No. 17-3947

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT COAL COMPANY

and

OLD REPUBLIC INSURANCE COMPANY,
Petitioners

v.

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

and

RICHARD R. CRUM,
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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MISCELLANEOUS

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STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2010 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Richard R. Crum. On June 5, 2015, United States Department of Labor (DOL) Administrative Law Judge Larry S. Merck issued a decision awarding benefits and

ordering Robert Coal Company (Robert Coal or the coal company), the miner's former employer, to pay them.

Robert Coal appealed the ALJ's decision to DOL's Benefits Review Board on June 26, 2015, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The Board affirmed the award on May 26, 2016. On June 24, 2016, Robert Coal requested reconsideration of the decision pursuant to 20 C.F.R. § 802.407(a) (allowing reconsideration if request filed within thirty days of the Board's decision), but the Board denied the request on July 12, 2017.

Robert Coal petitioned this Court for review on September 8, 2017. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Because the miner had exposure to coal-mine dust – the injury contemplated by 33 U.S.C. § 921(c) – in the Commonwealth of Kentucky, within this Court's territorial jurisdiction, the Court has jurisdiction over the coal company's petition for review.

STATEMENT OF THE ISSUES[1]

The issues in this case are:

1. Whether an ALJ may credit doctors who report that the miner's coal mine work substantially contributed to his totally disabling respiratory condition, where they were unable to apportion causation between the miner's coal mine work and his smoking history.

2. Whether an ALJ may discredit doctors whose opinions concerning the cause of the miner's totally disabling respiratory condition is premised on beliefs contrary to the medical conclusions set forth in the preamble to the black lung regulation at 20 C.F.R. § 718.201.

STATEMENT OF THE CASE

A. Introduction

In order to be entitled to BLBA benefits, a miner must prove that (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) his respiratory condition is totally disabling; and (4) his pneumoconiosis is a substantially contributing cause of his disabling respiratory condition. 20 C.F.R. §§ 718.202-204, 725.202(d)(2); *Navistar, Inc. v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014).

[1] While Robert Coal's opening brief raises many issues, the Director limits her response to the following two legal issues.

The "pneumoconiosis" the miner must prove may be either "clinical" or "legal." *Clinical (or "medical") pneumoconiosis* refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP," and is typically diagnosed by chest x-ray, biopsy, or autopsy, 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). In contrast, *legal pneumoconiosis* is a broader category, including "*any* chronic lung disease or impairment . . . *arising out of coal mine employment*." 20 C.F.R. § 718.201(a)(2) (emphasis added). *See e.g. Sunny Ridge Min. Co., Inc. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014). A chronic lung disease or impairment (whether obstructive or restrictive) that is "significantly related to, or substantially aggravated by" exposure to coal-mine dust, is considered to have "arise[n] out of coal mine employment," and is therefore considered to be legal pneumoconiosis. 20 C.F.R. § 718.201(b).

In the instant case, all parties agree that Claimant suffers from a totally disabling respiratory condition in the form of a chronic obstructive pulmonary

disease (COPD), thereby satisfying the third element of the entitlement criteria.[2] The dispute concerns the cause of the miner's COPD. Robert Coal's doctors reported that the miner's COPD was due solely to his smoking (and possibly to asthma), but not to coal mine employment, thereby precluding Claimant's entitlement to benefits. In contrast, the doctor conducting the statutory-mandated evaluation, as well as Claimant's doctors, reported that the miner's COPD was due to both smoking and coal mine employment, thereby satisfying the remaining first (legal pneumoconiosis), second (disease causation), and forth (disability-causation) entitlement criteria.[3]

In awarding benefits, the ALJ gave more weight to Claimant's doctors, and did so even though they were unable to determine what portion of the miner's disabling COPD was due to coal mine employment and what portion was due to his smoking. And the ALJ discredited Robert Coal's doctors because, *inter alia*,

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[2] "*COPD*" is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011). COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); *Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121, n.2 (9th Cir. 2014). Both cigarette smoking and dust exposure during coal-mine employment can cause COPD. *See* 65 Fed. Reg. 79939-43 (summarizing medical and scientific evidence of link between COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as a cause of COPD).

[3] The BLBA at section 413(b) requires DOL to provide each claimant/miner with a complete medical evaluation. 30 U.S.C. § 923(b); 20 C.F.R. § 725.406. Here, this evaluation (by Dr. Srinivas Ammisetty) is supportive of Claimant's entitlement. For simplicity, hereinafter "Claimant's doctors" will refer to Claimant's doctors as well as DOL's 413(b) doctor.

their explanations concerning causation were contrary to the preamble of the regulation at 20 C.F.R. § 718.201.

In its opening brief, Robert Coal argues that an ALJ cannot credit the medical opinion of doctors who find that a miner's disabling respiratory condition is due in part to coal mine employment, but who cannot determine which part of the miner's respiratory disability is due to coal mine employment and which is due to other factors. The coal company asserts that such opinions are speculative. Robert Coal further argues that an ALJ cannot discredit the opinion of doctors simply because the ALJ believes their rationale is contrary to the regulatory preamble. The Director disagrees on both counts.

B. Doctors who find causation but are unable to apportion blame

In *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013), this Court held that an ALJ properly credited doctors who reported that the miner's respiratory disability was due to coal mine employment but could not apportion the blame between the miner's coal mine employment and his smoking. *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (holding the ALJ erred in rejecting doctors' reports diagnosing smoking and coal dust as causes of miner's obstructive lung defect because the doctors did not "allocate [the] blame between them"). The Fourth and Seventh Circuits have concluded the same. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006)

(concluding "'doctors need not make such particularized findings'" regarding competing etiologies) (quoting *Freeman United Coal Min. Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001)).

C. Reliance on the preamble to evaluate medical opinions

The BLBA defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). DOL's previous regulation concerning pneumoconiosis mimicked this provision by allowing a claimant to establish pneumoconiosis by proving the existence of a respiratory or pulmonary disease or impairment arising out of coal mine employment. 20 C.F.R. § 718.201 (1999).

As these definitions were applied over the years, it became clear that, while there was no dispute (or very little) in the medical community that chronic *restrictive* lung diseases could arise from coal mine employment and therefore be designated as "pneumoconiosis," there arguably was a question whether chronic *obstructive* lung diseases could as well.[4] There was also some dispute whether

[4] A *restrictive impairment* is "characterized by reduction in lung volume," *Merck* 1858; whereas *obstructive impairments* "are characterized by a reduction in airflow," *Merck* 1853. In lay terms, a restrictive disease makes it more difficult to inhale, while an obstructive disease makes it more difficult to exhale. *See Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121 n.2 (9th Cir. 2014); *Gulf & Western Indus. v. Ling*, 176 F.3d 226, 229 n.6 (4th Cir. 1999).

pneumoconiosis could be latent and progressive in cases other than "complicated" pneumoconiosis (the most extreme form of the disease).

In order to prevent inconsistent results and claim-by-claim review of these issues, DOL investigated these causation questions during its general revision of the black lung regulations. *See* 62 Fed. Reg. 3343 (Jan. 22, 1997); 64 Fed. Reg. 54978 (Oct. 8, 1999); and 65 Fed. Reg. 79938 (Dec. 20, 2000). DOL determined that the prevailing medical understanding was that coal dust exposure could in fact cause chronic obstructive disease, and could in fact be latent and progressive, absent complicated pneumoconiosis. Accordingly, DOL proposed changing the definition of pneumoconiosis to reflect this. 62 Fed. Reg. 3343 (Jan. 22, 1997).

After two hearings, two comment periods, and consultation with the National Institute for Occupational Safety and Health ("NIOSH"), DOL confirmed that coal mine dust exposure can cause chronic obstructive pulmonary disease, and that pneumoconiosis may be latent and progressive absent complicated pneumoconiosis.[5] This resulted in the present regulation at 20 C.F.R. § 718.201, specifically subsections 718.201(a)(2), (c).

In coming to that conclusion, DOL published preambles describing the development of, and bases for, section 718.201. Notably, the preamble beginning

[5] NIOSH is the statutory scientific advisor to the black lung program. 30 U.S.C. § 902(f)(1)(D).

at 65 Fed. Reg. 79938 (Dec. 20, 2000) explained why certain medical conclusions and/or studies were accepted and why others were rejected.[6]

In four published decisions, this Court has approved the use of the preamble in weighing medical opinions. *See Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483 (6th Cir. 2014) ("The sole issue presented here is whether the ALJ was entitled to discredit Dr. Rosenberg's medical opinion because it was inconsistent with the [DOL's] position set forth in the preamble, and the answer to that question is unequivocally yes."); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (explaining that, in considering the cause of the miner's COPD, the ALJ may consult the preamble "to assess the doctors' credibility"); *see also Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 601-02 (6th Cir. 2014); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013).

In addition, all the circuits that have considered the issue agree that the ALJ, as the fact finder, may use the preamble to assess the credibility of medical opinions: *Blue Mtn. Energy v. Director, OWCP*, 805 F.3d 1254, 1261 (10th Cir. 2015) (identifying the preamble as "a reasonable and useful tool for ALJs to use in evaluating the credibility of the science underlying expert reports that address the cause of pneumoconiosis"); *Peabody Coal v. Director, OWCP*, 746 F.3d 1119, 1125 (9th Cir. 2014) ("[T]he ALJ simply — and not improperly — considered the

[6] Hereinafter "preamble" refers to this December. 20, 2000, preamble.

regulatory preamble to evaluate conflicting expert medical opinions [on the etiology of a miner's COPD]."); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (holding ALJ could consider preamble "in assessing medical expert opinions [on whether smoking-related COPD can be distinguished from dust-related COPD]"); *Helen Min. Co. v. Director, OWCP*, 650 F.3d 248, 257 (3d Cir. 2011) (affirming ALJ's consideration of preamble which "unquestionably supports the reasonableness of his decision to assign less weight to [an] opinion."); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (finding ALJ's according less weight to an opinion in conflict with the preamble was "sensible"). *See generally Energy West Min. Co. v. Estate of Blackburn*, 857 F.3d 817 (10th Cir. 2017) (providing a comprehensive appraisal of factors to consider in weighing medical opinion evidence under the BLBA).

Of particular use to ALJs in the weighing of the medical opinions are the following preamble observations: "coal miners have increased risk of developing [COPD]," 65 Fed. Reg. 79943; "dust-induced emphysema and smoked-induced emphysema occur through similar mechanisms," *id.*; "[s]mokers who mine have additive risk for developing significant obstruction," *id.*; "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis," 65 Fed. Reg. 79940; "it is clear that a miner who may be asymptomatic and without significant impairment at retirement

can develop pulmonary impairment after a latent period," 65 Fed. Reg. 79971; and "[t]he relationship between hypersecretion of mucus (chronic bronchitis) and chronic airflow limitation (emphysema) on the one hand and the environmental factor of coal mining exposure on the other appear to be similar to those found for cigarette smoking, 65 Fed. Reg. 79939.

D. Procedural History

Claimant filed his claim for BLBA benefits in 2010. Appendix at (A.) 20. After reviewing evidence developed by the parties, the district director of DOL's Office of Workers' Compensation Programs concluded that Claimant was entitled to benefits. *Id.* Dissatisfied with this decision, the coal company requested an administrative hearing, which was held before Administrative Law Judge Larry S. Merck. *Id.*

The ALJ issued a decision on June 5, 2015, awarding Claimant benefits. A.19. Robert Coal appealed this award to the Benefits Review Board, which affirmed the ALJ's decision on May 26, 2016, A.12, and denied Robert Coal's motion for reconsideration on July 12, 2017, A.9. The coal company's petition to this Court followed on September 8, 2017. A.1.

E. Relevant Facts

1. General facts

Claimant was employed in coal mine work for almost nine years, ending in 1984. A.25. He does not have clinical pneumoconiosis, A.50, but suffers from totally disabling COPD, in the form of emphysema and bronchitis, A.53. He has smoked cigarettes for at least ten pack years, and presently smokes several cigarettes a day.[7] A.21-22.

2. Claimant's medical opinions[8]

Dr. Srinivas Ammisetty (A.57) examined Claimant pursuant to DOL's statutory obligation to provide each miner-claimant with a complete pulmonary examination.[9] *See supra* n.3. He reported that Claimant's COPD was due to smoking and coal mine employment, and that coal mine employment "significantly exacerbated" Claimant's pulmonary condition. A.60.

Dr. James Gallai (A.64, 173) reported that Claimant's COPD was due to coal mine employment and smoking, with coal mine employment being the more harmful of the two causes. A.66. While believing Claimant presently smoked

[7] A *pack year* is one pack of cigarettes per day for one year.

[8] The medical opinions, as well as the decisions below, are described only to the extent they directly relate to the two legal issues set forth in this brief.

[9] Dr. Ammisetty, like all the doctors discussed in this brief, is a Board-certified internist and pulmonologist. A.30, 32, 35, 41, 45.

only a few cigarettes a day, the doctor stated he would still consider that coal mine employment "contributed substantially" to the miner's COPD if it turned out Claimant smoked more or for a longer period. A.222. He stated "[i]t [was] impossible to apportion the exact amount from the cigarette smoking or the coal dust exposure. . . ." A.66. And added: "[B]ecause you have two processes going on. . . . You have the cigarette smoking and you have the coal dust exposure. They can overlap. They can not [sic] overlap. I don't think you can tell how much is from which." A.257.

Dr. Ronald Klayton (A.68, 80) reported that Claimant's COPD was due to smoking and coal mine employment, but that he "[could not] state the relative contributions of each. . . ." A.70. He explained that he "[couldn't] differentiate between the two," but that coal mine employment was "at least a contributing factor." A.124. *See also* A.162 ("So I can't say that it was exclusively smoking. . . .").

3. Robert Coal's medical opinions

Dr. David Rosenberg (A.276, 311) reported that it was possible to distinguish coal mine employment from smoking as the cause of a miner's COPD. If the FEV_1/FVC ratio obtained during pulmonary function testing is preserved, according to the doctor, the COPD is generally due to coal mine employment; if

the ratio is reduced, the COPD is generally due to smoking.[10] A.280-81, 319-20, 327, 330-31. Because Claimant's ratio was reduced, the doctor concluded Claimant's COPD was due to smoking. *Id.*; A.282-83, 347. Dr. Rosenberg explained he could also tell the difference between emphysema due to coal mine employment and emphysema due to smoking because, although both factors caused emphysema "through similar mechanisms," smoking destroyed lung tissue in a different manner because smoking particles are smaller than coal mine dust particles. A.285-86, 288, 322. Finally, the doctor opined that Claimant's bronchitis was not due to coal mine employment because "chronic bronchitis dissipates within months" of a miner ceasing coal mine employment. A.289.

Dr. Thomas Jarboe (A.297, 335), like Dr. Rosenberg, believed the FEV1/FVC ratio was critical in distinguishing the causes of Claimant's COPD. He stated that if the ratio is preserved, coal mine employment is the cause; if the ratio is reduced, smoking is the cause. A.305-06. And like Dr. Rosenberg, Dr. Jarboe opined that "the lapse between [Claimant's] last exposure to coal mine dust and the development of symptoms strongly indicates that the symptoms have not resulted from the inhalation of coal mine dust." A.307-08, 348-50.

[10] The FEV_1 value is the forced expiratory volume in one second, and the *FVC* value is the forced vital capacity. 20 C.F.R. § 718.103(a); *see Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 nn.6, 7 (7th Cir. 1988). A miner's FEV_1/FVC ratio of 55 or less is indicative of total respiratory disability. 20 C.F.R. § 718.204(b)(2)(i)(C).

F. Decisions Below

1. ALJ decision awarding benefits, A.19

Based upon the opinions of Drs. Ammisetty, Gallai, and Klayton, the ALJ found that Claimant's COPD was due in significant part to coal mine employment (therefore establishing legal pneumoconiosis and disease-causation), and that Claimant's total respiratory disability was significantly related to his legal pneumoconiosis (therefore establishing disability-causation), A.32, 35, 40, 50,54.

While the ALJ was aware that these three doctors were unable to precisely apportion the contributions of the two causal factors, he found this inability did not automatically render the opinions speculative. In support, the ALJ cited the Court's decisions in *Cornett v. Benham, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) (crediting doctor's causation opinion that impairment "could have been caused by either smoking or coal dust exposure" as "'tantamount to a finding that both coal dust exposure and smoking were operative factors and that it was impossible to allocate blame between them'"); and *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 358 (6th Cir. 2007) (concurring) (crediting doctor's causation opinion that coal mine employment "probably contributes to some extent in an undefinable portion" to the miner's respiratory impairment). A.34-35, 40.

While the ALJ credited the opinions of Claimant's doctors on the cause of Claimant's COPD, he conversely discredited the opinions of Robert Coal's

doctors, Dr. Rosenberg and Dr. Jarboe, both of whom believed that none of Claimant's COPD was due to his coal mine employment. A.44-45, 49. The ALJ rejected those opinions because, *inter alia*, their underlying rationale was contrary to the preamble of section 718.201. A.43-45, 48-49, 54. The ALJ noted, for instance, that both doctors eliminated coal mine employment as a cause because Claimant's FEV_1/FVC value was reduced, whereas coal mine employment, according to the two doctors, results in a preserved ratio. A.43-45, 48. The ALJ found this basis to be contrary to the preamble at 65 Fed. Reg. 79943, which states that "coal miners have an increased risk of developing COPD," and that the "COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC." A.44.

The ALJ also observed that Dr. Rosenberg's belief that coal-mine-related emphysema and smoking-related emphysema were distinguishable was contrary to the preamble at 65 Fed. Reg. 79939, which explains that "[t]he relationship between hypersecretion of mucus (chronic bronchitis) and chronic airflow limitation (emphysema) on the one hand and the environmental factor of coal mining exposure on the other appear to be similar to those found for cigarette smoking." A.45, quoting 65 Fed. Reg. 79939.

In addition, the ALJ questioned Dr. Jarboe's refusal to identify coal mine employment as a cause simply because Claimant's COPD developed a number of

years after the miner's last coal mine work. A.48. The ALJ found this basis to be contrary to the preamble at 65 Fed. Reg.79971 and to section 718.201 itself, which provides that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *Id.*

2. Board decision affirming the ALJ's award, A.9

The Board found that the ALJ properly credited Claimant's doctors (diagnosing COPD due to coal mine employment and smoking), even though they were unable to apportion the causes. The Board explained that a well-reasoned opinion that both coal mine employment and smoking caused a miner's respiratory disability did not become non-credible simply because a doctor "could not apportion how much of claimant's obstructive pulmonary disease was due to coal mine dust exposure and how much was due to cigarette smoking. . . ." A.16. The Board also found that, based upon this Court's decision in *A & E Coal Co. v. Adams*, 694 F.3d 798 (6th Cir. 2012), the ALJ properly discredited the opinions of Drs. Rosenberg and Jarboe because of their inconsistencies with the preamble. A.14-15.

SUMMARY OF THE ARGUMENT

For Claimant to be entitled to benefits, he had to prove that his totally disabling COPD was related at least in part to his coal mine employment. Claimant's doctors satisfied this standard by reporting that his COPD was due to

both coal mine employment and smoking. Robert Coal asserts that the opinions of these doctors are legally insufficient to prove the requisite cause because, while the doctors were definite that both coal mine dust and smoking contributed, they were unable to apportion the blame. The coal company asserts that the doctors' failure to apportion fault renders the opinions speculative. Not true. This Court in *Ramage* and *Cornett* held that as long as the doctors were clear and definite that contribution occurred, the exact apportionment is not required, especially since a miner's entitlement does not require that coal mine employment be the sole cause of the miner's respiratory disability.

The ALJ discredited the coal company's doctors because they based their opinions on, *inter alia*, reasoning inconsistent with the preamble to the black lung regulation at 20 C.F.R. § 718.201. That preamble provided explanation and a discussion of the scientific studies that led to the substance of the regulation. Robert Coal asserts that an ALJ cannot use the preamble in that manner without notice and comment. Again, not true. In four published decisions, this Court has held that the preamble is an acceptable tool in reviewing medical opinions as long as the preamble does not require reliance and the fact finder – the ALJ – does not view the preamble as binding. Neither occurred here. Consequently, Robert Coal's arguments are without merit.

ARGUMENT

A. Standard of Review

The two issues addressed in this brief present questions of law. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013).

B. The ALJ did not err in crediting the opinions of Claimant's doctors, despite the fact they could not apportion the causes of Claimant's COPD.

Drs. Ammisetty, Gallai, and Klayton all reported, without equivocation or speculation, that Claimant's COPD was due to his coal mine employment as well as to his smoking history, but they declined to apportion the responsibilities, explaining it was impossible to make that distinction. In its opening brief, Robert Coal asserts that the doctors' failure to apportion responsibility rendered their opinions speculative and therefore legally insufficient to establish the requisite causation. The Director disagrees, and so has this Court.

In *Ramage*, 737 F.3d at 1059, the Court addressed a coal company's argument that a doctor's opinion was speculative because he "could not determine the percentage of [the miner's] COPD caused by coal dust exposure as opposed to smoking," while acknowledging "that it [was] possible that all of [the mine's]

respiratory impairment was the result of smoking," and that the miner could have had "the same respiratory impairment even if [he] had never worked in a coal mine." *Id.* The Court rejected the argument, observing that, '[w]hile [the doctor] agrees that the symptoms *could* be caused by smoking alone, his medical opinion is clear that [the miner's] coal dust exposure and [his] long smoking history contributed to his COPD." *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (explaining it was not necessary for the doctor to allocate blame because, with the statutory definition of pneumoconiosis, the claimant "was not required to demonstrate that coal dust was the *only* cause of his current respiratory problems"). As in *Ramage*, all three Claimant's doctors here were clear and unwavering that Claimant's COPD was due to both coal mine employment and smoking, with uncertainty only related to the exact proportions.

Tellingly, however, Robert Coal does not cite or distinguish *Ramage*. And its attempt to distinguish *Cornett* is ineffectual. The coal company asserts that the *Cornett* Court's discussion concerning allocation of blame was *dicta* because the Court had already concluded that a remand was necessary based upon another ALJ error in weighing of the doctor's opinion. Opening brief at (OB) 20-21. Not so. The Court found many reasons for the remand, and did not give one priority over the other. In any event, even without *Cornett*, Robert Coal's argument sinks with *Ramage*.

Perhaps aware of the unfriendly waters within this Circuit and others, *see supra* pp. 9-10, Robert Coal spends much time in attempting to prove that the Court's decisions in *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010), and *Pluck v. PB Oil Pipeline Co.*, 640 F.3d 671 (6th Cir. 2011), bolster the coal company's speculation argument. OB 17-18. Not true. As a general matter, Robert Coal's application of these common-law toxic tort cases to a highly technical regulatory program grounded in policy concerns, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991), is problematic at best. For instance, the "differential diagnosis" technique used in the tort cases is designed to tease out a single cause of a medical condition. *Hardyman v. Norfolk & W. Ry. Co.* 243 F.3d 255, 260 (6th Cir. 2001) (explaining a *differential diagnosis* "identif[ies] *the* cause of a medical problem by eliminating likely causes until the most probable one is *isolated*") (emphasis added). But under DOL's black lung regulations, coal-mine dust exposure or pneumoconiosis may be one or several causes of, or factors in, a respiratory disease or impairment. 20 C.F.R. §§ 718.201(b), .204(c)(1).

Moreover, Congress envisioned the prompt and informal adjudication of black lung claims. It accordingly released the fact finder (here the ALJ) and the Board from "common law or statutory rules of evidence or by technical or formal rules of procedure. . . ." 33 U.S.C. § 923(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). In contrast, the company's tort decisions are facially inapposite

because they involve the question of whether expert medical testimony is admissible under section 702 of the Federal Rules of Evidence.[11]

That is not to say that the concerns addressed in section 702 of the Federal Rules are completely foreign to BLBA cases. Section 702's requirement that medical testimony be based on facts and data, and that it apply reliable principles and methods to the facts and data, is consistent with this Court's holding in *Director, OWCP v. Rowe*, 710 F.2d 251, 254-56 (6th Cir. 1983), that a medical opinion be both "reasoned and documented" to be credited under the BLBA. *See* 20 C.F.R. §§ 718.202(a)(4), .204(b)(2)(iv). Ultimately, however, the decision to credit a medical opinion lacking "an articulate rationale" is "essentially a credibility matter" left to the ALJ's fact finding discretion in BLBA cases. *Wolf Creek Collieries v. Stephens*, 298 F.3d 511, 522 (6th Cir. 2002); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000) (explaining that an ALJ may "discredit an opinion that lacks a thorough explanation, but is not legally compelled to do so"); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) (affirming an ALJ's credibility finding despite the employer's allegation that the doctor's opinion was conclusory).

[11] That section provides that an expert witness may testify if, *inter alia*, (1) "the testimony is based upon sufficient facts or data," (2) "the testimony is the product of reliable principles and methods," and (3) the witness "has reliably applied the principles and methods reliably to the facts of the case." Fed.R.Evid. 702.

Here, the opinions of Claimant's doctors were based upon solid ground, not speculation: without hesitation, they reported that both smoking and coal mine employment caused Claimant's COPD. To use the words of *Ramage*, the doctors were "clear that [the miner's] coal dust exposure and [his] long smoking history contributed to his COPD." And the doctors were able to be decisive because they relied on (1) facts specific to the miner, namely his physical examination, employment and smoking histories, and objective testing; and (2) the preamble's scientific and medical findings demonstrating a link between coal-dust exposure and the development of COPD independent of smoking, with the two exposures resulting in additive and similar effects. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 490 (6th Cir. 2012) (holding that the ALJ properly determined that medical opinions attributing miner's disability to smoking and coal dust inhalation constituted "reasoned medical judgment[s]" based on examination and testing of miner and scientific fact that both exposures cause "lung tissue destruction" and "shar[e] some cellular and biochemical mechanisms").

In any event, contrary to Robert Coal's understanding, the Court's *Tamraz* and *Plunk* decisions actually support rather than undermine the ALJ's decision in this case. Unlike the instant case, the doctors' opinions there were built on speculation (*Tamraz*) and insufficiently-developed evidence (*Plunk*).

In *Tamraz,* a products liability case turned on the cause of a welder's Parkinson's disease. The Court held the district court erred in allowing a neurologist to present a purely speculative opinion that manganese exposure could have caused the welder's Parkinson. The neurologist speculated that the welder was exposed to fumes presumably containing manganese, that manganese exposure theoretically could trigger Parkinson's disease, that this welder may have had genes predisposing him to Parkinson's and, therefore, that manganese exposure induced Parkinson's by triggering the welder's genetic pre-disposition. 620 F.3d at 670. The Court rejected the doctor's hypothesizing as based on multiple "leaps of faith," and was especially critical of his reliance on a theoretical link between manganese exposure and the development of Parkinson's when there was no scientific support for this premise in the first place. *Id*. In contrast, Claimant's doctors in the instant case identified coal mine employment as one of the causes of the miner's respiratory disability, and their opinions were based on the non-speculative (and undisputed) understanding that coal mine employment can in fact cause COPD.

In *Pluck*, the medical expert stated that the plaintiff's cancer was due to benzene exposure, but did not do his homework: he did not determine how much exposure the plaintiff actually suffered or whether the exposure was even in excess of safety regulations. The Court concluded: "[I]t is well-settled that the mere

existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff's symptoms." *Pluck*, 640 F.3d at 679. In contrast, Claimant's doctors considered his exposure to coal mine dust and the extent of his smoking history before opining concerning the cause of his disabling COPD. A. 57, 61, 64, 68.

C. The ALJ did not err in using the preamble to discredit Robert Coal's doctors.

The coal company asserts that the ALJ erred in using the preamble to section 718.201 to discredit the opinions of Drs. Rosenberg and Jarboe that Claimant's disabling COPD was solely due to smoking. OB 24-31. Specifically, the coal company argues that the preamble legally cannot undermine medical opinions because it was not subject to notice and comment and was written by lawyers rather than doctors. OB 26-27. The Director disagrees.

As noted *supra* p.9, this Court in *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012), specifically held that the preamble may be used to "assess . . . doctors' credibility," and that there was no need for notice-and-comment rulemaking. The Court explained: "Although the ALJ was not required to look at the preamble to assess the doctors' credibility, . . . the ALJ was entitled to do so. . . ." The Court subsequently reaffirmed its holding in *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 283, 491-92 (6th Cir. 2014) ("The sole issue presented here is whether the ALJ was entitled to discredit [a] medical opinion because it

was inconsistent with DOL['s] . . . preamble, and the answer to that question is unequivocally yes . . . .") (citations omitted); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017) (affirming ALJ's use of preamble to discredit Dr. Rosenberg's ratio theory).

Notably, the only limitations the Court has put on the use of the preamble in assessing credibility is that the preamble must not suggest that it is binding, and the ALJ must not treat the preamble as if it were binding. *Adams*, 694 F.3d at 801. The first criterion is eliminated because the Court in *Adams* specifically found no suggestion of binding effect in the preamble. *Id.* And the second criterion is met by a close look at the ALJ's language when he discredited the opinions because of inconsistency with the preamble. Concerning Dr. Rosenberg, the ALJ noted:

> Dr. Rosenberg stated that . . . the ratio of FEV_1/FVC generally is preserved [when caused by coal mine employment]. . . . Although Dr. Rosenberg apparently disagrees, the Department of Labor, in consultation with the National Institute of Occupational Safety and Health (NIOSH), concluded that coal mine dust exposure may cause COPD, with associated decrements in FEV_1/FVC . . . [citing the preamble at 65 Fed. Reg. at 79,943] . . . . Because Dr. Rosenberg relied on a faulty premise that contradicts a legislative fact, Dr. Rosenberg's opinion is entitled to diminished weight.

A.43-44. The ALJ noted further:

> Dr. Rosenberg's comment that emphysema caused by coal dust exposure will manifest itself differently than emphysema caused by smoking is contrary to the position of the Department of Labor. *See* 65 Fed. Reg. 79939 (citing with approval a study which found that "[t]he relationships between hypersecretion of mucus (chronic bronchitis) and chronic airflow limitation (emphysema) on the one

> hand and the environmental factor of coal mining exposure on the other appear to be similar to those found for cigarette smoking"). I therefore find that the manifestation of Claimant's impairment is not a credible basis for the opinion that coal dust played no contributing role in Claimant's obstructive lung impairment.

A.27.

Concerning Dr. Jarboe, the ALJ observed that the doctor's premise – that a miner's reduced FEV_1/FVC ratio was unrelated to coal mine employment – was "somewhat antithetical to the findings of the National Institute for Occupational Safety and Health (NIOSH), which were cited with approval by the Department of Labor." A.48 (citing 65 Fed. Reg. 79943). The ALJ then observed that the doctor's "premise [was] 'contrary to legislative fact,'" [citing the preamble at 65 Fed. Reg. 79940, 79943], and concluded "that [Claimant's] reduced FEV_1/FVC ratio is not an adequate basis for Dr. Jarboe's opinion that cigarette smoking, alone, caused Claimant's COPD." *Id.*

Finally, in discrediting Dr. Jarboe's determination that Claimant's COPD was not due to coal mine employment because of the length of time before the COPD presented itself, the ALJ observed: "Dr. Jarboe's statements regarding the period of time since Claimant's coal mine employment ceased is at odds with the

Department of Labor's determination that coal mine dust exposure can cause a chronic pulmonary impairment after a latent period."[12] A.30.

There is nothing in these comments indicating the ALJ's belief that he was bound by the preamble. There is no coercive-type language, and the very fact that the ALJ identified the preamble's statements as a legislative fact dispels coercion: a fact finder may take judicial notice of a legislative fact, but he/she is not required to do so. *United States v. Husein*, 478 F.3d 318, 337 (6th Cir. 2007) ("Judicial notice is typically a discretionary function.").

Robert Coal argues that *Adams* can be distinguished because there, the ALJ's reliance on the preamble was limited, whereas the ALJ in this case primarily relied upon the preamble in weighing the medical opinions. OB 28-29. The hole in this argument, however, is obvious: the Court made it clear in *Adams* what its qualifications were concerning use of the preamble. An ALJ's frequency of use was not one of the qualifications.

Robert Coal's final argument concerning the preamble is that it was written by lawyers, not scientists. OB 26-27. This is an odd complaint since the preamble is a "public law document," like the Act and regulations. *See Adams*, 694 F.3d at

[12] Notably, Dr. Jarboe's opinion is not only inconsistent with the preamble, it is inconsistent with section 718.201(c), which provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine employment." *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (affirming ALJ's discrediting of doctor's opinion as inconsistent with section 718.201(c)).

802. In any event, Congress enlisted NIOSH to be the statutory scientific advisor to the black lung program. 30 U.S.C. § 902(f)(1)(D). In revising the regulatory definition of pneumoconiosis, the Department sought and received guidance from NIOSH, which supported the scientific analysis contained in the preamble. 65 Fed. Reg. 79937.

CONCLUSION

The ALJ correctly determined that the ALJ was not required to give less weight to the opinions of Drs. Ammisetty, Gallai, and Klayton that Claimant's COPD was due to his coal mine employment as well as his smoking, merely because the doctors were not sure how the blame was divided. The ALJ also

permissibly discredited the opinions of Drs. Rosenberg and Jarboe because the bases of their causation opinions were inconsistent with the preamble.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 6699 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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