No. 11-9531

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIDGER COAL COMPANY,

Petitioner

v.

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

and

DELORES ASHMORE (widow of MERRIL D. LAMBRIGHT),

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

(Oral Argument Requested)

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Consitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

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STATEMENT OF RELATED CASES

There have been no prior appeals to the Court in this case and, to the Director's knowledge, there are no related appeals currently pending.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

A Department of Labor (DOL) administrative law judge (ALJ) awarded the claim of Merrill D. Lambright for disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, on February 9, 2005. The ALJ also awarded the claim of Mr.

Lambright's widow, Delores Ashmore,[1] for survivor's benefits.[2] Bridger Coal Company, the mine operator responsible for paying benefits, timely appealed the ALJ's decision to the Benefits Review Board on February 23, 2005. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision. 33 U.S.C. § 921(b)(3), as incorporated. On March 16, 2006, the Board vacated the ALJ's decision, and remanded the case. Bridger timely sought reconsideration on April 6, 2006. *See* 20 C.F.R. § 802.407(a) (thirty-day period for seeking reconsideration of Board decision). The Board denied reconsideration on October 31, 2006.

On remand, the ALJ denied both claims on February 26, 2008.

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[1] Ms. Ashmore retained her prior name when she married Mr. Lambright. *See* Director's Exhibit 9.

[2] The BLBA was amended in 2010. Section 1556 of the Affordable Care Act revised the entitlement criteria for certain miners' and survivors' claims. PUB. L. NO. 111-148, § 1556(a), (b) (2010). These amendments, however, apply only to claims filed after January 1, 2005. PUB. L. NO. 111-148, § 1556(c) (2010). Since Mr. Lambright filed his claim in 1998, and Ms. Ashmore filed her claim in 2002, the amendments have no impact on this case.

Ms. Ashmore filed a timely appeal on March 21, 2008. *See* 33 U.S.C. § 921(a), as incorporated. The Board reversed the ALJ's decision, and awarded benefits on both claims on October 26, 2009. Bridger timely sought reconsideration on November 23, 2009. *See* 20 C.F.R. § 802.407(a). The Board denied reconsideration on March 31, 2011.

Bridger timely petitioned this Court for review of the Board's decision on May 20, 2011. *See* 33 U.S.C. § 921(c), as incorporated (sixty-day period for seeking review after final decision of the Board); 20 C.F.R. § 802.406 (sixty-day appeal period runs from issuance of decision on reconsideration motion); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 219 (7th Cir. 1986) (same). The Court has jurisdiction over Bridger's petition under 33 U.S.C. § 921(c), as incorporated, as the "injury" in this case—Mr. Lambright's exposure to coal-mine dust—occurred in Utah and Wyoming.

STATEMENT OF THE ISSUES

1. Did the law-of-the-case doctrine preclude the Board from revisiting the issue of complicated pneumoconiosis in 2009 when its prior decision (2006) was non-final, and there had been new

developments in the law since that prior decision?

2. Should the Board have granted Bridger's 2009 motion for reconsideration even though a majority of the en banc Board did not vote to grant the relief sought?

3. Should the Court affirm the ALJ and Board decisions awarding benefits, as they applied the correct legal standard for invocation of an irrebuttable statutory presumption of entitlement based on the presence of complicated pneumoconiosis, and are supported by substantial evidence?

4. Did the ALJ properly award benefits on Mr. Lambright's claim as of his filing date, given that the evidence does not establish when he contracted complicated pneumoconiosis?

STATEMENT OF THE CASE

Mr. Lambright filed a claim for federal black lung benefits with DOL (the lifetime claim) on March 19, 1998. DX 1. After the miner's death in 2002, Ms. Ashmore prosecuted his claim, and filed a claim for survivor's benefits (the survivor's claim) on March 19, 2002. DX 63. Although an ALJ awarded both claims, the company appealed, and the Board vacated the ALJ's decision and remanded the case for further consideration. On remand, the ALJ denied both

claims. Ms. Ashmore appealed, and the Board reversed the ALJ's decision, and awarded both claims. The Board also denied Bridger's motion for reconsideration. Bridger now seeks review by this Court.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The BLBA compensates coal miners who are totally disabled by pneumoconiosis arising out of coal-mine employment, and survivors of miners who died due to pneumoconiosis.[3] 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis "means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d

[3] To obtain benefits on a lifetime claim, a miner must prove (1) that he has pneumoconiosis, (2) that the disease arose out of coal-mine employment, and (3) that he has a totally disabling pulmonary impairment due in part to the disease. 20 C.F.R. §§ 718.202, .203. 204; *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1214 (10th Cir. 2009). On a survivor's claim filed on or before January 1, 2005, the claimant—in addition to showing that the miner had employment-related pneumoconiosis—must demonstrate that he died due to the disease. 20 C.F.R. § 718.205; *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 873-74 (10th Cir. 1996).

1013, 1016 (10th Cir. 2010). It can occur in either "simple" or "complicated" forms. *Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 7 (1976).

Simple pneumoconiosis is a less severe form of the disease that may or may not cause significant pulmonary impairment. *Id.* "Complicated pneumoconiosis, [which is] generally more serious, involves progressive massive fibrosis [and] usually produces significant pulmonary impairment . . ., [which] may induce death by cardiac failure, and may contribute to other causes of death." *Id.* Bridger concedes that Mr. Lambright had simple pneumoconiosis; the primary contested issue is whether he suffered from complicated pneumoconiosis.

Although the statute does not specifically reference "complicated pneumoconiosis" or "progressive massive fibrosis," that condition is clearly encompassed and made compensable by Section 411(c)(3) of the BLBA, 30 U.S.C. § 921(c)(3). *See Pittsburg & Midway Coal Min. Co. v. Director, OWCP*, 508 F.3d 975, 984 (11th Cir. 2007). Section 411(c)(3) provides an irrebuttable presumption of total disability due to pneumoconiosis (in a lifetime claim) or death due to pneumoconiosis (in a survivor's claim) where

> a miner who [suffers] or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. § 921(c)(3). The implementing regulation is substantively identical. 20 C.F.R. § 718.304; *see Pittsburg & Midway*, 508 F.3d at 983 n. 6.

B. Relevant Medical Evidence

Three pathologists—Drs. Dobersen, Tomashefski and Crouch—rendered opinions on whether Mr. Lambright had complicated pneumoconiosis.

Dr. Dobersen performed an autopsy on Mr. Lambright, including gross and microscopic examinations. Director's Exhibit (DX) 65.[4] Dr. Dobersen is board-certified in anatomic, clinical and forensic pathology, and is the medical examiner for Arapahoe

[4] Exhibit numbers refer to the evidence admitted before the ALJ.

County, Colorado.

On microscopic examination, Dr. Dobersen found acute bronchopneumonia, as well as "features of complicated coal workers pneumoconiosis," including centrilobular emphysema and extensive anthracosis, with focally dense scarring. He also found features of silicosis. On gross examination, the doctor saw extensive anthracosis, with areas of anthracotic scarring, "some of which measure up to 2½ inches in diameter." He also noted that centrilobular emphysema was present, and observed that the pulmonary blood vessels were consistent with pulmonary hypertension.

Based on his examination, Dr. Dobersen diagnosed "complicated coal workers[']s pneumoconiosis (progressive massive fibrosis) including silicosis." This diagnosis was based on Mr. Lambright's history of exposure to coal dust and silica; the "[e]xtensive anthracosis and focal silicotic nodules" in his lungs; centrilobular emphysema with extensive scarring; and evidence of chronic pulmonary hypertension. Dr. Dobersen also concluded that Mr. Lambright had chronic cor pulmonale, characterized by cardiomegaly, right ventricular hypertrophy and dilation;

pulmonary hypertension; and "features of congestive heart failure."[5] He additionally found that Mr. Lambright had arteriosclerotic cardiovascular disease at the time of his death. DX 64.

After the autopsy, Dr. Dobersen summarized his opinion on the cause of Mr. Lambright's death and completed a death certificate. Noting that the miner was 56 years old, had end-stage lung disease, and was living in a nursing home at the time of his death, the physician attributed death to "complications of complicated coal worker's pneumoconiosis (progressive massive fibrosis) also known as black lung disease. A component of silicosis was also apparent." *Id.* The death certificate reflects these same conclusions. DX 65.

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[5] Cor pulmonale is a cardiovascular disease characterized by "[r]ight ventricular enlargement secondary to a lung disorder that produces pulmonary artery hypertension." THE MERCK MANUAL (17th ed. 1999) at 1702; *see generally Mancia v. Director, OWCP*, 130 F.3d 579, 585 (3d Cir. 1997). The usual direct cause of chronic cor pulmonale is chronic obstructive pulmonary disease (*e.g.*, chronic bronchitis or emphysema). THE MERCK MANUAL at 1702. Cor pulmonale "has been associated with pneumoconiosis as an end-stage complication." *Mancia*, 130 F.3d at 585 (citation omitted). The presence of cor pulmonale with right-sided congestive heart failure is *prima facie* evidence of a totally disabling pulmonary impairment. 20 C.F.R. § 718.204(b)(2)(iii).

At Bridger's request, Drs Tomashefski and Crouch reviewed Dr. Dobersen's report, five autopsy slides (including two of lung tissue) and various medical records. Dr. Tomashefski, who is board-certified in anatomic and clinical pathology, found no significant fibrosis on the lung slides, but did find scattered nodules consistent with silicosis, and severe pulmonary hypertension. Employer's Exhibit (EX) 2. Based on his overall review, he diagnosed mild simple silicosis, mild centriacinar emphysema, acute bronchopneumonia and severe pulmonary hypertensive vascular disease.

Dr. Tomashefski stated that the cause of the pulmonary hypertension could not be determined, but that the miner's condition was most consistent with primary pulmonary hypertension. Moreover, while allowing that the silicosis was possibly related to coal-dust exposure, the physician found it more likely related to silica exposure during hard-rock mining.[6] Dr. Tomashefski concluded that Mr. Lambright did not have either

[6] Prior to his 20-year employment as a coal miner, Mr. Lambright was hard-rock miner for five years. *See* DX 2.

complicated silicosis or complicated pneumoconiosis, as the largest lesion he observed was "less than 2 cm. in diameter." He attributed Mr. Lambright's death to primary pulmonary hypertension, cor pulmonale, and bronchopneumonia without contribution from simple silicosis.

Dr. Crouch diagnosed simple coal-workers' pneumoconiosis and simple siderosis, the latter attributed to exposure to welding fumes. EX 3. She also found centriacinar emphysema, bronchopneumonia, and severe primary pulmonary hypertension. Dr. Crouch attributed Mr. Lambright's death to pneumonia "in the setting of cardiac failure and cor pulmonale resulting from severe pulmonary hypertension." She found that his pulmonary hypertension was unrelated to any dust exposure, and that the dust-related changed in Mr. Lambright's lungs were insufficient to cause impairment or make any "significant contribution" to his pulmonary hypertension. Dr. Crouch is board-certified in anatomic pathology.

In addition to the pathologists' reports, the record contains numerous x-ray and CT-scan readings, as well as a biopsy report and several medical reports by non-pathologist physicians. Neither

the x-ray interpretations nor the biopsy report revealed the presence of complicated pneumoconiosis; in fact, in many instances the physicians providing these results did not diagnose simple pneumoconiosis either. Likewise, none of the non-pathologist physicians diagnosed the complicated form of the disease. Although none of the CT-scans was read as positive for the presence of complicated pneumoconiosis, Dr. Wheeler observed a 2.8 cm node on the August 21, 2000, scan, which he believed was "compatible with inflammatory disease such as sarcoid, TB or histoplasmosis but [could not] rule out lymphoma." DX 57.

C. Proceedings before the District Director

After Mr. Lambright filed his claim for benefits in1998, DOL's district director identified Bridger as the coal-mine operator liable for the claim, developed medical evidence, and awarded benefits on December 21, 1998. DX 1,18, 20, 27. Bridger requested a hearing, which was held before an ALJ. DX 28, 49. At the hearing, Mr. Lambright asked the ALJ to remand his case to the district director for the submission of additional medical evidence. The ALJ subsequently granted this request by order dated October 12, 2000. DX 49, 50.

On the same day as the ALJ issued the remand order, Bridger asked the district director to modify the award entered on Mr. Lambright's claim. DX 51, 52; *see* 20 C.F.R. § 725.310 (1999).[7] The district director granted Bridger's request in February 2001, and changed the award to a denial. DX 55. Within thirty days, Mr. Lambright requested a new ALJ hearing. DX 56. While his hearing request was pending before the district director, however, Mr. Lambright died on January 31, 2002. DX 64.

After Mr. Lambright's death, Ms. Ashmore filed an application for survivor's benefits on March 19, 2002. DX 63. She also submitted Dr. Dobersen's autopsy report and other medical evidence to the district director. DX 59, 65. Although Ms. Ashmore did not specifically request modification of the district director's denial of Mr. Lambright lifetime claim (his request for a hearing had

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[7] DOL revised the Black Lung program regulations on December 20, 2000, effective January 19, 2001. 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). Some of the changes were prospective only, but others applied to claims pending on January 19, 2001, such as Mr. Lambright's. *See* 20 C.F.R. § 725.2(c). Citations to the 1999 edition of the Code of Federal Regulations indicate that a prior version of the regulation is applicable. Otherwise, our citations refer to the 2011 edition of the Code of Federal Regulations.

not yet been acted on), the district director issued a "Proposed Decision and Order Granting Request for Modification" awarding benefits on the lifetime claim. DX 61. The district director found that Mr. Lambright had complicated pneumoconiosis based on the autopsy report, and awarded benefits from March 1998 (when Mr. Lambright filed his claim) through December 2001 (when he died). *Id*.

The district director ultimately awarded Ms. Ashmore's claim as well, based on the finding that Mr. Lambright had complicated pneumoconiosis. DX 75. Bridger requested a hearing on both claims, which was held before ALJ Thomas M. Burke.

D. The First ALJ Decision

ALJ Burke awarded benefits on both claims on February 9, 2005 (ALJ 2005). Relying on the three pathologists' evaluations of the autopsy material, he found that all three physicians (Drs. Dobersen, Tomashefski and Crouch) concluded that Mr. Lambright had at least simple pneumoconiosis. ALJ 2005 at 10; *see* 20 C.F.R.

§ 718.202(a)(2).[8]

The ALJ then evaluated whether the autopsy evidence established that Mr. Lambright had complicated pneumoconiosis. ALJ 2005 at 10-11. He credited the positive opinion of Dr. Dobersen over the negative opinions of Drs. Tomashefski and Crouch. *Id.* The ALJ specifically did not "accord[] [Dobersen] greater weight simply because he was the prosector, " although he noted he could under this Court's precedent. ALJ 2005 at 10; *see Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 874-76 (10th Cir. 1996) (ALJ may give greater weight to prosector's opinion). Rather, ALJ Burke also credited Dr. Dobersen's opinion for three other reasons: (1) the physician made "detailed findings," particularly a 2½ inch lesion related to coal-dust exposure; (2) Dr. Dobersen understood the concepts of simple and complicated pneumoconiosis; and (3) Dr. Dobersen has superior qualifications—*i.e.*, Dobersen is board-certified in three subdisciplines of pathology

[8] The ALJ found that the medical-opinion evidence also supported a finding of simple pneumoconiosis, relying principally on Dr. Tuteur's opinion (EX 1), which had been submitted by Bridger. ALJ 2005 at 18; *see* 20 C.F.R. § 718.202(a)(4).

(anatomic, clinical and forensic), whereas Dr. Tomashefski is board-certified in only anatomic and clinical pathology and Dr. Crouch is board-certified solely in anatomic pathology. ALJ 2005 at 10-11.

ALJ Burke also weighed the autopsy evidence along with the other evidence of record (x-rays, CT-scans, medical reports and treatment records), and gave the autopsy evidence more weight because it was "the most compelling." ALJ 2005 at 19. In so doing, he again relied on Dr. Dobersen's opinion, noting that his finding of complicated pneumoconiosis was consistent with a large node observed on CT-scan by Dr. Wheeler. Although Dr. Wheeler had speculated that the node could be due to a variety of different causes (*e.g.*, tuberculosis, histoplasmosis) unrelated to coal mining, the ALJ found the physician's view "undocumented and unreasoned on this record" because Mr. Lambright's hospitalization and treatment records contained no indication he was treated for these diseases. ALJ 2005 at 18. *Id.* Based on the autopsy evidence, ALJ Burke concluded that the Section 411(c)(3) presumption had been invoked, and awarded benefits on both the lifetime and survivor's claims. ALJ 2005 at 19.

Having awarded both claims, ALJ Burke found that benefits

were payable on the lifetime claim from March 1998 (Mr. Lambright's claim-filing date) through December 2001 (the month before he died). 2005 ALJ at 20. He reasoned that Mr. Lambright had became totally disabled due to pneumoconiosis at some point prior to June 1998 (the date of the first medical report diagnosing total disability due to simple pneumoconiosis). He thus awarded benefits from the date the miner filed his claim in accordance with the applicable regulation. *Id.*; *see* 20 C.F.R. § 725.503. Finally, the ALJ awarded Ms. Ashmore survivor's benefits commencing in January 2002, the month of Mr. Lambright's death. *Id.*

E. The First Board Decision

Bridger appealed, challenging both ALJ Burke's complicated-pneumoconiosis finding and his entitlement-date finding on Mr. Lambright's lifetime claim. The Board vacated the ALJ's decision, and remanded for further consideration on March 16, 2006 (Board 2006). The Board affirmed the ALJ's unchallenged finding that Mr. Lambright had simple pneumoconiosis arising out of coal-mine employment. Board 2006 at 3, n. 2. Citing Fourth Circuit case law, however, the Board vacated the ALJ's finding of complicated pneumoconiosis because the record did not contain any

"equivalency determination"—*i.e.*, a determination that the lesions found on autopsy (or the node seen on the CT-scans) would, if viewed on x-ray, result in an opacity of one cm or greater.[9] Board 2006 at 4; *see* 30 U.S.C. § 921(c)(3)(A) (complicated pneumoconiosis shown by x-ray opacity greater than one cm.); *Double B. Min., Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999) ("equivalency determination" required to demonstrate complicated pneumoconiosis by autopsy evidence under 30 U.S.C. § 921(c)(3)(B)).

The Board remanded both the lifetime and survivor's claims to the ALJ to determine whether Mr. Lambright was totally disabled due to, or died due to, simple pneumoconiosis. Board 2006 at 5; *see* 20 C.F.R. §§ 718.204, .205. The Board also directed the ALJ to reconsider his entitlement-date finding on the lifetime claim. Board 2006 at 5-6. Bridger moved for reconsideration, requesting that the Board formally "reverse" the ALJ's complicated-pneumoconiosis

[9] The Board phrased its holding as "vacating" the ALJ's complicated-pneumoconiosis finding, but its holding that, as a matter of law, the evidence could not support such a finding effectively reversed the ALJ's finding.

finding rather than simply "vacate" it. The Board summarily denied this request.

F. The Second ALJ Decision

On remand, ALJ Burke denied benefits on both claims on February 26, 2008 (ALJ 2008). On the lifetime claim, he found that Mr. Lambright had a totally disabling pulmonary impairment at the time of his death, but also found that his disability was not due to simple pneumoconiosis. ALJ 2008 at 2-4, 7-10; *see* 20 C.F.R. § 718.204(b)(2)(ii)-(iv), (c). On the survivor's claim, ALJ Burke found that Ms. Ashmore had not proved that her husband's death was due to pneumoconiosis. ALJ 2008 at 10-11; *see* 20 C.F.R. § 718.205. In both instances, the ALJ did not consider Dr. Dobersen's autopsy report because the Board had already "discredited" it. ALJ 2008 at 10.

G. The Second Board Decision

Ms. Ashmore, without the assistance of counsel, appealed. After initial briefing was complete, the Board requested supplemental briefing on the proper standard for invoking the Section 411(c)(3) presumption in cases involving autopsy evidence. The Board asked the parties to address whether it should continue

to apply the standard adopted by the Fourth Circuit (invocation only if the autopsy "results show a condition that would produce opacities greater than one centimeter in diameter on an x-ray[,]" *Double B Min., Inc.,* 177 F.3d at 242-43), or adopt the more-recent standard adopted by the Eleventh Circuit (invocation if autopsy evidence is "consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards[,]" *Pittsburg & Midway*, 508 F.3d at 986). The Board also asked the parties to address whether the ALJ's 2005 decision awarding both claims should be reinstated if the Eleventh Circuit's standard were applied. Bridger argued in favor of the Fourth Circuit standard, and that the evidence was insufficient to establish complicated pneumoconiosis even under the Eleventh Circuit standard. The Director urged the Board to adopt the Eleventh Circuit standard, and argued that ALJ Burke's prior finding of complicated pneumoconiosis should be reinstated under that standard.

On October 26, 2009, a divided Board panel issued a decision (Board 2009) vacating ALJ Burke's 2008 decision, and reinstating his 2005 award of benefits on both claims. The majority, agreeing with the Director, adopted the Eleventh Circuit's standard for

invocation of the Section 411(c)(3) presumption based on autopsy evidence, and held that no "equivalency determination" is required. Board 2009 at 5-7, 12-13. As a result, the Board vacated its own 2006 decision, and proceeded to review the ALJ's 2005 decision based on the issues raised in Bridger's earlier appeal. Board 2009 at 7.

The majority rejected Bridger's arguments that the ALJ had improperly shifted the burden of proof to the company and had failed to comply with the Administrative Procedure Act. Board 2009 at 10-11. It also held that Dr. Dobersen's report was sufficient to establish the presence of complicated pneumoconiosis, thus invoking the Section 411(c)(3) presumption. 2009 Board at 11. Adopting the Director's view, the majority concluded that Dr. Dobersen's diagnosis, which was based on findings "of extensive anthracosis and scarring—with lesions measuring up to 2.5 inches (6.35 centimeters) in diameter—along with evidence of extensive centrilobular emphysema and severe cor pulmonale, comports with the accepted medical definition of complicated pneumoconiosis." *Id.* (citations and internal quotations omitted). The majority also held that the ALJ rationally gave Dr. Dobersen's opinion greater

weight than the contrary opinions of Drs. Tomashefski and Crouch based on the former's superior credentials. 2009 Board at 12.

Finally, the majority affirmed ALJ Burke's March 1998 entitlement-date finding on the lifetime claim, albeit for different reasons than the ALJ had articulated. 2009 Board at 13-15. The Board held that the claim-filing date was the correct entitlement date because the record did not establish when Mr. Lambright contracted complicated pneumoconiosis, nor did it establish that he did not have complicated pneumoconiosis at some point subsequent to his filing date. 2009 Board at 13-14. Thus, resort to the claim-filing date was appropriate.

The dissenting judge would have continued to apply the Fourth Circuit standard and, accordingly, would not have reinstated the 2005 award of benefits. Board 2009 at 16-17. He also would have affirmed ALJ Burke's 2008 decision denying both claims under 20 C.F.R. §§ 718.204 and 718.205. Board 2009 at 17.

Bridger moved for reconsideration, arguing that the Board should not have reconsidered the issue of complicated pneumoconiosis, and should not have upheld ALJ's Burke's

complicated-pneumoconiosis and entitlement-date findings. The five-member Board, sitting en banc, denied reconsideration in an order (Board 2011) dated March 31, 2011. Two members voted to grant Bridger's motion, overturn the Board's 2009 decision, and affirm ALJ Burke's 2008 denial of benefits.[10] Board 2011 at 3. Two other members voted to deny Bridger's motion, and affirm the Board's 2009 decision. *Id.* The fifth member agreed with the panel majority regarding adoption of the Eleventh Circuit's Section 411(c)(3) standard, but would have remanded the case for the ALJ to apply that standard. *Id.* Since no disposition commanded a majority, the Board concluded that its "2009 decision . . . stands" under its governing regulation and denied Bridger's motion. Board 2011 at 4; *see* 20 C.F.R. § 802.407(d). Bridger then petitioned this Court for review.

SUMMARY OF THE ARGUMENT

The Court should affirm the decision of the Board awarding benefits on both the lifetime and survivor's claims. Bridger's

[10] The Board's *per curiam* order does not identify how any individual member voted.

preliminary legal arguments have no merit. The Board was not precluded from revisiting the issue of complicated pneumoconiosis under the law-of-the case doctrine, as its prior decision was non-final and new developments occurred in the relevant law after the prior decision. Moreover, the Board properly denied Bridger's 2009 motion for en banc reconsideration, as a majority of the Board declined to grant the relief the company sought.

As for the merits, the Board properly applied the Eleventh Circuit's standard—"the miner's autopsy . . . results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards"—for invocation of the Section 411(c)(3) presumption. That standard is consistent with the statutory and regulatory language, comports with medical science, and is the standard advocated by the Director. Further, Dr. Dobersen's autopsy report is sufficient to establish complicated pneumoconiosis (and invoke the presumption) under that standard, and the ALJ properly gave his opinion controlling weight.

Finally, the ALJ correctly used Mr. Lambright's filing date (March 1998) as the entitlement date on the lifetime claim. The evidence does not establish when he contracted complicated

pneumoconiosis. Thus, the ALJ properly used the "default" entitlement-date established by the regulations—the claim-filing date.

ARGUMENT

A. Standard of Review

This appeal presents legal issues of statutory and regulatory interpretation, which the Court reviews *de novo*. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006). "In interpreting the BLBA, however, [the Court] give[s] 'considerable weight' to [DOL's] construction of the statute . . ., and 'substantial deference' to the agency's reasonable interpretation of its own regulations." *Id.* (citations omitted).

This case also involves review of the ALJ's factual findings. Such findings are reviewed under a substantial-evidence standard. *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009). The Court will "only inquire into the *existence* of evidence . . . that 'a reasonable mind might accept as adequate to support' [the ALJ's] conclusion." *Id.* (quoting *Hansen v. Director, OWCP*, 984 F.2d 364, 368 (10th Cir. 1993); other citation omitted; emphasis in original). The Court is "especially mindful that 'the task of weighing

conflicting medical evidence is within the sole province of the ALJ,' . . . and that 'where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence.'" *Id.*

B. The Board properly reinstated ALJ Burke's 1995 award of benefits and correctly denied Bridger's motion for reconsideration.

Bridger raises two preliminary procedural objections to the Board's decision in this case. Neither has any merit. The Board properly revisited its prior complicated-pneumoconiosis holding and reinstated ALJ Burke's 2005 decision based on its adoption of the Eleventh Circuit's Section 411(c)(3) standard. Moreover, the Board rightly denied Bridger's reconsideration motion, as three members declined to grant the relief Bridger requested.

1. The Board was not foreclosed from revisiting its earlier complicated-pneumoconiosis determination under the law-of-the-case doctrine.

Bridger asserts that the Board was precluded from addressing complicated pneumoconiosis and invocation of the Section 411(c)(3) presumption in its 2009 decision under the law-of-the-case

doctrine.[11] Because the Board had addressed the issue in its 2006 decision, the company contends that it could not reconsider the issue in 2009. The Court should reject this contention.

"Generally, the 'law of the case' doctrine dictates that prior judicial decisions on rules of law govern the same issue in subsequent phases of the same case." *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1224 (10th Cir. 2007) (citation omitted). The doctrine is discretionary, however, and not a restraint on a tribunal's power. 495 F.3d at 1224-25. This Court has characterized it as "merely a 'presumption, one whose strength varies with the circumstances.'" 495 F.3d at 1225 (quoting *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995)).

Thus, the doctrine is particularly applicable where the initial ruling is a by a higher forum, and the subsequent consideration is by a lower forum. *See Been*, 495 F.3d at 1225 ("[i]f the original

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[11] Bridger's argument that the Board did not have jurisdiction to reconsider ALJ Burke's 2005 decision is merely a different iteration of its law-of-the-case argument. As explained in the text, law-of-the-case is a discretionary limit on a tribunal's power, and is not jurisdictional.

ruling was issued by a higher court, a district court should depart from the ruling only in exceptionally narrow circumstances") (citation omitted). In contrast, a lower court "generally remains free to reconsider [its own] earlier interlocutory orders." *Id.* (citation omitted); *accord Rimbert v. Eli Lilly and Co.*, ___ F.3d ___, 2011 WL 3328543, *3 (10th Cir., Aug. 3, 2011).

The Board's 2006 decision in this case was interlocutory: it remanded the case to the ALJ for further proceedings. *See Van Dyke v. Missouri Min., Inc.*, 78 F.3d 362, 364-65 (8th Cir. 1996). Thus, while the ALJ was bound by that decision, the Board was not bound when Ms. Ashmore appealed the ALJ's decision on remand. *See Been*, 495 F.3d at 1225. Rather, it had discretion to revisit its prior holdings.

And its exercise of that discretion here was particularly appropriate. When the Board issued its 2006 decision, only the Fourth Circuit had addressed the legal standard for invocation of the Section 411(c)(3) presumption based on autopsy evidence.[12]

[12] As discussed below, the decisions of the Third and Sixth Circuits cited by Bridger, *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14 (cont'd . . .)

See Double B. Min., 77 F.3d at 242-43. While that decision was not controlling given that the instant case arose within the jurisdiction of this Court, the Board was not free simply to ignore it. *See generally Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980 (4th Cir. 1992) (where no controlling law from circuit where case arose, Board cannot ignore relevant out-of-circuit precedent simply because it is from different circuit). It is not surprising, therefore, that the Board in 2006 followed the only circuit court precedent available at that time.

When Ms. Ashmore appealed the ALJ's 2008 decision, however, the Eleventh Circuit had issued its decision in *Pittsburg & Midway.*[13] Although that decision, like *Double B Min.*, was not controlling in this case, it was "persuasive" authority that the Board was obliged to at least consider. *See Shuff*, 967 F.2d 977 at 980.

(. . . cont'd)
(3d Cir. 1981), and *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999), did not adopt an "equivalency determination" requirement.

[13] Moreover, as discussed below, the Fourth Circuit itself had appeared to retreat from universal application of the *Blankenship* standard. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 (4th Cir. 2006).

The present case is thus directly analogous to this Court's ruling in *Been*. There, a district court initially found, absent controlling precedent from this Court or the Supreme Court, that a complaint under Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. § 192, did not require proof of a "competitive injury." *Been,* 495 F.3d at 1225. Subsequently, the district court reached the opposite conclusion, based on consideration of "persuasive" decisions by other circuits. *Id.* Given the discovery of such persuasive authority and the fact that the district court was reconsidering its own previous non-final determination, the Court held that the district court did not abuse its discretion in revisiting the issue. *Id.*; *see also Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n. 14 (D.C. Cir. 1990) (court not bound by law-of-the-case where "dispositive doctrine has evolved" since prior decision).

Likewise, the Board here reconsidered its own decision based on new persuasive authority. Simply put, the Board was not bound to blindly adhere to its prior decision, given the new development in the law regarding invocation of the Section 411(c)(3) presumption. The Court should reject Bridger's law-of-the-case argument.

2. Bridger could not prevail on its motion for reconsideration because a majority of the Board declined to grant relief.

After the Board's 2009 decision, Bridger filed a motion for reconsideration, arguing that the Board erred in reconsidering the issue of complicated pneumoconiosis, and in reinstating ALJ Burke's 2005 award of benefits. Instead, the company wanted the Board to affirm his 2008 denial of benefits. Bridger now contends that the Board erred in not granting its reconsideration motion because a majority of the Board did not endorse the panel majority's opinion. The Court should reject this contention, as it is contrary to both the applicable statute and regulations, and is not consistent with circuit court precedent.

The Board is composed of five members. 33 U.S.C. § 921(b)(1), as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 801.201(a). Like the circuit courts, however, it ordinarily sits in panels of three. *See* 33 U.S.C. § 921(b)(5), as incorporated; 20 C.F.R. § 801.301. And, when sitting in panels, it only takes the concurrence of two members to decide a case. *See id.* Any party dissatisfied with a panel decision may seek en banc reconsideration, as Bridger did here. 20 C.F.R. § 802.407(b).

When the Board sits en banc, "official action can be taken *only on the affirmative vote of at least three members*." 33 U.S.C. § 921(b)(2) (emphasis added); *see also* 20 C.F.R. § 801.301(a). Thus, a party seeking reconsideration en banc can obtain relief only "upon the *affirmative vote of the majority of permanent members* of the Board." 20 C.F.R. § 802.407(d) (emphasis added). And where the party seeking reconsideration cannot persuade three members to grant it relief from a panel decision, it cannot prevail—"[a] panel decision *shall stand unless vacated or modified by the concurring vote of at least three permanent members*." *Id.* (emphasis added).

Here, only two members of the en banc Board agreed with Bridger that ALJ Burke's 2008 denial of benefits should be affirmed. The other three members declined to grant Bridger the relief it requested, albeit for different reasons.[14] Thus, under the plain language of both the Board's organic statute and its

[14] Two members voted to uphold the 2009 Board decision and reinstate the ALJ's 2005 award of benefits, and the third—while agreeing with the panel's adoption of the Eleventh Circuit's standard for invocation of the Section 411(c)(3) presumption—would have remanded for reconsideration of the evidence under that standard.

procedural regulations, it had to deny Bridger's reconsideration motion, and allow its 2009 decision to stand. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (same principle governs construction of unambiguous regulatory language).

Bridger, of necessity, ignores this language, as its argument is untenable in light of the plain statutory and regulatory provisions. The Court, however, should follow the statute and regulations, and reject the company's argument.

Moreover, circuit court precedent refutes Bridger's argument that it should have prevailed on reconsideration even when no majority supported any course of action. As the Fourth Circuit has recognized, when the Board reviews a matter and no resolution commands a majority of the members voting, then the decision under review stands as a matter of "affirmance-by-necessity." *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n. 8 (4th Cir. 1995); *accord Todd Shipyards Corp. v. Black*, 717 F.2d 1280,

1287-88 (9th Cir. 1983) . While *Curry* involved review of an ALJ decision by the Board, the same principle applies here, where the decision under review by the full Board on reconsideration was the panel decision awarding benefits. Since three members could not agree on a disposition of Bridger's reconsideration motion, the underlying panel decision was affirmed by necessity. For this reason, as well, the Court should reject Bridger's contention that the Board erred in allowing the panel decision to stand.

C. The Board properly awarded benefits on both the lifetime and survivor's claims because Mr. Lambright had complicated pneumoconiosis.

Turning to the merits of the claims, the central issue in this case is whether ALJ Burke and the Board correctly determined that the autopsy evidence established that Mr. Lambright had complicated pneumoconiosis. If so, then the irrebuttable presumptions of both total disability due to pneumoconiosis (on the lifetime claim) and death due to pneumoconiosis (on the survivor's claim) were invoked under Section 411(c)(3) of the BLBA. This issue has two components—the proper legal standard for invocation of the presumption, and the application of that standard to the evidence in this case. The Court should adopt the legal standard

enunciated by the Eleventh Circuit in *Pittsburg & Midway Coal Min. Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007), and should hold that the evidence of record is sufficient to invoke the presumption under that standard.

1. The Eleventh Circuit's standard for invoking the Section 411(c)(3) presumption based on autopsy evidence is consistent with the statutory language, the intent of Congress, and medical science, and is also the standard advocated by the Director.

The standard for invocation of the presumption based on autopsy evidence is a matter of first impression for this Court. The statute provides three avenues for establishing complicated pneumoconiosis and invoking the presumption:

> (A) . . . by chest roentgenogram, yield[ing] one or more large opacities (greater than one centimeter in diameter) . . ., (B) . . . by biopsy or autopsy, yielding massive lesions in the lung, or (C) . . . by other means . . . which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. § 921(c)(3); *see* 20 C.F.R. § 718.304 (implementing regulation). The question here is what must be shown to invoke the presumption under prong (B)—*i.e.*, how the presence of "massive lesions" on autopsy or biopsy must be established.

Neither the BLBA nor the regulations defines "massive lesions" for purposes of prong (B). Moreover, there is no definitive standard in the medical community for diagnosing complicated pneumoconiosis based on autopsy or biopsy evidence. *See* 65 Fed. Reg. 79936 (Dec. 20, 2000) (declining to adopt specific pathological standards for diagnosis of pneumoconiosis by autopsy due to lack of consensus in medical community); 64 Fed. Reg. 54978 (Oct. 8, 1999) (same); 45 Fed. Reg. 13684 (Feb. 29, 1980) (same); *see generally Pittsburg & Midway*, 508 F.3d at 986-87. Two circuit courts—the Fourth and Eleventh—however, have addressed the issue. The Eleventh Circuit's approach is superior.

The Fourth Circuit spoke first in *Double B Min., Inc., v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). It noted that the three prongs of Section 411(c)(3) provide three methods of diagnosing the same condition, and held that "[b]y explicitly referencing prongs (A) and (B) as guides, prong (C) . . . requires 'plainly that equivalency determinations shall be made.' [Citation omitted.] Logic commands that prongs (A) and (B) be similarly equivalent." 177 F.3d at 243. The Fourth Circuit further held that because prong (A) established an "objective" standard, "it provides the mechanism for

determining equivalencies under prong[] (B) . . . ." *Id.* Thus, a lesion found on autopsy or biopsy would invoke the presumption only if "the biopsy [or autopsy] results show a condition that would produce opacities greater than one centimeter in diameter on an x-ray." [15] *Id.*

In contrast, the Eleventh Circuit held that an equivalency determination is not required in order to invoke the presumption based on autopsy evidence under prong (B). *Pittsburg & Midway*,

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[15] Bridger claims that the Third and Sixth Circuits agree with the Fourth Circuit's position. The decisions cited by the company, however, do not support its claim. In *Clites v. Jones & Laughlin Steel Corp.*, the Third Circuit held—as the statute plainly mandates—that an equivalency determination is required in order to invoke the presumption *under prong (C)* (dealing with invocation based on "other evidence"). 663 F.2d 14, 16 (3d Cir. 1981). The court did not address whether an equivalency determination would be required under prong (B). Likewise, in *Gray v. SLC Coal Co.*, the Sixth Circuit stated that a lesion found on autopsy may "only justify invocation of the presumption if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a 'massive lesion.'" 176 F.3d 382, 390 (6th Cir. 1999) (citation omitted) (emphasis added). The court did not address the meaning of "massive lesion," or indicate whether such a lesion must be shown to be equivalent to the prong (A) criteria.

508 F.3d at 987, n. 7. Based on the legislative history of the BLBA, case law interpreting the statute, and the regulatory history of DOL's Black Lung program regulations, the court determined that the term "massive lesions" contained in prong (B), as well as the conditions described in prongs (A) and (C), refer to the same condition—complicated pneumoconiosis. 508 F.3d at 984-86. Thus, "[i]t is sufficient if the claimant can establish . . . that the miner's autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards." 508 F.3d at 986 (citation omitted).

The Eleventh Circuit specifically (and rightly) rejected the Fourth Circuit's approach in *Double B Min.* (requiring an equivalency determination under prong (B)) because that approach (1) conflated prong (B) with prong (A); (2) rendered prong (B) superfluous in light of the equivalency-determination requirement for evidence under prong (C); (3) improperly valued x-ray results over more probative autopsy findings; and (4) appeared to conflict with the express statutory mandate (contained in 30 U.S.C. § 923(b)) that claims not be denied solely on the basis of negative x-ray results. 508 F.3d at 987, n. 7.

Pittsburg & Midway represents the better interpretation of the statute. That decision is more consistent with the language of Section 411(c)(3) and with principles of statutory construction. Section 411(c)(3) contains no language indicating that an equivalency determination is required under prong (B). While such a determination is required under prong (C), Congress separated the prongs with the disjunctive "or," indicating that alternatives were intended. *Pittsburg & Midway*, 508 F.3d at 987, n. 7; *see also Long v. Bd. of Gov's of the Fed. Res. Sys.*, 117 F.3d 1145, 1157 (10th Cir. 1997) ("the use of a disjunctive in a statute generally indicates alternatives were intended") (citation omitted).

Moreover, given that prong (C) requires an equivalency determination, imposing such a requirement on prong (B) would improperly render prong (B) superfluous. *Pittsburg & Midway*, 508 F.3d at 987, n. 7. A court should "not construe a statute in a way that renders any words or phrases meaningless, redundant or superfluous." *Bridger Coal Co./Pac. Minerals, Inc. v. Director, OWCP*, 927 F.2d 1150, 1153 (10th Cir. 1991) (citations omitted).

In addition, both the legislative history of the BLBA and the regulatory history of DOL's regulations indicate that the provisions

of Section 411(c)(3) of the BLBA and Section 718.304 of the regulations were intended simply to refer to the medical criteria for diagnosing complicated pneumoconiosis. *See Pittsburg & Midway*, 508 F.3d at 985-86. Section 411(c)(3) adopts the criteria set out in the original House version of the BLBA, which explicitly provided benefits only where the miner suffered from complicated pneumoconiosis. *See* H. Rep. No. 91-563 (*reprinted in* 1972 U.S.C.C.A.N. 2503, 2542); *Usery v. Turner Elkhorn*, 428 U.S. 1, 23, n. 22 (1976). Likewise, the preamble to the revised regulations refers to Section 411(c)(3)'s creation of "an irrebuttable presumption . . . invoked by proof of complicated pneumoconiosis." 65 Fed. Reg. 79936 (Dec. 20, 2000). Thus, an autopsy finding of complicated pneumoconiosis, based on acceptable medical criteria, suffices to invoke the Section 411(c)(3) presumption even if it is not accompanied by an equivalency determination.

This approach not only accords with the language and structure of the BLBA's provisions, and the legislative and regulatory histories, but also appropriately recognizes that autopsy evidence is generally the most probative evidence regarding the presence of pneumoconiosis, and specifically is more probative

than x-ray evidence. *See Usery v. Turner Elkhorn*, 428 U.S. at 32 (autopsy can reveal pneumoconiosis not shown on x-ray); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990) (proper to give greater weight to autopsy evidence). By the same token, the Eleventh Circuit's approach, unlike that of the Fourth Circuit, runs no risk of contravening Section 413(b)'s prohibition on denying any claim "solely on the basis of the results of a[n x-ray]."[16] 30 U.S.C. § 923(b); *see Pittsburg & Midway*, 508 F.3d at 987, n. 7.

Furthermore, *Pittsburg & Midway* appropriately recognizes that, given the absence of consensus in the medical community for diagnosing complicated pneumoconiosis on autopsy, resolution of whether an autopsy shows the presence of "massive lesions" should proceed on a case-by-case basis rather than be subject to a

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[16] Given that it requires physicians to speculate regarding how a large pneumoconiotic lesion would appear on a chest x-ray, the Fourth Circuit's standard actually allows a claim to be defeated on the basis of a hypothetical x-ray, a result surely not intended by Congress.

categorical rule. *See* 65 Fed. Reg. 79936 (Dec. 20, 2000); 64 Fed. Reg. 54978 (Oct. 8, 1999); 45 Fed. Reg. 13684 (Feb. 29, 1980). Finally, *Pittsburg & Midway* is consistent with the Director's interpretation of the statute and regulations. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006) (Director's interpretation of statute entitled to "considerable weight," and his construction of regulations entitled to "substantial deference") (citations and internal quotations omitted).

For all of these reasons, the Court should adopt the Eleventh Circuit's standard, and hold that autopsy evidence supporting a diagnosis of complicated pneumoconiosis under accepted medical standards is sufficient to invoke the irrebuttable presumption under Section 411(c)(3)(B). Such a diagnosis need not be accompanied by a determination that the lesions found on autopsy would result in opacities of greater than centimeter if viewed by x-ray.

Bridger offers only a half-hearted defense of the Fourth Circuit's *Double B Min.* standard, arguing that Board had "no valid reason" for following *Pittsburg & Midway* and that the Eleventh Circuit "offered nothing better" than the Fourth Circuit's approach.

As demonstrated above, however, the Eleventh Circuit's standard is superior, as it is consistent with the statutory language, the intent of Congress and medical science.[17]

Moreover, even the Fourth Circuit may no longer apply the *Double B Min.* standard in all cases involving autopsy evidence under prong (B). In a more recent decision, that court stated that an autopsy prosector's finding of massive lesions was "another statutory basis for application of the [Section 411(c)(3)] presumption," in addition to an equivalency determination offered by the physician. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 (4th Cir. 2006). The court noted that the physician's use of the word

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[17] And, contrary to Bridger's assertion, *Pittsburg & Midway* does not relieve a fact-finder of the obligation to consider all types of relevant evidence. Rather, it simply (and properly) refuses to privilege x-ray evidence over autopsy evidence. In this regard, Bridger's reliance on *Lester v. Director, OWCP*, 993 F.2d 1143 (4th Cir. 1993), is misplaced. *Lester* rejected the argument that a claimant could establish the presence of complicated pneumoconiosis based solely on a positive x-ray, even though the biopsy and autopsy evidence were negative. 993 F.2d at 1145. *Pittsburg & Midway* is consistent with *Lester* in obliging the fact-finder to consider all relevant evidence, *see* 30 U.S.C. § 923(b), but is also consistent with the principle that autopsy evidence is the most probative evidence for diagnosing the presence of pneumoconiosis. *See Usery*, 428 U.S. at 32; *Shonk*, 906 F.2d at 269.

"massive" was consistent with the ordinary meaning of the term as used by Congress in Section 411(c)(3)(B), and that "[t]hese determinations by the prosector . . . may only lead one to conclude that massive lesions were present . . . sufficient to trigger the presumption . . . ." *Id.* While these statements might be *dicta* because the physician also provided an acceptable equivalency determination, they certainly undermine the contention that the Fourth Circuit necessarily requires an equivalency determination in all cases involving autopsy evidence under prong (B).

2. Dr. Dobersen's autopsy report is sufficient to invoke the Section 411(c)(3) presumption under the Pittsburg & Midway standard, and is more credible than Bridger's evidence.

Applying the *Pittsburg & Midway* standard to the facts of this case requires resolution of two questions. Does Dr. Dobersen's diagnosis of complicated pneumoconiosis satisfy the standard and establish the presence of "massive lesions?" And did the ALJ properly give Dr. Dobersen's opinion greater weight than the contrary opinions of Drs. Tomashefski and Crouch? The answer to both questions is yes.

Dr. Dobersen's opinion establishes the the presence of "massive lesions" as contemplated by Section 411(c)(3). He based

his finding on the presence of extensive anthracosis and scarring—with lesions measuring up to 2½ inches (6.35 cm) in diameter—along with evidence of extensive centrilobular emphysema and severe cor pulmonale. Such lesions are clearly "massive" within the meaning of the statute. *See Pittsburg & Midway*, 508 F.3d at 978 (autopsy finding of lesions of up to 1.2 cm sufficient to support diagnosis of complicated pneumoconiosis); *Gruller v. BethEnergy Mines, Inc.*, 16 Black Lung Rep. (MB) 1-3, 1-5 (1991) (diagnosis of complicated pneumoconiosis with lesions "up to 1.0 cm in diameter" sufficient to establish presence of "massive lesions"); *see also Perry v. Mynu Coals*, 469 F.3d at 365 (physician's use of word "massive" consistent with meaning of term used in Section 411(c)(3)(B)).

Moreover, the ALJ rationally gave Dr. Dobersen's opinion greater weight than the contrary opinions of Drs. Tomashefski and Crouch. While the ALJ did not rely solely on Dr. Dobersen's status as the prosector, that status was key here. *See Northern Coal Co.*, 100 F.3d at 874-76 (10th Cir. 1996) (affirming ALJ giving greater weight to prosector). Only Dr. Dobersen was able to view the totality of Mr. Lambright's lungs, and determine the extent of the

lesions presented. In contrast, Drs. Tomashefski and Crouch were limited to viewing two microscopic slides of lung tissue. Further, Dr. Dobersen is board-certified in three subdisciplines of pathology (forensic, anatomic and clinical), whereas Dr. Tomashefski is only board-certified in anatomic and clinical, and Dr. Crouch only in anatomic.[18] *See Hansen v. Director, OWCP*, 984 F.2d 364, 369-70 (10th Cir. 1993) (ALJ may give greater weight to opinion of more-qualified physician).

Bridger nonetheless contends that the ALJ's reliance on Dr. Dobersen's opinion is contrary to other medical evidence (primarily x-rays that were negative for the presence of complicated pneumoconiosis). But autopsy evidence is the most probative evidence regarding the presence of pneumoconiosis, *Usery v. Turner Elkhorn*, 428 U.S. at 32, and an ALJ rationally may give autopsy findings more weight than other categories of evidence. *Peabody Coal Co. v. Shonk*, 906 F.2d at 269. Further, as discussed below with respect to Bridger's entitlement-date arguments, the other

[18] Forensic pathology focuses on determining the cause of death.

evidence is simply not credible with respect to whether Mr. Lambright had complicated pneumoconiosis. Neither the x-rays nor the CT-scans showed even simple pneumoconiosis (which is no longer at issue); the biopsy evidence cannot negate the presence of pneumoconiosis; and the non-pathologist phyisicians were either unaware of the autopsy findings of massive lesions or (in the case of Dr. Tuteur) incorrectly assumed that the autopsy finding was wrong.

Bridger also asserts that the Board's reliance on Dr. Dobersen's opinion contradicts the ALJ's 2008 evaluation of (and—in the company's view—his discrediting of) that opinion. Even a cursory reading of the ALJ's 2008 decision belies this assertion. ALJ Burke did not independently discredit Dr. Dobersen's opinion on remand. Rather, he essentially ignored it solely because—in the ALJ's words—that opinion "ha[d] already been discredited by the Board [in its 2006 decision]." In fact, the Board did not "discredit" Dr. Dobersen's opinion. Rather, it held that it was legally insufficient to invoke the Section 411(c)(3) presumption because it lacked an "equivalency determination." The only credibility determination that ALJ Burke made with respect to Dr. Dobersen's

opinion was in 2005—when he found that opinion more probative and credible than Bridger's evidence.

As for Bridger's other contentions (such as that Drs. Tomashefski and Crouch reviewed more evidence, and that Dr. Dobersen's finding of a 2½ inch lesion was somehow "unexplained"), they are essentially requests for the Court to reweigh the conflicting reports in the place of the ALJ. As this Court has noted, "'the task of weighing conflicting medical evidence is within the sole province of the ALJ,' . . . and 'where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence.'" *Energy West Min.*, 555 F.3d at 1217 (quoting *Hansen*, 984 F.2d at 993). Thus, the Court should decline Bridger's invitation to reweigh the evidence.

In short, the ALJ reasonably found (in 2005) that the Section 411(c)(3) presumption had been invoked in both claims. As evidence exists "that 'a reasonable mind might accept as adequate to support' [the ALJ's] conclusion," the Court should affirm the

Board's decision awarding benefits on both the lifetime and survivor's claims.[19] *See id.*

D. ALJ Burke and the Board correctly awarded benefits on Mr. Lambright's lifetime claim as of his claim filing date—March 1998.

Assuming that the Court affirms the determination that Mr. Lambright had complicated pneumoconiosis, Bridger contends that ALJ Burke erred in awarding benefits on the lifetime claim as of March 1998, the date Mr. Lambright filed his claims.[20] Bridger's arguments have no merit, and the Court should reject them.

The rules for determining the entitlement date in a miner's lifetime claim are straightforward. A miner is entitled to benefits as of the month he became totally disabled due to pneumoconiosis. 20 C.F.R. § 725.503(b). If the evidence does not establish when the miner became so disabled, benefits are payable as of the filing date

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[19] Alternatively, the Court could remand the case for ALJ Burke to reweigh the evidence under the *Pittsburg & Midway* standard, but we believe the result of any such remand is foreordained for the reasons set forth above.

[20] There is no question that Ms. Ashmore was entitled to benefits on the survivor's claim as of January 2002, the month in which Mr. Lambright died. *See* 20 C.F.R. § 725.503(c).

of the claim. *Id.*; *see generally Amax Coal Co. v. Director, OWCP*, 312 F.3d 882, 891-92 (7th Cir. 2002). This rule is subject to the proviso that where the evidence definitively shows that the miner was not disabled at some point after he filed his claim, he cannot receive benefits as of his filing date. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 Black Lung Rep. (MB) 1-181, 1-183 (1989).

The same principle applies even when a miner had complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 Black Lung Rep. (MB) 1-28, 1-29/30 (1989). Since a miner who has complicated pneumoconiosis is irrebuttably presumed to be totally disabled, the operative date is the month when the miner contracted complicated pneumoconiosis. *Id.* at 1-30. Thus, in complicated-pneumoconiosis cases,

> [i]f the evidence does not reflect when [the miner]'s simple pneumoconiosis became complicated pneumoconiosis, the onset date for the payment of benefits is the month during which the claim was filed . . . , unless the evidence affirmatively establishes that the miner had only simple pneumoconiosis for any period subsequent to the date of filing . . . .

Id. (citation omitted).

Applying these rules here, ALJ Burke's March 1998 entitlement-date finding was clearly correct.[21] Mr. Lambright had complicated pneumoconiosis. The record does not show when he contracted the complicated form of the disease. Likewise, there is no definitive proof that he did not have complicated pneumoconiosis at some point after he filed his claim. Thus, benefits are payable on his lifetime claim as of the filing date—March 1998. 20 C.F.R. § 725.503(b); *Williams*, 13 Black Lung Rep. (MB) at 1-30.

Bridger nonetheless asserts that ALJ Burke's finding was wrong, as the earliest evidence of complicated pneumoconiosis—Dr. Dobersen's autopsy report—post-dates both Mr. Lambright's death and his filing date.[22] The earliest evidence of disability (or of

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[21] ALJ Burke cited Dr. Guicheteau's June 1998 report (DX 11) in finding that Mr. Lambright became totally disabled due to pneumoconiosis at some point prior to June 1998. Dr. Guicheteau, however, did not diagnose complicated pneumoconiosis. Rather, he found that Mr. Lambright was totally disabled by simple pneumoconiosis. His report does not address when Mr. Lambright contracted complicated pneumoconiosis, the critical inquiry in the entitlement-date analysis. The ALJ's error in this regard was harmless, as he reached the correct result, even if for the wrong reason.

[22] Notably, Bridger does not suggest any alternative entitlement (cont'd . . .)

complicated pneumoconiosis) does not establish the date of onset; rather, it only shows that the miner became totally disabled or contracted complicated pneumoconiosis at some earlier point.[23] *See Director, OWCP v. Gurule*, 653 F.2d 1368, 1371-72 (10th Cir. 1981) (abrogated on other grounds by *Lukman v. Director, OWCP*, 896 F.2d 1248, 1250-51 (10th Cir. 1990); *see also Green v. Director, OWCP*, 790 F.2d 1118, 1119 n. 4 (4th Cir. 1986); *Merashoff v. Consolidation Coal Co.*, 8 Black Lung Rep. (MB) 1-105, 1-108/109 (1985).

(. . . cont'd)
date. Before the Board, Bridger essentially argued that no benefits were due on Mr. Lambright's claim because the earliest evidence of complicated pneumoconiosis post-dated his death. Even when a miner dies in the same month he becomes entitled to benefits, however, he is entitled to at least one month's payment on his lifetime claim. 20 C.F.R. § 725.502(c).

[23] Bridger's reliance on two ALJ decisions in other cases on this point is misplaced. Those decisions have no precedential value and, more importantly, they conflict with the controlling regulation and case law. Also, contrary to Bridger's suggestion, the Board did not affirm the entitlement-date finding in one of the ALJ decisions (the other was not appealed); that finding was simply not at issue on appeal. *See Gruller v. BethEnergy Mines, Inc.*, 16 Black Lung Rep. (MB) 1-3 (1991).

Moreover, the other medical evidence (x-rays, CT-scans, a biopsy and medical opinions) cited by Bridger does not warrant a different result. The x-ray evidence is particularly unconvincing. As late as December 2001—the month before the miner died—the x-ray evidence was negative for even simple pneumoconiosis, which even Bridger's pathologists now concede existed. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 31-32 (citing S. REP. NO. 92-743 at 12 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2316) (x-ray evidence not reliable indicator of absence of pneumoconiosis; autopsy evidence may reveal presence of disease when x-rays did not); *see also Peabody Coal Co. v. Shonk*, 906 F.2d at 269 (7th Cir. 1990) (autopsy evidence more probative than x-rays on existence of pneumoconiosis); *see also* 30 U.S.C. § 923(b) (claim cannot be denied on negative x-rays alone).

As for the CT-scan evidence, even Dr. Scott (who was retained by Bridger) found that the 2000 CT-scan revealed a large mass. While he attributed the mass to causes other than pneumoconiosis, his conclusion is undercut by the finding of complicated pneumoconiosis on autopsy. And negative biopsy evidence (necessarily much more limited in scope than the autopsy evidence)

cannot rule out the existence of pneumoconiosis. 20 C.F.R. § 718.106(c). Finally, of the medical-evidence reports from non-pathologist physicians, only Dr. Tuteur was aware of the autopsy finding of complicated pneumoconiosis, and he incorrectly assumed that the autopsy finding was wrong. Thus, none of the medical opinions is sufficient to show that Mr. Lambright did not have complicated pneumoconiosis at some point after his claim-filing date.

Bridger also contends that the Board wrongly held that Mr. Lambright's claim did not involve a modification request. *See* 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.310 (1999). The company argues that there was such a request, that it was necessarily based on a change in Mr. Lambright's condition and, as a result, that Mr. Lambright's claim-filing date cannot be his entitlement date.[24]

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[24] Modification may be based on either a mistake in a determination of fact in the prior decision, or on a change in the miner's condition. 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.310 (1999); *see, e.g., Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). Although not cited by Bridger, the regulations provide that the "default" entitlement date (*i.e.*, the date used when (cont'd . . .)

Bridger's argument fails. The Board *did* determine that Mr. Lambright's claim was before the ALJ on a modification request, but one *filed by Bridger*. Board 2009 at 14-15. Bridger does not challenge this determination. And the company's modification request had to have been based on a mistake-in-fact.[25] Pneumoconiosis is a progressive and irreversible disease (*i.e.*, once a miner contracts the disease, either simple or complicated, he cannot be cured and his condition will not improve). *See Usery v. Turner Elkhorn Min Co.*, 428 U.S. at 7. Hence, an operator's request to modify a prior award to a denial must be based on a mistake in a factual determination in the prior decision rather than on a change

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(. . . cont'd)
the evidence does not establish the onset date of total disability due to pneumoconiosis) in a change-in-condition modification request is the date that modification was requested, rather than the claim filing date. 20 C.F.R. § 725.503(d)(2).

[25] The entitlement-date rules for mistake-in-fact modification requests are the same as for claims generally—*i.e.*, the "default" entitlement date (where the date of onset of total disability cannot be determined) is the miner's claim-filing date. *See* 20 C.F.R. § 725.503(d)(1).

in the miner's condition. Thus, Bridger's argument is without merit, and should be rejected.[26]

[26] Bridger's reliance on *Drummond Co., Inc., v. Director, OWCP*, 278 Fed. Appx. 971, 2008 WL 2154390 (11th Cir., May 23, 2008), in support of its contention that Mr. Lambright could not receive benefits as of his claim-filing date is unavailing. *Drummond Co.* involved a modification request filed by a claimant, not by an operator. Moreover, the court's unpublished and essentially summary order lacks persuasive value, as it is does not discuss (or even cite) the governing regulation, 20 C.F.R. § 725.503.

CONCLUSION

The Director requests that the Court affirm the decision of the Board awarding benefits on both the lifetime and survivor's claims.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

The Director respectfully requests that the Court hold oral argument in this case. The case presents an important issue of statutory interpretation—the standard for invoking the irrebuttable presumption of 30 U.S.C. § 921(c)(3) based on autopsy evidence—that is a matter of first impression for this Court. The Director believes that argument will aid the Court in its decisional process.

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I hereby certify that this brief complies with 1) the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 10,601 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Bookman Old Style font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

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s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

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I hereby certify that on September 19, 2011, an electronic copy of the foregoing brief was served through the CM/ECF systems, and two paper copies were served by mail, postage prepaid, on the following:

Ronald E. Gilbertson, Esq.
Husch Blackwell, LLP
750 17th Street, N.W.
Suite 1000
Washington, D.C. 20006-4656
Ronald.Gilbertson@huschblackwell.com

and that two paper copies were served by mail, postage prepaid, on the following:

Delores Ashmore
2575 Trails End Court
Grand Junction, Colorado 81505

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor