No. 19-4089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONSOL OF KENTUCKY, INC.,

Petitioner

v.

ALLEN R. MADDEN

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES..... iii

STATEMENT OF JURISDICTION.....1

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE.....4

A. Statutory and Legal Background 4

1. The black lung claim withdrawal regulation.....4

2. The BLBA's statute of limitations and implementing regulation.....5

B. Proceedings Below.....5

1. Mr. Madden's 2002 Claim.....5

2. Mr. Madden's 2005 Claim.....6

3. Mr. Madden's 2012 Claim.....8

a. Consol's Motion for Summary Decision.....10

b. ALJ Clark's First Decision Awarding Benefits.....13

c. The Board's Decision Remanding the Case 15

d. The Proceedings on Remand before ALJ Clark 16

e. ALJ Clark's Remand Decision Awarding Benefits.....18

f. The Board's Decision Affirming the Award 19

SUMMARY OF THE ARGUMENT 20

ARGUMENT 21

A. Standard of Review 21

B. Consol has failed to establish a due process violation 22

C. Consol has failed to rebut the presumption of timeliness 30

CONCLUSION 34

STATEMENT REGARDING ORAL ARGUMENT 35

CERTIFICATE OF COMPLIANCE...36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Cases: **Page:**

Adkins v. Donaldson Mine Co.,
19 Black Lung Rep. (MB) 1-36 (Ben. Rev. Bd. 1993)..32

Arch of Ky., Inc. v. Director, OWCP,
556 F.3d 472 (6th Cir. 2009) 5,10,11,12,21,31,33

Arkansas Coals, Inc. v. Lawson,
739 F.3d 309 (6th Cir. 2014) 8

Betty B Coal Co. v. Director, OWCP,
194 F.3d 491 (4th Cir. 1999) 23,24

Big Branch Res., Inc. v. Ogle,
737 F.3d 1063 (6th Cir. 2013) 21

Bradley v. School Bd. of City of Richmond,
416 U.S. 696 (1974)..25

Brandywine Explosives & Supply v. Director, OWCP,
790 F.2d 657 (6th Cir. 2015) 15

Clevenger v. Mary Helen Coal Co.,
22 Black Lung Rep. (MB) 1-193 (Ben. Rev. Bd. 2002).....................4,11,12,13,25

Cumberland River Coal Co. v. Banks,
690 F.3d 477 (6th Cir. 2012) 29

Dotson v. Dotson Coal Co.,
893 F.2d 1134 (6th Cir. 1990) (table)...22

Energy West Mining Co. v. Oliver,
555 F.3d 1211 (10th Cir. 2009) 23,30

Hardisty v. Director, OWCP,
776 F.2d 129 (7th Cir. 1985) 27

Harlan Bell Coal Co. v. Lemar,
904 F.2d 142 (6th Cir. 1990) 24

Island Creek Coal Co. v. Holdman,
202 F.3d 873 (6th Cir. 2000) 25,28

Island Fork Constr. v. Bowling,
872 F.3d 754 (6th Cir. 2017) 32

Lane Hollow Coal Co. v. Director, OWCP,
137 F.3d 799 (4th Cir. 1998) 23,28

Matthews v. Eldridge,
424 U.S. 319 (1976) 22

McKamey v. River Basin Coals, Inc.,
187 F.3d 636 (6th Cir. 1999) (table)..22,29

NLRB v. Jackson Hosp. Corp.,
557 F.3d. 301 (6th Cir. 2009) 22

North American Coal Co. v. Miller,
870 F.2d. 948 (3d Cir. 1989)..29

Pavesi v. Director, OWCP,
758 F.2d 956 (3d Cir. 1985)..27

Peabody Coal Co. v. Director, OWCP,
718 F.3d 590 (6th Cir. 2013) 3

Shortt v. Director, OWCP,
766 F.2d 172 (4th Cir. 1985) 27

Thompson v. Kentucky,
209 U.S. 340 (1908)..27

Warner-Lambert Co. v. Heckler,
787 F.2d 147 (3d Cir. 1986)..29

Westmoreland Coal Co. v. Stallard,
876 F.3d 663 (4th Cir.), *as amended* (Dec. 21, 2017) 32

Youghiogheny and Ohio Coal Co. v. Milliken,
200 F.3d 942 (6th Cir. 1999) 6,28

Zurich Am. Ins. Group v. Duncan o/b/o Duncan,
889 F.3d 293 (4th Cir. 2018) 31

Statutes

Administrative Procedure Act,
5 U.S.C. § 551 *et seq.*

5 U.S.C. § 706 22

Black Lung Benefits Act,
30 U.S.C. §§ 901-944

30 U.S.C. § 901(a) 1
30 U.S.C. § 921(c)(4)...15
30 U.S.C. § 932(a) 2,6
30 U.S.C. § 932(f)..5,33
30 U.S.C. § 932(k) 27

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. § 901 *et seq.*

33 U.S.C. § 921(a) 2
33 U.S.C. § 921(b)(3) 2
33 U.S.C. § 921(c) 2
33 U.S.C. § 922 6

Regulations

20 C.F.R. § 718.305(b)(1)(i) 15
20 C.F.R. § 718.305(b)(1)(ii)...15
20 C.F.R. § 718.305(c)..15
20 C.F.R. § 718.305(d)(1)(i) 15

20 C.F.R. § 718.305(d)(1)(ii) 15

20 C.F.R. § 725.306 4,8
20 C.F.R. § 725.306(a) 4
20 C.F.R. § 725.306(b) 4
20 C.F.R. § 725.308 5
20 C.F.R. § 725.308(a) 5,33
20 C.F.R. § 725.308(b) 5,14,30
20 C.F.R. § 725.309 29
20 C.F.R. § 725.309(c) 8
20 C.F.R. § 725.309(c)(2) 8,16,24,28
20 C.F.R. § 725.309(c)(4) 29
20 C.F.R. § 725.310 6
20 C.F.R. § 725.310(a) 6
20 C.F.R. § 725.310(b) 6
20 C.F.R. § 725.351(b) 29
20 C.F.R. § 725.409(a) 7
20 C.F.R. § 725.409(c) 7,8
20 C.F.R. § 725.419(a) 6
20 C.F.R. § 725.419(d) 6
20 C.F.R. § 725.455(c) 22
20 C.F.R. § 725.456(b)(1) 25
20 C.F.R. § 725.502(a)(2) 5

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This appeal involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. § 901-944, filed by Allen R. Madden on May 21, 2012. Joint Appendix (JA) 36. The BLBA provides benefits to miners who are totally disabled from pneumoconiosis. 30 U.S.C. § 901(a).

On April 5, 2016, Administrative Law Judge (ALJ) Richard M. Clark issued

a Decision and Order Awarding Benefits on Mr. Madden's claim, payable by Consol of Kentucky, Inc. (Consol). JA 91. Consol timely appealed this decision to the Benefits Review Board (the Board) on May 2, 2016, 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 issued a Decision and Order on May 18, 2017, remanding the claim to ALJ Clark. JA 115. The Board had jurisdiction to review his decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). On June 20, 2018, ALJ Clark issued a Decision and Order on Remand Awarding Benefits. JA 211. Consol timely appealed the Remand Decision to the Board on July 3, 2018. The Board affirmed the Remand Decision on September 9, 2019. JA 228.

This Court has jurisdiction over Consol's petition for review 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. Consol timely petitioned this Court for review of the Board's decision on November 6, 2019. JA 240. The injury – Mr. Madden's occupational exposure to coal mine dust – occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. Consol contends that it should be dismissed and liability transferred to the

Black Lung Disability Trust Fund (Trust Fund) because its due process rights were violated by the Department of Labor's (DOL) initial omission of a copy of Mr. Madden's second claim from the record in this (his third) claim for benefits. Despite this initial procedural misstep, Consol was timely notified of its potential liability throughout these proceedings and has been able to prepare a meaningful defense to Mr. Madden's claim for benefits and its designation as the liable party. Neither ALJ Clark nor the Board found Consol's allegation of prejudice persuasive.

Has Consol established that its due process rights were violated?

2. Under the BLBA, a miner is required to file a claim for benefits within three-years of: "(1) a medical determination of (2) total disability (3) due to pneumoconiosis (4) which has been communicated to the miner." *Peabody Coal Co. v. Director, OWCP*, 718 F.3d 590, 593 (6th Cir. 2013). At the hearing, Mrs. Madden testified that she and Mr. Madden "had to go back over" to Dr. Rasmussen in connection with Mr. Madden's 2008 request for modification of the prior denial of his second claim for BLBA benefits. The record does not identify when this evaluation occurred, what Dr. Rasmussen diagnosed, or whether the diagnosis was even communicated to Mr. Madden.

Does Mrs. Madden's testimony trigger the running of the three-year

limitations period?[1]

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The black lung claim withdrawal regulation

20 C.F.R. § 725.306 provides, in relevant part, that a previously-filed claim may be withdrawn when: (1) the claimant makes the request in writing and includes the reasons therefore; and (2) the adjudicator determines that withdrawal is in the claimant's best interest. 20 C.F.R. § 725.306(a). The regulation further provides that once withdrawn, "the claim will be considered not to have been filed." 20 C.F.R. § 725.306(b).

In *Clevenger v. Mary Helen Coal Co.*, 22 Black Lung Rep. (MB) 1-193, 2002 WL 32301638 (Ben. Rev. Bd. 2002) (*en banc*), the Board held that the provisions of section 725.306 are applicable only up until such time as a decision on the merits issued by an adjudication officer becomes "effective" – a point that is readily identifiable by regulation and marks the point beyond which allowing withdrawal would be unfair to opposing parties. 2002 WL 32301638 at *5. As

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[1] Consol also challenges ALJ Clark's award of benefits on its merits. Opening Brief (OB) at 37-42. This brief does not address this argument.

relevant here, an ALJ's decision and order becomes effective when it is filed in the district director's office. 20 C.F.R. § 725.502(a)(2).

2. The BLBA's statute of limitations and implementing regulation

The BLBA provides in relevant part that "[a]ny claim for benefits by a miner under this section shall be filed within three years … [of] a medical determination of total disability due to pneumoconiosis." 30 U.S.C. § 932(f). The regulation implementing this statutory provision, 20 C.F.R. § 725.308, additionally requires that the medical determination of total disability due to pneumoconiosis be "communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. § 725.308(a). Moreover, the regulation provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. § 725.308(b). To rebut the presumption of timeliness, an employer must show by a preponderance of the evidence that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. *Arch of Ky., Inc. v. Director, OWCP*, 556 F.3d 472, 479 (6th Cir. 2009).

B. <u>Proceedings Below</u>

1. Mr. Madden's 2002 Claim

Mr. Madden filed his initial claim for benefits on December 9, 2002. A district director in DOL's Office of Workers' Compensation Programs (OWCP) issued a proposed decision on November 24, 2003, denying the claim because Mr.

Madden did not establish pneumoconiosis or total disability. Mr. Madden did not pursue this claim, and the proposed decision became final. *See* JA 3 (citing Director's Exhibit (DX) 1); *see also* 20 C.F.R. § 725.419(d) (specifying when district director decisions become final).

2. Mr. Madden's 2005 Claim

Mr. Madden filed a second claim for benefits on February 5, 2005. *See* JA 3. The district director issued a proposed decision awarding the claim on October 28, 2005. *Id*. (citing 2005 claim at DX 33). Consol requested a hearing pursuant to 20 C.F.R. § 725.419(a), and the case came before ALJ Alan L. Bergstrom who denied benefits on September 27, 2007. JA 1. ALJ Bergstrom determined that Mr. Madden again failed to establish pneumoconiosis or total disability. JA 22.

On April 3, 2008, Mr. Madden requested modification of ALJ Bergstrom's denial of benefits.[2] JA 25. The district director denied modification on September

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[2] Any party to a black lung claim may request modification of the terms of an award or denial at any time prior to one year from the date of the last payment of benefits or at any time before one year following the denial of a claim. 33 U.S.C. § 922 as incorporated by 30 U.S.C. § 932(a); *see also* 20 C.F.R. § 725.310(a). Modification may be granted based on either a "change in conditions" or "mistake in determination of fact." 20 C.F.R. § 725.310. Modification proceedings can only be initiated before the district director. 20 C.F.R. § 725.310(b); *see* 33 U.S.C. § 922; *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 956 (6th Cir. 1999).

12, 2008, finding that Mr. Madden had abandoned the request when he failed to timely respond to a show cause order.[3] JA 26-27. Aggrieved by the district director's denial, Mr. Madden requested a hearing before an ALJ.[4] JA 29.

The modification request was assigned to ALJ Theresa Timlin. ALJ Timlin first denied Consol's motion for summary judgment, explaining that Mr. Madden had a right to a hearing on "the sole issue of whether the District Director properly denied the claim by reason of abandonment." JA 31; *see* 20 C.F.R. § 725.409(c). Mr. Madden, however, then filed a "Motion for Withdrawal of Request for Hearing and Claim." JA 33. ALJ Timlin granted the motion in part on November 5, 2009. JA 30. Her ruling, captioned "Order Cancelling Hearing and Granting Withdrawal of Request for Hearing," stated:

> As I find good cause, I hereby GRANT the Claimant's motion to

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[3] Generally speaking, abandonment occurs when a claimant fails to take the necessary steps to allow a claim to be processed and decided. 20 C.F.R. § 725.409(a). Here, the district director issued an Order to Show Cause on July 30, 2008, requiring Mr. Madden to submit evidence essential to the processing of his claim, including responses to Consol's discovery requests, within 30 days. 2005 claim at DX 84. Mr. Madden did not timely respond to this order.

[4] On September 12, 2008. Mr. Madden submitted to the district director a July 25, 2008 medical examination by Dr. Baker and answers to Consol's interrogatories. 2005 claim at DX 86. These documents, received by the district director on September 15, 2008, were returned to Mr. Madden because they were received outside the deadline set by the show cause order, and after the district director had issued his decision denying modification. 2005 claim at DX 87.

> withdraw his request for hearing, pursuant to 20 C.F.R. § 725.306. The hearing scheduled in this matter for December 9, 2009, is hereby CANCELLED. The parties are hereby advised that this matter is administratively closed and the file will be returned to the District Director for appropriate handling.

JA 31.[5]

3. Mr. Madden's 2012 Claim

On May 21, 2012, Mr. Madden filed the instant application for benefits.[6] JA

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[5] As noted above, the sole issue before ALJ Timlin was whether the district director properly denied the claim by reason of abandonment. The ALJ thus correctly administratively closed the file, and left the denial of modification intact, when Mr. Madden decided not to go forward with the hearing. JA 27. Unlike withdrawal of a claim, where it is considered not to have been filed, *supra* at 4, an abandoned claim is treated as a denial on all elements of entitlement. 20 C.F.R. § 725.409(c).

[6] Mr. Madden's current claim (like his 2005 claim) is a "subsequent claim," that is, a claim filed more than one year after the effective date of a final order denying a claimant's previously-filed claim. 20 C.F.R. § 725.309(c); *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 314 (6th Cir. 2014). Consideration of a subsequent claim involves two steps. First, to ensure that the previous denial's finality is respected, "a subsequent claim must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R § 725.309(c). If the new evidence establishes a condition of entitlement previously decided against the claimant, the subsequent claim is allowed and all of the evidence, old and new, is considered to determine whether the claimant is entitled to benefits. 20 C.F.R. § 725.309(c)(2); *Arkansas Coals*, 739 F.3d at 314. Any evidence submitted in connection with a prior BLBA claim must be submitted into evidence in a subsequent claim, provided that it was not excluded in the adjudication of the prior claim. 20 C.F.R. § 725.309(c)(2). Consol contends that the initial failure to include the 2005 claim in the current claim violated its due process rights.

36. On January 25, 2013, the district director issued a proposed decision awarding benefits. JA 58. Consol requested a formal hearing, which was held before ALJ Clark on August 26, 2015.

At the hearing, Mr. Madden testified that he had been examined by Dr. Rasmussen on four different occasions, and each time the doctor told him he was disabled by black lung disease.[7] Hearing Transcript (HT) 23-24. He couldn't remember when he first saw Dr. Rasmussen, although he stated that his wife might. HT 23. He thought it was 2000 or 2001, then every two or three years after that, although he "c[ouldn't] put a date to it." HT 25-26. Mrs. Madden then testified that Dr. Rasmussen examined Mr. Madden in 2004 for the first time, and then in 2006 and 2007. HT 34. She further explained that when Mr. Madden's former counsel (Joseph E. Wolfe, Esq. (JA 25)) filed for modification in 2008

> [t]hat's when we had to go back over there again to Rasmussen, and we done that. Then he sent him to Baker. Then we was supposed to have court in June – December of 2010 and he didn't have us ready and he had to postpone it, and he quit. . . . he postponed court in 2010. That's when we came back to you [Wes Addington, Esq.], after 2010.

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[7] The record supports the miner's testimony that he was examined by Dr. Rasmussen a total of four times, but does not support the examination dates provided by the miner. Dr. Rasmussen examined the miner on April 27, 2005; January 19, 2006; September 21, 2006, and August 21, 2012. *See* 2005 claim at DX 64-13; DX 8. Dr. Rasmussen was deposed on March 8, 2007. 2005 claim at DX-64.

HT 36-37.

a. Consol's Motion for Summary Decision

Shortly after the hearing, Consol moved for summary decision, arguing that the claim must be dismissed as untimely. JA 70, 79. Consol argued that the Maddens' hearing testimony established that Dr. Rasmussen communicated a determination of total disability due to pneumoconiosis to Mr. Madden more than three years before the 2012 claim was filed. JA 78. Consol also asserted that ALJ Timlin's 2009 Order granting Mr. Madden's withdrawal of his request for a hearing, coupled with the fact that the 2005 claim file was not contained in the Director's Exhibits currently before ALJ Clark in the current, 2012 claim, indicated that Mr. Madden's 2005 claim had been withdrawn. Therefore, Consol reasoned that Dr. Rasmussen's earlier (2005 and 2006) opinions triggered the running of the three-year statute of limitations, rendering Mr. Madden's 2012 claim untimely.[8]

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[8] Medical opinions diagnosing total disability due to pneumoconiosis that are submitted in connection with a previously-denied BLBA claim are considered misdiagnoses, and therefore, insufficient to trigger the running of the BLBA's three-year statute of limitations. *Arch of Ky.*, 556 F.3d at 480-83. According to Consol, however, if Mr. Madden's 2005 claim was withdrawn, and thus never filed, *supra* at 4, Dr. Rasmussen's 2005 and 2006 opinions were not misdiagnoses and started the limitations clock.

Mr. Madden opposed Consol's motion. *See* November 30, 2015 letter from Wes Addington, Esq. to ALJ Clark. With regard to the 2005 claim, Mr. Madden maintained that only his request for modification was withdrawn. Indeed, Mr. Madden stressed that because ALJ Bergstrom's 2007 decision was an effective final order, withdrawal of his 2005 claim was not possible under *Clevenger*. *See supra* at 4. Therefore, Mr. Madden argued that because ALJ Bergstrom had found Dr. Rasmussen's 2005 and 2006 opinions outweighed by the opinions of Consol's experts, Dr. Rasmussen's earlier opinions constituted misdiagnoses that did not start the limitations period (citing *Arch of Ky., supra* at 10 n.8).[9]

ALJ Clark denied Consol's motion on December 22, 2015. JA 82. He concluded that in light of *Clevenger*, ALJ Timlin's Order could only be read to permit withdrawal of Mr. Madden's request for a hearing on his modification request. JA 84. And because ALJ Bergstrom had rejected Dr. Rasmussen's 2005

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[9] Mr. Madden also countered Consol's allegation that it was "surprised" at the hearing to learn that Mr. Madden had been examined by Dr. Rasmussen before 2012. JA 72. Mr. Madden pointed out that the same law firm had represented Consol before ALJ Bergstrom and would have had access to the records containing Dr. Rasmussen's earlier exams. Consol now admits that it had "meaningful knowledge" of the documents connected with Mr. Madden's 2005 claim. OB 31. Despite possessing the 2005 claim documents throughout, Consol nonetheless argues that the initial failure to include them violated its due process rights. Consol does not succeed in establishing this highly counter-intuitive contention. *Infra* at 22-26.

and 2006 diagnoses, the misdiagnoses did not trigger the running of the limitations period. *Id*. The ALJ then found that there was a genuine issue of fact regarding a possible earlier evaluation by Dr. Rasmussen, and thus, summary decision on the limitations issue was improper. JA 85. The ALJ then instructed the parties to file their closing briefs.

In its brief to the ALJ, Consol renewed its arguments that the district director's failure to include the 2005 claim file into the record amounted to a concession that the 2005 claim had been withdrawn; therefore, the Maddens' hearing testimony established that Dr. Rasmussen told the miner he was totally disabled due to pneumoconiosis in the 2000s, making the 2012 claim untimely. Consol also complained that the omission of the 2005 claim file from the record deprived it of a full and fair hearing, thus requiring liability to be transferred to the Trust Fund. Mr. Madden's closing brief addressed only the issue of entitlement and argued that benefits should be awarded.

The Director's closing brief addressed only Consol's arguments regarding the withdrawal of the 2005 claim and the timeliness of the 2012 claim. JA 87. The Director asserted that: 1) Dr. Rasmussen's first three opinions (one in 2005 and two in 2006), as discussed by ALJ Bergstrom, must be considered misdiagnoses under *Arch of Ky.*, and thus insufficient to trigger the limitations statute; 2) under *Clevenger*, ALJ Bergstrom's 2007 decision and order was final and could not be

withdrawn, rather only the modification request had been withdrawn and not filed; and 3) because the same law firm had represented Consol before ALJ Bergstrom and ALJ Clark, it would have had access to the 2005 claim record. JA 88-89. The Director accordingly concluded that "[Consol] has not been prejudiced by the 2005 claim not having been included in the current file," and therefore, it should not be dismissed as the responsible operator. JA 89

b. ALJ Clark's First Decision Awarding Benefits

ALJ Clark awarded benefits on April 5, 2016. JA 91. He rejected Consol's argument that Mr. Madden's 2012 claim was not timely filed. The ALJ held that, in view of *Clevenger*, ALJ Timlin's 2009 Order "can only be read to permit withdrawal of Claimant's request for a modification hearing" (and not withdrawal of the entire 2005 claim). JA 95. The ALJ was unpersuaded by Consol's contention that the absence of the 2005 claim file from the record amounted to a concession by the Director that the 2005 claim should be treated as if it had never been filed, and therefore Dr. Rasmussen's 2005 and 2006 medical opinions triggered the running of the limitations period. In the ALJ's view, "[Consol's] convoluted argument is not supported by logic or applicable law." *Id*. The ALJ observed that Consol suffered no prejudice because it had been given Dr. Rasmussen's opinions and ALJ Bergstrom had discussed them in denying the 2005 claim. *Id*. Moreover, ALJ Clark reasoned that just because the 2005 claim was not

included in the record did not mean that the claim had "magically disappeared." *Id*. Finally, the ALJ held that there was no evidence that Mr. Madden had ever been provided with any of Dr. Rasmussen's reports or that he understood them. JA 96. The ALJ also found Mr. and Mrs. Madden's hearing testimony vague on when Dr. Rasmussen examined Mr. Madden and what he told them. JA 97. The ALJ added that Mr. Madden's belief that he was totally disabled, "no matter how ardent," was insufficient to start the timeliness clock. JA 98. In sum, the ALJ concluded that Consol had not rebutted the presumption that Madden's 2012 claim was timely filed. *See* 20 C.F.R § 725.308(b).

Addressing the merits of Mr. Madden's benefits claim, ALJ Clark credited Mr. Madden with 16.5 years of underground coal mine employment, and approximately five more years of substantially similar surface coal mine employment. JA 100. He noted that Consol had conceded that Mr. Madden has a disabling respiratory impairment – a concession consistent with the newly submitted medical evidence. JA 106 n. 7. Accordingly, the ALJ invoked the "fifteen-year" presumption that Mr. Madden is totally disabled due to pneumoconiosis.[10] JA 63. The ALJ then noted that the newly-submitted x-ray

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[10] The "fifteen-year" presumption is invoked if, *inter alia*, the miner was employed in underground coal mining for at least fifteen years and has a totally disabling

evidence was positive for clinical pneumoconiosis, and that Consol's experts' opinions were insufficient to disprove legal pneumoconiosis or to rule out pneumoconiosis as a cause of Mr. Madden's total respiratory disability. JA 108, 111. Notably, the ALJ relied on ALJ Bergstrom's 2007 decision for a description of the 2005 claim's medical evidence. JA 110-111. Concluding that Consol had not rebutted the fifteen-year presumption, the ALJ awarded benefits.

c. The Board's Decision Remanding the Case

The Board rejected Consol's arguments that the 2005 claim had been withdrawn and therefore the 2012 claim was untimely. The Board agreed with ALJ Clark that: (1) the law did not permit Mr. Madden to withdraw the 2005 claim when it was pending before ALJ Timlin on modification in light of ALJ Bergstrom's prior final and effective decision and order denying the claim, and 2) because ALJ Bergstrom had denied benefits, Dr. Rasmussen's earlier opinions

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respiratory condition. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b)(1)(i),(ii). Once invoked, the miner is rebuttably presumed entitled to benefits, *i.e.*, is presumed to have proved that his disabling respiratory condition was due at least in part to pneumoconiosis. 30 U.S.C. § 921(c)(4); 20 C.F.R § 718.305(c). To defeat entitlement, the liable coal mine operator must either: 1) prove that the miner has neither clinical pneumoconiosis arising out of coal mine employment nor legal pneumoconiosis, 20 C.F.R. § 718.305(d)(1)(i); or 2) prove that "no part of the miner's respiratory or pulmonary total disability was caused by [his] pneumoconiosis . . . ," 20 C.F.R. § 718.305(d)(1)(ii). *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 665 (6th Cir. 2015). This later standard is often referred to as the "rule out" standard.

were misdiagnoses that did not trigger the statute of limitations. JA 120-121.

The Board, however, vacated ALJ Clark's award of benefits and remanded the case because the record was incomplete. *See* 20 C.F.R. § 725.309(c)(2) (requiring any evidence submitted in connection with a prior BLBA claim be submitted into evidence in a subsequent claim). It explained that the ALJ's timeliness determination could not be affirmed because the evidence submitted in connection with Mr. Madden's 2008 modification request (*i.e.*, after ALJ Bergstrom's denial) might support Consol's limitations defense, and the entirety of 2005 claim file might support its efforts to rebut the 15-year presumption. JA 121-22. Accordingly, the Board instructed the ALJ on remand to admit all evidence from the 2005 claim and then, in light of the new evidence, reconsider whether the 2012 claim was timely filed, and whether Consol rebutted the fifteen-year presumption. JA 122. Finally, the Board found no merit in Consol's complaint that it had been denied due process because of the absence of the 2005 claim file from the record. The Board held that the omission did not deprive it of a fair opportunity to mount a meaningful defense against the claim. JA 123.

d. The Proceedings on Remand before ALJ Clark

ALJ Clark issued an Order on October 11, 2017, granting the Director three weeks to submit the 2005 claim file into the record, and two weeks after that for the parties to brief the case. JA 125. On October 19, 2017, the Director submitted

most (840 pages) of the 2005 claim file to the ALJ. JA 128. Consol responded on October 24, 2017, requesting an additional 90 days to review the evidence associated with the 2005 claim, develop any additional evidence, and prepare closing arguments. *See* JA 129.

On November 9, 2017, the ALJ issued an Order granting Consol's motion. JA 129. The ALJ gave the parties one month to inform him what additional evidence or discovery was needed in relation to the 2005 claim file, and until February 6, 2018 to brief the case. JA 129. The ALJ also encouraged the parties to meet and confer if these timeframes were not adequate, and to request a conference with him to address any concerns. JA 130.

On February 21, 2018, Consol submitted a brief in which it noted that the copy of the 840 page, 2005 claim file submitted by the Director lacked three exhibits: Dr. Rasmussen's September 21, 2006 medical report, Mr. Madden's 2008 answers to interrogatories, and Dr. Baker's 2008 medical report. JA 131, 134. After a conference call was held on the issue, the ALJ issued an Order on March 29, 2018, instructing the Director to submit the missing materials in two weeks. JA 144. The Director obtained these exhibits and submitted them on April 11, 2018. JA 147. On April 12, 2018, the ALJ issued an Order granting the parties until April 27, 2018, to determine whether additional discovery was necessary, and until May 11, 2018, to submit briefs (assuming no further discovery was needed).

JA 205. On May 15, 2018, the ALJ closed the record while noting that the parties sought no additional discovery. JA 208.

e. ALJ Clark's Remand Decision Awarding Benefits

On June 20, 2018, ALJ Clark issued a decision and order awarding benefits. JA 211. The ALJ first addressed whether Mr. Madden's 2012 claim was timely. JA 215. The ALJ disagreed with Consol that the Maddens had conceded at the hearing that they knew that Mr. Madden was totally disabled due to pneumoconiosis three years before the 2012 claim was filed based on Dr. Rasmussen's examinations in the 2000s. In the ALJ's view, the Maddens' hearing testimony was vague on precisely when Mr. Madden saw Dr. Rasmussen and what the doctor had told him. JA 216. Nor was there any evidence that Mr. Madden had ever received Dr. Rasmussen's written reports or understood them. *Id*. Moreover, ALJ Clark explained that ALJ Bergstrom considered and rejected Dr. Rasmussen's reports, effectively rendering them misdiagnoses that did not trigger the running of the limitations period. *Id.* Finally, the ALJ found no evidence post-dating ALJ Bergstrom's decision that was sufficient to rebut the presumption that Mr. Madden's 2012 claim was timely filed. Although Dr. Baker had examined Mr. Madden in 2008, the doctor did not diagnose total disability due to pneumoconiosis, and regardless, there was no indication that miner had received the report. JA 217. Accordingly, the ALJ concluded that Mr. Madden's 2012

claim was timely.

Turning to the merits of the claim, the ALJ again determined that Consol's evidence was insufficient to rebut the fifteen-year presumption, and he accordingly awarded benefits. JA 217-224.

Regarding who should be liable for those benefits, the ALJ rejected Consol's argument that the Director's initial failure to include a copy of the 2005 claim file into the record, or to produce a complete copy in response to the ALJ's first Order on remand, amounted to "procedural outrage." JA 224.[11] He noted that the full record of the 2005 claim, including the documents submitted in connection with the 2008 modification request, were ultimately produced and "did not include any information helpful to [Consol's] claim of untimeliness." JA 224. And because Consol was represented by the same law firm and had access to those records as well as Judge Bergstrom's decision, "it would be difficult for [Consol] to claim any prejudice because it was never provided with these documents." *Id*.

f. The Board's Decision Affirming the Award

The Board held that the ALJ permissibly found Consol failed to meet its burden to establish that Dr. Rasmussen communicated to Mr. Madden he was

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[11] The ALJ also commented that, because Mr. Madden's modification request was withdrawn, it was arguable whether the documents submitted in connection with the request would be admissible in the 2012 claim. JA 224.

totally disabled due to pneumoconiosis after the denial of the 2005 claim but three years before he filed his 2012 claim. JA 233-234. In particular, the Board held that the ALJ rationally found Mrs. Madden's hearing testimony vague regarding when she and Mr. Madden saw Dr. Rasmussen in connection with Mr. Madden's modification request because she did not specify exactly when they saw the doctor, and that even Consol agreed that her reference to additional 2010 court proceedings was unclear. JA 233.

The Board also rejected Consol's claim that its due process rights were violated by the district director's initial failure to include a copy of the 2005 claim file in the record, and by the ALJ's procedural rulings on remand regarding its submission. The Board observed that Consol ultimately received all the evidence from the 2005 claim, and was provided an opportunity to address that evidence. JA 236. The Board then affirmed the ALJ's determination that Consol failed to rebut the fifteen-year presumption, and thus affirmed the award of benefits.

Consol's petition for review to this Court followed.

SUMMARY OF THE ARGUMENT

Consol asserts that it should be dismissed as the responsible operator and that liability for Mr. Madden's benefits should transfer the Trust Fund because it was deprived of its due process right to a full and fair hearing by the district director's initial failure to include the 2005 claim file. Any missteps in this regard,

however, did not rise to the level of a core due process violation, and Consol has failed to establish that any irregularity in the course of proceedings was so unfair as to "impugn the results" in this case. Consol's request that it be relieved of liability based on due process concerns must be rejected.

Mr. Madden timely filed his 2012 claim. A miner must file a federal black lung claim for benefits within three years of being informed of a medical determination of total disability due to pneumoconiosis. While Mrs. Madden testified that she and Mr. Madden "had to go back over" to Dr. Rasmussen after Mr. Madden's 2005 claim was denied, the ALJ and Board correctly ruled that her vague testimony did not trigger the running of the three-year limitations period.

ARGUMENT

A. Standard of Review

In reviewing decisions of the Benefits Review Board, the Court's "task is limited to correcting errors of law and ensuring the [Board] adhered to the substantial evidence standard in its review of the ALJ's factual findings." *Arch of Ky.*, 556 F.3d at 477 (internal quotations omitted). Substantial evidence means "[s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1068-69 (6th Cir. 2013). The Court reviews the Board's legal conclusions de novo. *Id.* at 1068.

This Court will only disturb an ALJ's ruling on a procedural matter if it is

arbitrary and capricious or an abuse of discretion. *See Dotson v. Dotson Coal Co.*, 893 F.2d 1334, 1990 WL 4056 (6th Cir. 1990) (table) (citing 5 U.S.C. § 706 (1988) (Administrative Procedure Act) and 20 C.F.R. § 725.455(c) (1989)). Accordingly, an ALJ has "broad discretion in dealing with procedural matters, including the submission of evidence." *McKamey v. River Basin Coals, Inc.*, 187 F.3d 636, 1999 WL 623737 at *3 (6th Cir. 1999) (table); *see also NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 305-06 (6th Cir. 2009).

B. Consol has failed to establish a due process violation.

Consol asserts that its "due-process right to a meaningful, full and fair hearing evaporated" because the district director initially failed to include the 2005 claim file, then "changed her position" regarding the completeness of the record, and "repeated[ly] fail[ed]" to provide the ALJ with the evidence associated with the 2005 claim. OB 18, 15-33. Consol charges that that these "procedural outrages" mandate the transfer of its liability for Mr. Madden's benefits to the Trust Fund. OB 15-33. The Court should reject Consol's overwrought complaints.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (internal citation and quotation omitted). This case does not involve a violation of this core principal. The Director ultimately provided the complete record in this case, and Consol was timely notified of its potential

liability throughout these proceedings and was provided ample opportunity to vigorously defend itself, which obviously it has done.

Consol's complaints, instead, stem from irregularities in the course of the administrative proceedings. Consol must, therefore, demonstrate that the process was infected by "some prejudicial, fundamentally unfair element." *Energy West Mining Co. v. Oliver,* 555 F.3d 1211, 1219 (10th Cir. 2009) *citing Betty B Coal Company v. Director, OWCP,* 194 F.3d 491, 501 (4th Cir. 1999); *cf. Lane Hollow Coal Co. v. Director, OWCP,* 137 F.3d 799, 808 (4th Cir. 1998) (noting prejudice requirement for non-core due process challenges). As the Tenth Circuit noted in *Oliver*, "…the Constitution is concerned with procedural outrages, not procedural glitches." The court further noted that litigation "is rarely pristine and is filled with risk." Due process does not protect against these sorts of missteps; rather the inquiry is "whether an adjudicative procedure as a whole is sufficiently fair and reliable." *Oliver*, 555 F.3d at 1219. It is Consol's burden to demonstrate that the alleged "procedural snafus" (OB 22) and "the Director's negligence" (OB 30) were so egregious that it would be fundamentally unfair for it to live with the outcome of this proceeding. Consol has not met this burden.

As the ALJ and the Board found, none of Consol's allegations of prejudice are compelling. First, Consol attacks, as contrary to regulation, the district director's initial failure to include the 2005 claim file in the transmittal of the 2012

claim to the ALJ. *See* 20 C.F.R § 725.309(c)(2). Although we agree that the district director erred in this regard, the error was corrected and Consol did not suffer as a result. Consol asserts (OB 21) that the omission of the 2005 claim file prevented it from augmenting the opinions of its experts from the 2005 claim (Drs. Repsher and Jarboe, who found no disability in 2005/06) with the 2012 evidence. But nothing stopped Consol from employing these experts again in the 2012, especially in light of ALJ Clark's invitations to Consol to submit new evidence following submission of the 2005 claim file. *Supra* at 17; *see Betty B Coal Co.*, 194 F.3d at 503 (no due process violation where coal company failed to ask ALJ to reopen the record on remand and thus acquiesced to decision on existing record); *cf. Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1049 (6th Cir. 1990) (due process violation where company was not given an opportunity to address changed legal standard). Moreover, Consol's suggestion that Dr. Repsher and Jarboe would have stuck to their original views is speculative at best, given they were contradicted by Consol's current experts (Drs. Fino and Dahhan, who found total disability based on later evidence) and Consol's withdrawal of the total disability issue at the ALJ hearing. HT 6. In short, Consol's claim that the post-hearing

remedies afforded to it were insufficient (OB 20) is utterly manufactured.[12] *Cf. Island Creek Coal Company v. Holdman,* 202 F.3d 873, 883-84 (6th Cir. 2000) (permanent loss of crucial evidence constitutes due process violation).

Consol next contends that the initial omission of the 2005 claim file signaled that the Director considered the 2005 claim withdrawn, which Consol relied on to its detriment. OB 19. But, as the ALJ recognized, the flaw in this argument is obvious: *Clevenger* had been settled law for ten years by the time Mr. Madden filed his 2012 claim (and Consol does not mention, let alone challenge, *Clevenger* here). JA 84. Consol, which was party to ALJ Bergstrom's final and effective 2007 decision, was thus on notice that the 2005 claim could not be withdrawn in 2009 during modification proceedings. *See Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) (court applies law in effect at time of decision). Any detriment Consol suffered because its timeliness defense was

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[12] Consol also complains that the initial omission of the 2005 claim file precluded it from deposing Drs. Rasmussen and Baker about their prior reports before the 2015 ALJ hearing. But Consol itself possessed the reports and could have asked the doctors about their findings solely to establish its statute of limitations defense. In addition, it could have asked the ALJ to admit Drs. Rasmussen's and Baker's reports *and* those from Drs. Repsher and Jarboe pursuant to the good cause exception to the evidence-limitation rules. 20 C.F.R. § 725.456(b)(1); *cf.* OB 23 (claiming these rules precluded submission of reports). The unfortunate truth is that Consol did not realize before the 2015 hearing that it possessed the 2005 claim file (*cf.* JA 72 with OB 31), and is now trying to use the district director's oversight to cure that mistake.

"turned upside down" by the subsequent inclusion of the 2005 claim file was purely self-inflicted due to its failure to recognize governing law. OB 22, 28.

Consol complains bitterly about the Director's alleged "changed position" in this case. In Consol's view, the Director represented to ALJ Clark that the missing materials were properly excluded, then reversed her position on appeal to the Board; thus, Consol charges that "prejudice occurred as the rules of what evidence would be considered constantly changed after the 2013 referral of the claim to OALJ." OB 26. These contentions are simply inaccurate. ALJ Clark consistently ruled that the 2005 claim had not been withdrawn and the Board affirmed that ruling. *See* JA 84 (ALJ denial of summary judgment), 95 (ALJ initial decision and order), 120 (Board affirmance). The Director's closing brief to ALJ Clark was filed almost eight weeks after he first pronounced his ruling, and in that brief, the Director did not state that the 2005 claim file was correctly excluded. At most, the Director observed that the materials submitted with Mr. Madden's *modification request* were properly excluded.[13] *Supra* at 12-13. In any event, the ALJ's correct application of governing law eight weeks earlier – that the 2005 claim was not

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[13] As noted above, the district director did not accept Madden's modification evidence because it was submitted outside the evidentiary development deadlines imposed by the district director and after the district director had denied modification. *Supra* at 7 n.4; 2005 claim at DX 87; *see* JA 26.

withdrawn – undermined the Director's supposedly contrary later opinion on the issue. Even if Consol did in fact rely on the Director's view in the face of the ALJ's decision (a dubious proposition), it did so voluntarily and at its own peril. *Thompson v. Kentucky,* 209 U.S. 340, 346 (1908) ("Due process of law does not assure to a [citizen] the interpretation of laws by the executive officers ... as against their interpretation by the courts ... or relief from the consequences of a misinterpretation by either."). Finally, even assuming that the Director's position did change when the case was on appeal before the Board, the Director is not prohibited from changing her position during the course of litigation in order to fulfill her duty to ensure proper enforcement and lawful administration of the Black Lung program. *See* 30 U.S.C. § 932(k); *Pavesi v. Director, OWCP*, 758 F.2d 956, 963 (3d Cir. 1985); *Shortt v. Director, OWCP*, 766 F.2d 172,174 (4th Cir. 1985); *Hardisty v. Director, OWCP*, 776 F.2d 129, 130 (7th Cir. 1985).

Consol further quibbles with the fact that it took six months for the Director to provide the entire 2005 claim file to the ALJ. But the Director timely responded to the ALJ's procedural orders in good faith, and although missteps occurred, the entire file was provided within six months. Indeed, Consol's own inaction contributed mightily to the delay. It requested a three-month extension of the ALJ's original deadline to review the 2005 claim file and determine if additional evidence or discovery was needed (JA 129-30), and identified the missing exhibits

only after the ALJ's second deadline had passed (JA 131). Consol can hardly justify *its delay* when it concedes that "*any cursory review of the record would have revealed Dr. Rasmussen's 2006 and Dr. Baker's 2008 examinations were missing*." OB 25 (emphasis added).

Consol further charges that the three opportunities taken by the Director to complete the record establishes that the Director did not fulfill her duty as custodian of the record. OB 28. But Consol does not deny that the Director did supply the complete record. Therefore, her custodial duty was in fact discharged. The cases on which Consol relies simply do not apply. They concern core due process violations where an unreasonable delay in notification of potential liability or loss of crucial evidence prevented the liable party from ever mounting a meaningful defense. *Lane Hollow Coal Co.,* 137 F.3d at 807 (17-year delay in notifying responsible operator core due process violation); *Island Creek Coal Co.*, 202 F.3d at 883-84 (permanent loss of crucial evidence constitutes core due process violation).

Consol's claim that the ALJ acted as an "evidence-gatherer" for the Director (OB 29) is completely baseless. Section 725.309(c)(2) requires the submission of the entire 2005 claim file, and the Board instructed the ALJ to admit the 2005 claim file on remand. JA 123. In ensuring that this task was completed, the ALJ was simply obeying the mandate on remand. *Youghiogheny and Ohio Coal Co.*,

200 F.3d at 950 ("inferior tribunals cannot refuse to obey the decisions of superior tribunals"). Regardless, the ALJ's reasonable and measured approach in obtaining the relevant evidence treated all parties fairly. 20 C.F.R. § 725.351(b) (detailing powers of ALJs); *see generally North American Coal Co. v. Miller*, 870 F.2d 948, 951 (3d Cir. 1989) ("'While the conduct of a hearing is within the sound discretion of the administrative law judge, the judge is obliged, above all, to ensure that all parties have the opportunity to fully present their case by way or argument, proof and cross-examination of the witness.'") (citation omitted); *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 162 (3d Cir. 1986) (an ALJ's "discretion includes the power to make reasonable, nonarbitrary decisions regarding the admission or exclusion of evidence for procedural reasons," and, holding, in affirming ALJ's ruling, "In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency"); *McKamey*, 1999 WL 623737 at *3.

Finally, Consol contends it was "further prejudiced" by the district director's failure to consider the 2005 claim evidence "to initially determine whether there has been a change in a condition of entitlement." OB 27 (citing 20 C.F.R. § 725.309). But this argument misconstrues the law. The threshold determination of a change in condition under Section 725.309 is based on evidence developed *after* the prior denial. 20 C.F.R. § 725.309(c)(4); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012) ("[T]he ALJ need not compare the old and new

evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present."). The district director determined in the 2012 claim (JA 66-69) that the newly-developed evidence, namely, Dr. Rasmussen's August 21, 2012, report, established all elements of entitlement. This necessarily established a change in a previously-denied element of entitlement, regardless of the grounds or evidence upon which the 2005 claim was denied. In any event, the district director's proposed decision did not become final, by virtue of Consol's appeal, and it occasioned no prejudice since the ALJ reviewed the case de novo.

In sum, Consol has failed to demonstrate that the course of proceedings here was so unfair as to "impugn its results." *Oliver,* 555 F.3d at 1219. Consol's request that it be relieved of liability based on due process concerns must be rejected.

C. <u>Consol has failed to rebut the presumption of timeliness.</u>

The BLBA requires a miner to file a claim for benefits within three years of a medical determination of total disability due to pneumoconiosis, and 20 C.F.R. § 725.308(b) establishes a rebuttable presumption of timeliness. *Supra* at 5.

In order to rebut the presumption that Mr. Madden's May 2012 claim was timely filed, Consol had to establish that a physician found Mr. Madden totally disabled due to pneumoconiosis before May 2009, and that Mr. Madden learned of

this diagnosis before that date. *Id.*; *Zurich Am. Ins. Group v. Duncan o/b/o Duncan*, 889 F.3d 293, 299 (6th Cir. 2018); *Arch of Ky.*, 556 F.3d at 479. The ALJ and Board correctly found that Consol failed to meet its burden.

Consol argues that Mrs. Madden's hearing testimony that she and Mr. Madden had "to go back over" (HT 36) to Dr. Rasmussen in connection with Mr. Madden's 2008 modification request "establishes Dr. Rasmussen diagnosed the miner with totally disabling pneumoconiosis after the 2007 benefits denial and at least three years before the 2012 claim was filed." OB 36. In fact, Mrs. Madden's testimony does no such thing. Her testimony not only fails to disclose the post-2007 date on which she and her husband went back to Dr. Rasmussen, it also does not prove that the doctor actually examined Mr. Madden at that time or told him he was totally disabled due to pneumoconiosis. HT 36. The ALJ reasonably dismissed the hearing testimony as too vague to trigger the limitations clock because it was unclear "precisely when [Mr. Madden] saw Dr. Rasmussen and what Dr. Rasmussen told him." JA 216. This credibility finding was both rational and for the ALJ, not this Court, to make. *Zurich Am. Ins. Group*, 889 F.3d at 299 ("We do not reweigh the evidence or substitute our judgment for that of the ALJ" and "we will not reverse the ALJ's decision merely because we would have taken a different view of the evidence were we the trier of facts.") (internal quotations omitted). Accordingly, the Court should affirm the ALJ's finding that Mrs.

Madden's hearing testimony was insufficient to trigger the statute of limitations as supported by substantial evidence.

Consol also summarily asserts that, although Dr. Baker did not assess total disability, his diagnosis of "a class 2 pulmonary impairment . . . suggests inability to do coal mine work" and demonstrates that the 2012 claim was untimely.[14] OB 36-37. As the ALJ correctly found, however, Dr. Baker's 2008 opinion is insufficient to start the limitations statute because the doctor did not clearly diagnose total disability due to pneumoconiosis. JA 217; *see Adkins v. Donaldson Mine Co.*, 19 Black Lung Rep. (MB) 1-36, 1-43 (Ben. Rev. Bd. 1993) ("[O]nly those medical opinions using the phrase, 'total disability due to pneumoconiosis,' or otherwise clearly indicating a medical determination of total disability due to pneumoconiosis should be found sufficient to trigger the statutory time limit for filing a claim."); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 669 (4th Cir. 2017) (observing that medical opinions of an "imprecise nature" will not trigger the running of the limitations period.). Moreover, ALJ Clark correctly noted that there was no evidence that Dr. Baker's report had been provided or communicated

[14] The Court should summarily dismiss this argument because it is being raised for the first time before this Court. *See* JA 216 (noting that "[Consol] appears to have abandoned" its argument that Dr. Baker's July 2008 evaluation could render Mr. Madden's claim untimely); *Island Fork Constr. v. Bowling*, 872 F.3d 754, 758 (6th Cir. 2017) (refusing to consider issue not raised to ALJ or Board).

to Mr. Madden. JA 217; 20 C.F.R. § 725.308(a).

In short, Consol's argument is contrary to law and should be rejected. *See Arch of Ky.*, 556 F.3d at 482 ("[The statute of limitations] does not exist as a trap for the unwary or unsophisticated miner."). Indeed, to expand the scope of triggering medical determinations beyond the text of Section 932(f) would conflict with the remedial nature of the BLBA and congressional intent "to include as many miners under the Act as possible." *Id*.

CONCLUSION

The Court should affirm the finding below that Consol is liable for the payment of Mr. Madden's BLBA benefits and that Mr. Madden's 2012 claim was timely.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes oral argument is unnecessary.

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 8,215 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, copies of the Brief for the Federal Respondent were served electronically using the Court's CM/ECF system on counsel of record.

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