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

---

**No. 19-1103**

**WESTMORELAND COAL COMPANY**
**Petitioner**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and RONNIE A. STIDHAM**
**Respondents**

---

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

---

# BRIEF FOR THE FEDERAL RESPONDENT

---

**KATE S. O'SCANNLAIN**
Solicitor of Labor
**BARRY H. JOYNER**
Associate Solicitor
**GARY K. STEARMAN**
Counsel for Appellate Litigation
**ANN MARIE SCARPINO**
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

Attorneys for the Director, Office of Workers' Compensation Programs

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**TABLE OF AUTHORITIES (cont.)**

## TABLE OF AUTHORITIES (cont.)



**Statutes**

# TABLE OF AUTHORITIES (cont.)

## Regulations



## Miscellaneous

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

---

**No. 19-1103**

**WESTMORELAND COAL COMPANY**
**Petitioner**

**v.**

**DIRECTOR, OFFICE OF WORKERS'COMPENSATION PROGRAMS, UNITED STATES DEPARTMENTOF LABOR, and RONNIE A. STIDHAM**
**Respondents**

---

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

---

# BRIEF FOR THE FEDERAL RESPONDENT

---

## STATEMENT OF JURISDICTION

This case involves a 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 Ronnie A. Stidham. On August 18, 2017, United States Department of Labor (DOL) Administrative Law Judge Alan L. Bergstrom (ALJ) issued a decision and order awarding benefits. Westmoreland Coal Company (Westmoreland) appealed the ALJ's decision to DOL's Benefits

Review Board (Board) on September 12, 2017, 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).

On November 26, 2018, the Board affirmed the award of benefits. Westmoreland then filed its petition for review on January 25, 2019. 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 where the injury occurred. Stidham's exposure to coal mine dust – the injury contemplated by 33 U.S.C. § 921(c) – occurred in the Commonwealth of Virginia, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Westmoreland's petition for review.

## STATEMENT OF THE ISSUES

It is undisputed that Stidham, who worked in the mines for twenty-two years until 1995, suffers from chronic bronchitis and is totally disabled. It is likewise undisputed that the ALJ properly invoked the fifteen-year presumption of total disability due to pneumoconiosis. The burden then shifted to Westmoreland to rebut the presumption by establishing that Stidham does not suffer from clinical and legal pneumoconiosis, or that pneumoconiosis plays no part in his total respiratory disability.

1. Westmoreland's experts (Drs. Rosenberg and Zaldivar) opined that Stidham does not have legal pneumoconiosis because chronic bronchitis due to coal dust exposure dissipates soon after exposure ceases. The ALJ rejected their opinions because they were impermissibly premised on a belief contrary to 20 C.F.R. § 718.201(c), which recognizes that clinical and legal pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." Moreover, the ALJ determined that Dr. Rosenberg's opinion impermissibly relied on general statistics rather than the specific circumstances concerning Stidham's health. The ALJ thus concluded that Westmoreland failed to disprove the existence of pneumoconiosis.

Is the ALJ's discrediting of the opinions of Drs. Rosenberg and Zaldivar on legal pneumoconiosis supported by substantial evidence and in accordance with law?

2. Relying on longstanding precedent in this circuit, the Board determined that the opinions of Drs. Rosenberg and Zaldivar were not credible regarding the cause of Stidham's disability because they failed to diagnose pneumoconiosis in the first instance. Westmoreland's opening brief does not address the Board's ruling at all.

Has Westmoreland waived any challenge to the finding that it failed to rebut the presumption of disability causation?

## STATEMENT OF FACTS

### A. Statutory and Legal Background

The BLBA provides for disability compensation and medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis is "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).

There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201. "Clinical 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). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is "significantly related to, or substantially aggravated by" dust exposure in coal mine employment is legal pneumoconiosis; coal mine dust need not be the disease's sole or even

primary cause. 20 C.F.R. § 718.201(b). The regulatory definition of "pneumoconiosis" further provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

Coal miners seeking federal black lung benefits must prove that (1) they suffer from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) they are totally disabled by a respiratory or pulmonary impairment; and (4) the pneumoconiosis contributes to the totally disabling impairment. 20 C.F.R. § 725.202(d); *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 207 (4th Cir. 2000). These elements are generally referred to as "disease," "disease causation," "disability," and "disability causation."

The elements of entitlement can be established with medical evidence or by presumption. One such presumption is 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," which the ALJ applied here. The fifteen-year presumption is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from a "totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If those criteria are met, then it is presumed that the

miner is totally disabled by pneumoconiosis, and therefore entitled to benefits. *Id.; Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013).

Once a miner invokes the fifteen-year presumption, the burden shifts to the employer to rebut it by demonstrating (1) that the miner does not have pneumoconiosis arising out of coal mine employment or (2) that "no part" of the miner's disability was caused by pneumoconiosis. 20 C.F.R. § 718.305(d); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015). To satisfy its burden under the first method of rebuttal, the employer must demonstrate that the miner has neither clinical nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i). To satisfy its burden under the second method, the employer must "rule out" pneumoconiosis as a cause of the miner's disability. *West Virginia CWP Fund v. Bender,* 782 F.3d 129, 141 (4th Cir. 2015); 20 C.F.R. § 718.305(d)(1)(ii).

**B. Relevant Medical Evidence**

It is undisputed here that Stidham is entitled to the fifteen-year presumption of total disability due to pneumoconiosis based on his twenty-two years of coal mine employment (ending in 1995) and total respiratory disability. Joint Appendix (JA) 387 n.4; Westmoreland's Opening Brief

(OB) 4. This summary is thus limited to describing the medical evidence relevant to rebuttal of the presumption.[1]

*Dr. Ajarapu's initial report*

On June 4, 2014, Dr. Ajarapu performed the DOL-sponsored complete pulmonary evaluation. JA 22-48; *see* 30 U.S.C. § 923(b) (giving each claimant-miner an opportunity to substantiate his or her claim with a complete pulmonary evaluation); 20 C.F.R. § 725.406(a) (outlining contents of the evaluation). Dr. Ajarapu performed a physical examination, took medical and social histories, and conducted pulmonary function tests (PFTs), arterial blood gas (ABG) studies, and a chest x-ray.[2] JA 22-48. She diagnosed chronic bronchitis due to coal dust exposure and smoking, and

[1] We also do not summarize the evidence on clinical pneumoconiosis because the Board's affirmance of the ALJ's finding that Westmoreland failed to disprove the existence of pneumoconiosis rested solely on the company's failure to disprove the existence of legal pneumoconiosis. JA 390, 390 n.12.

[2] Pulmonary function tests, also called spirometry, "measure the degree to which breathing is obstructed." *See Yauk v. Director, OWCP,* 912 F.2d 192, 196 n.2 (8th Cir. 1989). These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two points. *See* Occupational Safety and Health Administration, U.S. Department of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), *available at* https://www.osha.gov/Publications/OSHA3637.pdf.

explained that "[b]oth coal dust and tobacco smoking cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms." JA 29. Dr. Ajarapu concluded that Stidham's positive response to bronchodilators "point[ed] to dual etiology and basis for pulmonary impairment."[3] JA 30. She further explained that Stidham's coal dust exposure contributes to his severe pulmonary impairment to a greater degree than his tobacco use because the miner's history of coal dust exposure (reported as 28 years) was longer than his smoking history (reported as 7 years). JA 30.

*Dr. Rosenberg's written report*

On November 14, 2014, Dr. Rosenberg performed a pulmonary evaluation of Stidham and reviewed Dr. Ajarapu's report at Westmoreland's request, and issued a written report. JA 139-177. Dr. Rosenberg reported that Stidham worked for twenty-eight years at the face of the mine where there was "a lot of dust exposure" and "smoked a minimal amount in the remote past." JA 140-41. He diagnosed a totally disabling obstructive pulmonary impairment, JA 142, but opined it was "unrelated in whole or part to past coal mine dust exposure." JA 147. Rather, Dr. Rosenberg

[3] Bronchodilators are medications used to expand the channels of the air passages of the lungs. *See Dorland's Illustrated Med. Dictionary* 253 (32nd ed. 2012).

attributed Stidham's pulmonary obstruction to cigarette smoking based on his interpretation of the miner's PFT results – specifically the marked reduction in the FEV1/FVC ratio. JA 144. According to Dr. Rosenberg, when coal dust causes an impairment, the FEV1/FVC ratio is preserved or only mildly reduced; when smoking causes an impairment, the FEV1/FVC ratio is reduced. JA 144-146.

Dr. Rosenberg further observed that Stidham's PFT results did not fully normalize on bronchodilation, and that this failure to normalize "probably relates to airway remodeling in relationship to asthma." JA 147.

Finally, Dr. Rosenberg claimed that any chronic bronchitis that Stidham suffers from is not related to coal dust because chronic bronchitis dissipates "within months of the time" that exposure ceases. JA 146. He asserted that

> it is direct irritation of airway lining cells by dust inhalation that causes the associated cough and sputum production. Hence, if coal dust's irritant effect is no longer occurring because coal dust exposure has ceased, it is only logical that the associated cough and sputum production will no longer be occurring.

JA 146-147.

*Dr. Ajarapu's supplemental report*

At DOL's request, Dr. Ajarapu submitted a supplemental report on April 8, 2015, that responded to Dr. Rosenberg's report. JA 184-187. Dr.

Ajarapu disagreed with Dr. Rosenberg that Stidham's chronic bronchitis necessarily would have dissipated once he left the mines. JA 186. She explained that Dr. Rosenberg failed to

> [a]ccount for the particles that get deposited and are not cleared by natural mechanisms, on chronic basis. These particles are embedded in the parenchyma of airway tissues, which continue to exert and cause mucous production even after years of exposure and this is a known mechanism of inflammatory response.

*Id.* at 186.

Dr. Ajarapu also disputed Dr. Rosenberg's belief that Stidham's reduced FEV1/FVC ratio established a smoking-related impairment. JA 187. She explained that the ratio generally characterizes the nature of the pulmonary impairment: a reduced ratio indicates an obstructive impairment, an increased ratio a restrictive impairment. *Id.* She emphasized, however, that coal dust can cause an obstructive, restrictive, or mixed pulmonary impairment depending on the particular circumstances of the exposure. Accordingly, she concluded that "there are volumes of research out there to support this view that coal dust can cause reduced FEV1/FVC ratio and doesn't have to be strictly tobacco abuse alone." *Id.*

*Dr. Zaldivar's report and deposition*

Dr. Zaldivar reviewed Stidham's medical records, including the reports of Drs. Rosenberg and Ajarapu. He submitted a written report on

Westmoreland's behalf on September 26, 2016, and was deposed by Westmoreland's counsel on November 14, 2016. JA 232-235; 266-305.

Unlike the other doctors, Dr. Zaldivar definitively diagnosed asthma. JA 235. He believed that "over the years" the asthma has caused "remodeling of the lungs," resulting in an "asthma-COPD overlap syndrome" that is partly related to smoking but not at all due to coal dust exposure. *Id*. He asserted that the asthma is unrelated to Stidham's work because "neither silica nor coal are allergenic substances." JA 234. He further opined that Stidham's bronchitis is not due to his work, agreeing with Dr. Rosenberg that industrial bronchitis "resolves once the individual leaves the dusty area." *Id*.

At deposition, Dr. Zaldivar further explained that "coal workers' pneumoconiosis should not cause chronic bronchitis, especially if one doesn't see much in the chest x-ray in the way of profusion." JA 285-286, 287. Dr. Zaldivar disputed Dr. Ajarapu's opinion that dust particles deposited in the lungs are not cleared by natural mechanisms, asserting that particles deposited in the large airways are trapped and incorporated into the bronchial tissue, where they do not produce any irritation. JA 289.

*Dr. Rosenberg's deposition*

Dr. Rosenberg was deposed by Westmoreland's counsel on November 16, 2016.[4] JA 306-335. Prior to deposition, Dr. Rosenberg reviewed, among other records, the report of Dr. Zaldivar (who, in turn, had reviewed Dr. Rosenberg's prior report). Dr. Rosenberg now clearly opined that Stidham suffers from asthma with airways remodeling. JA 312-313, 316-317. (Before his written report had mentioned these conditions only in passing and equivocated on their existence. JA 147.). Dr. Rosenberg also stated that Stidham has a "phenotype of COPD," which occurs in long-term asthmatics who are not treated appropriately because chronic bronchospasm leads to scarring of the airway.[5] JA 316-317, 320-21.

Dr. Rosenberg confirmed that Stidham has chronic bronchitis, which he defined as "simply cough and sputum production." JA 318. He attributed this condition to asthma, and reiterated that bronchitis is "expected to dissipate" once exposure to coal dust ceases. JA 318-319. He further testified that coal dust does not cause or contribute to asthma, but admitted

[4] Stidham, who was not represented by an attorney before the ALJ, did not cross-examine Westmoreland's experts. JA 267, 307, 336.

[5] Notably, Dr. Rosenberg acknowledged that Stidham was taking several medications for asthma when he examined Stidham, and he pointed to no evidence indicating Stidham's asthma had not been properly treated. JA 321. In addition, neither Dr. Rosenberg nor Dr. Zaldivar identified the basis for their belief that Stidham was a "long-term" asthmatic. JA 235, 316.

that coal dust could cause bronchospasm while an asthmatic person works in the mines. JA 316.

**C. Decisions Below**

*The ALJ awards benefits.*

The ALJ issued a decision and order on August 18, 2017 awarding benefits to Stidham. JA 336-365. He invoked the fifteen-year presumption of total disability due to pneumoconiosis and found that Westmoreland had failed to rebut it.

The ALJ credited Dr. Ajarapu's opinion that Stidham's pulmonary disease is a result of coal mine dust exposure and smoking. He determined that her opinion was well-reasoned and well-documented, finding Dr. Ajjarapu credibly explained how coal dust exposure continues to cause symptoms of bronchitis after exposure ends, and why Stidham's condition is related to both coal dust and smoking. JA 360-361.

On the other hand, the ALJ discounted the opinions of Drs. Rosenberg and Zaldivar on both the existence of legal pneumoconiosis and disability causation. First, the ALJ rejected their respective opinions that Stidham's chronic bronchitis is not be related to coal dust exposure because chronic industrial bronchitis dissipates once exposure ceases. He found their view to be inconsistent with DOL's regulation recognizing pneumoconiosis as a

latent and progressive disease that may first become detectable only after exposure to coal mine dust ends. JA 360 (citing 20 C.F.R. § 718.201(c); *Sunny Ridge Mining Co. v. Keathley,* 773 F.3d 734 (6th Cir. 2014)). Second, the ALJ rejected their opinions because both flatly denied any possible relationship between coal dust exposure and asthma, whereas the regulations (*i.e.*, the definition of legal pneumoconiosis) allow for it. JA 360-361.

Third, the ALJ rejected Dr. Rosenberg's opinion that Stidham's chronic bronchitis cannot be due to coal dust because chronic bronchitis resolves for "most patients" within 12 months, finding that position based on general statistics rather than Stidham's particular circumstances. JA 360.

Finally, the ALJ rejected Dr. Rosenberg's opinion that coal dust exposure did not cause Stidham's impairment because his FEV1/FVC ratio was reduced. JA 361. The ALJ found Dr. Rosenberg's reasoning inconsistent with DOL's position set forth in the preamble that the FEV1/FVC ratio may be reduced in COPD caused by coal dust exposure. *Id.* (citing *Central Coal Co. v. Director, OWCP*, 762 F.3d 483 (6th Cir. 2014); *Quarto Mining Co. v. Marcum*, 604 Fed. App'x 477 (6th Cir. 2015)).[6]

[6] This Court has likewise held that "Dr. Rosenberg's hypothesis regarding the FEV1/FVC ratio runs directly contrary to the [DOL's] own conclusions." *Westmoreland Coal Co. v. Stallard* [*Stallard*], 876 F.3d 663, 671 (4th Cir.

Having discredited Westmoreland's expert opinions, the ALJ accordingly found the fifteen-year presumption unrebutted and awarded benefits.

*The Board affirms the award of benefits.*

The Board affirmed the ALJ's award on November 26, 2018. JA 386-392. First, it affirmed, as unchallenged on appeal, the ALJ's invocation of the fifteen-year presumption. JA 387 n.4. It then turned to rebuttal. It affirmed the ALJ's discrediting of Westmoreland's expert opinions regarding the cause of Stidham's chronic bronchitis because they were inconsistent with 20 C.F.R. § 718.201(c) and *Sunny Ridge*, *supra*. JA 389-390, 390 n.9. Second, it upheld that ALJ's discounting of Dr. Rosenberg's opinion because he relied on generalities rather than the particular facts regarding Stidham's medical condition. JA 390 (citing *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 316-17 (4th Cir. 2012); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997)). Last, the Board rejected Drs. Rosenberg's and Zaldivar's opinions on disability causation because they failed to diagnose pneumoconiosis in the first instance, contrary to the ALJ's finding. JA 391, 391 n.13 (citing *Hobet Mining, LLC,* 783 F.3d at

---

2017) (upholding ALJ's rejection of Dr. Rosenberg's causation opinion on this basis).

505, *quoting Scott v. Mason Coal Co.,* 289 F.3d 269-270 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.,* 43 F.3d 109, 116 (4th Cir. 1995)).

## SUMMARY OF THE ARGUMENT

The Court should affirm the award of benefits. It is undisputed that the ALJ properly invoked the fifteen-year presumption of total disability due to pneumoconiosis. To defeat entitlement, Westmoreland was required to establish that Stidham does not suffer from clinical and legal pneumoconiosis, or that pneumoconiosis plays no part in his total respiratory disability.

Westmoreland, however, failed to disprove the existence of legal pneumoconiosis. The ALJ properly discredited the opinions of Westmoreland's experts ( Drs. Rosenberg and Zaldivar) that Stidham's chronic bronchitis is not due to coal dust exposure because they were impermissibly premised on a belief contrary to 20 C.F.R. § 718.201(c), which recognizes that clinical and legal pneumoconiosis may become manifest after "the cessation of coal dust exposure." Moreover, the ALJ permissibly determined that Dr. Rosenberg's opinion impermissibly relied on general statistics rather than the specific circumstances concerning Stidham's health.

Westmoreland has also waived any challenge to the finding that it failed to establish that pneumoconiosis plays no part in Stidham's disability. Relying on long-established precedent in this circuit, the Board found that the opinions of Drs. Rosenberg and Zaldivar were not credible regarding the cause of Stidham's disability because they erroneously failed to diagnose pneumoconiosis in the first instance. Westmoreland's opening brief does not address this determination at all. Accordingly, Westmoreland waived any challenge to its failure to rebut the presumption of disability causation.

## ARGUMENT

### A. Standard of Review

This case presents issues of law and fact. The Court reviews an ALJ's findings of fact to determine whether they are supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Substantial evidence is of "sufficient quality and quantity 'as a reasonable mind might accept as adequate to support' the finding under review." *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389 (1971)). The Court must "defer to the ALJ's determination regarding the proper weight to be accorded competing medical evidence, and [the Court] must be careful not to substitute [its] judgment for that of the ALJ." *West Virginia CWP*

*Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015) (internal quotation marks omitted).

The Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). 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), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted); *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007).

The Court confines its review of an order of the Board awarding benefits under the BLBA to "the grounds actually invoked by the Board" in affirming the ALJ's decision. *Island Creek Coal Co. v. Henline,* 456 F.3d 421, 426 (4th Cir. 2006).

**B. The ALJ's determination that Westmoreland failed to rebut the presumption of legal pneumoconiosis is rational and supported by substantial evidence.**

1. The ALJ permissibly discredited the opinions of Drs. Rosenberg and Zaldivar that Stidham does not suffer from legal pneumoconiosis because they were based on a premise inconsistent with DOL regulation 20 C.F.R. § 718.201(c).

Once the ALJ determined that Stidham was entitled to the 15-year presumption, the burden shifted to Westmoreland to rebut the presumption by establishing that Stidham does not suffer from clinical and legal pneumoconiosis, or that pneumoconiosis plays no part in his total respiratory disability. 20 C.F.R. § 718.305(d). To satisfy this burden, Westmoreland proffered the opinions of Drs. Rosenberg and Zaldivar. Both doctors opined that Stidham's chronic bronchitis was not related to his previous twenty-two years of coal dust exposure (ending in 1995) because chronic bronchitis dissipates once exposure ceases. The ALJ found this view at odds with 20 C.F.R. § 718.201(c), which recognizes pneumoconiosis as a latent and progressive disease that may first become detectable only after exposure to coal mine dust ends, and accordingly discredited the doctors' diagnosis of no legal pneumoconiosis. The Court should affirm the ALJ's finding.

It is well-established that an ALJ may reject a medical opinion that is contrary to the BLBA or its implementing regulations. *Stallard,* 876 F.3d at 671; *Lewis Coal Co. v. Director, OWCP,* 373 F.3d 570, 580 (4th Cir. 2004):

*see also Harman Mining Co.*, 678 F.3d at 311 (collecting cases) ("a robust body of case law holds that an ALJ should not credit expert opinions of doctors who rely on facts or premises that conflict with the Act").

In particular, an ALJ may discredit a medical opinion that runs counter to the definition of pneumoconiosis at 20 C.F.R. § 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 dust exposure." *See Hobet Mining LLC,* 783 F.3d at 503 (affirming ALJ's finding that doctor's opinion – "that it would be unusual for [the miner] to have pneumoconiosis ten years after he ended his coal mine employment" – was "not in accord with the accepted view that [coal workers' pneumoconiosis] is both latent and progressive") (internal quotation marks omitted); *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 999 (7th Cir. 2005) (affirming ALJ's discrediting of doctor's opinion – that the miner's pulmonary condition could not be due to coal mine dust exposure since he was no longer working in the mines – as contrary to the regulation finding that pneumoconiosis may be latent and progressive); *see also Eastern Assoc. Coal Corp. v. Director, OWCP*, 805 F.3d 502, 512 (4th Cir. 2015) (rejecting coal company's argument that

simple, clinical pneumoconiosis and legal pneumoconiosis are not latent or progressive).

And directly relevant here, the Sixth Circuit has applied these principles in the chronic bronchitis context. *Sunny Ridge Mining. Co., Inc. v. Keathley*, 773 F.3d 734 (6th Cir. 2014). There, Dr. Broudy, the coal company's expert, opined that the miner's chronic bronchitis could not be legal pneumoconiosis because chronic bronchitis due to coal dust dissipates once exposure ceases. In affirming the ALJ's rejection of the opinion as inconsistent with Section 718.201(c), the court explained that

> Dr. Broudy's statement about coal mine dust-related chronic bronchitis was a statement about a form of legal pneumoconiosis. . . "Legal pneumoconiosis" is a broad category encompassing "*any* chronic lung disease or impairment" arising out of employment as a coal miner. . . . Chronic bronchitis, when caused by exposure to coal mine dust, is a form of legal pneumoconiosis.
>
> Federal regulations recognize pneumoconiosis, including legal pneumoconiosis, as a latent and progressive disease that may first become detectable after cessation of coal dust exposure. This conclusion is compelled by previous decisions of this circuit. . . . These decisions are consistent with a plain reading of the regulation. Subsection (a) of 20 C.F.R. § 718.201 defines "pneumoconiosis" as "includ[ing] both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." The word "pneumoconiosis" in subsection (c) of that same section is not specifically limited to either type of pneumoconiosis. 20 C.F.R. § 718.201(c). It therefore applies to both. As the Fourth Circuit stated in *Barber v. Director, Office of Workers' Compensation Programs,* 43 F.3d 899, 901 (4th Cir.1995), "[t]he legal definition of 'pneumoconiosis' is

> incorporated into every instance the word is used in the statute and regulations."

773 F.3d at 738-39 (citations omitted). The court concluded that while Dr. Broudy's opinion could have been interpreted as consistent with the BLBA (as the coal company urged), substantial evidence supported the ALJ's reading of the opinion.[7] It therefore upheld the ALJ's rejection of the opinion as contrary to the black lung regulations. *Id*. at 739.

The Sixth Circuit subsequently followed *Sunny Ridge* in *Consol. of Ky., Inc. v. Eskut*, 734 F. App'x 964, 969 (6th Cir. 2018) (upholding ALJ's rejection of doctor's opinion that industrial bronchitis dissipates after leaving the mines as contrary to Section 718.201(c)). And this Court has likewise upheld an ALJ's discrediting of a doctor's opinion that a miner's bronchitis "usually ceases with cessation of exposure" on the ground that it was inconsistent with Section 718.201(c)'s "latent and progressive" provision. *Westmoreland Coal Co., Inc. v. Fortner*, 671 F. App'x 231 (4th Cir. 2016)

---

[7] *Accord Piney Mountain Coal Co.*, 176 F.3d at 764 ("[W]e must review the ALJ's reading of Dr. Stefanini's opinion through the prism of the "substantial evidence" standard. . . . [T]o overturn the ALJ, we would have to rule as a matter of law that no "reasonable mind" could have interpreted and credited the doctor's opinion as the ALJ did."); *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (noting that it would have been possible to read doctor's opinion as not hostile to the BLBA, but holding "on substantial evidence review we would have to find that the latter interpretation was the only permissible one, not that it was one of several").

(per curiam), *affirming Fortner v. Westmoreland Coal Co,. Inc.*, BRB No. 14-0412, 2015 WL 6087285 (Ben. Rev. Bd. 2015).

The ALJ's decision here thus falls squarely within this well-established precedent, and Westmoreland has provided no compelling reason to depart from it. *See* OB 16-17. The opinions of Drs. Zaldivar and Rosenberg rest on the same impermissible assumption as Dr. Broudy's in *Sunny Ridge*.[8] Moreover, their assumption is not supported by "medical authorities or publications," as Westmoreland claims. OB 17. Westmoreland does not identify these supposed authorities, and none was submitted into the record for the ALJ's consideration. Certainly, Westmoreland has not met its "heavy burden of showing that the [Secretary]

[8] Westmoreland argues that its expert opinions should have been credited because they rest on scientific principles concerning the "very reaction of the nature of the lungs to coal deposits of coal mine dust." OB 15-16 (citing Dr. Zaldivar's deposition testimony that dust particles are either eliminated from the lungs or become embedded and no longer produce symptoms). The ALJ, however, found that Dr. Ajjarapu's contrary opinion – that embedded particles in the lung tissue continue to produce mucous even years after dust exposure ends – was more persuasive and credible. JA 350. Although the Board declined to address the ALJ's crediting of Dr. Ajarapu's opinion, JA 390 n.11, this Court has repeatedly explained that it is the province of the ALJ, not the Court, to weigh and resolve conflicting medical opinions. *See e.g. West Virginia CWP Fund*, 782 F.3d at 144 (court defers to ALJ's determination regarding proper weight to be given competing medical evidence); *Westmoreland Coal Co., Inc. v. Cochran,* 718 F.3d 319, 324 (4th Cir. 2013) (observing that it is the ALJ's role, not the courts, to resolve the "battle of the experts," and upholding ALJ's decision to credit medical opinion that aligned with science in the preamble over contrary opinions).

was not entitled to use [her] delegated authority to resolve the scientific question in this manner." *Eastern Assoc. Coal Corp.*, 805 F.3d at 512; *Midland Coal Co.*, 358 F.3d at 490 (noting that the court would "credit the position adopted in benefits proceedings by the Department of Labor" on a question of scientific fact "unless the mine operators produced the type and quality of medical evidence that would invalidate a regulation").

2. The ALJ reasonably discredited Dr. Rosenberg's opinion on legal pneumoconiosis because it was based on generalities rather than the specific facts concerning Stidham's medical condition.

In addition to discrediting Dr. Rosenberg's opinion for being inconsistent with Section 718.201(c), the ALJ discounted the doctor's opinion because it was based on his belief that the symptoms of chronic bronchitis in "most patients" end within three months after the exposure causing the symptoms ceases. JA 360. The ALJ properly concluded that Dr. Rosenberg's reliance on general statistics rather than Stidham's actual circumstances rendered his opinion unpersuasive. *See Harman Mining Co.,* 678 F.3d at 312 (judge permissibly discounted medical opinion that relied on statistics to distinguish effects of smoking and coal dust).

Westmoreland did not address this additional reason in its opening brief, and so, waived any objection to the finding. *See infra* Argument C. Thus, the ALJ's rejection of Dr. Rosenberg's no-legal pneumoconiosis

opinion must stand, irrespective of the ALJ's determination that the diagnosis also conflicted with Section 718.201(c). *Harman Mining Co.*, 678 F.3d at 313 ("[E]ven if we were to agree ... that the ALJ's invocation of the preamble in discrediting [an expert's] opinion was improper (which we do not), any such error would likely be harmless because the ALJ provided [ ] independent reasons ... for dismissing [the] opinion."); *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 213 n.13 (4th Cir. 2000) (declining to reach the employer's other arguments that the ALJ erred in discrediting doctors' opinions "in light of [the reviewing court's] conclusion that there was a sufficient factual basis to support one reason for discrediting each opinion").

**C. The Board correctly determined that Westmoreland's expert opinions failed to rebut the presumption of disability causation.**

The second way that that Westmoreland could have rebutted the fifteen-year presumption was to prove that pneumoconiosis plays no part in Stidham's total respiratory disability. 20 C.F.R. § 718.305(d)(1)(ii). The Court should affirm the decision below that Westmoreland failed to do so.

This Court has consistently held that "opinions that erroneously fail to diagnose pneumoconiosis may not be credited at all, unless an ALJ is able to identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon the doctor's misdiagnosis." *Hobet Mining LLC,* 783 F.3d at 505 (internal

quotation and citations omitted). Relying on this Court's case law, the Board observed that Westmoreland had failed to identify "any evidence indicating that the opinions of Drs. Rosenberg and Zaldivar on the issue of causation are independent of their misdiagnosis that [Stidham] does not have legal pneumoconiosis." JA 391 n.13. The Board accordingly concluded that Westmoreland had failed to rule out pneumoconiosis as a cause of Stidham's disability through its discredited medical opinions. JA 391.

Westmoreland's opening brief does not address the Board's determination or this Court's extensive case law on the issue. It has thus waived any challenge to the Board's finding that the discredited medical opinions of its experts failed to rebut disability causation. *See generally Suarez-Valenzuela v. Holder,* 714 F.3d 241, 248-49 (4th Cir. 2013) (collecting cases) (petitioner's failure to challenge certain findings of Board of Immigration Appeals in opening brief resulted in waiver); *see also Island Creek Coal Co. v. Wilkerson,* 910 F.3d 254 (6th Cir. 2018) (petitioner coal company waived Appointments Clause argument by failing to raise issue in opening brief). In any event, Westmoreland's doctors' finding that pneumoconiosis did not cause Stidham's disability is inextricably tied to their erroneous legal pneumoconiosis conclusion. *See e.g.*, OB 20 (acknowledging that its doctors believed Stidham's underlying condition

was related to smoking, not coal mine employment); *cf*. JA 360-61 (crediting Dr. Ajarapu's opinion that Stidham's chronic bronchitis and disabling pulmonary impairment were due to both coal dust exposure and smoking).[9]

## CONCLUSION

For reasons discussed above, the Court should affirm the ALJ's award of benefits.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

BARRY H. JOYNER
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5651

Attorneys for the Director, Office
of Workers' Compensation Programs

[9] *Stallard*, 876 F.3d at 670-72, also puts to rest Westmoreland's extended defense of Dr. Rosenberg's impermissible use of the FEV1/FVC ratio to determine the etiology of Stidham's disability. OB 21-26.

## ORAL ARGUMENT STATEMENT

The Director believes that oral arguments is unnecessary in this case, because "the facts and legal arguments are adequately presented in the briefs and record." Fed. R. App. P. 34(a)(2)(C). If the Court disagrees, the Director stands ready to participate.

## 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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 5531 words as counted by Microsoft Office Word 2010.

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Scarpino.ann@dol.gov

## CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

Paul E. Frampton, Esq.
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25301
pframpton@bowlesrice.com

Victoria Herman, Esq.
Wolfe, Williams & Reynolds
28 Cross Roads Drive
Mt. Hope, WV 25880
vheraman@wwrrlawfirm.com

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Scarpino.ann@dol.gov