No. 19-3113

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND CREEK COAL COMPANY,

Petitioner

v.

LARRY ALLEN YOUNG

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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF THE ISSUES

This case involves a 2012 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 Larry Allen Young. On October 16, 2017, United States Department of Labor (DOL) Administrative Law Judge (ALJ) Timothy J. McGrath issued a decision awarding benefits and ordering Island Creek Coal Company (Island Creek or the coal company), the miner's former employer, to pay them. Island Creek appealed

this decision to DOL's Benefits Review Board, which affirmed the ALJ's award on December 17, 2018. Island Creek petitioned this Court for review on February 13, 2019.

1. Island Creek argues in its opening brief that the ALJ's decision awarding benefits should be vacated because the ALJ was not properly appointed. Island Creek did not raise this Appointments Clause challenge before the ALJ, and raised it before the Board only in a motion four months after briefing had closed and seven months after it had filed its brief before the Board. Consistent with this Court's case law and its own longstanding precedent, the Board found the challenge untimely and declined to hear it. The first question presented is whether Island Creek forfeited its Appointments Clause challenge by failing to timely raise it before the administrative agency.

2. It is undisputed that Mr. Young, who worked in underground coal mining for at least nineteen years, suffers from a totally disabling respiratory impairment. It is likewise undisputed that the ALJ properly invoked the fifteen-year presumption of total disability due to pneumoconiosis. The burden then shifted to Island Creek to rebut the presumption by establishing that Mr. Young does not suffer from clinical and legal pneumoconiosis, or that pneumoconiosis plays no part in his total respiratory disability.

In *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598 (6th Cir. 2014), this Court held that a miner may establish legal pneumoconiosis by showing that his coal-mine dust exposure "*contributed* to the [respiratory] disease *at least in part.*" (Emphasis added). On rebuttal, the ALJ required Island Creek to establish that Mr. Young's coal mine dust exposure did not *contribute at least in part* to his respiratory disease in order to disprove the existence of legal pneumoconiosis.

In light of this Court's holding in *Arch on the Green*, the second question presented is whether the ALJ used the correct legal standard in determining that Island Creek failed to prove that Mr. Young does not suffer from legal pneumoconiosis; and

3. The third question presented is whether substantial evidence supports the ALJ's conclusion that Island Creek failed to prove that Mr. Young does not suffer from legal pneumoconiosis.

STATEMENT OF THE CASE

A. Legal Background

1. Definition of pneumoconiosis

In order to be entitled to BLBA benefits, a miner must prove that (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) his respiratory condition is totally disabling; and (4) his pneumoconiosis is a substantially contributing cause of his disabling respiratory

condition. 20 C.F.R. §§ 718.202-204, 725.202(d)(2); *Navistar, Inc. v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014).

As set forth in 20 C.F.R. § 718.201, the "pneumoconiosis" a miner must prove may be "clinical" or "legal." *Clinical (or medical)* pneumoconiosis refers to a collection of diseases recognized in the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP," and is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

Legal pneumoconiosis is a broader category, covering "any chronic lung disease or impairment . . . arising out of coal mine employment," whether restrictive or obstructive in nature.[1] 20 C.F.R. § 718.201(a)(2). A chronic lung disease or impairment is considered to have "arise[n] out of coal mine

[1] A *restrictive impairment* is "characterized by reduction in lung volume," whereas *obstructive impairments* "are characterized by a reduction in airflow." *The Merck Manual* (19th ed. 2011) 1853, 1858. In lay terms, a restrictive disease makes it more difficult to inhale, while an obstructive disease makes it more difficult to exhale. *See Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121 n.2 (9th Cir. 2014).

employment" if it is "significantly related to, or substantially aggravated by," dust exposure in coal mine employment. 20 C.F.R. § 718.201(b).

As noted above, the Court in *Arch on the Green* held that a miner's respiratory impairment is "significantly related to, or substantially aggravated by" exposure to coal-mine dust if the exposure "*contributed* to the [respiratory] disease *at least in part.*" 761 F.3d at 598 (emphasis added). *See also Island Creek Coal Co. v. Marcum*, 657 Fed.App'x 370, 377 (6th Cir. 2016) (explaining that legal pneumoconiosis is established if the miner's respiratory condition "was caused *in part* by coal mine employment") (emphasis added) (internal quotation omitted).

A miner may be found to suffer from *legal* pneumoconiosis even if he does not have *clinical* pneumoconiosis, *e.g.*, even if the chest x-ray, biopsy, and autopsy evidence is not positive for clinical pneumoconiosis. 20 C.F.R. § 718.202(a)(4). The regulation at 20 C.F.R. § 718.201 also provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure." *See Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 305 (6th Cir. 2018) ("Federal regulations recognize pneumoconiosis, including legal pneumoconiosis, as a latent and progressive disease. . . .").

2. The preamble to the regulatory definition of pneumoconiosis

Section 718.201 was promulgated in 2000. 65 Fed. Reg. at 80045 (Dec. 20, 2000). Its preamble "explained the medical and scientific premises for the changes." *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012). Notably, the preamble addresses a number of issues relevant to the medical evidence now before the Court. For instance, the preamble explains that medical literature has shown that "coal miners have increased risk of developing COPD [chronic obstructive pulmonary disease]," including emphysema, 65 Fed. Reg. at 79943; "dust-induced emphysema and smoked-induced emphysema occur through similar mechanisms," *id.*; "[s]mokers who mine have additive risk for developing significant obstruction," *id.*; and "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis," 65 Fed. Reg. 79940. The preamble also rejected, as contrary to medical studies, the opinion of a doctor who "found no evidence of a *clinically significant* reduction in [obstructive] lung function resulting from coal mine dust exposure," even though the doctor acknowledged that a reduction was statistically possible. 65 Fed. Reg. 79938 (emphasis added).

In four published decisions, this Court has approved the use of the preamble in weighing medical opinions. *See Central Ohio Coal*, 762 F.3d at 491-92 ("The sole issue presented here is whether the ALJ was entitled to discredit [the doctor's]

medical opinion because it was inconsistent with the [DOL's] position set forth in the preamble, and the answer to that question is unequivocally yes."); *A & E Coal*, 694 F.3d at 802 (same); *see also Arch on the Green*, 761 F.3d at 601-02; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013).

3. The fifteen-year presumption

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 respiratory condition. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b)(1)(i), (iii). 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 satisfy one of two alternate methods of rebuttal: 1) proving 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) proving 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, 664 (6th Cir. 2015). This latter standard is often referred to as the "rule-out" standard.

B. Procedural facts

Mr. Young filed his claim for BLBA benefits in 2012. Joint Appendix at (JA) 317. After reviewing the evidence, the district director of the Office of Workers' Compensation Programs (OWCP) concluded that Mr. Young was entitled to benefits because the fifteen-year presumption of entitlement was invoked and unrebutted. JA 316-53. At the coal company's request, the district director in December 2013 transferred the case for an ALJ hearing, which was held in May 2016. JA 317.

On October 16, 2017, the ALJ issued a decision awarding Mr. Young benefits because the fifteen-year presumption was invoked and unrebutted. JA 316. The ALJ found no rebuttal under the first method because Island Creek failed to disprove the existence of legal pneumoconiosis, JA 341-49; and no rebuttal under the second method because the coal company failed to prove that Mr. Young's respiratory disability was unrelated to his pneumoconiosis, JA 349-50.

Island Creek appealed this decision to the Board, arguing that the ALJ erred in finding that the company failed to disprove legal pneumoconiosis. JA 355. Briefing on this issue was completed on April 13, 2018 (the due date of the coal company's optional reply, which was not filed). But on August 7, 2018, Island Creek requested permission to file a supplemental brief addressing the Supreme Court's decision in *Lucia v. SEC*, 138 S.Ct. 2044 (issued on June 21, 2018).

On December 17, 2018, the Board affirmed the ALJ's award, concluding that the ALJ properly found that Island Creek had failed to either disprove legal pneumoconiosis or rule out pneumoconiosis as a cause of his disability, and had thereby failed to rebut the fifteen-year presumption of entitlement. JA 355, 357-361. The Board also determined that Island Creek had waived its *Lucia* argument by not raising it in the coal company's opening brief. JA 356 n.2.

C. Substantive facts

1. General background

Mr. Young was employed in underground coal mining for at least nineteen years, ending in 1999, and has smoked cigarettes since 1969, one-to-three packs a day. JA 319-20. He was diagnosed with emphysema as far back as 2002. JA 62.

2. Relevant medical opinions

Island Creek submitted the opinions of three doctors to prove that Mr. Young did not suffer from legal pneumoconiosis: Drs. Jeffrey Selby, Peter Tuteur, and William Culbertson.

Dr. Selby discussed Mr. Young's condition in a 2013 medical report, JA 116, and a 2016 deposition, JA 234. He diagnosed total respiratory disability due equally to asthma and emphysema.[2] JA 120, 125, 263. He identified asthma as a

[2] The doctor also diagnosed an inflammatory infectious disease of unknown origin, shown as scarring on x-ray. JA 120, 242.

cause based upon symptomology, variable pulmonary function study results, and reduced diffusion capacity.[3] JA 256-57, 259, 264. And he identified emphysema as a cause based upon emphysematous changes shown by biopsy, JA 242, and reduced diffusion capacity. JA 242, 244, 262.

Dr. Selby opined that, while emphysema could be due to or aggravated by coal dust exposure, that was not the case here. JA 239, 247, 262. He eliminated coal dust as a cause because the x-ray pattern was "not right"; there was no evidence of coal dust in the lungs by x-ray; the biopsy revealed no coal macules; and "if there is a skip period of no disease for several years," the miner's condition is "highly unlikely to be related to coal mining." JA 240, 264. *See also* JA 256 ("We can eliminate coal mine dust as a cause because it wouldn't suddenly jump in here several years after cessation of exposure. . . ."). When specifically asked if an individual can suffer from legal pneumoconiosis without an x-ray positive for pneumoconiosis, he replied that it "depend[ed]" upon whether there were no other cause for the condition. JA 267. With no other cause, then it was "a fairly clear cut reason to invoke coal mine dust." *Id.* In short, Dr. Selby's attribution of all of Mr. Young's emphysema to smoking, and none to coal-dust exposure, was because

[3] The doctor defined *diffusion capacity* as "the ability of the lungs to allow oxygen to diffuse across the air sacs into the fine network of capillaries where the blood is so that oxygen can get into the bloodstream and carbon dioxide can get out of the bloodstream and exhaled." JA 261.

there was "more than enough explanation from many more years of cigarette smoking than coal dust exposure, many more years of secondary exposure. . . ." JA 266. Dr. Selby also opined that asthma was never due to or aggravated by coal dust exposure. JA 264.

Dr. Tuteur reported on the miner's condition in a 2014 letter. JA 180. He diagnosed a moderately severe obstructive condition in the form of emphysema, with a reduced diffusion capacity. JA 182. He concluded that Mr. Young did not have clinical or legal pneumoconiosis "of sufficient severity and profusion to cause clinical symptoms, physical examination abnormalities, impairment of pulmonary function or radiographic change." *Id.*

The doctor explained that "though it is statistically possible for an individual miner to develop [COPD] as a result of the inhalation of coal mine dust, it occurs relatively infrequently and thus attribution of coal mine dust etiology of COPD is not valid for an individual cigarette smoking miner such as [Mr. Young]. . . ." JA 184-85. In support, Dr. Tuteur cited to numerous studies, most of which were performed before 2000, JA 183-84, and he did not provide copies of the articles for review by the ALJ or the opposing parties.

Dr. Tuteur defended his use of statistics to determine causation as "[b]ased on a reasoning process regularly used by physicians in terms of developing regular risk or likelihood using the medical literature as a data foundation for this

conclusion." JA 183. Relying on statistics, Dr. Tuteur concluded that if Mr. Young had "never worked in the coal mine industry, [his] clinical picture and course would have been no different." JA 185.

Dr. Culbertson, Mr. Young's treating physician since 2011, JA 145, was deposed in 2014. JA 139. He diagnosed obstructive conditions such as emphysema, COPD, and granulomatous inflammation, JA 147, 158, possibly "some" coal workers' pneumoconiosis, JA 150, 169, and (contrary to Dr. Selby) no asthma, JA 163. He reported that Mr. Young's impairment was due to COPD, which in turn was related to the miner's smoking history. JA 149, 158-59, 161.

When asked whether pneumoconiosis could cause "dramatic drops" in Mr. Young's respiratory condition, Dr. Culbertson indicated it could. JA 161-62. When asked whether a latency period such as Mr. Young's could be due to coal-mine dust exposure, he stated: "I think all of his x-ray changes and his pulmonary function studies could be explained by years of smoking and the histoplasmosis," JA 161, but later agreed that "11 or 12 years" would be a "sufficient" latency period, JA 171. The doctor also explained that pneumoconiosis causes a restrictive impairment that does not respond to treatment, JA 164, 169, adding that a miner with pneumoconiosis by x-ray would not have Mr. Young's "severe degree of impairment," JA 166. When asked whether Mr. Young suffered from legal

pneumoconiosis, Dr. Culbertson responded that he did not understand the term, explaining: "I'm a clinician and I go by clinical findings." JA 172.

When asked whether he could exclude Mr. Young's twenty-three years of coal dust exposure as a cause, Dr. Culbertson initially responded: "I can. . . . I don't think it's likely," adding: "I don't see how you could claim that coal dust is the cause of his COPD when he's been a two-pack-a-day smoker for 40 years." JA 173. But the doctor then admitted it was "possible" that coal dust exposure aggravated Mr. Young's COPD. JA 174.

3. ALJ decision (JA 316)

At the outset, the ALJ found invocation of the fifteen-year presumption. JA 339. He then considered whether the medical evidence rebutted the presumption. *Id.* Turning first to whether Island Creek disproved clinical pneumoconiosis, the ALJ found that the chest x-rays were in equipoise, JA 340; a biopsy failed to detect pneumoconiosis, JA 341; and a recent CT-scan was read as showing no indication of pneumoconiosis, *id.* Based upon the CT-scan evidence, the ALJ determined that the medical evidence proved the absence of clinical pneumoconiosis. JA 342.

Next, the ALJ considered legal pneumoconiosis. JA 342. He first explained that Drs. Manoj Malmudar and Glen Baker both opined that Mr. Young's COPD was due to smoking and coal dust exposure, and thus were of no aid to Island

Creek in its burden to disprove legal pneumoconiosis. JA 343. Consequently, the ALJ turned to the opinions Island Creek's doctors: Selby, Tuteur, and Culbertson.

The ALJ reported Dr. Selby's conclusions: that Mr. Young had no respiratory condition arising out of coal mine employment, and that his smoking-related emphysema was "not caused by nor contributed to by coal mine dust inhalation." JA 345. The ALJ then observed that the doctor "did not offer a persuasive rationale or support for his summary conclusion. . . ." *Id.* In support of this criticism, the ALJ made the following observations:

1. The doctor stated that coal dust "does not suddenly 'jump in' several years after cessation of exposure," but neither explained nor supported that supposition, and "the Act recognizes pneumoconiosis can be both latent and progressive," JA 345;
2. The doctor reported that the miner's pulmonary function study results were "all over the map," but did not acknowledge or explain the significance of the fact that all the results established total respiratory disability by regulation, *id.*;
3. The doctor would not diagnose a coal-dust-related respiratory condition unless there were positive x-ray or biopsy results – evidence of dust or coal macules in the lungs or, as the doctor termed it, the "right pattern" – but the BLBA and the regulations provide that coal dust exposure can

cause an obstructive lung disease even without an x-ray, biopsy, or autopsy documenting clinical pneumoconiosis, JA 346;

4. The doctor reported that coal-dust exposure is incapable of reducing a miner's diffusion capacity to the extent here, but gave no support for that premise, *id.*;
5. The doctor admitted that smoking and coal-dust exposure may have an "additive effect," but failed to explain why that did not happen here, *id.*;
6. The doctor failed to explain why, even if smoking was sufficient to cause the miner's respiratory condition, the miner's significant coal-dust exposure did not also contribute to or aggravate that condition, *id.*; and
7. The doctor categorically eliminated coal mine dust as the cause of the miner's asthma – a respiratory condition – but the Act provides that respiratory conditions "caused or aggravated by coal mine dust exposure" may be covered, JA 346-47.

Accordingly, the ALJ found Dr. Selby's opinion insufficient to disprove legal pneumoconiosis.

Next, the ALJ considered Dr. Tuteur's opinion. The ALJ detailed the statistics relied on by the doctor, JA 333-34, and acknowledged that physicians may "regularly use statistically based studies for important clinical decision making, and weigh relative risk factors. . . ." JA 344. But, the ALJ maintained,

"[e]mployer's burden [was] not to establish a clinical diagnosis, but to exclude coal dust exposure as a factor in Mr. Young's respiratory impairment," and the doctor "has conceded he cannot do so." A.344-45. The ALJ also criticized the doctor for not explaining "why Mr. Young could not be one of the statistically rare individuals who develop obstruction as a result of coal mine dust exposure"; and for not addressing "any additive effects from [Mr. Young's] significant history of coal mine dust exposure." *Id.* Finally, the ALJ cited Seventh and Tenth Circuits cases holding that proof that a miner "[has] statistically less risk of coal dust contribution to his COPD [] is insufficient to establish rebuttal [of the fifteen-year presumption]." *Id.*

Finally, the ALJ considered Dr. Culbertson's opinion. JA 347. The ALJ found it insufficient to disprove legal pneumoconiosis because "[the doctor] agreed Mr. Young's coal mine dust exposure could possibly be an aggravating factor to his respiratory impairment." JA 348. The ALJ also agreed with the doctor that he (the doctor) did not understand the concept of legal pneumoconiosis, for much of the doctor's discussion related to clinical rather than legal pneumoconiosis. *Id.* The ALJ further found the doctor's opinion at odds with the BLBA, which provides that a miner is entitled to benefits even if his x-ray is negative for pneumoconiosis; and at odds with the preamble's discussion of pneumoconiosis, which recognizes

that coal-mine dust exposure can be "additive with smoking in causing clinically significant airways obstruction and chronic bronchitis." *Id.*

The ALJ concluded that Dr. Culbertson, as Mr. Young's treating physician, made his observations tailored to his treatment of the miner, and therefore failed to answer the question of whether coal-mine dust exposure "play[ed] any part in [Mr. Young's] respiratory impairment." JA 349. Accordingly, the ALJ concluded that the doctor's opinion failed to meet Island Creek's burden.

Next, the ALJ considered the second rebuttal method: proving that no part of Mr. Young's total respiratory impairment was due to his presumed-and-unrebutted-legal pneumoconiosis, JA 349, and concluded that the coal company failed in this burden. Among other reasons, the ALJ found the opinions of Drs. Selby and Tuteur not persuasive because they assumed – contrary to the ALJ's determination – that Mr. Young did not in fact suffer from pneumoconiosis. *Id.* (citing *Big Branch*, 737 F.3d 1063; and *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050 (2013)).[4]

[4] The ALJ did not consider Dr. Culbertson's opinion in this analysis, likely because the doctor admitted that coal-dust exposure was a possible cause of Mr. Young's respiratory impairment. Island Creek has not challenged the ALJ's finding that it failed to establish rebuttal under the second method.

4. Board decision (JA 355)

In addition to making its Appointments Clause argument (which the Board denied, *supra* p. 9), Island Creek argued to the Board, as it presently does to the Court, that the ALJ erred in finding that the opinions of Drs. Selby, Tuteur, and Culbertson failed to disprove legal pneumoconiosis. With respect to Dr. Selby's opinion, the Board set forth the doctor's main bases for finding no legal pneumoconiosis: the x-rays did not show coal dust or the "right pattern"; the lung biopsy did not report coal macules; and, Mr. Young's respiratory disability "suddenly jump[ed] in" after "several years" and then progressed "too quick[ly]. JA 350-60. The Board explained that the ALJ reasonably discounted this opinion because a miner may suffer from legal pneumoconiosis even without a diagnosis of clinical pneumoconiosis (in particular, without an x-ray read positive for pneumoconiosis); and because pneumoconiosis is known as a latent and progressive disease. JA 359-60, The Board concluded that the ALJ's discrediting of Dr. Selby's opinion on these grounds was permissible and supported by regulation and case law, and was therefore without error.[5] JA 360.

[5] The Board explained that, "[b]ecause the administrative law judge provided valid reasons for discrediting" Dr. Selby's opinion, as well as those of Drs. Tuteur and Cumbertson, "any error he may have made in discrediting their opinions for other reasons would be harmless." It therefore declined to address the ALJ's additional reasons for discrediting Island Creek's experts. JA 360 n.10.

Turning to Dr. Tuteur's opinion, the Board concluded that the ALJ permissibly discredited it as unreasoned because it was based on statistical probability. JA 359. Citing *Brandywine Explosives*, 790 F.3d at 668, the Board held that the ALJ properly discredited the doctor's opinion where he "failed to adequately explain how he eliminated Mr. Young's nineteen years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment." *Id.*

The Board also affirmed the ALJ's discrediting of Dr. Culbertson's opinion, finding that the "judge permissibly found that [it] did not adequately address the relevant issue: the degree to which Mr. Young's coal mine dust exposure may have contributed to his obstructive pulmonary impairment." JA 360. The Board therefore affirmed the ALJ's determination that Island Creek failed to rebut the presumption by disproving legal pneumoconiosis.

The Board then upheld the ALJ's finding that Island Creek failed to establish rebuttal by ruling out pneumoconiosis as a cause of Mr. Young's respiratory disability, and therefore affirmed the ALJ's award of benefits. JA 361.

SUMMARY OF THE ARGUMENT

Island Creek has forfeited its Appointments Clause argument because it did not timely raise the issue before the agency. The first time it raised the challenge was in August 2018, four months after briefing had closed before the Board. The

Board, consistent with its longstanding precedent, properly denied this motion, finding the Appointment Clause argument waived because Island Creek had failed to timely raise it in its opening brief to the Board.

Under longstanding principles of administrative law, Island Creek's failure to timely raise its Appointments Clause challenge before the agency means that it cannot raise that argument now to this Court. Island Creek has forfeited the issue, and has pointed to no circumstance sufficient to excuse that forfeiture.

On the merits, the question is whether the ALJ properly discredited Island Creek's medical opinions, submitted to prove that Mr. Young does not suffer from legal pneumoconiosis. Island Creek asserts that the ALJ used the wrong standard concerning legal pneumoconiosis, and that the ALJ improperly discredited the medical opinion evidence. This is not true. The ALJ used a standard that comports with the standard articulated by this Court in a published decision; moreover, the ALJ's bases for discrediting Island Creek's experts are supported by substantial evidence, and have been affirmed by this and other courts.

ARGUMENT

I.

ISLAND CREEK'S CHALLENGE – THAT THE DECISIONS BELOW MUST BE VACATED BECAUSE THE ALJ WAS NOT APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE – SHOULD BE REJECTED.

A. Standard of review

Whether Island Creek has forfeited its Appointments Clause challenge by failing to timely it raise before the agency is a question of law. This Court reviews questions of law *de novo*. *Arch of Ky., Inc. v. Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009). However, the Court reviews for an abuse of discretion the Board's determination that Island Creek did not timely raise the challenge because it was not presented in its opening brief to the Board. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 639 (6th Cir. 2009) (finding no abuse of discretion in Board's excusing claimant's failure to preserve the issue when the Director had preserved it); *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) ("[W]e afford considerable deference to the agency tribunal. In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency.") (internal quotation omitted).

B. Island Creek failed to timely raise its Appointments Clause challenge when this claim was pending before the agency.

Island Creek failed to timely make an Appointments Clause challenge before the ALJ or Board. For nearly five years – from December 2013 (when the district director forwarded the case for the ALJ hearing) until August 2018 (four months after briefing before the Board had ended), Island Creek never challenged the authority of DOL ALJs to decide black lung cases generally or of ALJ McGrath to

decide this case.. Island Creek waited until its motion for supplemental briefing to raise the Appointments Clause for the first time.[6]

By then, it was too late. The Board properly refused to consider Island Creek's new issue, holding "[b]ecause [Island Creek] did not raise the Appointments Clause issue in its opening brief, it waived the issue." A. 356 n.3. As support, the Board cited *Lucia*, 138 S.Ct. at 2055 (requiring a "timely challenge" to an officer's appointment), and this Court's decision in *Island Creek Coal Co. v. Wilkerson [Wilkerson]*, 910 F.3d 254 (6th Cir. 2018), which held that an Appointments Clause challenge was forfeited when not raised in an opening brief before the Court.

The Board's own precedent likewise confirms that it is procedurally improper for a party to raise an issue for the first time after briefing is completed or the Board has issued its decision. *Williams v. Humphreys Enters., Inc.*, 19 Black Lung Rep. (MB) 1-111, 1-114 (1995) (declining to consider new issues raised by petitioner after it files opening brief identifying the issues to be considered on appeal); and *Senick v. Keystone Coal Mining Co.*, 5 Black Lung Rep. (MB) 1-395,

[6] The Director agrees that ALJs who preside over BLBA proceedings are inferior officers, and that the ALJ here was not properly appointed when he adjudicated the miner's claim. To remedy this, the Secretary of Labor in December 2017 ratified the ALJ's appointment and the appointments of other then-incumbent DOL ALJs. *See infra* p. 32.

1-398) (1982) (stating that the Board "will not normally address new arguments raised in reply briefs" and declining to do so); *see also Caldwell v. North American Coal Corp.*, 4 Black Lung Rep. (MB) 1-135, 1-138 to 1-39 (1981) (same, while explaining that its "practice accords with the treatment of reply briefs in the United States Courts of Appeals"); *Ravalli v. Pasha Maritime Servs.*, 36 Ben. Rev. Bd. Serv. 91 (2002) (issues may not be raised for the first time in a motion for reconsideration).

Following this policy, the Board has routinely declined to consider Appointments Clause challenges raised subsequent to a petitioner's opening brief. *See Pauley v. Consolidation Coal Co.*, BRB No. 17-0554 BLA (Apr. 25, 2018) (declining to consider Appointments Clause challenge raised for first time in post-briefing motion for abeyance), Federal Respondent's Separate Appendix (SA) 385; *Eversole v. Shamrock Coal Co.*, BRB No. 17-0629 BLA (Apr. 24, 2018) (same), SA 375. Even after the Supreme Court decided *Lucia*, the Board has continued to deny as untimely similar belated attempts to challenge an ALJ's authority. *Motton v. Huntington Ingalls Indus.*, 52 Ben. Rev. Bd. Serv. 69, 69 n.1, 2018 WL 6303734, at *1 n.1 (2018) (Appointments Clause challenge forfeited when first raised in post-briefing motion); *Luckern v. Richard Brady & Assoc.*, 52 Ben. Rev. Bd. Serv. 65, 66 n.3, 2018 WL 5734480, at *2 (2018) (Appointments Clause challenge forfeited when first raised in reply brief); *Radcliff v. Energy West Mining Co.*, BRB

No. 17-0484 BLA (June 19, 2019) (Appointments Clause challenge in motion for reconsideration forfeited), SA 387; *Tackett v. IGC Knott County*, 2019 WL 1075364, BRB No. 18-0033 BLA (Feb. 26, 2019) (Appointments Clause challenge not raised in initial appeal to BRB is untimely); *Haynes v. Good Coal Co.*, 2019 WL 523769, BRB Nos. 18-0021 BLA; 18-0023 BLA (Jan. 18, 2019) (post-briefing motion raising Appointments Clause challenge is untimely), *appeal docketed*, No. 19-3142 (6th Cir.); *Conley v. National Mines Corp.*, BRB No. 17-0435 BLA (Jan. 7, 2019) (motion for reconsideration); *appeal docketed*, No. 19-3139 (6th Cir.), SA 370; *Eversole v. Shamrock Coal Co.*, 2018 WL 7046745, BRB No. 17-0629 BLA (Dec. 12, 2018) (post-briefing motion); *Beams v. Cain & Son, Inc.*, 2018 WL 7046795, BRB No. 18-0051 BLA (Nov. 26, 2018) (post-briefing motion); *McIntyre v. IGC Knott County*, 2018 WL 70466700, BRB No. 17-0583 BLA (Nov. 26, 2018) (post-briefing motion); *Elkhorne Eagle Mining Co. v. Higgins*, 2018 WL 3727423, BRB No. 17-0475 (July 30, 2018) (post-briefing motion), *appeal docketed*, No. 18-3926 (6th Cir.), *Elkins v. Dickenson-Russell Coal Co.*, 2018 WL 3727420, BRB No. 17-0461 BLA (July 5, 2018) (post-briefing motion); *Napier v. Star Fire Coals, Inc.,* BRB No. 17-0149 BLA (July 5, 2018) (motion for reconsideration), *appeal docketed*, No. 18-3838 (6th Cir.), SA 377.

The Board procedure of declining to hear an issue not raised in an opening brief is certainly inoffensive as it closely parallels this Court's own rule on the

subject. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999) (recognizing similarity between Board and Court rule that issues not raised in opening briefs are generally considered abandoned); *Caldwell*, 4 Black Lung Rep. at 1-138-39 (explaining that rule in courts of appeals is basis for Board practice); *see, e.g., Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 779 (6th Cir. 2018) ("[A]rguments made to us for the first time in a reply brief are waived."); *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) (same); *accord Golden v. Comm'r*, 548 F.3d 487, 493 (6th Cir. 2008) ("[T]heir argument was forfeited when it was not raised in the opening brief."); *Pagan v. Fruchey*, 492 F.3d 766, 769 n.1 (6th Cir. 2007) (en banc) ("It is well established that issues not raised by an appellant in its opening brief . . . are deemed waived.").

Nor was the Board's refusal to afford special treatment to Appointments Clause challenges out of line. This Court confirmed that Appointments Clause challenges "are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture" in *Wilkerson*, 910 F.3d 254 at 256 (quoting *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018)). The *Wilkerson* panel declined to consider the petitioner's Appointments Clause challenge because it was not raised before the Court until petitioner's reply brief: "Time, time, and time again, we have reminded litigants that we will treat an argument as forfeited when it was not raised in the opening brief." 910 F.3d at 256 (internal quotation

omitted). *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (holding that petitioner "forfeited its [Appointments Clause] argument by failing to raise it in its opening brief"); *In re DBC*, 545 F.3d 1373, 1377, 1380 & n.4 (Fed. Cir. 2008) (refusing to entertain an untimely Appointments Clause challenge to the appointment of a Patent Office administrative judge); *see also Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018) (citing *Lucia* and holding that petitioners "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency"), *cert. denied*, 139 S.Ct. 2013(2019).

This Court will only overturn the Board's procedural rulings for an abuse of discretion. *Greene*, 575 F.3d at 639. The Board's straightforward application here of its longstanding rule against petitioners raising new issues after filing an opening brief falls far short of that standard. Consequently, Island Creek failed to preserve its Appointments Clause challenge before the agency.

C. By failing to timely raise the issue before the agency, Island Creek forfeited its Appointments Clause challenge before this Court.

Island Creek's failure to preserve its Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles governing judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," or the "Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia*, the Supreme Court held that SEC ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause. In so holding, the Supreme Court explained that it "has held that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." 138 S.Ct. at 2055 (emphasis added, internal quotation omitted).

To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he – unlike other litigants – had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservation concerns had been raised in *Lucia's* merits briefing: as amicus, the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot

succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).[7]

Unlike the challenger in *Lucia*, Island Creek failed to timely raise and preserve its Appointments Clause challenge before the agency. It waited nearly five years, (from December 2013 to August 2018) to first raise the issue. As the Board properly concluded, by then it was too late.

Under longstanding principles of administrative law, Island Creek may not now raise before the court an argument it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. Based on the improper appointment, the district court invalidated the agency's order. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the

[7] Even if *Lucia*'s repeated references to timeliness could be considered dicta, "[a]ppellate courts have noted that they are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow*, 278 F.3d 581, 588 (6th Cir. 2002) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also Kabani & Co.,* 733 F. App'x at 919 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

agency's proceedings "while it has opportunity for correction [.]" *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37.[8]

This Court has consistently applied these normal principles of forfeiture, and explained that it is "well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997). And in cases under the BLBA, the Court will not consider issues that were not raised and preserved before the Board. *See*, *e.g.*, *Island Fork Construction v. Bowling*, 872 F.3d 754, 757-58 (6th Cir. 2017) ("Because KIGA did not raise the issue of its status before the ALJ or the Board, and instead participated in the proceedings, the challenge to personal jurisdiction was

[8] As previously discussed, Island Creek's initial raising of its Appointments Clause challenge in a motion for supplemental briefing before the Board was not an "objection made at the time appropriate under its practice." *L.A. Tucker*, 344 U.S. at 37. Island Creek thus failed to exhaust its administrative remedies. *See Spectrum Health-Kent Community Campus v. N.L.R.B.*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the [NLRB]'s regulations require.").

forfeited."); *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) ("Generally, this court will not review issues not properly raised before the Board."); *Hix v. Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987) ("[W]e hold that even if a claimant properly appeals some issues to the Board, the claimant may not obtain [judicial] review of the ALJ's decision on any issue not *properly* raised before the Board.") (emphasis added).

These principles apply with full force to Appointments Clause challenges. As explained earlier, those challenges are not jurisdictional and receive no special entitlement to review. *See supra* p. 25; *see also GGNSC Springfield LLC v. NLRB,* 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *Turner Bros. Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) ("Appointments Clause challenges are nonjurisdictional and may be waived or forfeited."). *Lucia* did not change this. This Court, as well as the Ninth and Tenth Circuits, have all held post-*Lucia* that Appointments Clause claims were forfeited when a petitioner failed to preserve them before the agency. *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (finding Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case); *Kabani & Co.*, 733 F. App'x at 919 ("[P]etitioners forfeited their Appointments Clause claim by failing

to raise it in their briefs or before the agency."); *Energy West Mining Co. v. Lyle on behalf of Lyle [Lyle]*, __F.3d _, 2019 WL 2934065 (10th Cir. July 9, 2019) ("Because Energy West did not invoke the Appointments Clause in proceedings before the Benefits Review Board, we lack jurisdiction to consider the validity of the administrative law judge's appointment."); *Turner Bros.*, 757 F. App'x at 699 (agreeing that "Turner Brothers' failure to raise the [Appointments Clause] issue to the agency is fatal").

Likewise, the Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d at 1377-81 (same).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)).

In fact, both the Secretary of Labor and the Board have taken appropriate remedial actions: the Secretary ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Department of Labor Administrative Law Judges* (Dec. 20, 2017).[9] And the Board has held that where an ALJ was not properly appointed and the issue is timely raised, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 82698645, at *2 (Ben. Rev. Bd. 2018) (en banc) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same), SA 368; *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (same), SA 381. Had Island Creek timely raised the issue, it could have obtained appropriate relief. *Energy West Mining Co.*, 2019 WL 2934065 at *1 (explaining that "the Board could have remedied a violation of the Appointments Clause by vacating the administrative law judge's decision and

[9] Available at: https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html.

remanding for reconsideration by a constitutionally appointed officer"). But it did not do so.

Island Creek's failure to timely present any Appointments Clause objection is quintessential forfeiture.

D. There are no grounds to excuse Island Creek's forfeiture.

In finding that Island Creek waived its Appointments Clause challenge, the Board correctly ruled that the company's arguments for excusing its forfeiture "lack merit." JA 357 n.1. Island Creek attempts to justify its administrative inaction by claiming that the Board could not cure the constitutional infirmity by appointing a new ALJ. OB 53. Energy West (represented by the same counsel as Island Creek) made this same argument in the Tenth Circuit to no avail. *Energy West Mining Co.*, 2019 WL 2934065 at *1. As that court understood, Island Creek is simply mischaracterizing the relief it seeks. It has not asked this Court to appoint a new ALJ (OB 39), for this Court, like the Board, is not empowered to do so. Rather, Island Creek seeks a ruling that the ALJ here was not constitutionally appointed, that his decision must therefore be vacated, and that a new decision must be rendered by a different, properly-appointed ALJ. The Board has issued many such orders already, *supra* p. 32, which would have spurred the Secretary of Labor (whose delegatee, the Director, is a party to this suit) to ensure the

availability of properly-appointed ALJs, if he had not already done so, *id.*[10] If Island Creek had timely acted before the agency, it could have obtained effective relief. *Energy West Mining Co.*, 2019 WL 2934065 at *1.

Island Creek attempts to justify its administrative inaction by reliance on this Court's decision in *Jones Brothers*. OB 44-52. That decision, however, provides no excuse. Indeed, the decision confirms that Island Creek's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the Court to excuse the forfeiture in that case. There, the Court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons.

[10] More generally, the Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr. Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); *Shaw v. Bath Iron Works*, 22 Ben. Rev. Bd. Serv. 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Mach. & Shipyard*, 17 Ben. Rev. Bd. Serv. 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet Gen. Shipyards,* 16 Ben. Rev. Bd. Serv. 49 (1983) (addressing an issue involving due process); *see generally* 4 Admin L. & Prac. § 11.11 (3d ed.) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance.").

First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers[.]"). Second, Jones Brothers' timely identification in its opening pleading of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (explaining that merely identifying the issue was a "reasonable" course for a "petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it"). Given these circumstances, the court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "[W]e generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, which identified the issue in its initial appellate filing, Island Creek did not timely identify the Appointments Clause issue to the Board. Moreover, Island Creek could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments

Clause violations, *see supra* p. 32, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* p. 34 n.10 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, Island Creek cannot plausibly claim to be surprised by *Lucia*. This Court considered and rejected that possibility in *Wilkerson*, explaining that "[n]o precedent prevented the company from bringing the constitutional claim before [*Lucia,*]" and that "*Lucia* itself noted that existing case law 'says everything necessary to decide this case.'" *Wilkerson*, 910 F.3d at 257 (quoting *Lucia*, 138 S. Ct. at 2053). The panel also noted that the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (2016), *cert. denied* 138 S.Ct. 2706 (2018), which reached the same conclusion as the Supreme Court in *Lucia*, was decided in December 2016, giving the *Wilkerson* petitioner enough time to properly raise the issue. Here, Island Creek also had enough time to raise the issue – *Bandimere* was decided before the ALJ's decision awarding the claim in October 2017, and long before Island Creek filed its brief with the Board. Any suggestion that Island Creek's forfeiture should be excused because *Lucia* was not foreseeable should be rejected.

Finally, if the Court were to excuse Island Creek's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly six

hundred cases from around the country – arising under the BLBA, the Longshore Act, and its extensions – currently pending before the Board. But in the great majority of these cases, no Appointments Clause claim has been raised. Should this Court excuse Island Creek's forfeiture here – where Island Creek failed to timely raise the claim to the agency – it would be inviting every losing party at the Board to seek a re-do of years of administrative proceedings. For the Black Lung program, whose very purpose is to provide timely and certain relief to disabled workers, that is precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice).

In sum, the basic tenets of administrative law required Island Creek to timely raise its Appointments Clause challenge before the agency. Island Creek's attempt to justify its failure to do so is unavailing. The Court should therefore find that Island Creek forfeited its challenge to the ALJ's authority under the Appointments Clause.

II.

THE ALJ APPLIED THE CORRECT STANDARD IN DETERMINING WHETHER MR. YOUNG SUFFERED FROM LEGAL PNEUMOCONIOSIS.

A. Standard of review

Whether the ALJ used the correct standard in weighing the evidence concerning legal pneumoconiosis is a question of law, which this Court reviews *de novo*. *Arch of Kentucky, Inc.*, 556 F.3d at 477.

B. Because the ALJ discredited Island Creek's medical experts, any alleged error in the legal standard for disproving legal pneumoconiosis is harmless. In any event, *Arch on the Green* held that to establish legal pneumoconiosis, a miner's coal mine dust exposure need only contribute at least in part to his respiratory impairment or disease. To rebut the presumption of legal pneumoconiosis, a liable operator must therefore prove that coal mine dust exposure did not contribute at least in part to his respiratory condition.

As previously explained, there are two methods to rebut the fifteen-year presumption, and it is the first method that is in contention here. That method requires the liable operator to disprove both clinical and legal pneumoconiosis. The ALJ found that Island Creek disproved clinical pneumoconiosis but not legal. In weighing the evidence under legal pneumoconiosis, the ALJ used the causation terms "significantly related to, or substantially aggravated by" and "in part due to" interchangeably. *Compare e.g.,* JA 342 *with* JA 344. Island Creek, however, asserts that the ALJ used the wrong standard in weighing the evidence concerning

legal pneumoconiosis, and that such error requires remand for further review. The Director disagrees, both as to error and the need for remand.

As a preliminary matter, this Court need not address any of Island Creek's "standard" arguments because, as the Board properly concluded, any error concerning the causation standard is harmless. JA 358 n.7; *see Sea "B" Mining Co. v. Acosta*, 831 F.3d 244, 253 (4th Cir. 2016) ("Reversal on account of error is not automatic but requires a showing of prejudice."). The ALJ simply found the opinions of Island Creek's medical experts not credible (or equivocal), regardless of the legal standard. Conversely, had the ALJ found the opinions of Drs. Selby and Tuteur to be credible, they would have been sufficient to disprove the existence of legal pneumoconiosis under any standard because they reported that absolutely none of Mr. Young's respiratory condition was due to his coal-dust exposure.

Consequently, any error in the standard applied by the ALJ is harmless, requiring this Court to reject Island Creek's request for remand. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (finding harmless error where "there was no reason to believe that the ALJ would have given more weight to [the doctor's] 'inadequately reasoned opinion' in the absence of" consideration of an impermissibly-considered contrary doctor's opinion); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 832 (10th Cir. 2017) (holding that the ALJ's alleged use of the wrong standard did not require remand because the

ALJ "reasoned that [the employer's] evidence was not credible); *cf. Consolidation Coal Co. v. Director, OWCP [Noyes]*, 864 F.3d 1142, 1153-54 (10th Cir. 2017) (remanding because the ALJ used the wrong standard and "did not make an express credibility finding").

In any event, the ALJ did not use an improper standard. Section 718.305, which implements the presumption, provides in relevant part that to rebut the presumption, the liable operator must "[e]stablish[] . . . that the miner does not . . . have . . . [l]egal pneumoconiosis *as defined in § 718.201(a)(2)*." 20 C.F.R. § 718.305(d)(1)(i)(A) (emphasis added). That section, in turn, defines legal pneumoconiosis as "any chronic lung disease or impairment . . . arising out of coal mine employment," 20 C.F.R. § 718.201(a)(2), with the term "arising out of coal mine employment" to "include[] any chronic pulmonary disease . . . significantly related to, or substantially aggravated by" exposure to coal-mine dust, 20 C.F.R. § 718.201(b). In *Arch on the Green*, this Court held that to satisfy legal pneumoconiosis's requirement that the respiratory impairment be "significantly related to, or substantially aggravated by" exposure to coal-mine dust, it is enough that the miner's coal-mine dust exposure "contributed to the disease *at least in part*." 761 F.3d at 598 (emphasis added).

Island Creek asserts that, contrary to *Arch on the Gree*n, a significant/substantial standard is more demanding than an in-part standard, and to

disprove legal pneumoconiosis, the coal company was required to prove only that Mr. Young's coal-dust exposure was not "significantly related to, or substantially aggravated by OB 10, 17. The coal company, however, is incorrect. OB 13. *Arch on the Green* acknowledged the possibility that the significantly related/substantially aggravating language may be "stricter," yet nonetheless adopted the in-part standard as being its equivalent. 761 F.3d at 598.

Island Creek attempts to distinguish *Arch on the Green* on the bare fact that the decision did not involve rebuttal of the fifteen-year presumption, but this argument falls short of the mark. OB 10. *Arch on the Green* involved the interpretation of the regulatory definition of pneumoconiosis, which, as just pointed out, is explicitly incorporated into the first rebuttal provision. 20 C.F.R. § 718.305(d)(1)(i)(A); *see also* 77 Fed. Reg. 19462 (Mar. 30, 2012) ("The proposed [rebuttal] rule further clarifies what that proof burden entails by cross-referencing the regulatory definition of pneumoconiosis."); *cf*. *Big Branch*, 737 F.3d at 1071 (equating employer's burden to disprove disability causation with miner's burden

to affirmatively prove it).[11] Consequently, *Arch on the Green* is without doubt highly persuasive, if not controlling.[12]

Curiously, Island Creek is not content to address the supposed discrepancy between the significantly/substantially and in-part standards. Instead, the coal company confuses matters by adding the "rule out" standard in its discussion of legal pneumoconiosis, mentioning the term ten times in its brief. OB 6, 12-15. The coal company's reasons for doing this, however, are unclear.

The "rule out" standard is applicable only to the second method of rebuttal. *See supra* p.7. With this method, the liable operator must "[e]stablish[] that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. § 718.305(d)(1)(ii). This Court has termed this standard "rule out" because even a de minimis or insignificant contribution from pneumoconiosis prevents rebuttal. *See generally Big Branch*, 737 F.3d 1063 (6th Cir. 2013). But it is undisputed that the second

[11] Notably, Island Creek seems to concede this, stating that, "while invocation of the 15-year presumption presumes a miner has legal pneumoconiosis, this does not alter the regulatory definition of what constitutes legal pneumoconiosis." OB 14. Left unsaid by Island Creek, of course, is *Arch on the Green*'s sanctioning of the in-part language.

[12] Like the *Arch on the Green* decision itself, the Director does not believe that the two standards, as applied, are materially different. To the extent they are, the Director respectfully disagrees with that decision.

method of rebuttal is not at issue in this case. And even more to the point, the ALJ never mentions "rule out" or de minimis when discussing legal pneumoconiosis.

III.

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDING THAT ISLAND CREEK'S MEDICAL EVIDENCE FAILED TO DISPROVE LEGAL PNEUMOCONIOSIS.

A. Standard of Review

On factual issues, the ALJ's "findings are conclusive if they are supported by substantial evidence and accord with the applicable law." *Central Ohio Coal Co.*, 762 F.3d at 488 (internal quotations and citations omitted). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support" the decision. *Id.* "Where the substantial evidence requirement is satisfied, the court may not set aside the ALJ's findings, even if the court would have taken a different view of the evidence were we the trier of facts." *Id.* at 489 (quotations and alterations omitted).

B. Introduction

The ALJ found that Island Creek's medical evidence – reporting that Mr. Young's respiratory condition was completely unrelated to his coal-dust exposure – was not credible. Substantial evidence supports the ALJ's fact finding.

C. The ALJ properly discredited Dr. Selby's opinion that Mr. Young's asthma and emphysema were unrelated to his coal-dust exposure.

Dr. Selby diagnosed two respiratory conditions: asthma and emphysema. He reported that asthma is never due to or aggravated by coal-dust exposure, and that emphysema may be caused by coal-dust exposure, but just not in Mr. Young's particular case. The ALJ gave seven distinct reasons why he rejected the doctor's opinion. The Board stopped at two in affirming the ALJ's decision, and the Court may do so as well. *See Island Creek Coal Co. v. Ramage*, 737 F.3d 1050, 1061 (6th Cir. 2013) (affirming the ALJ's discrediting of doctor's opinion, even though one of the ALJ's "multiple reasons for discounting [the doctor's] opinion" was incorrect, where the Court "[could] discern why the ALJ discounted [the doctor's] opinion. . . and such discounting was based on substantial evidence"); *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 313 (4th Cir. 2012) (reviewing court need not consider ALJ's additional reasons for discrediting doctor's opinion when it finds a sufficient factual basis for one).

As the Board explained, the ALJ discredited Dr. Selby's opinion because the doctor acknowledged that pneumoconiosis can be a latent and progressive disease, but gave reasons for finding no causation that called into question whether the doctor truly believed in the latent and progressive nature of pneumoconiosis. The ALJ also discredited Dr. Selby's opinion because the doctor acknowledged that a miner may suffer from a coal-dust related respiratory condition without having an x-ray, biopsy, or autopsy positive for clinical pneumoconiosis, but his reasons for

finding no causation ultimately required that the miner have proof of clinical pneumoconiosis. These are proper bases to discredit a doctor's opinion. *See Cumberland River*, 690 F.3d at 487-88 (finding ALJ properly discredited [doctor's] statement regarding the period of time since [the miner's] coal mine employment cased" as "inconsistent with section 718.201(c)'s recognition that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure"; affirming ALJ's discrediting of doctor's opinion that "there was not enough dust retention showing on x-ray" as inconsistent with the fact that a miner may have legal pneumoconiosis without clinical pneumoconiosis); *Hobet Mining, LLC v. Epling,*783 F.3d 498, 506 (4th Cir. 2015) (ALJ reasonably discredited doctor's opinion that it would be unusual for pneumoconiosis to develop years after coal mine work as inconsistent with the disease's latent and progressive nature)

In its opening brief, Island Creek asserts that the ALJ misinterpreted Dr. Selby's opinion. OB 28-29. According to the coal company, the doctor believes that pneumoconiosis can be latent and progressive, but just not here. As the coal company explains it, Dr. Selby found significance in the fact that Mr. Young left coal mine employment in 1999 but did not become disabled until 2013, fourteen years later. Similarly telling, according to the doctor, was the fact that Mr. Young was not disabled in 2011, but then "quickly" became disabled by 2013. According

to Dr. Selby, this pattern was not typical of latent and progressive diseases related to coal-dust exposure.

The ALJ was understandably skeptical. Although Mr. Young's pulmonary function studies did not establish *disability* until 2013, Mr. Young was diagnosed with a respiratory *disease* (emphysema) in 2002, only three years after he left mining. JA 62. Moreover, the ALJ observed that Dr. Selby rejected pneumoconiosis's latency and progressivity beyond a period of "several years": the judge specifically quoted the doctor's statement that coal-dust exposure "does not suddenly 'jump in' *several years* after cessation of exposure." JA 345 (emphasis added). Dr. Selby offered no support for this conclusion, nor did he offer support for his characterization of Mr. Young's respiratory decline as "sudden." In fact, Island Creek's other expert, Dr. Tuteur, reviewed the same studies, and described them as demonstrating "a slow downhill worsening." JA 181.

The ALJ also correctly observed that Dr. Selby supported his no-legal pneumoconiosis opinion with factors relating to clinical pneumoconiosis: for instance, he expected x-ray evidence of dust or coal macules in the lungs, or as the doctor termed it, the "right pattern." JA 346. Because legal pneumoconiosis does not require x-ray evidence of clinical pneumoconiosis, the ALJ was properly unpersuaded. 20 C.F.R. § 718.202(a)(4); *Cumberland River*, 690 F.3d at 487 (upholding ALJ's discrediting of doctor's no pneumoconiosis diagnosis that relied

on negative x-rays); *Harman Mining Co.*, 678 F.3d at 313 (same). Island Creek tacitly admits the problem, for it stresses that "Dr. Selby's discussion of the x-ray findings in this case was a very small portion of a multifaceted reasoning base[]." OB 30. But Island Creek leaves it at that, and does not explain why the ALJ was required to accept the doctor's opinion in spite of this invalid reasoning. *See Harman Mining Co.*, 678 F.3d at 313.

Instead, Island Creek attacks, unsuccessfully, some of the ALJ's other reasons for discrediting Dr. Selby's opinion.[13] The coal company, for instance, asserts that the ALJ incorrectly observed that the BLBA includes asthma within the definition of pneumoconiosis. OB 32, referring to JA 346. Although the BLBA does not contain the word "asthma," Island Creek ignores the fact that the Act covers obstructive conditions related to coal-dust exposure, and asthma is, in fact, an obstructive impairment. *See* 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000) (preamble to definition of legal pneumoconiosis).

Next, Island Creek argues that the ALJ was wrong to expect Dr. Selby to explain his finding that the variation in Mr. Young's pulmonary function studies

[13] Island Creek suggests that the ALJ was confused over the word "diffusion." OB 32 n.7. If so, the blame falls on Dr. Selby. He reported that coal-dust exposure does not result in a "decreased diffusion capacity," but then stated that pneumoconiosis usually shows itself as "restrictive lung disease with diffusion abnormalities." JA 238 (emphasis added). A "decreased diffusion capacity" is similar enough to "diffusion abnormalities" that the ALJ could reasonably have questioned the doctor's consistency.

was atypical of pneumoconiosis when the studies, even with variation, consistently showed total respiratory disability. OB 29, referring to JA 345. According to the coal company, "the questions of disability and causation [are] separate." OB 29. Island Creek, however, misses the point. Mr. Young had a baseline of disability that never improved, that never varied. The ALJ reasonably expected the ALJ to discuss this, but no discussion was forthcoming.

Ultimately, Island Creek ignores the biggest defect in Dr. Selby's opinion. As observed by the ALJ, the doctor failed to persuasively explain why, even if smoking was the main cause of Mr. Young's obstructive impairment, coal-dust exposure did not also contribute. The ALJ reasonably discredited the doctor's opinion because of this. *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 664 (6th Cir. 2015)

D. The ALJ properly discredited Dr. Tuteur's opinion that Mr. Young's emphysema was not due to coal dust exposure.

Dr. Tuteur opined that Mr. Young's obstructive impairment in the form of emphysema was due to smoking and not coal-dust exposure because, statistically, smoking causes pulmonary impairment in the general populations more often than coal dust causes pulmonary impairment in non-smoking miners. And the doctor stressed that physicians regularly use statistics to determine risk and cause. The ALJ understood the doctor's explanation that, in treating patients, statistics are important, and that doctors look for the most likely cause of patients' conditions.

But, as the ALJ correctly pointed out, his concern, unlike Dr. Tuteur's, was not to determine the most likely cause, but rather, whether Island Creek disproved coal dust as *a* cause of Mr. Young's respiratory impairment. JA 344-45.

Moreover, as the ALJ correctly pointed out, while allegedly only a small number of miners may develop respiratory impairment, that does not explain why Mr. Young was not included in that number. JA 345. This is a proper basis of analysis. *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726 (7th Cir. 2008) (faulting Dr. Tuteur for failing to explain why miner was not the "rare" where coal dust exposure causes COPD); *Lyle*, __F.3d _, 2019 WL 2934065 at *8 ("[The doctor] has again relied on statistical probabilities. . . . [T]he administrative law judge could reasonably fault [the doctor] for failing to explain why Mr. Lyle wasn't among the miners in the western United States suffering legal pneumoconiosis from exposure to coal dust.").

Island Creek asserts that it was "logically absurd" for the ALJ to ignore "the relevant scientific literature."[14] OB 20. But it is "logically absurd" to believe that

[14] Dr. Tuteur did not submit the research he relied on, so the company's argument in essence would require the ALJ to take it on faith that his description of the underlying science is both complete and accurate. For instance, Dr. Tuteur asserts that only 3.2% of underground miners develop pneumoconiosis, citing the Upper Big Branch Report to the Governor, May 2011; but the report found that among the 24 victims of the disaster with sufficient lung tissue to autopsy, 17 had pathological evidence of the disease. *Id*. at 32 (available at https://www.documentcloud.org/documents/2401616-mcateer-giip-report-on-upper-big-branch-mine.html. It is also worth noting that while the medical

the method used to determine the most likely cause is appropriate when the relevant legal question is entirely different, namely, whether coal mine employment contributed in any part to a miner's respiratory condition.

Notably, the courts of appeals have not only rejected an expert's undue reliance on statistics, but two have explicitly upheld an ALJ's rejection of Dr. Tuteur's opinion for this very reason. *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 829-30 (10th Cir. 2017); *Beeler*, 521 F.3d at 726; *see also Lyle*, __F.3d _, 2019 WL 2934065 at *8 (affirming ALJ's rejection of expert's undue reliance on statistical probabilities); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014) (same); *Consolidation Coal Co. v. Director, OWCP*, 732 F.3d 723, 735 (7th Cir. 2013) (ALJ properly rejected doctor's opinion that relied on general statistics without relating them to the specific miner).

The company attempts to distinguish these cases as fact-based while stressing that besides statistics, the doctor relied on "the clinical data available and the histories of coal mine work and ongoing tobacco abuse." OB 24. But the underlying statistical foundation for Dr. Tuteur's opinions here was the same as *Estate of Blackburn* and *Beeler*. Regardless, Island Creek erroneously minimizes

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community's views on the effect of coal dust exposure has changed over time, *see* 65 Fed. Reg. 79939-43 (preamble to definition of legal pneumoconiosis), Dr. Tuteur's has not. *See Blakely v. Amax Coal Co.*, 54 F.3d 1313, 1317 (7th Cir. 1995) (COPD should be attributed to smoking, not coal dust exposure).

the doctor's reliance on statistics – it was the driving force here, JA 183-85, and the ALJ was right to recognize it. JA 344-45.

Moreover, Dr. Tuteur's heavy reliance on statistics means that he is not likely to find a smoking miner's emphysema related to coal-dust exposure. But as the preamble to the regulatory definition of pneumoconiosis discusses, emphysema can, in fact, be related to such exposure, statistically as well as clinically. *See supra* pp. 6-7. Further, his statistical scalpel fundamentally undercuts the fifteen-year presumption itself, which presumes that a long-term miner's total disability is due pneumoconiosis. Dr. Tuteur works from the opposite starting point: if a miner smoked, the miner's coal-dust exposure had no effect, regardless of the length of coal mine employment.

In any event, the coal company's list of factors relied upon by Dr. Tuteur to prove the absence of legal pneumoconiosis illustrates why the ALJ found the doctor's opinion concerning legal pneumoconiosis unpersuasive: x-rays, CT-scans, biopsies, and interstitial pulmonary process are relevant to clinical rather than legal pneumoconiosis. *See supra* pp. 4, 46. The ALJ therefore properly found Dr. Tuteur's opinion insufficient to prove that Mr. Young does not suffer from legal pneumoconiosis.

E. The ALJ properly discredited Dr. Culbertson's opinion that Mr. Young's emphysema was due to smoking and histoplasmosis.

Dr. Culbertson determined that Mr. Young's obstructive impairment, in the form of emphysema, was due to smoking and histoplasmosis because the medical data "could be explained by years of smoking and the histoplasmosis." JA 161. The doctor admitted, however, that Mr. Young had "some" coal workers' pneumoconiosis. JA 150. And when asked whether he could exclude Mr. Young's coal-dust exposure as a cause, Dr. Culbertson initially responded: "I can. . . . I don't think it's likely." JA 173. But he then admitted it was "possible" that coal dust exposure aggravated Mr. Young's COPD. JA 174. This back and forth waffling amply justifies the ALJ's finding that the doctor simply did not understand the relevant inquiry. JA 348. And because Dr. Culbertson left open the possibility that Mr. Young's emphysema was due in some part to his coal-dust exposure, the ALJ reasonably concluded that the doctor's opinion failed to support a finding of no legal pneumoconiosis. JA 348-49.

The ALJ was also critical of the doctor's opinion because he "made his findings as a clinician," thinking of main cause and treatment; and because, like Dr. Tuteur, Dr. Culbertson's reasons for finding no pneumoconiosis were addressed more to clinical pneumoconiosis than legal pneumoconiosis. *Id*.

Island Creek asserts that the ALJ erred in discrediting Dr. Culbertson's opinion because he was Mr. Young's treating physician, and he reported that "smoking alone was an adequate explanation" for Mr. Young's respiratory

impairment. OB 34 (citing 20 C.F.R. § 718.104(d)). The coal company also asserts that there is no basis to discredit an opinion because it was written by a doctor as a clinician. OB 38. The Director disagrees.

First, Island Creek does not even address the equivocation in Dr. Culbertson's causation determination. *See Greene v. King James Coal Min. Co.*, 575 F.3d 628, 635 (6th Cir. 2009) (ALJ properly rejected doctor's opinion as vague and equivocal). Moreover, Dr. Culbertson could not even bring himself to answer the question in dispute. When directly asked whether coal dust exposure played any role in Mr. Young's COPD, the doctor did not answer "yes" or "no." Instead, he avoided the question by stating: "I believe that smoking alone is an adequate explanation for his COPD that's progressively worsening." JA 178. This answer – focusing on primary cause – is legally insufficient to prove that Mr. Young's emphysema was unrelated to his coal-dust exposure. These defects in Dr. Culbertson's opinion thus render his *status* as a treating physician or as a "clinician" entirely irrelevant. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (explaining that treating physicians "get the deference they deserve based on their power to persuade").

In addition, Island Creek does not address the ALJ's observation that the doctor's alleged "finding" of no legal pneumoconiosis was supported by reference to factors more aligned with clinical pneumoconiosis. JA 348. The ALJ, however,

recognized the problem and properly discredited the opinion accordingly. *See supra* p. 16.

In sum, the ALJ correctly recognized that the doctor's explanation was not, in fact, adequate for purposes of BLBA entitlement since it left unanswered whether Mr. Young's coal-dust exposure caused or aggravated his disabling emphysema. Certainly, the ALJ's interpretation of the doctor's opinion was permissible. *See Big Branch*, 737 F.3d at 1072 (explaining that, in "review[ing] determinations of credibility and the weight afforded to various medical opinions, [the Court] defer[s] to the ALJ whenever his conclusions are supported by substantial evidence," and the determination of "whether a medical opinion is well-reasoned" is "ordinarily left to the ALJ"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, (6th Cir. 2018) (explaining that "it was for [the ALJ, not the Court], to decide whether the doctor's "inconsistencies undermined his medical analysis").

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 12,553 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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