Bairds' deaths. Westmoreland's justiciability argument should be rejected.

[24] Nor, contrary to Westmoreland's suggestion, is remand necessary to identify the individual or individuals entitled to receive any underpayment on either claim. The regulations specify the order in which survivors or legal representatives of a deceased beneficiary are entitled to receive underpayments. 20 C.F.R. §725.545. If the Court affirms the award of the claims here, the determination of the proper payee on any underpayment can be made by the district director after the Court's decision.

## III. The ALJ correctly awarded benefits on both Mr. Baird's lifetime claim and Mrs. Baird's survivor's claim.

*A. Mr. Baird's Lifetime Claim*

1. Invocation of the Section 921(c)(4) presumption

Totally disabled claimants who worked as coal miners for at least fifteen years are rebuttably presumed to be entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b). Since Mr. Baird had thirty-one years of coal-mine employment, he could invoke the Section 921(c)(4) presumption by establishing that he had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b). Westmoreland challenges the ALJ's conclusion that the miner satisfied that burden. It argues that the ALJ improperly evaluated three categories of evidence relevant to the disability question: pulmonary-function tests, medical opinions, and arterial blood-gas studies. None of these arguments has merit. The Court should affirm the ALJ's finding of total disability, and his resulting invocation of the Section 921(c)(4) presumption in Mr. Baird's claim.

*Pulmonary-Function Tests*. Much of Westmoreland's invocation argument focuses on the ALJ's evaluation of the pulmonary

function test evidence. Pet. Br. 14-19, 20-23. Three tests were entered into evidence: one each from Drs. Baker, Castle, and Craven. The ALJ found that all three studies were qualifying, and thus supportive of a finding of total disability. Based on the height determined by the ALJ (69"), this finding was plainly correct—all three studies produced qualifying values when bronchodilators were not administered to the miner. *See* 20 C.F.R. Part 718, App. B.

Westmoreland does not challenge the ALJ's determination that the Baker and pre-bronchodilator Castle studies produced qualifying values.[25] Nor does it disagree that the Craven study was qualifying if Mr. Baird was, as the ALJ found, 69" tall. Instead, the company argues that the ALJ erred in averaging several of the heights listed in the record to arrive at that 69" figure, accusing him of "creating" evidence. Pet. Br. 15-19.[26]

---

[25] As noted previously, Dr. Castle's post-bronchodilator study sheds no light on Mr. Baird's disability status. *See* 45 Fed. Reg. 13,682 (Feb. 29, 1980).

[26] Westmoreland also makes several references to Mr. Baird's advanced age (he was in his late '80's) when the tests were performed, implying that the test results were not indicative of disability for such an elderly man. For miners over age 71, the age-71 table values may be used absent medical evidence showing that (cont'd . . .)

Height is one of three factors (along with age and sex) that determine whether a given pulmonary function test result shows that a miner is totally disabled. *See* 20 C.F.R. § 718.103(b)(2); 20 C.F.R. Part 718, App. B. As a result, where the record contains conflicting evidence as to a miner's height, the ALJ must resolve the conflict in order to evaluate the tests. *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114 (4th Cir. 1995). And one method that an ALJ can use is to average reported heights, and rely on the average figure, *even if no test listed that precise height*. *K.J.M.*, 24 Black Lung Rept. (MB) 1-40 at 45-46. Based on the 69" height that he calculated, the ALJ correctly found that the Craven test (like the Baker and Castle tests) produced qualifying values.

Notably, Westmoreland does not argue that the ALJ should have settled on any particular height other than 69". It does not

---

(. . . cont'd)
the miner's pulmonary-function results were normal for his age. *K.J.M. v. Clinchfield Coal Co.*, 24 Black Lung Rept. (MB) 1-40, 46-47 (2008). Because Westmoreland produced no such evidence here with regard to the pre-bronchodilator results, the ALJ properly relied on the age-71 table values in determining whether Mr. Baird's values were qualifying. Indeed, Dr. Rosenberg averred that Mr. Baird's pre-bronchodilator results were indicative of total disability, his advanced years notwithstanding. JA 737-38.

even describe an alternate method the ALJ should have used to resolve the issue. Rather, the company generally argues that the ALJ "failed to assess each individual height measurement to determine which reports appeared to be credible[.]" Pet. Br .16. But the ALJ did exactly that. He excluded three of the 19 heights recorded during Mr. Baird's several claims because they were either outliers or not recorded for the purpose of a pulmonary function test. JA 1027. He then found that four of the remaining heights reflected a particularly "conscientious effort to take an accurate measurement" because they were recorded to a fraction of an inch. *Id.* Unable to distinguish among those four tests, he averaged them. While another factfinder might have reached a different result, this reasoning fell within the ALJ's broad discretion to weigh conflicting evidence. *See Frontier-Kemper Constructors, Inc. v. Director, OWCP*, --- F.3d ---, 2017 WL 5897323 *3 (4th Cir. Nov. 30, 2017) ("We defer to the ALJ to . . . resolve inconsistencies or conflicts in the evidence.").

Finally, even if the Craven test were deemed non-qualifying, it would not advance Westmoreland's cause. First, it would not change the fact that the other two pulmonary function tests in

evidence were qualifying. Second, it would not change the fact that Drs. Baker and Rosenberg testified that Mr. Baird was totally disabled, and that no doctor disagreed with that conclusion. *See infra* at 44-45. Indeed, according to the predicted values listed on the Craven test itself, Mr. Baird's results fell significantly below predicted normal values, even if they were not qualifying. *See JA* 673. The test report also states that Mr. Baird had moderately severe lung obstruction. *Id.*; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even mild impairment may be totally disabling). Since Dr. Craven's test unequivocally showed that Mr. Baird had diminished pulmonary capacity, Westmoreland's argument that Dr. Craven's test deserves more weight because it is the most recent is inapposite. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (explaining that the "later evidence rule" does not apply where the more recent evidence shows that the miner's condition has improved). The ALJ's conclusion that the pulmonary function test evidence in this claim demonstrated that Mr. Baird was totally disabled should be affirmed.

*Arterial Blood-Gas Studies.* Arterial blood-gas (ABG) studies can also be used to establish total disability. 20 C.F.R. § 718.204(b)(2)(ii). As Westmoreland points out, the ALJ recognized that both blood gas studies in evidence in the miner's claim were non-qualifying. Pet. Br. 19; JA 1041. The company's claim that the ALJ failed to weigh these non-qualifying results with the qualifying pulmonary-function tests and medical opinions diagnosing total disability, however, is incorrect. The ALJ explicitly weighed all the evidence relevant to the total-disability question, including the ABG results. JA 1041.

Moreover, Westmoreland's suggestion that the ABG results undermine the qualifying pulmonary-function test results also misses the mark. ABG studies measure different impairments than pulmonary-function tests, and non-qualifying ABG results are therefore not contrary to qualifying pulmonary-function results. *Allen v. Director, OWCP*, 69 F.3d 532 (Table), 1995 WL 649877 *2 (4th Cir. 1995) (citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), *abrogated on other grounds*, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511 (6th Cir. 2003)).

Westmoreland has failed to identify any reversible error in the ALJ's treatment of the ABG results.

*Medical-Opinion Evidence*. Total disability can also be established "if a physician exercising reasoned medical judgment . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her most recent coal-mine work]." 20 C.F.R. § 718.204(b)(2)(iv). In this case, Drs. Baker and Rosenberg unequivocally found that Mr. Baird had a totally disabling pulmonary impairment (at least in a pre-bronchodilator state), and Dr. Castle was not sure of his disability status in a post-bronchodilator state (and did not even address whether the miner was disabled without administration of the drugs). The ALJ permissibly concluded that these medical opinions supported a finding of total disability, particularly since no physician found that Mr. Baird retained the pulmonary capacity to perform his regular coal-mine employment (which is the standard for total disability in the black lung context). *See* 20 C.F.R. 718.204(b)(2)(iv) (allowing total disability to be shown by medical opinion evidence even if objective testing is non-qualifying); *Consolidation Coal Co. v. Director, OWCP (Bailey)*, 721 F.3d 789, 795

(7th Cir. 2013) ("[E]ven if [the miner's] pulmonary function tests were muddled, the ALJ could rightly rely on medical opinion to establish total disability.").

The Board affirmed this finding as unchallenged. JA 1129. Westmoreland now attempts to contest the ALJ's evaluation of the medical opinions in its opening brief to this Court. Pet. Br. 1123-25. This attempt comes too late. *See Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (holding that issues not raised before Board are waived on appeal to court) (citation omitted). Thus, the Court should decline to address Westmoreland's contention and affirm the ALJ's holding. In any event, these arguments amount to little more than a request for the Court to reweigh the evidence—something the Court cannot do. *See Mingo Logan Coal*, 724 F.3d at 557. Thus, the Court should affirm the ALJ's finding that the medical opinions establish that Mr. Baird had a totally disabling pulmonary impairment.

In sum, there was no error in the ALJ's evaluation of the pulmonary-function tests, arterial blood-gas studies, and medical opinions admitted into evidence. The conclusion that flowed from that evaluation—that Mr. Baird was totally disabled and thus

entitled to the Section 921(c)(4) presumption—should therefore be affirmed.

2. Rebuttal of the Presumption

Once the presumption was invoked on Mr. Baird's claim, the burden shifted to Westmoreland to either 1) disprove the existence of both legal and clinical pneumoconiosis, or 2) rule out pneumoconiosis as even a partial cause of his disability. 20 C.F.R. § 718.305(d)(1); *Bender*, 782 F.3d at 134-35, 137-43. The ALJ correctly found that the company failed to establish either method of rebuttal.

*Legal Pneumoconiosis*. To rebut the presumption of legal pneumoconiosis, the company offered the opinions of Drs. Castle and Rosenberg. The ALJ correctly found them inadequate to the task.[27] JA 1047-51; ALJ p.34. He rationally found neither opinion

[27] Westmoreland curiously suggests that the ALJ failed to properly consider Mr. Baird's smoking history (which ended *before 1950*) in evaluating the medical evidence on the cause of his lung disease. Pet. Br. 26-27. But neither Dr. Castle nor Dr. Rosenberg attributed that disease to smoking. Indeed, Dr. Castle specifically confirmed that smoking was *not* a significant factor in Mr. Baird's lung condition. JA 708. Any error by the ALJ on this issue was harmless and therefore insufficient to support Westmoreland's (cont'd . . .)

credible, as both doctors improperly relied on the fact that Mr. Baird's pulmonary-function values showed partial reversibility following the administration of bronchodilators to exclude dust exposure as a cause of Mr. Baird's lung disease. But even after the administration of bronchodilators by Dr. Castle, Mr. Baird still exhibited at least a mild impairment. Neither Castle nor Rosenberg offered any explanation as to why coal dust was not a factor in this remaining, irreversible portion of Mr. Baird's impairment. The ALJ, thus, rationally discounted those opinions. *See Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (ALJ can discount causation opinion based on partial reversibility); *accord Crockett Collieries v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007).

The ALJ also properly faulted Dr. Castle for relying on generalities rather than the facts of Mr. Baird's case, and Dr. Rosenberg for failing to offer an adequate explanation for his conclusion that coal dust could not have contributed to Mr. Baird's

---

(. . . cont'd)
petition to vacate these awards. *See Williams*, 453 F.3d at 621-22 and n.6.

asthma.[28] *See Consolidation Coal Co. v. Director, OWCP (Burris)*, 732 F.3d 723, 735 (7th Cir. 2013) (affirming ALJ's rejection of report based on generalities); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (affirming ALJ's rejection of unexplained report purporting to sever connection between coal dust and asthma).

With respect to Dr. Castle, Westmoreland merely summarizes his opinion. Pet. Br. 32. At most, this is just another untenable request for the Court to re-evaluate the credibility of the medical evidence. *See Mingo Logan Coal*, 724 F.3d at 557.

As for Dr. Rosenberg, the company tries to defend his opinion on the basis of his theory that dust-related disease results in a "preserved" $FEV_1/FVC$ ratio, whereas Mr. Baird's tests did not show a preserved ratio. Pet. Br. 32-34. Although not cited by the ALJ in his evaluation of Dr. Rosenberg's opinion, the physician's reliance on the $FEV_1/FVC$-ratio theory *undercuts* his credibility rather than

[28] The ALJ could also have discounted Dr. Castle's opinion for the same lack of explanation, but did not do so.

bolstering it as Westmoreland claims.[29] Indeed, the Court recently affirmed an ALJ's rejection of Dr. Rosenberg's idiosyncratic theory, as it is contrary to DOL's evaluation of the scientific evidence in the preamble to the black lung regulations). *Westmoreland Coal Co. v. Stallard*, --- F.3d ---, 2017 WL 5769516 **5-6 (4th Cir. Nov. 29, 2017). The Court should reject Westmoreland's defense of Dr. Rosenberg here.

Because the ALJ correctly found the Castle and Rosenberg opinions insufficient to disprove the existence of legal pneumoconiosis, Westmoreland cannot rebut the Section 921(c)(4) presumption on the basis that Mr. Baird did not have pneumoconiosis. *See* 20 C.F.R. § 718.305(d)(1). Thus, the Court (like the Board before it) need not reach the company's clinical-pneumoconiosis arguments. *See id.* But, as we will now see, those arguments are meritless as well.

---

[29] *See Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust* § 4.2.3.2 (Nat'l Inst. for Occupational Safety and Health, 1995), *quoted in* Regulations Implementing the Coal Mine Safety and Health Act of 1969, 65 Fed. Reg. 79,919, 79,943 (Dec. 20, 2000)) (chronic obstructive lung disease, *regardless of cause*, characterized by "decrements in certain measures of lung function, *especially* $FEV_1$ *and the ratio of* $FEV_1/FVC$") (emphasis added)).

*Clinical Pneumoconiosis.* With respect to clinical pneumoconiosis, the ALJ found the x-ray evidence to be in equipoise, and thus insufficient to rebut the presumption of clinical pneumoconiosis, and further found that "[e]ven if the x-ray evidence is viewed in the light most favorable to [Westmoreland,] it shows abnormal lungs and no explanation for those abnormalities,"—a showing plainly insufficient to disprove the existence of clinical pneumoconiosis. JA 1045, 1047. He also discounted the negative findings on clinical pneumoconiosis by Drs. Castle and Rosenberg because they primarily relied on the x-ray readings of Dr. Wiot, which the ALJ had already found insufficient to prove the absence of the disease. JA 1050. The ALJ also specifically rejected the theory espoused by Westmoreland's doctors that x-ray opacities of coal workers' pneumoconiosis "invariably" are rounded and appear primarily in the upper lung zones. JA 1049-50.

The ALJ's finding that the x-ray evidence was in equipoise is plainly supported by substantial evidence, and should be affirmed. He considered both the quality and quantity of readings of each of the four x-ray films in reaching his conclusion. Each was read as positive and negative for pneumoconiosis by an equal number of

highly qualified x-ray readers. Thus, the ALJ's finding of equipoise was eminently reasonable and should be affirmed. Moreover, because he found the x-ray evidence to be in equipoise, the ALJ permissibly rejected the clinical-pneumoconiosis findings of Drs. Castle and Rosenberg, as they incorrectly assumed that the negative readings preponderated. *See Swiger*, 98 Fed. Appx. at 236.

Westmoreland ventures two assaults on the ALJ's finding, but neither attack succeeds. First it suggests that the ALJ should have given more weight to Dr. Wiot's readings based on his credentials. Pet. Br. 28. But the ALJ fully considered the qualifications of the readers, as well as the quantity and quality of the readings in evaluating the x-ray evidence. JA 1046-47. Westmoreland is simply asking the Court to reweigh the evidence. That request should be denied. *See Mingo Logan Coal*, 724 F.3d at 557.

Second, Westmoreland attempts to defend the theory—advanced by Drs. Wiot and Meyer—that clinical pneumoconiosis always begins with rounded opacities in the upper lung. Pet. Br. 29-30. But that is not so. As the ALJ found, clinical pneumoconiosis may be established by a positive x-ray, and an x-ray will be considered positive if it is "classified as Category 1, 2, 3

. . . according to the [International Labour Organization's (ILO) *Classification of Radiographs of the Pneumoconioses*]." 20 C.F.R. §718.102(b). Any x-ray showing an opacity profusion of 1/0 or greater may be considered positive for pneumoconiosis, *U.S. Steel Mining*, 386 F.3d at 982 n.6, with no distinction between opacities appearing in the upper, middle or lower lung zones or between rounded and irregular opacities. Westmoreland's theory is contrary to longstanding caselaw, *see Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 973 (7th Cir. 1984) ("[A]n x-ray showing . . . small irregular opacities is a positive reading and establishes the existence of pneumoconiosis") as well as the *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* (Rev. Ed. 2011), which include several standard radiographs—which are compared to a miner's x-ray to diagnose clinical pneumoconiosis —that have no rounded or upper-zone opacities). *ILO Guidelines*, Appx. D at 31, 32. Westmoreland's attempt to defend the rounded-opacity upper-zone theory—and its overall attack on the ALJ's clinical pneumoconiosis finding—thus fall short.

In sum, the Court should affirm the ALJ's finding that Westmoreland failed to rebut the presumptions of legal and clinical pneumoconiosis. And, as a result, Westmoreland cannot satisfy the first prong of rebuttal under Section 921(c)(4).

*Disability Causation*. Given that the ALJ permissibly found that Westmoreland failed to disprove the existence of pneumoconiosis, the question of disability causation is easily resolved. The Castle and Rosenberg opinions on disability causation (the only evidence that could arguably rule out pneumoconiosis as a cause of Mr. Baird's disability) both relied on the assumption that Mr. Baird did not suffer from pneumoconiosis. *See* JA 601, 683, 721-24, 744, 874-75. The ALJ ultimately concluded that Mr. Baird suffered from both forms of the disease. A medical opinion that erroneously fails to diagnose pneumoconiosis is entitled to little, if any, weight on the issue of disability causation unless it includes a "reasoned explanation . . . of *why* the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present." *Hobet*

*Mining*, 783 F.3d at 505.[30] Neither Dr. Castle nor Dr. Rosenberg provided such a reasoned explanation. Thus, the ALJ correctly found their opinions legally insufficient to rebut the presumption of disability causation under Section 921(c)(4).

Westmoreland's challenge to the ALJ's disability-causation finding is, at base, simply another iteration of its failed legal-pneumoconiosis argument— *i.e.*, that Mr. Baird's pulmonary condition was wholly unrelated to coal-dust exposure. As we have shown above, the ALJ permissibly rejected that argument in the legal-pneumoconiosis context. It fares no better as a disability-causation argument.

In sum, the ALJ correctly found that Mr. Baird invoked the Section 921(c)(4) presumption, and Westmoreland failed to rebut the presumption. As a result, the Court should affirm the award of benefits on Mr. Baird's lifetime claim.

---

[30] *See also Toler*, 43 F.3d at 116 ("[A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total pulmonary disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctors' judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.").

*B. Mrs. Baird's Survivor's Claim*

Mrs. Baird's claim is also easily resolved. Mr. Baird was awarded benefits on his lifetime claim. Mrs. Baird filed her survivor's claim after 2004, and it was pending on or after March 23, 2010. Thus, as the ALJ found, she met all prerequisites for automatic entitlement under 30 U.S.C. § 932(*l*). *See* Pub. L. 111-148, §1556(b), (c); *Stacy*, 671 F.3d at 381-82.

Westmoreland makes no complaint about the ALJ's findings under Section 932(*l*). Instead, it presents an irrelevant argument about whether Mrs. Baird proved that her husband's death was due to pneumoconiosis. Pet. Br. 34-38. Since Mr. Baird's cause of death does not matter under Section 932(*l*), the Court should disregard this argument, and affirm the award of Mrs. Baird's survivor's claim.[31]

[31] If the Court were to overturn the award of Mr. Baird's lifetime claim (thereby precluding entitlement on Mrs. Baird's claim under Section 932(*l*)), the Court would have to remand for the ALJ and Board to consider whether she proved that pneumoconiosis caused or hastened her husband's death, an alternate route to entitlement that was not addressed below.

## CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and the Board awarding the lifetime claim of Mr. Baird and the survivor's claim of Mrs. Baird.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor

MAIA S. FISHER
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and 2) 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 2010 in fourteen-point Bookman Old Style font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

## CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2017, an electronic copy of this brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

Paul E. Frampton, Esq.
Fazal A. Shere, Esq.
Bowles Rice, LLP
600 Quarrier Street
Charleston, West Virginia 25301
pframpton@bowlesrice.com
fshere@bowlesrice.com

Joseph E. Wolfe, Esq.
Victoria S. Herman, Esq.
Wolfe, Williams & Reynolds
P.O. Box 625
Norton, Virginia 24273-0625
usdcaminbl@wwlawfirm.com
vherman130@gmail.com

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

# ADDENDUM

**26 U.S.C. § 9501(d)(1)(A):**

*Expenditures from Trust Fund* Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for—

(1) the payment of benefits under [30 U.S.C. § 932] in any case in which the Secretary of Labor determines that—

(A) the operator liable for the payment of such benefits—

(i) has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary of Labor, or

(ii) has not made a payment within 30 days after that payment is due, except that, in the case of a claim filed on or after the date of the enactment of the Black Lung Benefits Revenue Act of 1981, amounts will be available under this subparagraph only for benefits accruing after the date of such initial determination, * * * *.

**20 C.F.R. § 725.522(a):**

If an operator or carrier fails or refuses to commence the payment of benefits within 30 days of issuance of an initial determination of eligibility by the district director (see § 725.420), or fails or refuses to commence the payment of any benefits due pursuant to an effective order by a district director, administrative law judge, Benefits Review Board, or court, the fund shall commence the payment of such benefits and shall continue such payments as appropriate. * * * *

**20 C.F.R. § 725.602(a):**

In any case in which the fund has paid benefits, including medical benefits, on behalf of an operator or other employer which is determined liable therefore, or liable for a part thereof, such operator or other employer shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund (with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

**30 U.S.C. § 921(c)(4):**

[I]f a miner was employed for fifteen years or more in one or more underground coal mines, * * * and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, * * * or that at the time of his death he was totally disabled by pneumoconiosis. * * * * The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

**20 C.F.R. § 718.305(b)-(d):**

(b)*Invocation.*

(1) The claimant may invoke the presumption by establishing that –

(i) The miner engaged in coal-mine employment for fifteen years, * * * and

* * *

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204 * * * *.

(c)*Facts presumed.* Once invoked, there will be rebuttable presumption-

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death * * * *

(d)*Rebuttal* –

(1)*Miner's claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by –

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in § 718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in § 718.201(a)(1) * * *; or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

* * * *