No. 14-3376

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PATRICIA A. PADAGOMAS,
Widow Of and On Behalf Of Edward J. Padagomas,

Petitioner

v.

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

Respondent

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

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: **Page**

Cases: **Page**

Statutes:

Regulations: **Page**

Title 20, Code of Federal Regulations (2014) (unless otherwise noted)

Regulations: **Page**

Federal Register:

Other Authorities:

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BRIEF FOR THE RESPONDENT

STATEMENT OF JURISDICTION

Patricia Padagomas, the widow of coal miner Edward Padagomas, petitions this Court to review the final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's (ALJ's) decision denying both the miner's claim and her survivor's claim for federal black lung benefits. This Court has jurisdiction over Mrs. Padagomas's petition under Section 21(c) of the

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c)—Mr. Padagomas's exposure to coal mine dust—occurred in Pennsylvania, within the jurisdictional boundaries of this Court.

The petition also meets section 21(c)'s timeliness requirements. The administrative law judge issued his decision denying benefits on September 19, 2013. Petitioner's Appendix (App.) 15A. Mrs. Padagomas filed a notice of appeal with the Board on October 4, 2013, within the statutorily mandated thirty-day period. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(a)). The Board issued its final order on July 11, 2014. App. 3A. Mrs. Padagomas petitioned this Court for review on July 23, 2014, within the statutorily mandated sixty-day period. App. 1A; 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)). Thus, this Court has both subject-matter and appellate jurisdiction to review the Board's order. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)).

STATEMENT OF THE ISSUES

Black lung disability benefits are available to miners who are totally disabled by pneumoconiosis. Survivors' benefits are available to the qualifying dependents of miners who die from that disease. In cases, such as this one, where no statutory presumptions apply, the claimant bears the burden of proving each

element of entitlement. The ALJ found that Mr. Padagomas suffered from pneumoconiosis during his lifetime. But she found the evidence insufficient to establish that Mr. Padagomas had a totally disabling respiratory condition during his lifetime or that pneumoconiosis had caused or hastened his death. She therefore denied both disability and survivors' benefits. The questions presented are:

1. Whether the ALJ properly determined that the medical evidence was insufficient to prove that Mr. Padagomas was totally disabled by a pulmonary or respiratory impairment prior to his death.

2. Whether the ALJ properly found that the record lacked competent medical evidence that showed pneumoconiosis hastened or was a substantially contributing factor leading to Mr. Padagomas's death and, therefore, denied the survivor's claim.

3. Whether the ALJ made a sufficient effort to resolve conflicts in the x-ray evidence before finding that the x-rays established that Mr. Padagomas suffered from pneumoconiosis.

STATEMENT OF THE CASE

A. Course of the proceedings below.

Edward Padagomas (the miner) worked as a coal miner in Pennsylvania. App. 208A, 243A. Because his coal mine work occurred prior to 1970, liability for

his claim rests with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.490(a). The miner initially filed for benefits in 2006 but that claim was finally denied in February 2007. App. 208A. He filed a subsequent benefits claim on September 2, 2008.[1] App. 207A. While his claim was pending, the miner died in October 2008. *Id*. Following a proposed decision denying the miner's claim, his widow Patricia Padagomas (the claimant), as the representative of the deceased miner, requested a hearing. The claimant filed her own claim for survivor's benefits on November 3, 2008. *Id*. After her claim was denied, she requested a hearing. DX 35. The two claims were consolidated for further proceedings.

After a formal hearing, ALJ Odegard denied both claims. App. 206A. On appeal, the Benefits Review Board vacated the denial and remanded for further consideration. App. 193A. On remand, the ALJ again denied both claims. App. 15A. The Board affirmed the denials. App. 3A. Claimant then petitioned this Court for review. App. 1A.

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[1] *See* 20 C.F.R. § 725.309(d) (a new claim filed more than one year after a final denial of a prior claim is a "subsequent claim" and "shall 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."). By establishing clinical pneumoconiosis, Mrs. Padagomas established a change in the miner's condition since the denial of his 2006 claim. App. 23A-24A. *But see infra* at pp. 34-36 (arguing that the ALJ erred in weighing the x-ray evidence underlying her finding that the miner had clinical pneumoconiosis).

B. Relevant facts.

1. Non-medical evidence.

Mr. Padagomas worked as an underground coal miner in Pennsylvania for three years between 1956 and 1959. Director's Exhibits 1, 3, 24.[2] He then worked in the garment industry from 1960 to 1981 as a warehouse worker where he was exposed to fibers and dust. DX 1. He continued working as a warehouse man or a security guard in places without any occupational exposure until he retired in 1996. *Id*.

At the 2010 hearing, Mrs. Padagomas testified that her husband was very ill during the last two years of his life. She stated he was unable to walk more than a few steps, that he could not climb stairs, that he had trouble sleeping and that he was "on oxygen all the time." App. 240A-41A. She said that he had smoked cigarettes, as much as three packs per day, but had "quit around 20-some years ago." App. 242A, 243A. Based on his review of Mr. Padagomas's records, Dr. Spagnolo testified that the miner smoked two packs of cigarettes a day for at least 20 years starting at age 18. App. 81A. Dr. Levinson stated that the miner smoked for "some 25 years but stopped many years prior to his death." App. 73A.

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[2] The Director's Exhibits are included in the Board's September 3, 2014, Index of Documents but are not paginated. The DX citation is employed for the reader's convenience to refer to record documents that are not also part of the Petitioner's Appendix.

2. Relevant medical evidence.

a. Objective medical tests.

The BLBA's implementing regulations allow claimants to establish certain elements of entitlements through the use of specified medical evidence. *See generally* 20 C.F.R. §§ 718.202, 718.204. Relevant to this case are pulmonary function and arterial blood-gas tests (which can be used to establish that a miner is totally disabled by a respiratory or pulmonary condition) and chest x-rays (which is one way of establishing that a miner suffers from pneumoconiosis). 20 C.F.R. §§ 718.204(b)(2)(i)-(ii), 718.202 (a)(1). Any objective medical evidence developed in connection with a BLBA claim must substantially comply with the quality standards specified in the regulations. 20 C.F.R. § 718.101(b).

Pulmonary function tests: The miner underwent a pulmonary function test on July 19, 2006, as part of his initial 2006 claim.[3] App. 109A-19A. That test

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[3] A pulmonary function (or ventilatory) test is one measure of a miner's pulmonary capacity. The test provides tracings of the individual's breath inspirations and expirations and measures three values: the FEV1 (forced expiratory volume), the FVC (forced vital capacity), and the MVV (maximum voluntary ventilation). The FEV1 value measures the amount of air exhaled in one second on maximum effort. It is expressed in terms of liters per second. Obtaining a FVC value requires the miner to take a deep breath and then exhale as rapidly and forcibly as possible. The FEV1 value is taken from the first second of the FVC exercise. The MVV value measures the maximum volume of air that can be moved by the miner's respiratory apparatus in one minute, and is expressed in liters. Tests that result in certain values specified in the regulations "qualify" as evidence of total respiratory or pulmonary disability. *See Dotson v. Peabody Coal*

(continued…)

produced results that qualified, facially, to establish respiratory disability. App. 108A; *see* 20 C.F.R. § 718.204(b)(2)(i). The test was reviewed by Dr. Spagnolo, who invalidated its results. Dr. Spagnolo indicated that the test was unacceptable because it did not include a sufficient number of tracings and because of "[l]ess than optimal effort, cooperation and comprehension" by the miner. App. 107A. In particular, Dr. Spagnolo noted that the miner coughed or closed his glottis during inspiration and expiration. *Id*.; *see* 20 C.F.R. Part 718, Appendix B (2)(ii)(B), (D).

The miner underwent a pulmonary function test on September 27, 2006, which also produced results indicative of respiratory disability. App. 95A-106A. Dr. Spagnolo reviewed this test as well and invalidated it because the flow loop tracings indicated that the miner used less than optimal effort, hesitated, coughed, or closed his glottis during the test. App. 94A; *see* 20 C.F.R. Part 718, Appendix B (2)(ii)(B), (D), (F). Additional pulmonary function tests mentioned in his Wilkes-Barre Veterans Affairs Medical Center (VAMC) treatment records (*see* below) were not conducted or reported in accordance with the requirements of 20 C.F.R. § 718.103 and Part 718, Appendix B (2). *See, e.g.*, 156A, 157A.

(…continued)
Co., 846 F.2d 1134, 1138 nn. 6, 7 (7th Cir. 1988); 20 C.F.R. § 718.103; 20 C.F.R. Part 718, Appendix B.

Blood-gas tests: The record contains the results of several arterial blood gas tests conducted at the VAMC.[4] *See, e.g.*, App. 145A, 148A. Although these tests produced results that indicated respiratory disability, the tests were all administered when the miner was acutely ill and hospitalized for exacerbation of congestive heart failure or for pneumonia, an acute pulmonary condition, or both. App. 22A, 148A; DX 30 (the miner was hospitalized on August 26, 2006, for congestive heart failure, and on both February 13, 2007, and April 14, 2007, for congestive heart failure and pneumonia) (unpaginated).[5] *See* 20 C.F.R. Part 718, Appendix C (Blood-gas tests "must not be performed during or soon after an acute respiratory or cardiac illness."). There was no physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition and not by acute illness. *See* 20 C.F.R. § 718.105(d) (Blood-gas tests "administered during a hospitalization that ends in the miner's death" must be "accompanied by a

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[4] Arterial blood gas tests "are performed to detect an impairment in the process of alveolar gas exchange." 20 C.F.R. § 718.105(a). The defect primarily manifests "as a fall in arterial oxygen tension either at rest or during exercise." *Id*. "[A]lveolar gas" refers to "the gas in the alveoli of the lungs, where gaseous exchange with the capillary blood takes place." Dorland's Illustrated Medical Dictionary 762 (32nd ed. 2012). Alveoli are the "small saclike structures" in the lungs. *Id*., at 55, 56, 1077.

[5] Director's Exhibit 30 contains more than 2000 pages of unpaginated hospital records from the VAMC that include treatment records and progress notes, from which a smaller sample of relevant portions are included in the Petitioner's Appendix at 120A-171A.

physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition.").

X-rays: Two chest x-rays in the record, dated October 9 and October 14, 2008, were taken and interpreted in the course of this claim.[6] Each was read by Drs. Navani and Smith, who are both board-certified radiologists and B-readers.[7]

Dr. Navani concluded that the October 9 x-ray was "of unreadable quality" because it contained "artifacts," was "underexposed, a "poor imp[ression]," and "AP supine."[8] DX 10 at 3. He therefore did not interpret it as either positive or negative for pneumoconiosis. Dr. Smith noted many of the same defects,

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[6] X-rays contained within the VAMC records were not reported or classified in compliance with the regulatory requirements; therefore, the ALJ did not accord them any weight. App. 20A at n.7. Claimant has not challenged this ruling.

[7] A "B-reader" is a physician who has "demonstrated ongoing proficiency in evaluating chest radiographs for radiographic quality and in the use of the ILO [International Labor Organization] classification for interpreting chest radiographs for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the National Institute for Occupational Safety and Health (NIOSH)[.]" Black Lung Benefits Act: Standards for Chest Radiographs, 79 Fed. Reg. 21606, 21612 (Apr. 17, 2014) (to be codified at 20 C.F.R. § 718.102(e)(2)(iii)). A board-certified radiologist is a physician certified by the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.202(a)(1)(ii)(C). Doctors with both credentials are often called "dually qualified."

[8] Neither Dr. Navani nor the ALJ explained what "AP supine" meant. It may indicate that the x-ray was an anterior-posterior x-ray of the miner in a supine position, which would conflict with the requirement that "[e]very chest [x-ray] shall be a single postero-anterior projection[.]" 20 C.F.R. Part 718, Appendix A (1).

indicating that the film was not of the highest quality due to underexposure, improper position, and underinflation. App. 90A. He nevertheless interpreted the film as positive for pneumoconiosis, identifying small opacities at a 1/0 profusion throughout both lungs. *Id*.[9]

Both Dr. Navani and Dr. Smith found the October 14 x-ray to be readable. Dr. Navani interpreted it as negative for pneumoconiosis, indicating that there were no opacities or abnormalities consistent with the disease. DX 10 at 1. Dr. Smith, however, interpreted it as showing small opacities at a 1/0 profusion. App. 91A.

b. Treatment records.

Mr. Padagomas was treated multiple times at Wilkes-Barre Veterans Affairs Medical Center from 2005 until his death in 2008. The records reflect hospitalizations and treatment for multiple conditions, primarily congestive heart

[9] The profusion of small opacities is rated on a scale from 0 to 3. Each of these categories has three subcategories, indicating whether the reader believes that the profusion is closer to one or the other neighboring categories. Readings are reported in the "category/subcategory" format. For example, a "2/3" profusion rating indicates that the reader believes the film shows category 2 profusion, but was close enough that the reader gave serious consideration to a category 3 rating. *See Guidelines for the Use of the ILO International Classification of Radiographs Pneumoconioses* (Rev'd ed. 2011) at 12-13 (available at http://www.ilo.org/safework/info/publications/WCMS_168260/lang--en/index.htm). Any rating below 1/0 "does not constitute evidence of pneumoconiosis" for purposes of the BLBA. 20 C.F.R. § 718.102(b).

failure, diabetes, hypertension, kidney failure and pleural effusion.[10] Black lung disease, silicosis and anthracosilicosis were occasionally listed in the miner's past medical history but there was no indication that the diagnosis was related to treatment that the miner was undergoing at the VAMC. *See, e.g.*, App. 125A, 133A, 151A. Included in the VAMC records are interpretations of chest x-rays and CT scans that were administered in conjunction with the miner's treatment. Abnormalities of the lungs were noted, especially the status of the miner's pleural effusion, but were never specifically classified or described as pneumoconiosis or associated with coal mine dust exposure. *See, e.g.*, App. 122A, 127A, 129A, 144A, 148A, 153A, 156A, 158A, 161A-168A. The report of an April 7, 2005 needle biopsy of the right upper lung lobe noted anthracotic pigment microscopically and listed a diagnosis of anthracotic nodules in the lung tissue. App. 170A.

On February 8, 2007, the miner underwent a cardiology consultation at VAMC for "questionable [congestive heart failure] and history of atrial fibrillation with worsening of his pleural effusion and dyspnea on exertion." App. 154A. The miner was found to need home oxygen due to his multifactorial dyspnea on

[10] Pleural effusion, commonly known as "water on the lungs," is "the presence of fluid in the pleural space," which is the cavity between each lung and the chest or thoracic wall. Dorland's Illustrated Medical Dictionary at 596 (effusion), 1460 (pleural), 1920 (thoracic) (32nd ed. 2012).

exertion. App. 155A. Dr. Fagan, the VAMC staff pulmonologist who saw the miner on February 8, noted that Dr. Doshi, the cardiologist, identified congestive heart failure as the main cause for the miner's dyspnea on exertion. App. 157A. The Certification of Medical Necessity for home oxygen treatment, dated February 22, 2007, specified that the need for oxygen related to the diagnoses of congestive heart failure and chronic obstructive pulmonary disease. DX 30 at pp. 48-49 (unpaginated).

In October 2008, the miner was again hospitalized at VAMC after a fall at home. App. 120A. He died in the hospital. App. 172A. The final progress note stated that the miner had "end stage (stage V) renal disease with diabetic nephropathy and hypertensive nephrosclerosis."[11] App. 122A. The miner's death certificate, signed by Dr. Vinay Desai from VAMC, listed the cause of death as cardiac arrhythmia due to myocardial infarction. App. 172A. "[O]ther significant conditions contributing to death but not resulting in the underlying cause" were pleural effusion, renal failure, congestive heart failure and coronary artery disease. *Id*.

[11] Nephropathy is any disease of the kidney. Dorland's Illustrated Medical Dictionary 1241 (32nd ed. 2012). Nephrosclerosis is the hardening of the kidney due to renovascular disease. *Id*. at 1243.

c. Dr. Samuel Spagnolo's diagnosis.

Dr. Spagnolo reviewed provided medical records, including the available records from the Wilkes-Barre VAMC, at the Director's request. App. 78A-81A. He noted that the miner's medical history included coronary artery disease with ischemic cardiomyopathy, "cardiomegaly and diastolic heart failure," hypertension, severe mitral and aortic stenosis, "chronic transudative pleural effusion thought to be related to chronic heart failure and fluid overload," chronic atrial fibrillation, chronic renal failure, "long standing diabetes with diabetic retinopathy and diabetic renal failure," pericardial effusion, anthracosilicosis and deep vein thrombosis. App. 81A-82A.[12] Dr. Spagnolo found that the miner's death "was caused by his ischemic cardiomyopathy resulting in diastolic heart failure complicated by long standing diabetes mellitus and diabetic nephropathy leading to end stage renal failure." App. 82A. Dr. Spagnolo concluded that there

[12] *Pericardial effusion* is the accumulation of fluid around the heart. Dorland's Illustrated Medical Dictionary 596 (32nd ed. 2012). *Cardiomegaly* is abnormal enlargement of the heart from either hypertrophy (overgrowth of an organ) or dilatation ("enlargement of the cavities of the heart, with thinning of its walls"). *Id.* at 294 (cardiomegaly), 898 (hypertrophy), 519 (dilatation of the heart). *Ischemic heart disease* is "any of a group of acute or chronic cardiac diseases resulting from insufficient supply of oxygenated blood to the heart." *Id.* at 536. *Ischemic cardiomyopathy* is the "name given to heart failure with left ventricular dilatation resulting from ischemic heart disease." *Id.* at 294. *Mitral stenosis* is the abnormal narrowing of the left, or mitral, heart valve. *Id.* at 1770. *Aortic stenosis* is the abnormal narrowing of the aortic heart valve. *Id.* at 1769.

was no objective evidence to indicate that Mr. Padagomas had clinical or legal pneumoconiosis or to suggest that pneumoconiosis had worsened or contributed to his death in any way.[13] App. 82A-83A.

d. Dr. Sander Levinson's diagnosis.

Dr. Levinson also reviewed the miner's medical records and provided an opinion at the claimant's request. App. 2A-77A. He stated that there was "no question that Mr. Padagomas did suffer from significant and severe multiple medical morbidities." App. 75A. He agreed with Dr. Spagnolo that the miner's

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[13] Compensable pneumoconiosis takes two forms, "clinical" and "legal." 20 C.F.R. § 718.201(a). "Clinical pneumoconiosis" refers to a cluster of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1). This cluster of diseases includes, but is not limited to, anthracosilicosis and "coal workers' pneumoconiosis" as that term is commonly used by doctors. *Id*. Clinical pneumoconiosis is generally diagnosed by chest x-ray, CT scan, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

"Legal pneumoconiosis" refers to "any chronic lung disease or impairment … arising out of coal mine employment" and specifically includes "any chronic restrictive or obstructive pulmonary disease" with such causation. 20 C.F.R. § 718.201(a)(2); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 312 (3d Cir. 1995) ("The 'legal' definition of pneumoconiosis (*i.e*., any lung disease that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment) is much broader than the medical [or 'clinical'] definition, which only encompasses lung diseases caused by fibrotic reaction of lung tissue to inhaled dust."). Coal mine dust does not need to be the sole or even the primary cause of a claimant's disabling respiratory disease for that disease to constitute legal pneumoconiosis. A disease arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

death "was caused by ischemic cardiomyopathy resulting in heart failure with recurrent pleural effusion, renal failure underlying long standing diabetes mellitus." *Id*. However, Dr. Levinson was "also strongly of the opinion that in addition to these morbidities Mr. Padagomas's pulmonary condition was directly impacted by a chronic pulmonary disease with pulmonary impairment that was significantly related to and substantially aggravated by his 3 years of dust exposure and coal mine employment." *Id*. He stated that the miner "had significant pulmonary impairment as documented by his pulmonary function studies and measures of oxygenation." *Id*. According to Dr. Levinson, "the causes of these impairments again was multifactorial but was significantly contributed to and aggravated by his coal mine dust exposure." *Id*. Dr. Levinson opined that Mr. Padagomas "clearly suffered from a chronic pulmonary disease with pulmonary impairment that was significantly related and substantially aggravated by the dust exposure he encountered in his 3+ years of coal mine employment." App. 76A. He also was of the opinion that pneumoconiosis was a significant contributing and aggravating factor in the occurrence of his death. App. 77A.

Dr. Levinson was deposed and testified that there was "strong evidence" in the x-rays, CT scan and biopsy reports that Mr. Padagomas had coal workers' pneumoconiosis. App. 43A. He stated that his opinion that Mr. Padagomas was totally disabled due to pneumoconiosis was based on the results of the arterial

blood gases and the pulmonary function studies. App. 46A. That same evidence of reductions in the miner's oxygenation and pulmonary function studies led Dr. Levinson to conclude pneumoconiosis contributed to the miner's death because coal dust accumulations in the miner's lungs impeded his ability to "weather the storm caused by his heart disease." App. 49A.

C. Summary of the decisions below.

1. ALJ Denial, February 2, 2011.

Judge Odegard first noted that 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement was unavailable to the claimant because Mr. Padagomas worked as a coal miner for only three years. App. 209A. As a result, the claimant bore the burden of proving that he suffered from pneumoconiosis. The ALJ determined that the x-ray evidence was contradictory and insufficient to establish pneumoconiosis. App. 216A-17A. The ALJ evaluated the biopsy findings of "anthracotic pigment" and "anthracotic nodules" and determined that the pathologist's report did not reflect finding "a fibrotic reaction of lung tissue to the particulate matter" or any resulting disease process; therefore, she concluded that this evidence failed to establish clinical pneumoconiosis. App. 217A. *See* 20 C.F.R. § 718.202(a)(2) (a biopsy finding "of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis."). The ALJ found that the VAMC treatment records, including CT scans, were insufficient to

support a finding of pneumoconiosis because the records did not contain an independent diagnosis of pneumoconiosis or the results of any medical testing to document a diagnosis of pneumoconiosis. App. 215A-16A. The ALJ determined that neither Dr. Levinson nor Dr. Spagnolo provided a well-reasoned opinion on the question of the presence of legal or clinical pneumoconiosis. App. 218A-19A.

Weighing all the evidence together, the ALJ concluded that claimant failed to prove by a preponderance of the evidence that the miner had pneumoconiosis. Because this finding precluded entitlement under both the miner's claim and the survivor's claim, the ALJ did not consider the remaining elements of entitlement.[14]

2. Benefits Review Board Remand, February 23, 2012.

On Mrs. Padagomas's first appeal, the Board affirmed as unchallenged the ALJ's finding of three years of coal mine employment. App. 194A n.2. The Board rejected claimant's contention that the ALJ failed to consider her testimony with regard to the miner's physical condition. *Id*. 199A. The Board also affirmed

[14] To prove her husband's disability claim, claimant was required to show that (1) he had pneumoconiosis; (2) his pneumoconiosis arose from coal-mine employment; (3) he had a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis contributed to that total disability. 20 C.F.R. § 725.202(d). If her husband's disability claim was successful, claimant would automatically be entitled to survivors' benefits regardless of the cause of his death. 20 C.F.R. § 725.212(a)(3)(ii); *see B&G Constr. Co. v. Director, OWCP*, 662 F.3d 233 (3d Cir. 2011). If not, she could prove her entitlement to survivors' benefits by establishing that her husband (1) had pneumoconiosis that (2) caused or hastened his death. 20 C.F.R. §§ 725.212(a)(3)(i); 718.205(b).

the ALJ's determinations that the treatment and hospital records were insufficient to establish the existence of pneumoconiosis, that the CT scan and biopsy evidence failed to establish clinical pneumoconiosis, and that Dr. Levinson's opinion based on that CT scan and biopsy evidence failed to establish clinical pneumoconiosis. *Id*. at 200A.

The Board, however, agreed with claimant that the ALJ failed to properly weigh the x-ray evidence; therefore, it vacated the finding of no clinical pneumoconiosis and remanded the claim for further consideration. App. 201A-202A.

3. ALJ Denial, September 19, 2013.

On remand, ALJ Odegard again denied benefits, but for a different reason than in her first decision. She found that the overall weight of the x-ray evidence was positive for simple clinical pneumoconiosis. App. 18A. She found Dr. Smith's and Dr. Navani's conflicting interpretations of the October 14 x-ray to be in equipoise. As for the October 9 x-ray, she found that Dr. Navani's interpretation was of no probative value because he rated the x-ray as unreadable. Because Dr. Smith had interpreted that same film as positive for pneumoconiosis, she ruled that the October 9 x-ray was, overall, positive. She noted, but did not discuss, the fact that Dr. Smith "found the same deficiencies in the [October 9] film that, in Dr. Navani's view, made the film unreadable[.]" App. 18A. Finding one x-ray

positive for pneumoconiosis and the other in equipoise, the ALJ ruled that the "the overall weight of the X-ray evidence is positive for pneumoconiosis." *Id*.

Reconsidering the medical opinion evidence in light of the positive x-ray evidence, the ALJ determined that Dr. Spagnolo's opinion was not well-reasoned or well-documented on the absence of pneumoconiosis, but that his opinion illuminating the miner's numerous other medical conditions (including congestive heart failure) which were documented by the miner's medical treatment records, did merit some weight. App. 20A. As for Dr. Levinson's opinion that the miner's breathing tests showed a disabling impairment consistent with coal mine dust exposure, the ALJ found that it was not well-documented or well-reasoned because the doctor did not acknowledge (1) that he relied on pulmonary function tests that had been invalidated, or (2) that the qualifying blood gas tests were all conducted when the miner was hospitalized for acute conditions, primarily congestive heart failure. App. 22A-23A. The ALJ found the record lacked any well-reasoned physician's opinion evidence establishing the presence of legal or clinical pneumoconiosis. App. 23A. Weighing all the evidence together, the ALJ found the positive x-ray evidence established the presence of clinical pneumoconiosis; therefore, she considered the other elements of entitlement. *Id*.

Turning to the question of whether Mr. Padagomas suffered from a totally disabling respiratory or pulmonary impairment, the ALJ declined to consider the

claimant's testimony because there was medical evidence on the issue of the miner's disability. App. 26A; 20 C.F.R. § 718.204(d)(3). The ALJ found that the pulmonary function results contained in the miner's VAMC treatment records could not be relied on because the testing information was incomplete. App. 25A. She also declined to consider the pulmonary function test results from the miner's 2006 claim, ruling that it "is too remote to be of significant value on the issue of the miner's disability." *Id.* She found that the arterial blood gas results, although qualifying, could not be relied on because the tests were all administered during the miner's hospitalization for acute illness so she could not determine whether the tests were in substantial compliance with the regulations or whether any test demonstrated technically valid results. *Id*.

The ALJ found Dr. Levinson's medical opinion insufficient to establish total respiratory or pulmonary disability because, first, the doctor's conclusion that the miner had a "significant pulmonary impairment" was based on the testing from the VAMC which the ALJ had determined lacked probative value and, second, the doctor did not opine that the miner was totally disabled by a respiratory or pulmonary impairment, only that the miner was totally disabled by multiple medical problems, including a cardiac condition which alone disabled the miner. App. 25A-26A. The ALJ also noted that, in light of the miner's multiple medical problems, particularly his long history of congestive heart failure, "Dr. Levinson's

opinion does not adequately explain why or how the Miner's condition was exacerbated by pneumoconiosis – he just said [the miner's] condition made it more difficult for the Miner to 'weather the storm' caused by heart problems." App. 27A. The ALJ found Dr. Spagnolo listed the miner's multiple medical problems but did not address whether the miner was totally disabled from a respiratory perspective. App. 26A. The ALJ concluded that the record lacked credible medical evidence to prove the miner had a totally disabling respiratory impairment, much less that pneumoconiosis was a substantially contributing cause of such a total disability. *Id*.; *see* 20 C.F.R. § 718.204. Accordingly, the ALJ denied the miner's claim for disability benefits. App. 27A.

On the survivor's claim, the ALJ found that the evidence was insufficient to show that pneumoconiosis caused, contributed to or hastened the miner's death.[15] The ALJ gave Dr. Spagnolo's opinion no weight because it was based on the assumption that the miner did not have pneumoconiosis, which contradicted her finding of clinical pneumoconiosis based on the x-ray evidence. App. 29A. The

[15] The ACA reinstated Section 422(*l*) of the BLBA, 30 U.S.C. § 932(*l*), to provide derivative entitlement to certain survivors of miners who were awarded benefits prior to their deaths. Pub. L. No. 111-148, § 1556(b) (2010). Amended Section 422(*l*) applies to survivors' claims filed after January 1, 2005, providing the claim is pending on or after the ACA's enactment date of March 23, 2010. Pub. L. No. 111-148, § 1556(c) (2010). Although Mrs. Padagomas's claim satisfies these time requirements, the miner's claim for benefits has not been successful. Therefore, Section 422(*l*) is not applicable to Mrs. Padagomas's claim.

ALJ found that Dr. Levinson's opinion—that the miner's clinical pneumoconiosis played a role in hastening the miner's death—warranted no weight as it was conclusory and at odds with the VAMC records, which indicated that respiratory problems did not play a significant role in the miner's final hospitalization. App. 29A. The ALJ found there was no credible medical evidence establishing that pneumoconiosis played any role in contributing to or hastening the miner's death; therefore, she denied the survivor's claim. App. 30A.

4. Benefits Review Board Affirmance, July 11, 2014.

The Board affirmed the denial of both claims. The Board affirmed as unchallenged the ALJ's findings that the pulmonary function test and arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i), (ii), and that total disability could not be established under subsection 718.204(b)(2)(iii) because there was no evidence of cor pulmonale with right-sided congestive heart failure. App. 6A n.9. More specifically, the Board held claimant did not challenge the ALJ's determination that the September 27, 2006 pulmonary function test and the August 28, 2006 arterial blood gas study were unreliable; therefore, it affirmed those findings. App. 7A.

Consequently, the Board held that the ALJ had permissibly discounted Dr. Levinson's disability conclusion because it was based upon those unreliable tests. *Id*. "Because Dr. Levinson's opinion is the only medical opinion of record

supportive of a finding of total disability," the Board affirmed the ALJ's finding that the medical opinion evidence did not establish that the miner was totally disabled by a respiratory or pulmonary condition and, therefore, her denial of the miner's claim. App. 7A-8A. The Board rejected claimant's assertion that her testimony could be used to establish total disability because the record contained medical evidence on the issue and a determination of total disability "shall not be based solely upon the … testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved." 20 C.F.R. § 718.204(d)(3); App. 8A n.11.

On the survivor's claim, the Board held that the ALJ permissibly determined that Dr. Levinson's opinion—the only evidence supportive of a finding that pneumoconiosis contributed to or hastened the miner's death—was conclusory and not sufficiently reasoned because it "did not explain at all what aspect of the miner's clinical pneumoconiosis played a role in bringing about, or hastening, the miner's death." App. 10A. Accordingly, the Board affirmed the denial of the survivor's claim.

Finally, the Board noted that, in light of its affirmance of the miner's claim on disability grounds and the survivor's claim on death-causation grounds, it "need not address the Director's contention that the [ALJ] erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis." *Id.*, at n.14.

STANDARD OF REVIEW

Mrs. Padagomas's challenges to ALJ Odegard's assessment of the evidence relevant to the disability and death causation issues are subject to substantial evidence review. This Court is to review the record to determine whether the ALJ's factual findings are rational, consistent with applicable law, and based upon substantial evidence. *Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*.

SUMMARY OF THE ARGUMENT

There is no dispute that Mr. Padagomas was totally disabled by a combination of conditions, including cardiac and renal problems. But, in order to be awarded benefits on the miner's claim, Mrs. Padagomas must prove that her husband had a totally disabling respiratory or pulmonary impairment, regardless of any other type of disability. The ALJ correctly rejected claimant's contention that the objective test results, the medical opinion evidence, or her testimony was sufficient to make this showing. In particular, the ALJ adequately explained her reasons for determining that Dr. Levinson did not credibly diagnose a totally disabling respiratory impairment. Credibility determinations are the ALJ's to make, and this ALJ's assessment that the medical evidence is insufficient to show

that Mr. Padagomas was totally disabled by a respiratory impairment is supported by substantial evidence and should be affirmed.

On the survivor's claim, Mrs. Padagomas must prove that pneumoconiosis caused, substantially contributed to, or hastened her husband's death. Again, the ALJ adequately explained her reasons for finding that Dr. Levinson's opinion did not credibly correlate Mr. Padagomas's death to his three years of coal mine employment. Therefore, the denial of the survivor's claim should be affirmed.

In the event that the Court disagrees, the case should be remanded with instructions for the ALJ to reconsider the question of whether the x-ray evidence supports a finding of clinical pneumoconiosis. That issue presented a significant medical dispute: Dr. Smith and Dr. Navani disagreed over whether the October 9 x-ray was of sufficient quality to diagnose the presence or absence of pneumoconiosis. Rather than engage in the substance of this dispute, the ALJ simply ignored it, dismissing Dr. Navani's concerns and finding that Mr. Padagomas had pneumoconiosis based on Dr. Smith's reading. The ALJ's failure to resolve this conflict in the evidence regarding the film's quality was error.

ARGUMENT

A. The ALJ properly weighed the evidence and reasonably determined that claimant failed to carry her burden of proving that the miner was totally disabled due to pneumoconiosis.

To establish entitlement to black lung disability benefits, claimant has to prove, among other things, that the miner had a totally disabling pulmonary or respiratory impairment. 20 C.F.R § 718.204(b)(1); *see Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 493 (7th Cir. 2004). A respiratory or pulmonary impairment is totally disabling if it, "standing alone," prevents a miner from performing his or her usual coal mine work. 20 C.F.R. § 718.204(b)(1). Total disability may be proved by qualifying arterial blood gas or pulmonary function tests or a physician's "reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques … that [the] miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment." 20 C.F.R. § 718.204(b)(2)(iv). In the absence of a statutory presumption, the claimant bears the burden of proving that the miner was totally disabled. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 273 (1994) (benefits claimant must prove entitlement by preponderance of the evidence).

1. The medical evidence is insufficient to establish that Mr. Padagomas was totally disabled by a respiratory or pulmonary condition.

Claimant contends that Dr. Levinson provided a competent medical opinion on the issue of total disability that is supported by the pulmonary function and arterial blood gas tests in the record. Pet. Br. at 19-21. This contention is flawed and must be rejected. Substantial evidence supports the ALJ's determination that claimant failed to prove that the miner had a totally disabling respiratory or pulmonary impairment.

As an initial matter, the claimant's challenges to the ALJ's evaluation of the objective medical evidence addressing disability, *see* Pet. Br. at 21-22, should be rejected as waived. The Board affirmed the ALJ's determination that the pulmonary function and arterial blood-gas tests in evidence did not establish total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i), (iv), as unchallenged during claimant's appeal to the Board. App. 6A n.9. The claimant has simply waited too long to raise these contentions. *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 1143 (3d Cir. 1980) ("[U]nder the doctrine of exhaustion of administrative remedies a court should not consider an argument which has not been raised in the agency proceedings which preceded the appeal, absent unusual circumstances."); *see Pennsylvania, Dept. of Public Welfare v. Sebelius*, 674 F.3d 139, 154 (3d Cir. 2012) (petitioner waived argument "which it did not raise before the agency").

Even aside from waiver, the ALJ permissibly determined that the pulmonary function studies in the record were not reliable because the test results were either incomplete (because they reported only FEV1 values, which cannot establish respiratory disability alone, *see* 20 C.F.R. § 718.204(b)(2)(i)) or had been invalidated (because the tests were improperly administered and lacked optimal effort on the part of the miner). App. 22A-23A. She correctly found that the arterial blood gas tests were all administered when the miner was hospitalized with acute illness, and there was no accompanying physician's report establishing that the qualifying test results were produced by a chronic respiratory or pulmonary condition as required by 20 C.F.R. § 718.105(d) (Blood-gas tests "administered during a hospitalization that ends in the miner's death" must be "accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition."). App. 22A.

Aside from those flawed test results, claimant's only affirmative evidence on the disability issue is Dr. Levinson's medical report and deposition testimony. But Dr. Levinson's diagnosis of a respiratory condition was based almost entirely on these very test results, *see* App. 73A, 75A, and the ALJ appropriately discounted Dr. Levinson's opinion for that very reason. App. 20A-23A, 25A. On similar facts, this Court held:

> We conclude that Dr. Frank's medical report does not constitute a well-reasoned medical judgment because her report was based upon

> unreliable medical evidence. Dr. Frank's conclusions regarding total disability were based entirely on pulmonary function evidence that did not comply with the quality standards. This alone undermines the reliability of Dr. Frank's medical report which should not have been considered by the ALJ to determine [the miner's] claim for disability benefits.

Director, OWCP v. Siwiec, 894 F.2d 635, 639 (3d Cir. 1990).

Indeed, Dr. Levinson's testimony was not even facially sufficient to support a finding of total respiratory or pulmonary disability. He opined that the miner had a "significant pulmonary impairment as documented by his pulmonary function studies and measures of oxygenation." App. 75A. When deposed, Dr. Levinson clearly stated that the miner was disabled due to his multiple medical conditions and that he believed pneumoconiosis was a substantially contributing cause of the miner's disability, but Dr. Levinson did not clearly answer whether the miner's respiratory or pulmonary impairment alone was totally disabling. App. 45A-48A. In contrast, the doctor testified that Mr. Padagomas's cardiac condition was, independently, totally disabling. App. 65A. The doctor's failure to directly address the key question—whether the miner had a pulmonary or respiratory condition that was, standing alone, totally disabling—undermines any credibility he might otherwise have.

Given these flaws, the ALJ reasonably rejected Dr. Levinson's respiratory-disability diagnosis as conclusory. App. 25A-26A; *see Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997) ("The mere statement of a conclusion by a

physician, without any explanation for the basis for that statement, does not take the place of the required reasoning."). Because Dr. Levinson's diagnosis, and the flawed test results it was based on, were the only evidence purporting to show that Mr. Padagomas was totally disabled by a respiratory or pulmonary condition, the ALJ properly concluded that Mrs. Padagomas failed to prove by a preponderance of the evidence that the miner was disabled within the meaning of the regulations. This finding was well within her discretion as fact-finder, and her decision denying benefits on the miner's claim should be upheld as supported by substantial evidence. *See, e.g., Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the ALJ, as trier-of-fact, assesses the credibility of medical opinions); *Balsavage v. Director, OWCP*, 295 F.3d 390, 395 (3d Cir. 2002) ("If substantial evidence exists, we must affirm the ALJ's interpretation of the evidence even if we 'might have interpreted the evidence differently in the first instance.'") (internal citations omitted).

2. The ALJ properly refused to base a finding of total respiratory disability on Mrs. Padagomas's lay testimony.

Contrary to claimant's assertion, her testimony about Mr. Padagomas's physical limitations, his extremely ill health and his constant need for home oxygen during his last years, while relevant, cannot establish that he was totally disabled due to a respiratory impairment or that any disabling respiratory impairment was due to pneumoconiosis. The ALJ correctly declined to base a

finding of a totally disability due to pneumoconiosis solely on claimant's testimony.

First, the regulations specifically preclude basing a disability determination solely upon testimony from any person, such as the claimant, who would be eligible for benefits if the claim were approved. 20 C.F.R. § 718.204(d)(3).

Second, lay evidence from other individuals may be considered relevant to the issue of total disability due to pneumoconiosis only if there is no medical or other relevant evidence addressing the miner's pulmonary or respiratory condition. As this Court has recognized, an ALJ cannot "ignore uncontradicted lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records." *Mancia v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997). Here, however, there is competent medical evidence in the form of VAMC records and from both Drs. Levinson and Spagnolo that Mr. Padagomas had multiple medical problems that rendered him totally disabled. This evidence establishes that his congestive heart failure alone was sufficient to disable him. App. 155A, 75A, 82A. Furthermore, the medical records document that home oxygen was prescribed to treat the miner's dyspnea on exertion due significantly to congestive heart failure. App. 23A, 155A, 157A. In light of the medical evidence addressing the medical necessity of the prescribed home oxygen and attributing the miner's physical limitations to a multitude of non-respiratory

and non-pulmonary medical problems, the ALJ correctly declined to consider Mrs. Padagomas's testimony as persuasive evidence that could prove Mr. Padagomas had a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. App. 26A.

B. The ALJ's finding that the evidence did not establish that pneumoconiosis caused or hastened Mr. Padagomas's death should be affirmed as supported by substantial evidence.

In her claim for survivors' benefits, Mrs. Padagomas bears the burden of establishing that pneumoconiosis was at least a "substantially contributing cause" of her husband's death within the meaning of the regulatory definition in 20 C.F.R. § 718.205(b)(2), (6).[16] Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. § 718.205(b)(6); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1005-06 (3d Cir. 1989).

The ALJ found that the medical evidence established that the direct and immediate causes of the miner's death were cardiac, diabetic and renal. App. 28A. She noted that respiratory problems did not play a significant role in the miner's

[16] Subsection (b)(1) is not applicable because there is no evidence that pneumoconiosis was the direct cause of the miner's death; subsection (b)(3) is not applicable because there is no medical evidence of complicated pneumoconiosis; and the miner had insufficient years of employment to qualify for the presumption of entitlement set forth in subsection (b)(4). 20 C.F.R. § 718.205(b). Also, because the miner's claim is denied, Section 422(*l*) does not grant Mrs. Padagomas automatic entitlement to benefits. 30 U.S.C. § 932(*l*); *see* footnote 15, *supra*.

final hospitalization. App. 29A. The only evidence supportive of claimant's contention that pneumoconiosis played a role in hastening the miner's death is Dr. Levinson's opinion that the miner's pneumoconiosis made it more difficult to "weather the storm" of his other medical conditions. App. 49A.

To support this conclusion, Dr. Levinson relied largely on the same pulmonary function studies and arterial blood gas tests that the ALJ reasonably discredited as flawed in her evaluation of the total-disability issue. App. 48A-49A; *supra* at pp. 28-30. He also cited the miner's reliance on oxygen as the basis for finding that pneumoconiosis was a substantially contributing factor leading to the miner's death. App. 49A. However, the miner's medical records reveal that the need for home oxygen was related to the miner's congestive heart failure and not to a chronic respiratory condition. *See* App. 155A,157A. Without any corroborating documentation, the ALJ permissibly found Dr. Levinson's claim that clinical pneumoconiosis hastened or played a role in bringing about the miner's death was "quite conclusory." App. 29A. Therefore, the ALJ permissibly rejected the doctor's opinion because she found the opinion was neither documented nor explained. *Lango*, 104 F.3d at 577.

The fact-finder is not bound to accept the opinion of any medical expert. Instead, she must "examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical

opinion or conclusion is based." *Rowe*, 710 F.2d at 255; *see Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997) (it is the ALJ's duty as fact-finder to assess the medical evidence). An ALJ's findings will not be disturbed on appeal if they are supported by substantial evidence. *See Balsavage*, 295 F.3d at 395. Here, the ALJ properly determined that the weight of the evidence failed to credibly establish that pneumoconiosis hastened the miner's death. Absent credible evidence linking the miner's death to pneumoconiosis, the survivor's claim must fail.

C. The ALJ erred by not resolving the medical conflict over the quality of the October 9, 2008 x-ray film.

As explained in the preceding sections, the Director believes that the ALJ and Board decisions denying Mr. Padagomas's claim for disability benefits and Mrs. Padagomas's claim for survivors' benefits should be affirmed. If this Court agrees, there is no need to consider this argument. If not, the Court should vacate the Board's order with instructions to reconsider the x-ray evidence.

The ALJ's finding that Mr. Padagomas had pneumoconiosis was based entirely on the October 9, 2008 x-ray.[17] Dr. Navani stated that this x-ray was

[17] The ALJ properly weighed the two equally probative but conflicting interpretations—Dr. Navani's negative reading and Dr. Smith's positive of 1/0—of the October 14, 2008 x-ray film and reasonably concluded that this film was equivocal and did not support a finding of clinical pneumoconiosis. App. 18A.

unreadable. DX 10 at 3. Dr. Smith, despite noting the same flaws in the film, found it to be readable and interpreted it as positive for simple clinical pneumoconiosis. App. 91A. Rather than determining whether the October 9 film was of such poor quality that any reading warranted little or no weight, the ALJ simply discarded Dr. Navani's "unreadable" interpretation without discussion, leaving Dr. Smith's positive reading uncontradicted. App. 18A. To properly consider this film, the ALJ should have resolved the conflict in the medical opinions about the quality of the x-ray film and only addressed Dr. Smith's positive interpretation if she determined that the film was of sufficient quality to allow a reliable reading.

The fact that Drs. Smith and Navani have similar qualifications does not give the ALJ license to simply ignore their dispute. *See Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("The mere fact that equally qualified experts gave conflicting testimony does not authorize the ALJ to avoid the scientific controversy by declaring a tie."); *see also Barren Creek Coal Co.*, 111 F.3d at 356 ("In the absence of a satisfactory explanation from the ALJ as to the degree of consideration given probative evidence countering the evidence in support of the claimant, a reviewing court cannot judge whether the ALJ simply disregarded significant probative evidence or reasonably failed to credit it."). That

is what the ALJ did here, and if this case is remanded, that error should be corrected.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 8,375 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee VirusScan Enterprise 8.8. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2015, the Director's brief was served electronically using the Court's CM/ECF system on, and copies mailed, postage prepaid, to the Court and the following:

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