



**RECENT SIGNIFICANT BLACK LUNG BENEFITS ACT DECISIONS  
November 2015**

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Chief Judge

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**A. Circuit Courts of Appeals**

In [\*Eastern Associated Coal Corp. v. Director, OWCP \[Toler\]\*, 805 F.3d 502, B.L.R. \(4<sup>th</sup> Cir. 2015\)](#), which involved a subsequent claim filed in 2008,<sup>1</sup> the ALJ awarded benefits pursuant to the 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4). See 20 C.F.R. §718.305; *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015). The Benefits Review Board eventually affirmed the award. On appeal before the Fourth Circuit, Employer contended that, by applying the 15-year presumption to the miner’s subsequent claim, the ALJ violated the Black Lung Benefits Act (BLBA), its implementing regulations, and the “principles of finality and separation of powers.” *Toler*, 805 F.3d at 504.

Before the ALJ, the parties stipulated that the miner was totally disabled due to a pulmonary impairment; therefore, as the miner had worked for twenty-seven years in coal mine employment (CME), sixteen of which were underground, the ALJ applied the 15-year presumption to the miner’s subsequent claim. After examining the opinions of Employer’s two doctors, the ALJ found that Employer failed to disprove the existence of pneumoconiosis or demonstrate that the miner’s impairment did not arise out of, or in connection with, his CME. Accordingly, the ALJ awarded benefits. Employer appealed the award, and the Board remanded the matter to the ALJ to provide Employer with an opportunity to submit new evidence addressing the 15-year presumption.

On remand, the ALJ again awarded benefits by applying the 15-year presumption to the miner’s subsequent claim and finding that Employer failed to rebut the presumption. Employer appealed the ALJ’s decision to the Board, which affirmed the award. The appeal to the Fourth Circuit then followed.

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<sup>1</sup> The miner’s only prior claim was denied based upon a failure to establish the existence of pneumoconiosis, despite an ALJ finding the miner had established a totally disabling pulmonary or respiratory impairment. The Board affirmed the ALJ’s denial of benefits, and the Fourth Circuit thereafter denied the miner’s petition for review.

Employer raised two main arguments on appeal before the Fourth Circuit. First, Employer argued that the ALJ erred in using the 15-year presumption to establish a change in an applicable condition of entitlement. The court disagreed, concluding instead that “the Act and the regulations show plainly that a coal miner *armed with new evidence* may invoke the [15]-year presumption to establish a change in an applicable condition of entitlement.” *Id.* at 511 (emphasis added). The court noted that the preamble to the 2001 regulations reinforced this conclusion, as the Department there stated that “the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by [the] statutory presumptions’ in effect at the time the Secretary promulgated the 2000 Final Rule.” *Id.* at 512 (quoting 65 Fed. Reg. 79,920, 79,972 (Dec. 20, 2000)). Finally, the court concluded that, even if it harbored doubts as to this conclusion, it “would defer to the Director’s reasonable and consistent interpretation of the applicable regulations.” *Id.*

The court went on to reject Employer’s arguments against such application of the 15-year presumption in a subsequent claim. The court disagreed that application of the presumption amounted to a “double presumption,” and instead noted that its use simply assists a miner in establishing the applicable conditions of entitlement in a subsequent claim. The court also disagreed with Employer’s argument that use of the 15-year presumption to establish a change in an applicable condition of entitlement is inconsistent with the Secretary of Labor’s concession in *National Mining Ass’n v. Dept. of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), that “the most common forms of pneumoconiosis are not latent.” *Id.* at 23-25. In addition, the court rejected Employer’s contention that the miner’s first claim and subsequent claim are the same “with a new label,” as the court had held that such “claims are not the same” in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc). *Toler*, 805 F.3d at 513. The court also concluded that *Lisa Lee Mines* foreclosed any suggestion that the miner must “prove that the etiology of his condition has changed by comparing the evidence pertaining to [his] second claim with the evidence underlying the denial of his first claim.” *Id.* (citing *Lisa Lee Mines*, 86 F.3d at 1361). Finally, the court rejected, as factually incorrect, Employer’s assertion that the miner had not submitted new evidence postdating the denial of his first claim pursuant to 20 C.F.R. §725.309(c)(4) and *Consol. Coal Co. v. Williams*, 453 F.3d 609 (4<sup>th</sup> Cir. 2006). Therefore, the court concluded that the ALJ violated neither the BLBA nor the applicable regulations in applying the 15-year presumption to the miner’s subsequent claim.

Second, the court turned to Employer’s argument that, by applying the 15-year presumption to the miner’s subsequent claim, the ALJ improperly reopened an Article III court’s final judgment: the Fourth Circuit’s 1998 denial of the miner’s petition for review in his first claim. The court concluded that the award in the miner’s subsequent claim “did not ‘retroactively . . . reopen’ anything, much less a final judgment of an Article III court.” *Toler*, 805 F.3d at 515. The court noted that, in fact, *Lisa Lee Mines* required that the ALJ “accept the correctness of the administrative denial of [the miner’s] 1993 claim – and, by necessary extension, our 1998 denial of [his] petition for review.” *Id.* (emphasis in original). Accordingly, the court rejected Employer’s contention that the ALJ inappropriately exercised “the judicial Power” in granting the miner’s subsequent claim.” *Id.*

In light of the above, the court denied Employer's petition for review.

**[Subsequent Claims Under 20 C.F.R. §725.309: Application of the 15-year presumption; used to demonstrate element of entitlement]**

In [Blue Mountain Energy v. Director, OWCP \[Gunderson\]](#), 805 F.3d 1254, B.L.R. (10<sup>th</sup> Cir. Nov. 2015), the ALJ, on second remand, awarded benefits by finding Claimant established that he was totally disabled due to legal pneumoconiosis. Of note, the ALJ found that "the brevity of Dr. Shockey's report [finding legal pneumoconiosis] causes it to be less probative in light of the comprehensiveness of the other medical opinions of record." [Gunderson v. Blue Mountain Energy, OALJ Case No. 2004-BLA-05323, slip op. at 14-15 \(Mar. 18, 2013\) \(unpub.\)](#). Furthermore, the ALJ found "Dr. Repsher's opinion that Claimant's COPD is not related to coal dust exposure based predominately, if not totally, on articles Dr. Repsher cites for the proposition that coal dust exposure is significantly less likely to cause COPD than cigarette smoking . . ." *Id.* at 15. Therefore, the ALJ accorded Dr. Repsher's opinion "less weight because it does not focus on Claimant's specific symptoms and conditions, but on statistics." *Id.* The ALJ also noted that Dr. Repsher failed to "address whether coal dust exposure and smoking could have been additive causes of Claimant's lung disease, an etiology clearly adopted in the Preamble to the Regulations." *Id.* In sum, the ALJ found the opinions of Drs. Cohen and Parker to be most probative because both doctors "more thoroughly evaluated Claimant's specific condition when determining that Claimant's obstructive lung disease was caused by coal mine dust exposure." *Id.* The ALJ also pointed out that Dr. Parker had, for example, "specifically linked Claimant's symptoms to the documented effects of coal mine dust exposure and cited to literature that has been approved by the Department in the Preamble." *Id.*

Employer moved for reconsideration, which the ALJ denied, except in respect to the onset date for the payment of benefits, which he modified accordingly.

Employer then appealed. The Board concluded that the ALJ had "permissibly relied on the preamble to the revised 2001 regulations as a statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of [CME]." [Gunderson v. Blue Mountain Energy, BRB No. 13-0412 BLA, slip op. at 6 \(May 16, 2014\) \(unpub.\)](#). The Board further noted that "the preamble does not constitute evidence outside the record with respect to which the [ALJ] must give notice and an opportunity to respond." *Id.* Of note, the Board concluded that the ALJ "reasonably credited Dr. Parker's diagnosis of legal pneumoconiosis because Dr. Parker linked claimant's impairment to the documented effects of coal mine dust exposure, based on studies that were cited with approval in the preamble to the revised 2001 regulations." *Id.* at 7. Furthermore, the Board stated that the ALJ "rationally discounted Dr. Repsher's opinion," as the ALJ found the opinion at legal pneumoconiosis insufficiently explained, "considering that the Department of Labor accepted medical literature stating that smoking and coal mine dust exposure are additive in causing COPD." *Id.* Accordingly, the Board affirmed the award of benefits.

Employer petitioned the Tenth Circuit for review. Before the court, Employer argued that the ALJ violated the Administrative Procedure Act (APA). Specifically, Employer first contended that the ALJ violated the APA by “relying on the preamble, thereby giving the preamble the ‘force and effect of law.’” *Gunderson*, 805 F.3d at 1259. At the outset, the court noted “the very limited extent to which the ALJ referenced the preamble,” as the ALJ included the preamble as only one of the tools he used to evaluate the credibility of two medical reports, and referenced the preamble on only two occasions. *Id.* The court also noted that, while such use of the preamble is a matter of first impression in the Tenth Circuit, numerous other courts have affirmed reliance on the preamble, including the Ninth, Sixth, Fourth, Third, and Seventh Circuits. The court disagreed with Employer that the ALJ’s citation to the preamble “undeniably changed the outcome” of the case, and further noted that the ALJ did not solely rely on the preamble in crediting the medical reports. *Id.* at 1260. The court concluded that that was “no indication in the ALJ’s final opinion that he was effecting some sort of change in the law or relying on a broadly-applicable rule premised on the preamble.” *Id.* at 1261. Instead, the ALJ simply “used the preamble’s summary of medical and scientific literature as one of his tools in determining whether the experts’ medical analyses of [Claimant’s] condition were credible.” *Id.* The court failed to see how the ALJ’s use of the preamble transformed “a summary of ‘the prevailing view of the medical community’ into binding law.” *Id.*

The court also rejected Employer’s argument predicated upon *Christensen v. Harris County*, 529 U.S. 576 (2000), and the fact that the preamble was not subject to notice and comment. The court distinguished *Christensen* on two grounds: (1) in contrast to the opinion letter in *Christensen*, which offered a legal interpretation of a statute, the preamble “provides a scientific justification for amending a regulation,” and (2) the question before the court in *Christensen* was one of *Chevron* deference, while in the present case the issue was whether “the ALJ was entitled to use the preamble as one of his tools in evaluating the scientific credibility of experts.” *Id.*

In light of the above, and in rejecting Employer’s first argument on appeal, the court concluded that the preamble “seems like a reasonable and useful tool for ALJs to use in evaluating the credibility of the science underlying expert reports that address the cause of pneumoconiosis.” *Id.* Accordingly, the court held “that an ALJ may—but need not—rely on the preamble to 20 C.F.R. §718.201 for this purpose.” *Id.* at 1262. The court noted that “parties remain free to offer other scientific materials for the ALJ to consider for the same purpose, including but not limited to, materials challenging the continued validity of the science described in the preamble.” *Id.*

Second, the court addressed Employer’s argument that the preamble constitutes evidence not contained in the record and, therefore, the ALJ was required to reopen the record to provide Employer with an opportunity to respond to findings in the preamble. The court rejected this argument, concluding that the ALJ did not abuse his discretion in refusing to do so and noting that Employer “was well aware of the preamble’s scientific findings . . . and had ample opportunity prior to the close of this record to submit evidence or expert opinions to persuade the ALJ that the preamble’s findings were no longer valid or were not relevant to the facts of this case.” *Id.* Furthermore, Employer’s requests to reopen the record largely “did not point to anything in the preamble that [Employer] considered no longer scientifically valid.” *Id.*

For the above reasons, the Tenth Circuit denied Employer's petition for review.

**[General Principles of Weighing Medical Evidence: The preamble to the amended regulations]**

**B. Benefits Review Board**

In [Cree v. Central Cambria Drilling Co., BRB No. 15-0129 BLA \(Nov. 2, 2015\) \(unpub.\)](#), which involved a survivor's claim<sup>2</sup> arising out of the Third Circuit, the ALJ found that Claimant was automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l), without holding a hearing.

Employer appealed and challenged Claimant's entitlement to survivor's benefits. In response, the Director requested that the Board vacate the award and remand the case to the ALJ to hold a hearing.

The Board began by summarizing the relevant regulations, noting that a hearing need not be held "if a party moves for summary judgment and the [ALJ] determines that there is no genuine issue as to any material fact and the moving party is entitled to the relief requested as a matter of law." *Cree*, slip op. at 3 (citing 20 C.F.R. §725.452(c)). Furthermore, if an ALJ "believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the [ALJ] shall notify the parties by written order and allow at least thirty days for the parties to respond." 20 C.F.R. §725.452(d). However, if any party files a timely request in response to the order, the ALJ "shall hold the oral hearing." *Id.* Finally, "[w]hile the parties may waive the right to a hearing before an [ALJ], such waiver must be in writing and filed with the Chief [ALJ] or the [ALJ] assigned to hear the case." *Cree*, slip op. at 3 (citing 20 C.F.R. §725.461(a)).

The Board concluded that, "[b]ecause the parties did not agree to a decision on the record, and no party filed a motion for summary judgment, the [ALJ] was obligated to hold a hearing before issuing his decision." *Id.* at 3-4. Therefore, the Board vacated the award of benefits and remanded the matter to the ALJ "for a hearing consistent with the aforementioned regulatory requirements." *Id.* at 4.

**[Review by the Administrative Law Judge: Entitlement to a hearing]**

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<sup>2</sup> At the time of the Board's decision, the underlying miner's claim was still pending before OALJ.