STUDENT NOTES

The Contra-APA Theory: Judge Thapar's (In)correct Concurrence

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In an otherwise unremarkable concurrence – unprompted by petitioners – Judge Amul R. Thapar of the United States Court of Appeals for the Sixth Circuit attempted to resuscitate a defunct legal theory in *Huscoal, Inc., v. Dir. O.W.C.P.*, United States DOL, No. 21-3937, 2022 U.S. App. LEXIS 25052 (6th Cir. Sept. 7, 2022). Federal Courts of Appeals have resoundingly rejected the renowned "contra-APA theory." Raised again in 2022, and after decades of failure, the contra-APA theory suggests that judicial reference to the medical literature in the Preamble to the Department of Labor's 2000 Regulations[2] ("2000 Regulations") implementing the Black Lung Benefits Act[3] ("BLBA" or "the Act") violates the Administrative Procedure Act ("APA").[4] The theory is meritless for two reasons. First, it fails to appreciate the Department of Labor's ("DOL's") authority to make scientific determinations –an authority assigned by Congress. Second, it fails to consider the veracity of the medical literature in the Preamble has survived, and is partly immune from, judicial scrutiny. The Preamble states scientific facts the Department of Labor determines and relies on when crafting the regulations. An Administrative Law Judge ("ALJ") may properly choose to consider those said facts when crediting or discrediting a medical opinion, based on that opinion's harmony or discord with the medical literature in the Preamble. The Administrative Procedure Act protects against the implication of rules that did not go through notice and comment. Because of the interdependent nature of the Preamble and the regulations, and due to the lack of notice and comment, an ALJ introduces no rule of law that is not a part of the regulations when they consult the Preamble.

I. Introduction

This note explores the viability of Judge Thapar's contra-APA theory through jurisprudence of uniform rejection and locating the theory within general administrative law. Additionally, this note explains why the theory has failed and should *continue* to fail in spite of Judge Thapar's concurrence. Not only does the contra-APA theory fail as a cogent legal argument, but its adoption

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2 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920, 79,939–41 (Dec. 20, 2000) ("Preamble").

3 30 U.S.C. §§ 901-45.

4 5 U.S.C. § 551 *et seq*.

would be wholly contrary to the spirit of the Black Lung Benefits Act. Congress created the Act from whole cloth. Presumably, the program operates as Congress envisioned. If Judge Thapar's theory were to prevail, it would completely upend the process by which courts evaluate medical evidence in every claim filed under the BLBA, making it more difficult for miners to receive benefits (a challenging process as is). Congress and courts have had the opportunity to reform the operation of the BLBA since the publication of the Preamble in 2000. Congress has taken no issue with judicial reference to the Preamble and courts have rejected the theory outright.

The contra-APA theory is not a single idea, but a family of objections to the way courts refer to the Preamble of the Department of Labor's (DOL's) 2000 regulations.[5] When hearing a miner's petition and evaluating the credibility of medical opinions, Administrative Law Judges ("ALJs") consult the Preamble. The theory argues that such reference violates the APA if an ALJ construes the Preamble in a way that contradicts the regulations or the Act itself. Legally, that notion is correct. A preamble may not contradict the regulations it precedes. Proponents of the theory have leveled that principle against the various ways ALJs have relied on the Preamble. Those arguments have failed because, as the courts have uniformly held, the usual mode of reliance is not contrary to the regulations nor the Act. Judge Thapar's concurrence is the latest iteration of this accurate legal statement, but wrongly applied. While it may appear logical, the theory runs afoul of established administrative principles and threatens to completely destabilize the already-limited predictability for miners to seek benefits under the Act. Hopefully, this note will help proponents of the contra-APA theory understand why it does not identify a real threat to the legal principles the APA exists to protect.

The BLBA created a federal benefits system by which coal miners can apply for and receive benefits if they are entirely disabled by coal dust exposure in the course of their employment.[6] Medical evidence is the keystone of every miner's claim.[7] The opinions of medical experts interpret medical evidence and amount to evidence itself.[8] The Preamble provides the bulk of the medical literature, which courts compare the substance of medical opinions to

5 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. at 79,939–41.,

6 *See* 30 U.S.C. § 901(a).

7 United States Department of Labor/Office of Administrative Law Judges – Black Lung Bench Book (2013), Chapter 3 at 3.1 ("Absent operation of a presumption, the award of benefits in a black lung claim is dependent on a claimant's ability to establish each element of the claim by a preponderance of the medical evidence.") and Chapter 1 at 1.3 ("Medical evidence constitutes the core of a black lung claim and, therefore, the record will normally contain a number of analog chest x-rays, pulmonary function studies, blood gas studies, and physicians' reports.") (hereinafter "Black Lung Bench Book").

8 20 C.F.R. § 725.414(a)(2)(i) ("The claimant is entitled submit . . . two medical reports.").

determine such an opinion's credibility.[9] Courts give credence to medical opinions that are in accord with the Preamble while discounting those that do not.[10]

Judge Thapar first referred to "overreliance on agency guidance [as] problematic" because it was not the product of notice-and-comment nor public comment procedures.[11] Second, Thapar claimed if the Preamble's medical conclusions were construed as binding, they may undermine the regulatory burden of proof.[12] Specifically, Thapar argued that while 20 C.F.R. § 718.202 provides that the *miner* carries the burden of proving coal dust contributed to his or her disease, and the Preamble states "[t]he risk coal dust poses is additive with cigarette smoking," then the *opposing party* would be required to prove that coal dust *did not* contribute to the miner's disease (if additive-risk finding were binding).[13] That result would contradict the official burden of proof.

Judge Thapar is correct. A preamble may not contradict the regulation it precedes. As this note will show, however, ALJs' reference to the Preamble does not create a presumption that is not contained in the regulations. Of course, each case and reference to the Preamble must be examined individually; however, the Preamble's contents do not provide for a legal rule in any case. The Preamble is simply medical facts and a record of the DOL's process. It is no legal error nor improper invocation of a legal rule when an ALJ looks to the Preamble; the medical evidence contained therein has a logical application.

As an example, the Preamble states the health risks of smoking cigarettes and that of coal-dust exposure are additive. The exposure compounds, and that it is impossible – in certain cases – to tell which symptoms are attributable to which cause.[14] That is a medical fact. Typically, when an ALJ reviews a medical opinion of a disabled miner's case, where a miner smoked and worked in mines, the ALJ may look to the Preamble to conclude that such an opinion has less merit if it fails to explain how both smoking and coal-dust exposure contributed to the miner's disease. As a matter of settled law, the ALJ may consult the Preamble. The particular medical facts that an ALJ finds contained within the Preamble is at no fault of the ALJ nor the application of any legal

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9 Consolidation Coal Co. v. Shipley, No. 19-1738, 2022 WL 402432, at *4 (4th Cir. Feb. 9, 2022) (The preamble "informs an ALJ's analysis of experts' medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusion") (internal quotations omitted).

10 *See e.g.*, Cent. Ohio Coal Co. v. Dir., O.W.C.P., 762 F.3d 483, 491–92 (6th Cir. 2014)("The sole issue presented here is whether the ALJ was entitled to discredit Dr. Rosenberg's medical opinion because it was inconsistent with the DOL position set forth in the preamble, and the answer to that question is unequivocally yes."); *see also Shipley*, No. 19-1738, at *4 ("Consistency with the preamble is one aspect of an expert's credibility in black lung cases.").

11 Huscoal, Inc., v. Dir. O.W.C.P., United States DOL, No. 21-3937, 2022 U.S. App. LEXIS 25052 at *16 (6th Cir. Sept. 7, 2022).

12 *Id.*

13 *Id.* (*citing* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000)).

14 Energy W. Mining Co. v. Est. of Blackburn, 857 F.3d 817, 828 (10th Cir. 2017) (quoting Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920, 79939-41(Dec. 20, 2000)).

rule. Proponents of the contra-APA theory may object to the soundness of that medical fact. There will always be scientific disputes. As this note explains, however, the authority of such a fact is based on the DOL's authority to determine it, which is, in turn, authorized by Congress. As explored herein, the courts have determined that no amount of contrary medical evidence could invalidate the Preamble's contents unless it were so persuasive that it would invalidate the regulation itself. While the contra-APA theory could appear facially sound, in the context of legal authority, it must fail.

Additionally, an appellate court's review of administrative determinations under the BLBA is limited to substantial evidence review. A court will affirm an ALJ's decision to credit or discredit a medical opinion if the decision was supported by "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15] The standard also asks whether [an] ALJ adequately explained the reasons for crediting certain testimony and documentary evidence over other evidence in the record."[16] Because courts have affirmed the Preamble as a proper source of guidance, so long as an ALJ explains how she consulted the Preamble in light of a sufficient factual basis in a given case, her reference to the Preamble will never violate the APA.

Since passage of the 2000 DOL regulations, parties to federal black lung claims have periodically raised at least one version of the contra-APA argument.[17] Federal courts have consistently shot the theory down. Calling upon nearly two decades of jurisprudence, the Fourth Circuit recently rejected the contra-APA theory in *Consolidation Coal Co. v. Shipley*, No. 19-1738, 2022 WL 402432, (4th Cir. Feb. 9, 2022) (preceding *Huscoal* by mere months). In *Consolidation*, the court reiterated that an ALJ may, but need not, consider the Preamble when weighing medical testimony; that the Preamble is consistent with regulations, and the APA allows agencies to create guidance for administrative courts. The Preamble is mere guidance, the Court continued, and judicial reference to the Preamble is appropriate because the Preamble "simply explains the scientific and medical basis for the regulations."[18] While the contra-APA theory characterizes the Preamble as an improperly-created rule, the Fourth Circuit's holding is the latest reiteration of courts' position that the Preamble is a proper *non-binding* source of information that explains the regulations

15 Quarto Min. Co. v. Marcum, 604 F. App'x 477, 478 (6th Cir. 2015) (quoting Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1068–69 (6th Cir.2013)).

16 *Huscoal*, 48 F.4th at 489.

17 *See e.g.,* Harman Min. Co. v. Dir., Off. of Workers' Comp. Programs, 678 F.3d 305, 314 (4th Cir. 2012) ("Harman objects to the ALJ's and the Board's invocation of the preamble to the 2000 regulations, spilling much ink in its briefs on why this reference violates the APA.") ("Consolidation first argues that the Board lacked authority to require the ALJ to assess medical evidence against the preamble because it effectively gave the latter the force of law."); A & E Coal Co. v. Adams, 694 F.3d 798, 801 (6th Cir. 2012) ("A & E Coal argues that the ALJ's invocation of the preamble violated the APA's rulemaking requirements because the preamble was not subjected to notice-and-comment rulemaking."); *see also Shipley*, No. 19-1738 at *2.

18 Shipley, No. 19-1738, at *1-4.

and why the regulations were amended, but is not a regulation itself.[19] Because no rule of law requires courts to consult the Preamble,[20] regardless of what is found in the Preamble, the Preamble itself is not a rule.

As stated, Thapar is echoing the arguments of years of defeated petitioners. Yet Judge Thapar's concurrence gives new hope to those dissatisfied with the present construction of the BLBA and its regulations. Without a clear and firm rebuttal, proponents of the contra-APA theory may mistake Judge Thapar's concurrence for the traction they hope for.

II. Locating the Preamble in Administrative Law

A preamble is an explanatory writing published alongside an agency rule, which explains the rule, helping an agency justify the agencies duty of reasoned decision-making. Preambles, the rulemaking process, and the inclusion of public concern is strictly regulated and heavily scrutinized.

The Black Lung Benefits Act ("BLBA") is a statute passed by Congress, which the Department of Labor is assigned to administer.[21] The BLBA and the Administrative Procedure Act provide the mechanical process the DOL must follow as it administers the BLBA. Whether the DOL properly adheres to the BLBA and the APA, is determined by courts according to the strictures of those statutes.[22] The constitutionality of the DOL's agency action is also subject to judicial review.[23] Additionally, the APA affords judicial review of agency actions under, both, the statutes that empower them and the regulations that agencies promulgate.[24]

Under the BLBA, the DOL is empowered to promulgate regulations that fill in the gaps in the BLBA, and add specificity to the goals Congress laid out in the statute.[25] Rulemaking is generally governed by the APA. [26] More broadly, the APA requires agencies to give notice to parties that will be affected by a rule before the rule is implemented. . 5 U.S.C. § 553(b) requires agencies to publish a "notice of proposed rule making . . . in the Federal Register [which] include[s] a statement of the . . . nature of the rule making proceedings [and] the terms

19 Adams, 694 F.3d at 802-03.

20 *Id.* at 802 ("Although the ALJ was not required to look at the preamble to assess the doctors' credibility, we agree with the Fourth Circuit that the ALJ was entitled to do so.") (internal quotations omitted).

21 *See* P.L. No. 107-275, 116 Stat. 1925 (2002) (reassigning responsibility for implementing the BLBA from the Social Security Administration, to the Department of Labor).

22 *See* 5 U.S.C. § 706.

23 5 U.S.C. § 706(2)(B) allows reviewing courts to "hold unlawful . . . agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity."

24 5 U.S.C. §§ 701-106 of the APA facilitate judicial review to cases where there is no other adequate remedy at law, the action is final, review is not otherwise limited by a separate statute, the action is one over which the agency has discretion, and the statute that empowers a given agency to act allows it; *see also* Judicial Review Under the Administrative Procedure Act, Congressional Research Service 1-2, December 8, 2020 (last visited March 11, 2023).

25 33 U.S.C. § 939(a) (the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations . . . as may be necessary in the administration of this chapter.").

26 *See* 5 U.S.C. § 553 (requiring certain rulemaking procedures).

or substance of the proposed rule or a description of the subjects and issues to be involved."[27] After publication, the APA also requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and then an "agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[28]

Preambles are also a requisite component of modern Final Rules published in the Federal Register, required in part to make rules approachable to non-experts. 1 C.F.R. § 18.12(a), "Preamble Requirements," published by the Administrative Committee of the Federal Register, provides that "[e]ach agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purposed for the rule or proposal."[29] Subsections 18.12(b) and (c) provide the minimum information that must appear in a preamble: "[a] discussion of the background and major issues involved." Agencies must also include any significant distinctions between proposed and final rules, if any, and substantive responses to public comments.[30]

The DOL's 2000 Regulations are rules, crafted according to the APA's requirements.[31] The regulations give granularity to the goals Congress laid out in broad strokes in the BLBA. Accordingly, the DOL was required to publish its intent to make the 2000 rules, solicit comments, respond to those comments, and, either, adjust the rules or explain why it would not. The DOL, in fact, solicited comments in 1997 and again in 1999.[32] In 1997, the DOL received more than two hundred comments and held two public hearings on the substance of the proposed rules.[33] The agency also consulted with the National Institute for Occupational Health and Safety, the federal agency charged with studying occupational health.[34] In 1999, the agency repeated the process to incorporate more public input.[35]

Further, when an agency creates a new rule or alters a rule that fills in the gaps of a statute it administers, it has a "duty of reasoned decision-making"[36] that must not be inconsistent with the APA, nor the statute which the agency

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27 5 U.S.C. §§ 553(b)(1)-(3).

28 5 U.S.C. § 553(c).

29 The ACFR is an agency created pursuant to the Federal Register Act, 44 U.S.C. Chapter 15.

30 1 C.F.R. § 18.12(c).

31 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920, 79,939–41 (Dec. 20, 2000) ("Preamble").

32 *See* Regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3,338 (Jan. 22, 1997) (Proposed Rules); *see also* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 64 Fed. Reg. 54,966 (Oct. 8 1999) (Proposed Rules).

33 Nat'l Mining Ass. v. Dep't of Labor, 292 F.3d 849, 854 (D.C. Cir. 2002).

34 *Id.*

35 *Id.*

36 *Id. at* at 868 (citing Motor Vehicles Manufacturers Ass. v. State Farm Automobile Insurance Co., 463 U.S. 29, 43 (1983).

administers.[37] Today, it is common for agencies to publish far more than the APA strictly requires. In an attempt to get ahead of inevitable challenges to the sufficiency of the agencies' due diligence, modern notices of proposed rulemakings have become very extensive. [38] Thus, agencies nearly always publish the actual text of the rule as well as "a 'preamble' to the actual rule text, which gives background and describes the rulemaking process and intentions." [39] Often, preambles contain more information than what is strictly required by the APA. [40] Courts have imposed additional requirements concerning the notice agencies must provide, which include "the data and methodology of any scientific evidence on which they relied."[41] When an agency fails to notify interested parties – or fails to adequately respond to their input – a court may require the agency to begin the rulemaking process anew.[42] A preamble helps an agency regulation survive challenge by serving as a record. The Preamble to the DOL's 2000 Regulations contain these requisite explanatory parts. [43]

In *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir 2002), industry members challenged the DOL's 2000 rules soon after finalization, alleging the DOL failed to adhere to the APA's rule making procedures. In upholding provisions of the rules, the D.C. Circuit partly relied on the contents of the Preamble to the 2000 Regulations, finding the "Secretary [of Labor] had successfully discharged her duty of reasoned decision-making."[44] Though petitioners cited to a number of medical studies that allegedly refuted the DOL's scientific findings, the court found the DOL had "considered this evidence and gave plausible reasons for rejecting it, noting that both studies focused on the narrower medical definition of pneumoconiosis rather than the broader legal one...".

In sum, the Preamble is a record of the DOL's rulemaking process, and the reasoning, methodology, and evidence the agency relies on. It attends the published regulations to explain and justify the rules – not to supplant them. The Preamble is not a rule, nor intended to operate as a rule; nor does the Preamble inject notions that are not reflected in the regulations. Rather, it is a companion document that provides information *about* the rules it precedes, and naturally reflects the contents of the rules it explains. Further, the Preamble has survived the battery of procedure imposed by the APA and judicial review of that procedure. Proponents of the contra-APA theory fret that reference

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37 *Id.* (citing Chemical Manufacturers Ass. v. Dep't of Transportation, 105 F.3d 702, 706 (D.C. Cir. 1997).

38 William F. Funk, Sidney A. Shapiro, & Russel L. Weaver, Administrative Procedure and Practice: A Contemporary Approach 96 (6th ed. 2019)

39 *Id*.

40 *Id.*

41 *Id.* at 97 (citing Portland Cement Ass. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

42 *Id.*

43 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920, 79,939–41 (Dec. 20, 2000).

44 Nat'l Mining Ass., 292 F.3d at 871.

to the Preamble may usurp the rules themselves. Yet, as the courts have unanimously declared, reference to the Preamble is permissible because the 2000 Regulations and its Preamble are consistent.[45]

III. Overview of the Black Lung Benefits Act

Congress' efforts to address the black lung disease has resulted in statutes that created an industry-specific benefits program that is fairly unique, and holds a special appreciation for miners. The contra-APA debate plays out wholly within this statutory framework.

Defining Black Lung

The law in question is about a disease that Congress attempted to address with the BLBA. To appreciate the real meaning of any change in the law, an explanation of that disease is necessary.

Coal workers' pneumoconiosis ("CWP"), colloquially known as "black lung," is an interstitial (meaning of the intervals between)[46] disease of the lungs caused by the inhalation of coal dust.[47] CWP is one ailment falling under the general subject of pneumoconiosis. Pneumoconiosis is the scarring of lung tissue and impairment of the lungs ability to exchange carbon dioxide and oxygen during respiration.[48] Exposure to coal dust over time can cause CWP, characterized in its basic form as "simple CWP," and as "complicated CWP" (also known as progressive massive fibrosis) in advanced forms.[49] CWP can lead to impaired lung function; can necessitate lung transplants; and may lead to premature death.[50] The disease is progressive and there is no cure.[51]

Legally, the Act and implementing regulations define CWP as "a chronic disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[52] Note that this definition is not strictly medical. The definition includes both "clinical," and statutory or "legal" pneumoconiosis.[53] "Clinical pneumoconiosis [is] [a] disease[] recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and fibrotic reaction of the lung tissue to that deposition

45 *Consolidation Coal Co. v. Shipley*, No. 19-1738, 2022 WL 402432 at *3 ("The preamble is entirely consistent with the Black Lung Benefits Act and its regulations and simply explains the scientific and medical basis for the regulations.") (brackets and citation omitted).

46 *Interstitial*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/interstitial (Nov. 13, 2022).

47 The Black Lung Program, The Black Lund Disability Trust Fund, and the Excise Tax on Coal: Background and Policy Options, Congressional Research Service, at 1, updated January 18, 2019, https://sgp.fas.org/crs/misc/R45261.pdf (hereinafter "Black Lung Program").

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 30 U.S.C. § 902(b); 20 C.F.R. §§ 718.201(a) and 725.201(1)(25).

53 20 C.F.R. § 718.201(a).

caused by dust exposure in coal mine employment."[54] "Legal" pneumoconiosis "[is], but 'not limited to, any chronic restrictive or obstructive pulmonary disease . . . significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[55] Legal pneumoconiosis entails "a broader class of lung diseases that are not pneumoconiosis as the term is used by the medical community."[56] "Legal pneumoconiosis is not medical pneumoconiosis; it is a legal fiction—long recognized by courts and later codified in regulations—designed to facilitate the remedial purposes of the Black Lung Benefits Act."[57] In other words, *clinical* means *medical* CWP, while *legal* CWP is an expansive set of other impairments that serve to qualify a coal miner for benefits under the Act.

A miner may qualify for benefits by proving legal or clinical pneumoconiosis.[58] Note that the definitions of both clinical and legal pneumoconiosis include exposure in coal mine employment. As such, a person can have this disease, but if he or she did not develop the disease as a result of coal mine employment, the Act would not recognize that person as a candidate for benefits.

Architecture of the BLBA

The nature of the law discussed herein is almost purely statutory. The common law contained no cause of action that could achieve the results the Act facilitates.

The entitlement program known as the federal Black Lung Program administered under the Black Lung Benefits Act is a statutory creature resulting from many iterations and revisions. Technically, the Act began as Title IV of the Federal Coal Mine Health and Safety Act of 1969,[59] as amended by the Black Lung Benefits Act of 1972;[60] the Federal Mine Safety and Health Amendments Act of 1977;[61] the Black Lung Benefits Revenue Act of 1981;[62] the Black Lung Consolidation of Responsibility Act 2002;[63] and finally, the Patient Protection and Affordable Care Act of 2010.[64,65] Together, these statutes comprise the Black Lung Benefits Act.[66] Initially, the program created under Title IV of the 1969 legislation –"Coal Act"– was intended to be a

54 Shepherd v. Incoal, Inc., 915 F.3d 392, 399 (6th Cir. 2019) (*citing* 20 C.F.R. § 718.201(a)(1).

55 *Id.* (*citing* 20 C.F.R. §§ 718.201(a)(2) and (b)).

56 Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1335 (10th Cir. 2014) (internal citations omitted).

57 *Marcum*, 604 F. App'x at 481 (*citing* Sunny Ridge Mining Co. v. Keathley, 773 F.3d 734, 738 (6th Cir.2014)).

58 *Cent. Ohio Coal*, 762 F.3d at 492 ("Coal miners are entitled to black-lung benefits if they establish either legal or clinical pneumoconiosis.").

59 P.L. No. 91-173, 83 Stat. 742 (1969).

60 P.L. No. 92-303, 86 Stat. 155 (1972).

61 P.L. No. 95-164, 91 Stat. 1290 (1977).

62 P.L. No. 97-119, 95 Stat. 1635 (1981).

63 P.L. No. 107-275, 116 Stat. 1925 (2002).

64 P.L. 111-148, 124 Stat. 119 (2010).

65 *See* 20 C.F.R. § 725.1(a).

66 300 U.S.C. §§ 901-904.

cooperative endeavor between states and the federal government, a program designed to provide benefits that are otherwise unavailable under state workers' compensation programs.[67]

Part A of the Act outlines Congress' purposes, first acknowledging "a significant number of coal miners living today . . . are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines," and many said miners leave behind surviving dependents.[68] Congress intended to "provide benefits . . . to coal miners . . . totally disabled due to pneumoconiosis and to the surviving dependents . . .; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability."[69]

Part B covers pre-1972 claims and provides cash benefits for miners disabled by CWP and for survivors of miners killed by CWP.[70] Today, any claims filed after 1972 are filed under Part C (which was initially envisioned to fill in the gaps in state workers' compensation programs).[71] As of 2002, all claims under parts B and C of the Act are administered by the DOL Office of Worker's Compensation Program ("OWCP").[72] Implemented by the DOL, Part C requires miners afflicted with CWP to file for benefits through state programs, but only if that state program provides benefits equal to, or greater than, the federal benefits available.[73] Though Maryland, Kentucky, West Virginia, and Virginia have each submitted their state compensation programs to DOL for approval, no state has yet been approved.[74] As a result, all new claims are filed directly under Part C to the OWCP within the DOL.[75] Each state has some version of a worker's compensation program and may provide benefits to miners with CWP, but no program is sufficient enough to replace the federal program. Because no state has been approved, the initial intention of the law has been somewhat stymied. The Act serves more as a standalone program, rather than a compliment to state programs, in which Congress initially envisioned.

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67 Black Lung Program, *supra* note 47, at 3.

68 30 U.S.C. § 901(a).

69 *Id.*

70 Black Lung Program, *supra* note 47, at 3.

71 *Id.*

72 P.L. No. 107-275, 116 Stat. 1925 (2002).

73 Black Lung Program, *supra* note 47, at 3.

74 *Id.*

75 *Id.*

Benefits and Claimants

Under the Act, potential beneficiaries are totally disabled miners through CWP, or a surviving spouse, parent, or children of a disabled miner in the event of the miner's death.[76] The benefits rate is set proportionately to the monthly pay rate for federal employees at a particular pay grade. The rate may be adjusted according to the number of dependents the miner has.[77]

Elements of a Claim

In initiating a claim, the miner bears the initial burden of proof.[78] The Act requires the claimant miner to prove the following four elements: (1) Proof of disease (pneumoconiosis); (2) proof the disease arose out of coal mining employment (causation); (3) proof the miner is entirely disabled because of a respiratory or pulmonary impairment (disability); and (4) proof the pneumoconiosis is a substantially contributing cause of the miner's total disability (disability causation).[79] A miner's failure to establish an element precludes the award of benefits.[80] Further, a claimant must prove each element by a preponderance of the evidence.[81]

15-Year Presumption

While the miner bears the burden of establishing each of the four elements under the Act, once the miner proves he or she is disabled and has worked at least a 15 year term in the industry, the burden shifts to the opposing party to disprove one of the elements of disease, causation, or disability.[82] Proving disability and 15 years of coal mining employment creates a rebuttable presumption that the miner has a qualifying disease. Also, proof of disability and a 15 year tenure creates a rebuttable presumption that the disease arose from the employment, and that disability arose from the disease.[83] The presumption may be rebutted, and ultimately and the claim defeated – if medical evidence can show that the miner does not in fact have a qualifying iteration of CWP (legal nor clinical).[84] While this 15-year presumption was a feature of the Act that expired in 1982, Congress revived the presumption in 2010 with the Patient Protection and Affordable Care Act ("ACA").[85]

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76 30 U.S.C. § 922.

77 *Id.*

78 20 C.F.R., § 725.103.

79 *Blackburn*, 857 F.3d at 822; *see also* 30 U.S.C. § 901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

80 McCauley v. DLR Mining, Inc., BRB No. 18-0606 BLA (Nov. 12, 2019) (*citing* Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989).

81 Greene v. King James Coal Min., Inc., 575 F.3d 628, 634 (6th Cir. 2009).

82 *Blackburn*, 857 F.3d at 822; *see also* 30 U.S.C. §§ 921(c)(4) and 20 C.F.R. § 718.305(b)-(c).

83 *Blackburn*, 857 F.3d at 822.

84 *Blackburn*, 857 F.3d at 822; *see also* 20 C.F.R. § 718.305(d)(1)(i)(A).

85 *Blackburn*, 857 F.3d at 822 n. 6; *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1556, 124 Stat. 119, 260 (2010).

Anatomy of a Claim

Claims are initiated at a local Social Security Office or a regional DOL District Director's Office.[86] Claims are first adjudicated by the DOL District Director (not the Director of DOL), who represents the interests of the Black Lung Disability Trust fund from which benefits may ultimately be paid.[87] The District Director then identifies, and bears the burden of identifying a "Responsible Operator" ("RO"),[88] which is the employer-operator responsible for paying the benefits a miner is entitled to under the Act.[89] An employer RO is usually the mining employer by which the miner was most recently employed[90] for at least one year[91] (or intermittent periods adding up to one year).[92] The employer RO is also a mining employer under whose employment the miner's disability or death arose (at least in part).[93] Under the Act, coal mine operators must purchase an indemnifying security instrument, self-insure, or subscribe to a commercial insurance contract in contemplation of this potential obligation.[94] As such, insurance companies are involved at the earliest stages of any claim.[95] In cases where a RO has no insurance and indigent, the Trust Fund assumes payment responsibilities.

The federal government may be responsible for the payment of benefits in certain cases. If an RO does not exist, cannot pay, and no successor in interest exists or is able to pay, or if the miner's tenure ended before 1970, benefits are paid from the Black Lund Disability Trust Fund ("Trust Fund").[96] The Trust Fund, primarily funded by an excise tax on coal, was created by the Black Lung Benefits Revenue Act of 1977.[97] The Trust Fund may recover funds, with interest, from an RO identified after the Trust Fund makes payments to miner claimants.[98] Similarly, if a District Director issues a proposed decision (subject to revision or alteration), benefits may be paid to the claimant from the Trust Fund . If the claimant ultimately prevails, the RO must reimburse the Trust Fund for those payments.[99]

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86 United States Department of Labor/Office of Administrative Law Judges – Black Lung Bench Book (2013), Chapter 1(I), at 1.1 (hereinafter "Black Lung Bench Book").

87 Black Lung Bench Book, Chapter 1(I)(A), at 1.1.

88 20 C.F.R. §§ 725.407(a)

89 Black Lung Program, at 4; *see also* 20 C.F.R. § 725.407(a).

90 20 C.F.R. §725.495(a)(2)

91 20 C.F.R. § 725.494(c).

92 Black Lung Bench Book, Chapter 1(I)(C), at 1.3.

93 20 C.F.R. §725.494(a).

94 Black Lung Program, at 4; see also 20 C.F.R. § 726.1.

95 *See e.g.*, Harman Min. Co. v. Dir., Off. of Workers' Comp. Programs, 678 F.3d 305 (4th Cir. 2012) (Petitioners, Harman Mining Company and Old Republic Insurance Company).

96 Black Lung Program, at 4; *see also* 20 C.F.R. §§725.1(c) and 725.407(a).

97 Black Lung Program, at 4; *see also* P.L. No. 95-227, 92 Stat. 15 (1978).

98 Black Lung Program, at 4.

99 Black Lung Bench Book, Chapter 1(III)(C), at 1.12.

After an RO is identified, the employer has an opportunity to challenge the District Director's decision or present evidence of indigency.[100] Once finalized, the RO may not submit additional evidence that it is not the proper RO on appeal.[101] While a claim is pending before the District Director, the parties are afforded the opportunity to proffer additional medical evidence.[102] The District Director then assembles a formal record.[103]

Adjudication and Judicial Review

The path of adjudication and appeal begins with a proposed order of the District Director, followed by a timely request for a hearing and a *de novo* review of the record at the Office of the Administrative Law Judge ("ALJ"). ALJ decisions are appealable to the Benefits Review Board ("BRB") for substantive review of the evidence, then to a United States Circuit Court of Appeals ("Circuit Court"), and finally to the United States Supreme Court via *writ of certiorari*.[104]

The District Director's proposed decision is considered a final order and either awards or denies benefits to the miner claimant.[105] Parties may either request the District Director to issue a revision or, within 30 days of the issuance of the Director's order, appeal and request a formal hearing before an Administrative Law Judge.[106] Any dissatisfied party may request a formal hearing.[107]

If a timely request for a hearing is filed, the District Director will transmit the file to the Office of Administrative Law Judges ("OALJ"), indicating the contested issues.[108] The OALJ, then, assigns the case to an ALJ for *de novo* review over questions of fact and law.[109] Accordingly, an ALJ has authority to make findings of fact and is the highest adjudicative body empowered to do so. Issues noted for review may be amended—provided that rovided that opposing parties are given adequate notice and time to develop additional evidence.[110] An ALJ either rejects or accepts the miner's claim and awards benefits,[111] issuing a compensation order.[112]

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100 Black Lung Bench Book, Chapter 1(I)(D), at 1.4.

101 *Id.*

102 *Id.*; *see also* 20 C.F.R. § 725.410.

103 Black Lung Bench Book, Chapter 1(I)(D), at 1.5.

104 Black Lung Bench Book, Chapter 1(III)(C), at 1.12.

105 20 C.F.R. § 725.418.

106 20 C.F.R. § 725.419(a).

107 *Id.*

108 20 C.F.R. § 725.421.

109 Black Lung Bench Book, Chapter 1(II)(A), at 1.7; *see also* 20 C.F.R. § 725.419(a).

110 Black Lung Bench Book, Chapter 1(II)(A), at 1.7 (*citing* Perry v. Director, O.W.C.P., BRB No. 91-1197 BLA (April 28, 1993)).

111 33 U.S.C. § 919(e).

112 33 U.S.C. § 921(a).

ALJ decisions may be appealed to the BRB, which reviews whether a denial or approval of benefits is supported by substantial evidence.[113] The scope of the BRB's authority to review is defined by 33 U.S.C. §921(b)(3), incorporated into the Act by 30 U.S.C. §932(a), requiring the Board to "affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law."[114] The BRB is comprised of five members, appointed by the Secretary of the DOL, and makes adjudicative judgements by an affirmative vote of at least three members.[115] The BRB may review substantial questions of law or fact, issue orders based on the hearing record, remand cases to the ALJ, and create stays of benefit payments pending final decision.[116] Federal district courts do not review claims brought under the Act, but do have authority to enforce judgements.[117]

Jurisdiction of United States Courts of Appeal is also established by [118] 33 U.S.C. § 921(c): any "person affected or aggrieved by a final order" of the BRB may appeal that order to "the circuit in which the injury occurred."[119] Appeals must be noted within 60 days. [120] A circuit court may affirm, modify, or set aside (in whole or in part) a final order of the BRB.[121] Though rarely granted, the Supreme Court may review an appeal from a Circuit Court.

Substantial Evidence Standard of Review

Relevant for this note, when a court reviews an ALJ's decision to credit or discredit a medical opinion, the court's standard of review is the substantial evidence standard, which frames how courts may consider the ALJ's reliance on the Preamble. The substantial evidence standard requires a court to review whether an ALJ's decision was supported by "substantial evidence," requiring "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[122] Accordingly, the modern interpretation of the standard requires a reviewing court to consider "whether [an] ALJ adequately explained the reasons for crediting certain testimony and documentary evidence over other evidence in the record."[123] If satisfied, an appellate court ends its review because it may not reweigh the evidence, which is the fact-finder's (ALJ) responsibility.[124] The substantial evidence standard is highly

113 Woodrow Noble v. B&W Resources Inc., BRB No. 18-0533 BLA, at 4, (Jan. 15, 2020).

114 *McCauley*, BRB No. 18-0606 BLA (*citing* O'Keefe v, Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965)).

115 33 U.S.C. §§ 921(b)(1)-(2).

116 33 U.S.C. §§ 921(b)(3)-(4).

117 33 U.S.C. §§ 921(d).

118 33 U.S.C. §§ 921(c).

119 *Id.*

120 *Id.*

121 *Id.*

122 *Marcum*, 604 F. App'x at 478 (quoting *Ogle,* 737 F.3d at 1068–69).

123 *Huscoal*, 48 F.4th at 489.

124 *Marcum*, 604 F. App'x at 478-79.

deferential; "the equivalent of the evidence necessary to withstand a motion for a directed verdict."[125] When a court reviews an ALJ's decision, its role is "not to weigh or to reweigh the evidence and determine where the preponderance lies [but to] determin[e] whether the decision is [based on] . . . substantial evidence."[126]

In light of the contra-APA debate, the substantial evidence standard serves as a legal overlay that helps explain why courts do not object when an ALJ consults the Preamble. The standard has two parts: (1) display of substantial evidence and (2) an explanation of why the ALJ relied on that evidence, i.e., medical opinions.[127] The ALJ must credit those opinions somehow. At the heart of the contra-APA debate is whether the Preamble may serve as a basis for an ALJ's decision to credit or discredit a medical expert. Courts routinely consider an ALJ's comparison of a medical opinion against the medical literature in the Preamble to be a component of the ALJ's duty of explanation.[128]

Medical Evidence

It is impossible to overstate the significance of medical evidence in a federal black lung claim. Just as the claim's process and program are statutory creations, the medical evidence are expressly prescribed by statute and regulation. For example, a claimant must meet the *legal* definition of "total disability". The definition is articulated by the Secretary of Health and Human Services, as augmented by medical testing criteria developed by the Secretary of Labor.[129]

Claimants must be given an opportunity to substantiate their claim under the Act by "means of a complete pulmonary evaluation including, but not limited to, a chest radiograph (X–ray), physical examination, pulmonary function tests, and a blood-gas study."[130] In addition to raw medical evidence, claimants and ROs are entitled to obtain and submit a limited number of physician's interpretations.[131] In each case, OWCP must "develop the medical evidence necessary to determine each claimant's entitlement to benefits."[132] To guarantee that miners can obtain this evidence, filing a claim initiates a miner's right to receive free and complete medical evaluation (in addition to medical

125 Funk, Administrative Procedure and Practice: A Contemporary Approach at 280.

126 *Id*.

127 Consolidation Coal Co. v. Shipley, No. 19-1738, 2022 WL 402432 at *4 (4th Cir. Feb. 9, 2022) (ruling that the credit an ALJ gave to medical experts for accord and or discord with the Preamble satisfied explanatory requirement of the substantial evidence standard).

128 *See e.g.*, *Marcum*, 604 F. App'x at 484.

129 *See* 30 U.S.C. § 902(f)(1) and § 902(f)(1)(D).

130 20 C.F.R. § 718.101.

131 *See* 20 C.F.R. § 725.414.

132 20 C.F.R. § 718.101.

evaluations the miner may obtain on his or her own).[133] Ultimately, the method by which a claimant proves his or her total disability, as well as the requirements for medical testing, are established by the Secretary of Labor.[134]

ALJs are not medical experts, yet ALJs must interpret and rely on medical opinions to evaluate the substance of a claim. Disposition of claims often reduce to a "battle of the experts."[135] An ALJ "may draw reasonable inferences from the evidence presented, but [may not] substitute [its] judgment for that of the medical expert."[136] Additionally, as part of the ALJ's crediting process, the court reviews medical literature contained in the Preamble and compares to the given medical opinion.[137] Accordingly, the authority of the literature within the DOL's Preamble and the nature of judicial reference to that literature are central to an ALJ's evaluation of the medical evidence – and ultimate disposition – of every claim. Thus, to the extent the contra-APA theory would limit judicial reliance on the Preamble, the theory threatens to reform the means by which an ALJ credits the medical evidence necessary to resolve any claim.

IV. Huscoal, a Synopsis

Judge Thapar used *Huscoal* as a platform to amplify and reignite the contra-APA theory. The essential issue in *Huscoal* was whether a coal miner's respiratory illness "arose 'at least in part' out of his coal-mine employment, or whether it was solely due to his [extensive] smoking history."[138] Explanation of the issues gives context to Thapar's objections:

> Peggy Clemons, the widow of James Clemons, sought survivor's benefits after her husband died in the course of his claim.[139] James Clemons death was caused by chronic obstructive pulmonary disease ("COPD") and his widow alleged that the respiratory disease that caused James death had itself been caused by his coal mining employment (a necessary component of her claim).[140] Again, COPD is not clinical CWP but can qualify a miner for benefits under the definition of *legal* pneumoconiosis. Clemons had ten years of mining employment and a long history of smoking; two packs per day for thirty years, or a "60-pack year" smoking history.[141] A "pack-year" is the metric usually used to

133 Black Lung Bench Book, Chapter 1(B), at 1.2.

134 20 C.F.R. § 718.1.

135 Black Lung Bench Book, Chapter 3(I), at 3.1.

136 Black Lung Bench Book, Chapter 2(I), at 2.1.

137 *Shipley*, No. 19-1738 at *4.

138 *Huscoal*, 48 F.4th at 486 (citing definition of "legal pneumoconiosis as provided by 20 C.F.R. § 718.201).

139 *Id.* at 485.

140 *Id.*

141 *Id.* at 486.

> quantify the fact of smoking history in a claim under the Act, and is determined by multiplying the number of years an individual smoked by the number of cigarette packs smoked per day.[142] The ALJ concluded that James Clemons had suffered from legal pneumoconiosis, based on medical opinions, and awarded Mrs. Clemons benefits.[143] The BRB affirmed and the Sixth Circuit reviewed the ALJ's decision on appeal.[144]

In *Huscoal*, the ALJ determined the expert's credibility yielded on whether the opinions explained why Mr. Clemons's COWP was or was not caused by smoking cigarettes *and* exposure to coal dust, (due to the fact that he smoked *and* worked in coal mines).[145] Huscoal claimed the ALJ improperly relied on the opinion of Dr. A. Sikder, over those of Drs. A. Habre, and B. Broudy.[146] As a matter of law, aside from reference to the Preamble, ALJs may assign an opinion less weight if it "solely attributes the disease to smoking tobacco *without adequately explaining why* coal dust is not a cause, where a history of coal dust exposure is present."[147]

As such, the ALJ provided less weight to the opinions of Drs. Habre and Broudy, concluding they were not well-documented, nor well-reasoned, because they did not explain why Mr. Clemons' exposure to coal dust did not contribute, at least in part, to his COPD.[148] Both opinions attributed Mr. Clemon's COPD only to smoking. Dr. Habre opined that Clemon's COPD "does not have clinical or legal pneumoconiosis because coal mine dust did not play a substantial role in his illness, and Dr. Broudy opined that Clemon's COPD was solely due to cigarette smoking. [149] On the other hand, Dr. Sikder diagnosed Mr. Clemon as a having a form of COPD caused by, *both,* cigarette smoking and a coal-mine dust exposure.[150]

As the record contained substantial evidence that Mr. Clemons had legal pneumoconiosis, the ALJ held that Mr. Clemon's pneumoconiosis was a substantially contributing cause of his total disability.[151] The ALJ credited the opinion of Dr. Sikder over the other opinions, and provided the basis for the ALJ's determination that Clemon's pneumoconiosis was a substantially

142 *Id*.

143 *Id.*

144 *Id.*

145 *Id.* at 489-93.

146 *Id.* at 486.

147 *Id.* at 490 (citing Island Creek Coal Co. v. Hill, 739 F. App'x 825, 832 (6th Cir. 2018)).

148 *Id.* at 487.

149 *Id.* at 487-88.

150 *Id.* at 486.

151 *Id*. at 488.

contributing cause. Ultimately, the Sixth Circuit concluded the ALJ's decision was supported by substantial evidence and declined Huscoal's petition for review.[152]

Logically, it is conceivable for medical opinions that account for smoking *and* occupational hazards are more probative for a miner who smoked *and* worked in mines than an opinion that does not. In *Huscoal*, the ALJ relied on the Preamble's position on the issue to credit the medical opinions.

Dr. Sikder relied on pulmonary function tests to attribute Clemons's obstructive impairment to both smoking and work in coal mines, which was, according to the ALJ's perspective, "consistent with the Department of Labor's . . . recognition in the Preamble to the 2001 revised regulations . . . that the effects of smoking and coal-mine dust exposure are additive."[153] The Preamble also guided the ALJ to discredit the opinions of Habre and Broudy. The ALJ objected to Habre's opinion of no legal pneumoconiosis because Clemons' chest x-rays failed to reveal any evidence of CWP: "[t]his was, in the ALJ's view, contrary to the DOL's position in the Preamble."[154] Broudy opined that Clemons's COPD was attributable only to smoking because Clemons' particular response to bronchodilation was typically attendant to COPD from smoking, but rarely to coal dust impairment. [155] The ALJ gave Broudy's opinion less weight because the opinion was "contrary to the DOL's view [reflected in the Preamble] that smoking and coal mine dust are equally harmful to the lungs and cause significant obstruction at roughly the same rate."[156]

Notably, the Sixth Circuit did *not* base its approval on the ALJ's use of the Preamble. Though the record reflects the ALJ's repeated reference to the Preamble,[157] the Sixth Circuit, found that the ALJ properly weighed evidence in accordance with the regulations and based on opinions that explained the etiology of Clemons's disease.[158] The court seems to have intentionally avoided the issue. In this author's opinion, the majority in *Huscoal* issued its opinion alongside Judge Thapar's complaints about the Preamble because, to avoid conflict between the majority and concurring opinions, the goal was to bypass any express reference to the Preamble. The ALJ's reference to the Preamble, nonetheless, is spelled out in the factual background of the decision and the court took no issue with the ALJ's reference nor reasoning.

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152 *Id.* at 493-94.

153 *Id*. at 487.

154 *Id*. at 488.

155 *Id.* (citing to the ALJ opinion).

156 *Id.*

157 *See e.g.*, *id.* at 488.

158 *Id.* at 492-93.

Though he fully concurred in judgement–which did not directly engage with the Preamble's authority at all– Judge Thapar took the opportunity to display his concern about judicial reliance on the Preamble:

> I join the majority opinion in full. I write separately only to note that overreliance on agency guidance is problematic. The ALJ here entirely discounted the testimony of two experts based on one line from a guidance document—the DOL's [Preamble]. . . . Huscoal didn't challenge that reasoning. But it is concerning for two reasons.
>
> First, the Preamble didn't go through notice and comment. The [APA] requires that before an agency issues a binding rule, it must (at the very least) publish a notice of the proposed rule, allow public comments, and respond. 5 U.S.C. § 553. Those procedures aren't mere formalities. Rather, they guard against underinformed agency action and protect regulated parties from unanticipated changes to their rights and duties. . . . Treating the Preamble—which hasn't gone through notice and comment—as binding would rob the public of the input and warning the law demands.
>
> Second, a binding Preamble would undermine the black-lung regulations. Consider the Preamble's language that the ALJ relied on here: "The risk [coal dust poses] is additive with cigarette smoking." [] Read as guidance, that language helps explain why the regulations don't disqualify miners with smoking histories from receiving benefits. *[]* Read as binding, though, that same language contradicts the regulations. The regulations require the *miner* to prove that coal dust contributed to his disease . . . . But a binding Preamble would require the *employer* to prove that coal dust *didn't* contribute to the disease. So when an ALJ turns the Preamble's explanation into a binding presumption, he switches the burden of proof the regulations prescribe. And since the regulations—unlike the Preamble—have gone through notice and comment, contradicting their mandate is unlawful.
>
> If Huscoal had argued on appeal that the ALJ's order read the Preamble as binding, we would need to more closely scrutinize the ALJ's reasoning. As it is, the only issue Huscoal raised was a substantial-evidence challenge. And as the majority correctly holds, the ALJ's decision passes evidentiary muster. So I concur.[159]

159 *Id. at 494.*

Thus, in Thapar's view, judicial reference to the Preamble depends on whether an ALJ's mode of reliance "turn[s] the Preamble's explanation[s] into . . . binding presumption[s]." [160] As the evolution of caselaw shows, further reviewed in the following section, Thapar pinpointed the issue. He applied the correct, but his fears are unfounded.

V. Why the Preamble is Proper Guidance

Courts have held the Preamble as a proper source of guidance to show the DOL's intent in crafting the regulations, and to present proper interpretation of the regulations. [161] A review of the leading events of the creation of the DOL's 2000 Regulations and judicial opinions responding to subsequent challenges to the regulations helps one appreciate the nexus between the Preamble and the regulations. The history shows the scientific literature contained in the Preamble is legitimate, and the DOL had congressional authority to identify and rely on that information; the Preamble is a proper source of guidance about the regulations.

The DOL solicited comments on versions of the proposed rules in 1997 and 1999.[162] Physicians, insurers, coal miners, and mining companies commented on the rules themselves and their consequences.[163] Public notice and comments gave the public an opportunity to influence rulemaking. Judge Thapar suggests DOL deprives the public of these processes when ALJ's refer to the Preamble.

As expected,, individuals commented on the nexus of smoking and CWP that proponents of the contra-APA theory highlight today. The agency, as required, responded to these comments:

> [S]everal commenters suggest that the department's proposal will allow compensation where a miner's totally disabling respiratory impairment has been caused by cigarette smoking. Neither the Black Lung Benefits Act, nor the court of appeals decisions, nor the Department's proposed regulation allows benefits to be awarded where a miner's totally disabling respiratory impairment is caused solely by cigarette smoking. The courts have held irrelevant, however, the existence of causes of a miner's total respiratory or pulmonary disability in addition to pneumoconiosis. *See Jonida Trucking, Inc v. Hunt*, 124 F.3d 739,

160 *Id.*

161 *See Adams*, 694 F.3d at 802.

162 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000); *see* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, Proposed Rule, 62 Fed, Reg, 3338 (Jan. 22, 1997); *and* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, Proposed Rule, 64 Fed. Reg. 54,966, 54,988 (Oct. 6, 1999).

163 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000).

> 744 (6th Cir. 1997) (coexisting heart disease). In such a case, the miner meets the statutory and regulatory criteria for an award of benefits.[164]

The DOL responded by highlighting that the burdens of proving a claim under the statute and regulations were unchanged by the proposed rule. No court's interpretation of the regulation, to this author's knowledge, has held otherwise.

After publication of the final rules, and during litigation, industry plaintiffs challenged the scientific legitimacy of the medical information, underlying the DOL's rules. In Nat'l Mining Ass'n v. Chao, petitioners challenged the DOL's scientific determinations on the alleged basis that the agency had no scientific expertise.[165] This argument "completely without merit"[166]:

> Plaintiffs' contention that the Court should reject the DOL's science choices as arbitrary and capricious *per se* because the DOL has no scientific expertise is completely without merit. When an agency acts pursuant to an express congressional delegation of rulemaking authority, it is not for the Court to make its own determination as to whether the Court believes the agency is qualified for the job that Congress entrusted it with. . . . Congress determined that the creation of medical eligibility criteria for black lung benefits was within the DOL's expertise. It is not for the Court to decide otherwise.[167]

Likewise, petitioners objected that the DOL had no authority to craft discrete rules involving medial information, defining legal pneumoconiosis. The court ruled it would not disturb the agency's determinations as to the "identification and classification of medical eligibility criteria under the BLBA, [because those are] matters on which the courts are to defer to the agency entrusted by Congress to make such . . . determinations."[168]

In subsequent appeals addressing the validity of specific regulations under the APA, the D.C. Circuit upheld each of the recent regulations, without contradicting the general principle. The Court relied on the medical studies published in the Preamble to conclude the DOL had sufficiently explained its reasoning for some of the rules, and why those rules survived an APA challenge. Presented by the petitioners, the Court considered that the DOL's studies

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164 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, Proposed Rule, 64 Fed. Reg. 54,966, 54,988 (Oct. 6, 1999).

165 Nat'l Mining Ass'n v. Chao, 160 F. Supp. 2d 47, 78 (D.D.C. 2001), *aff'd in part, rev'd in part sub nom.* Nat'l Min. Ass'n v. Dep't of Lab., 292 F.3d 849 (D.C. Cir. 2002).

166 *Id.*

167 *Id.*

168 *Id.* at 73 (internal quotations omitted).

contradicted that of medical and scientific studies. The Court explained that the agency was entitled to determine whether to credit such studies, and that a given regulation would survive challenge. The agency had met its explanatory burden so long as it explained away that contrary evidence, the Court explained:[169]

> The Secretary revised § 718.205(c)(5) to state that "pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death." Calling the rule arbitrary and capricious, NMA says "there is no science to support" a hastening death rule in the case of a death caused by a non-respiratory condition.
>
> . . .
>
> In any event, the record contains medical testimony indicating that "impairment of lung function from pneumoconiosis [can] weaken the body's defenses to infections and increase susceptibility to other disease processes." 65 Fed. Reg. at 79,950 . . . . Although NMA cites two medical studies suggesting contrary conclusions, . . . the Secretary considered this evidence and gave plausible reasons for rejecting it, noting that both studies focused on the narrower medical definition of pneumoconiosis rather than the broader legal one, and that one of the studies concluded only that hastening death was rare but "did not rule it out as a medical possibility," 65 Fed. Reg. at 79,951. In light of all this, we think it obvious that the Secretary has successfully discharged her duty of reasoned decision making.[170]

It is important to note how the Court alluded to the medical information in the Preamble directly, relying on the information to determine whether the agency had satisfactorily explained why it chose to rely on that evidence instead of contrary evidence. Thus, the scientific literature contained in the Preamble was a component in the Court's affirmation of some of the regulations. The legitimacy of the regulations themselves is based on the medical evidence in the Preamble. Accordingly, the medial information in the Preamble and the regulations reinforce one another, making it appropriate for an ALJ to look to the Preamble to make determinations under the regulations.

169 Nat'l Min. Ass'n v. Dep't of Lab., 292 F.3d at 870–71.

170 Nat'l Min. Ass'n v. Dep't of Lab., 292 F.3d at 871.

Comparatively, a response by the Eleventh Circuit to a direct challenge to regulations, promulgated by the Mine Safety and Health Administration ("MSHA"), explained how congressional intent authorized an agency's right to both determine scientific facts and make policy judgements according to the purposes of the legislation that empowered MSHA:

> [W]e believe it appropriate to give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise. When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. To do otherwise puts this court in the unenviable—and legally untenable—position of making for itself judgments entrusted by Congress to MSHA. Finally, the Mine Act evinces a clear bias in favor of miner health and safety. The duty to use the best evidence and to consider feasibility are appropriately viewed through this lens and cannot be wielded as counterweight to MSHA's overarching role to protect the life and health of workers in the mining industry. Not only do we decline to balance interests, we acknowledge that when MSHA itself weighs the evidence before it, it does so in light of its congressional mandate.[171]

The Court upheld the regulations on the grounds of scientific deference and legislative intent. Similar to the legislation authorizing MSHA's regulations, the Black Lung Benefits Act clearly reflects a congressional intent: to favor and remediate the harms suffered by miners disable by their work in coal mines, as reflected in the 1972 Senate Report on the Act:

> The Black Lung Benefits Act of 1972 is intended to be a remedial law—to improve upon the 1969 provisions so that the cases which should be compensated, will be compensated. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.[172]

Though Courts have interpretated the Act as being in favor of miners when evidence presented comes to a stalemate,[173] Congress, nonetheless, intended to remediate the disabled miner's plight. Congress stated clearly in Section 901 of the Act:

171 Nat'l Min. Ass'n v. Sec'y, U.S. Dep't of Lab., 812 F.3d 843, 866 (11th Cir. 2016) (internal quotations and citations omitted).

172 *S.Rep*. No. 92–743, p. 11 (1972), U.S.Code Cong. & Admin. News 1972, pp. 2305, 2315.

173 *See* Dir., O.W.C.P. v. Greenwich Collieries, 512 U.S. 267, 280-81 (1994) (barring application of the "true doubt" rule that awards miners benefits when evidence for both parties fails to support their positions).

> [T]he purpose of this subchapter [is] to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.[174]

Congress entrusted the DOL to execute a specific purpose, and that delegation of authority legitimizes the DOL's regulations, technical expertise, and authority to make scientific determinations. The courts have approved of the DOL's rules and relied on the Preamble to determine whether the DOL has done its job the correct way—it it has. The Preamble is proper guidance about the regulations because the Preamble contains the premises that support the conclusions (the regulations). The regulations reflect policy decisions that effectuate purposes of the Act, resulting from the authority delegation.

Judge Thapar's fear of improper presumption of the Preamble's medical information is meritless. It is not a legal error that the medical literature in the Preamble concludes that health risks of smoking and coal-dust exposure are additive. That is a scientific fact. Some studies conclude otherwise, however, Congress entrusted DOL to determine which science it would adopt. Thus, the fact that DOL had adopted that particular medical fact is perfectly within the DOL's experetise. Perhaps the DOL's adoption of such a fact is the only thing that that makes the medical information in the Preamble more persuasive than contrary medical literature, but Congress believed thee DOL was the proper party to determine which facts should inform the regulations implementing the Act. Thus, medical information in the Preamble ultimately flows from Congress' authority.

VI. History of the Contra APA-theory

The following is a chronological overview of the development, and failure, of the contra-APA theory. The theory and responses of the theory have evolved over time. This is not an exhaustive account of every contra-APA critique, but an overview of each Circuit's rejection of the theory. This list also includes several cases where Circuits reaffirmed the position after adoption.

Every U.S. Court of Appeals that has fielded the question has rejected the contra-APA theory. The Third, Fourth, Sixth (prior to *Huscoal*), Seventh, Ninth and Tenth Circuits have rejected the argument outright. The D.C. Circuit rejected the argument in a direct attack on the regulations. The First, Second, Fifth, Eighth, and Eleventh Circuits have never–to this author's knowledge–reviewed the issue.

174 30 U.S.C.A. § 901.

Broadly, courts have agreed it is appropriate for an ALJ to refer to the medical literature in the Preamble when evaluating the credibility of an expert medical opinion. Challenges invoking the APA have taken a few forms: against crediting an opinion; against discrediting an opinion; and against invocation of the Preamble at all. The courts have settled that so long as an ALJ's reference is permissive, then the reference is not compulsory nor binding, and therefore not violative of the APA. Accordingly, some have attacked case-specific examples of an ALJ's invocation of the Preamble, arguing an ALJ considered the Preamble binding as applied. To this author's knowledge, none have prevailed.

NMA v. DOL, (D.C. Cir. 2002)

As stated, Thapar's objections are not new. The contra-APA theory has resurfaced many times within two decades since the DOL promulgated its 2000 Regulations.[175] In fact, the contra-APA theory resurfaced in the very first challenge.

In 2001, mine operators, insurance companies, and the National Mining Association ("NMA") leveled a complaint challenging many of the then-new regulations in *National Mining Association v. Chao*, 160 F. Supp. 2d 47, 51 (D.D.C. 2001).[176] The district court upheld each of the regulations.[177] On appeal, the Court of Appeals for the District of Columbia upheld in part and reversed certain provisions of the regulations as impermissibly retroactive.[178] Reviewing the NMA challenges, the D.C. Circuit commented on a "meritless" objection by the NMA, which appeared to be an early articulation of the contra-APA theory. Yet, the D.C. Circuit declined to rule on the issue for due to ripeness:[179]

> NMA [] alleges that the preamble to the regulations impermissibly suggests that an adjudicator may ignore a medical report if the reporting doctor concludes that a miner's obstructive lung disease was caused by smoking, rather than mining. This objection is entirely meritless. The regulation's plain text in no way indicates that medical reports will be excluded if they conclude that a particular miner's obstructive disease was caused by smoking, rather than mining. Indeed, the preamble itself states that the revised definition does not alter the requirement that individual miners must demonstrate that their obstructive lung disease arose out of their work in the mines.

175 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000).

176 Nat'l Mining Ass'n v. Chao, 160 F. Supp. 2d. at 51 (D.D.C. 2001).

177 Nat'l Min. Ass'n v. Dep't of Lab., 292 F.3d at 855 (D.C. Cir. 2002)("The District Court granted the NMA limited injunctive relief, but ultimately granted the Secretary's motion for summary judgment, upholding the regulations in every respect.").

178 *Id.* at 868-75.

179 *Id.* at 863.

> See 65 Fed. Reg. at 79,938. And appellants acknowledge that this regulatory statement is acceptable. . . . To the extent that appellants' objection is based on anticipated misapplications of the rule by agency adjudicators, it is unripe for review. Appellants may object to applications of the rule only in the context of concrete cases.[180]

NMA argued that the regulatory scheme would allow an ALJ to "ignore" a medical opinion that pronounced "a miner's obstructive lung disease was caused by smoking, rather than mining." [181] NMA would be expressing a view contrary to the Preamble's position that "the risk [of chronic bronchitis] is additive with cigarette smoking."[182] Though the D.C. Circuit waived the argument, noting that the Preamble itself states that it does not alter the miner's burden, petitioners in at least one other subsequent case, *Harman Min. Co. v. Dir., Off. of Workers' Comp. Programs*, 678 F.3d 305 (4th Cir. 2012), would rely on the D.C. Circuit's statements.[183]

Midland Coal Co. v. Dir., Off. of Workers' Comp. Programs, (7th Cir. 2004)

In 2004, Midland Coal Company ("Midland") appealed to the Seventh Circuit after benefits were awarded to former miner George W. Shores; Midland made two "ambitious arguments," which the court rejected.

[184] Midland challenged whether pneumoconiosis is progressive and latent as a matter of fact or law.[185] The court focused on the DOL's regulations and the authority of the agency's scientific findings.[186]

The court's analysis of the soundness and authority of the DOL's scientific assertions, which underlie the regulations, is pertinent to the contra-APA debate. *Midland* holds that a court must defer to those assertions when they are expressly contained within a regulation. A full account of the court's analysis makes clear that medical findings reflected within the regulations themselves warrant deference under the *Chevron*[187] doctrine (meaningful within the contra-APA debate).

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180 *Id.*

181 *Id.*

182 Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 65 Fed. Reg. 79,920 at 79440 (Dec. 20, 2000).

183 Harman, 678 F.3d 305, 316 (4th Cir. 2012).

184 Midland Coal Co. v. Dir., O.W.C.P, 358 F.3d 486, 488–89 (7th Cir. 2004).

185 *Id.* at 489-90.

186 *Id.*

187 The *Chevron* doctrine, established the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 (1984), is the highly deferential standard under which courts defer to a federal agency's interpretation of an ambiguous statute that gives the agency authority, if the agency's interpretation is reasonable.

> Whether pneumoconiosis (including the condition described for these purposes as "legal" pneumoconiosis) is a disease that can be latent and progressive is a scientific question. The Department of Labor's regulation reflects the agency's conclusion on that point. Midland is now challenging that scientific finding, but we see no reason to substitute our scientific judgment, such as it is, for that of the responsible agency.
>
> At that time [prior to passage of the 2000 regulations], because the agency had not gone through formal rule-making procedures, this deference was not compelled under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* . . . Now that the agency has issued a formal regulation using full notice-and-comment procedures, *Chevron* imposes on the mine operators the heavy burden of showing that the agency was not entitled to use its delegated authority to resolve the scientific question in this manner. Midland has not undertaken to show why the Department's conclusion was not itself supported by substantial evidence . . . . Unless and until Midland did so, Shores was fully entitled to rely on the rule without the need to prop it up by introducing yet more independent scientific evidence tending to show that it is scientifically valid.[188]

Midland supports that unless a petitioner can produce scientific evidence powerful enough to invalidate the scientific premise of a DOL regulation, when the regulation expressly contains such a premise, then both the regulation and the DOL's scientific premises are entitled to deference under the *Chevron* doctrine. *Midland* does not assert that a rule not contained in a regulation is entitled to *Chevron* deference. As explained later in this note, *Midland* has since become a pillar of the judiciary's rejection of the contra-APA theory.

The question remained, however, whether the scientific determinations, that serve as a premise of a regulation, are entitled to any deference *separate and apart* from the regulations. In *Midland*, the issue was whether pneumoconiosis is in fact progressive, which the DOL answered that it was progressive in 20 C.F.R. § 718.201(c). However, as many of the following cases demonstrate, the question of scientific fact at issue in a claim under the Act is often not expressly answered by the regulations, but by the medical literature in the Preamble. For example, many cases turn on whether the health risks of smoking and coal mining are additive. The Preamble says that they are.[189] That fact of additive risks and the fact that pneumoconiosis is progressive

188 *Midland*, 358 F.3d at 490.

189 *Blackburn*, 857 F.3d at 828 (holding that the Preamble affirmative reflects the medical conclusion that the health risks associated with smoking cigarettes and the risks of exposure to coal dust *are* additive, rather than *can* be additive).

are both premises of the DOL's regulations, but only the latter is codified as a regulation. *Midland* did not clearly provide that such a medical fact also warrants *Chevron* deference.

Consolidation Coal Co. v. Dir. OWCP, (7th Cir. 2008)

The Seventh Circuit first reviewed a challenge to judicial reliance on the Preamble in *Consolidation Coal Co. v. Dir. O.W.C.P.*, 521 F.3d 723 (7th Cir. 2008). In *Consolidation*, the Seventh Circuit did not directly address whether reference to the Preamble was proper or not, but implied it was "sensible."[190]

The court affirmed an ALJ's decision to give less weight to the medical opinion of Dr. Tuteur, that a claimant miner's COPD must be attributable to smoking because "miner's rarely have clinically significant obstructions from coal dust."[191] Affirming the ALJ's decision, the court reasoned that Tuteur's stance "would lead to the logical conclusion that Dr. Tuteur categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust."[192] That court characterized the ALJ's decision as "sensible," in part because "the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant."[193] In other words, "[t]his medical authority [the Preamble] indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." [194]

Helen Mining Co. v. Dir. OWCP, (3rd Cir. 2011)

In *Helen Mining Co. v. Dir. OWCP*, 650 F.3d 248 (3rd Cir. 2011), petitioners argued that an ALJ improperly invoked the Preamble to discredit a medical opinion because the Preamble "lacks the force of law and cannot provide a legal basis to give an opinion less weight."[195] The medical opinion was otherwise flawed and warranted less credit, the ALJ and Third Circuit agreed, asserting that radiographic pneumoconiosis was necessary to find legal pneumoconiosis (which is contrary to 20 C.F.R. 718.202(a)(4)).[196] Nonetheless, the court wrote that "Helen Mining's argument regarding the legal gravamen of the preamble misses the point. The ALJ's reference to the preamble to the regulations . . . unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."[197] To substantiate that conclusion the Third Circuit cited to *Midland*.

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190 Consolidation Coal Co. v. Dir., O.W.C.P., 521 F.3d 723, 726 (7th Cir. 2008).

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 Helen Min. Co. v. Dir. OWCP, 650 F.3d 248, 256 (3d Cir. 2011).

196 *Id.*

197 *Id.* at 257.

Just as petitioners in *Midland* challenged a regulation, the medical opinion discounted by the ALJ in *Helen* was contrary to regulation 20 C.F.R. 718.202(a)(4). *Midland* clearly supports the *Helen* court's affirmation of the ALJ's decision to discount the opinion for hostility to the regulation. Notably, the *Helen* court considered the Preamble to be an expression of the DOL's scientific findings, just as many courts would later do.[198] Relying on *Midland*, the *Helen* court seemingly concluded that because the regulations are entitled to deference, it is reasonable to refer to regulations via the Preamble.

Harman v. Dir. OWCP, (4th Cir. 2012)

In 2012, the Fourth Circuit expressly rejected the argument that an ALJ may not refer to the Preamble when determining the credibility of a medical opinion.[199] Harman's challenge was the first fully realized challenge to the Preamble apart from the regulations.

In 2005, an ALJ found that Gary Looney was permanently disabled and that his COPD arose out of coal mining employment, and awarded Looney benefits payable by Harman Mining Company ("Harman").[200] Looney had worked for coal mines from 1969 to 1991 and had smoked for decades.[201] Harman challenged the award, and sought to overturn the ALJ's factual finding that Looney's COPD arose from his work in coal mines, contending that the ALJ's invocation of the preamble violated the APA.[202]

In the course of weighing the medical evidence, the ALJ discounted a portion of Dr. Gregory Fino's opinion, because his conclusion that "induced obstructive lung disease is insignificant where the miner does not suffer from clinically significant pneumoconiosis" conflicted with the recognition in the preamble that coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis."[203] The ALJ determined that this conflict compromised the probative value of Fino's opinion.[204] On appeal, Harman explicitly objected to the ALJ's reliance on the Preamble.[205]

198 *See e.g.*, *Adams*, 694 F.3d at 801-02 ("The ALJ similarly credited Dr. Rasmussen's opinion because it was consistent with the medical and scientific premises underlying the amended regulations, as expressed in the preamble."); *Harman*, 678 F.3d at 314 ("The preamble to the regulations simply sets forth the medical and scientific premises relied on by the Department in coming to these conclusions in its regulations."); *Cent. Ohio Coal Co.*, 762 F.3d at 491 ("The ALJ was entitled to consider the DOL's position and to discredit Dr. Rosenburg's testimony because it was inconsistent with the DOL position set forth in the preamble to the applicable regulations.").

199 *Harman*, 678 F.3d 305, 316 (4th Cir. 2012).

200 *Id.* at 310.

201 *Id.* at 309.

202 *Id.* at 309-14.

203 *Harman*, 678 F.3d at 313 (internal citations omitted).

204 *Id.*

205 *Id.*

After concluding that ample evidence supported the ALJ's findings the Fourth Circuit explained why Harman's attack on the ALJ's "limited invocation of the preamble [was] unjustified."[206]

HARMAN'S OBJECTION

Harman's argument is perhaps the purest formulation of the contra-APA theory, though Harman does not refer to it as such. An overview of Harman's argument is warranted.

First, as a base reference, Harman noted that the APA's standards for adjudication apply to claims under the Act absent some express statutory exemption.[207] Harman properly recognized that the APA requires that administrative decisions are based on records created by the parties, that all parties have the opportunity to make their case on a level playing field, and that an ALJ must explain conclusions and reasoning concerning issues of material fact, law, or discretion.[208]

Second, Harman invented a rule that it named the "hostility to the preamble"[209] rule, which ALJs use to "place a thumb on the scale" and "discredit expert opinions offered by employers or their insurers that suggests that a miner's condition is unrelated to coal mine employment."[210] Along the way, Harman characterized the Preamble as "not a scientific document," but one "written by Department of Labor lawyers or administrators," that was "not published for notice and comment rulemaking under 5 U.S.C. § 553(a)," and that "discusses medical research that is mostly irrelevant or misapplied with respect to an individual claim."[211] Harman labeled the Preamble's research concerning the effects of pneumoconiosis and cigarette smoking, as "controversial and scientifically unsettled or subject to valid scientific criticism."[212] Harman also argued that the inverse of the "hostility to the preamble" rule, under which an ALJ's use of the Preamble to credit medical opinions that are in harmony with the Preamble, can also violate the APA.[213]

To bolster its argument, Harman invoked the objections of the NMA. Harman noted that while the 2000 Regulations did not apply any new presumptions concerning the miner's burden of proof in a typical claim, he shared the belief of the NMA that "the portion of the Preamble addressing the smoking and mining issue was invalid because, among other things, it seemed to create

206 *Id.* at 314.

207 Brief for Respondent at 13, HARMAN MINING CO., et al., Petitioners, v. DIRECTOR, Office of Workers' Compensation Programs, United States Department of Labor and Gary Looney, 2011 WL 2634732 (C.A.4), (hereinafter "Respondents Brief").

208 Respondents Brief at13 (citing 5 U.S.C. §§ 554, 556, 557(c)(3)(A)).

209 An apparent cousin of the "hostility to the Act" rule under which ALJs may discredit medical opinions at odds with the statute itself. *See Midland*, 358 F.3d at 492 ("In that light, the ALJ's inference of hostility to the Act was permissible.").

210 Respondents Brief at 14.

211 *Id.* at 14-5.

212 *Id.* at 16-17.

213 *Id.* at 15.

an irrebuttable presumption that all obstructive lung disease in miners was related to coal dust exposure and thus constituted 'legal' pneumoconiosis."[214] While the Preamble includes no data that "proves that physicians are unable to render a differential diagnosis in cases of miners who also smoked cigarettes," Harman argued, courts nonetheless "treat[] the Preamble as an irrebuttable presumption or legislative criterion that prohibit[s] a finding that a miner's COPD was related exclusively to smoking notwithstanding the diagnostic facts obtained by a competent physician."[215]

Harman summarized the application of the "hostile to the preamble" rule in its case as "a *de facto* exclusionary rule requiring the ALJ to discredit any medical opinion attributing Looney's COPD to smoking and not at all to mining, regardless of the expert's explanation for his differential diagnosis."[216] Harman insisted that this supposed "irrebuttable presumption" triggered whenever a physician disagreed with the Preamble, "prove[d] that NMA's fears were justified."[217]

Specifically, Harman argued that reliance on the Preamble in this case violated the APA in three ways. First, that because the Preamble was not the product of notice and comment rulemaking, an ALJ's reliance on the Preamble as a dispositive set of rules violated Section 553(a) of the APA, which requires rules that affect the substantive rights of parties to go through notice and comment.[218] Second, that judicial reliance on the Preamble violates Sections 554(b)(3), (c), and 556(d) and (e), which together, afford parties a notice guarantee, opportunity to cross-examine, to receive a judgement based on facts in the record, and to present relevant evidence.[219] Third, Harman argued that a court cannot properly articulate a decision, as required by Section 557(c)(3)(A), when the court consults the Preamble, which Harman characterized as an "unjustified preference for medical evidence that contains no explanation or documentation."[220]

HARMAN, 4TH CIRCUIT RESPONSE

In response to Harman's objections, the Fourth Circuit unequivocally wrote: "It's arguments uniformly fail."[221] Ultimately, the Fourth Circuit rejected each sub-species of Harman's contra-APA theory.

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214 *Id.* at 17.

215 *Id.* at 18.

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.* at 21.

220 *Id.*

221 *Harman*, 678 F.3d at 315.

The court noted that "[t]he preamble to the regulations simply sets forth the medical and scientific premises relied on by the Department in coming to these conclusions in its regulations."[222] Justifying the ALJ's reliance, the court wrote that "[t]he ALJ cited the preamble not to imbue it with the force of law or to transform it into a legislative rule, but simply as a source of explanation as to the Department's rationale in amending the regulations."[223] The court also found that an ALJ may reference the Preamble in her determination of that credibility of a medical opinion but is not required to.[224]

Without attempting to challenge the holdings in *Helen* [225] and *Consolidation Coal Co.*, [226] Harman instead objected to the Preamble as an improper source of law wholly apart from the regulations. [227] In *Helen,* it was argued that the Preamble cannot be a source of law for want of notice and comment rulemaking, which the Fourth Circuit labeled as a "manufacture[d] . . . legal claim."[228] Referring to the weight other courts have given to preambles in other regulations, the court wrote that while "the preamble does not control the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent."[229]

The Fourth Circuit also rejected Harman's argument that failure to include the Preamble in the record violated the APA as "meritless," because the APA does not require that publicly available documents such as the BLBA and its regulations be incorporated into the record.[230] Confronting the last argument based on an alleged violation of the APA, the court rejected that the ALJ failed to adequately explain its findings and conclusions.[231] Rather, reference to the Preamble does not impair an ALJ's ability to explain itself and an ALJ satisfies its duty of explanation "if a reviewing court can discern what the ALJ did and why she did it."[232]

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222 *Harman*, 678 F.3d at 314.

223 *Id.* 314-15 (citing *Wy. Outdoor Council*, 165 F.3d 43, 53 (D.C. Cir. 1999)).

224 *Id.* at 314-15.

225 *Helen*, 650 F.3d 248, 256 (3d. Cir. 2011).

226 Consolidation Coal Co. v. Dir., OWCP, 521 F.3d 723 (7th Cir. 2008).

227 *Harman*, 678 F.3d 315 (4th Cir. 2012).

228 *Id.* at 315.

229 *Id.* at 315–16 (4th Cir. 2012) (citing *Wy. Outdoor Council*, 165 F.3d at 53).

230 *Id.* at 316.

231 *Id.*

232 *Id.* (citing *Piney Mountain Coal Co. v. Mays*, 176 F.3c 753, 762 (4th Cir. 1999)).

Though a settled issue today,[233] the court commented on Harman's decision not to challenge the scientific validity of the positions contained in the Preamble. Had Harman challenged the validity the court would have given credit to the position of the DOL unless a petitioner "produced the type and quality of medical evidence that would invalidate a regulation."[234]

Notably, Harman attempted to distinguish itself from *Helen*,[235] and *Consolidation Coal Co*.[236] In both prior decisions the issue reduced to the validity of a DOL's scientific determinations as reflected in the regulations. Harman was the first to argue that the Preamble was uniformly disqualified as a source of law for lack of notice and comment, apart from the regulations. The Fourth Circuit tackled the challenge directly – without reliance on *Helen* nor *Consolidation* – finding that the Preamble simply contains the facts that the DOL relied on when crafting the regulations and expressly affirmed an ALJ's privilege to reference them or not.

A & E Coal Co. v. Adams, (6th Cir. 2012)

In the same year as *Harman*, A & E Coal Company ("A&E") filed a near-duplicate set of complaints with the Sixth Circuit in *A & E Coal Co. v. Adams*, 694 F.3d 798 (6th Cir. 2012). A & E's petition raised similar complaints based on alleged violations of the APA and failed for much the same reasons.

James Adams worked in coal mines for twelve years and smoked for twenty-five.[237] Predictably, physicians' opinions differed as to the cause of Adam's disease.[238] Dr. Donald Rasmussen diagnosed Adams with COPD and opined that it was impossible to discern the degree to which Adams's COPD was caused by smoking versus coal dust exposure.[239] Dr. Thomas Jarboe diagnosed Adams with emphysema and asthma, opining that it was possible to tell whether smoking or coal dust caused such disease by the presence or absence of coal dust deposits in a patient's chest x-ray, and that Adam's lack of such deposits meant that Adams disease was the result of smoking only.[240]

An ALJ weighed these opinions and credited Dr. Rasmussen for according with the regulation's framework and not "irrationally rul[ing] out factors in his causation analysis."[241] On the other hand, the ALJ discredited the opinion of Dr. Jarboe as not well-reasoned, for failure to account for Adams's history of

233 *See Marcum*, 604 F. App'x at 484.

234 *Harman*, 678 F.3d at 316 n. 3 (4th Cir. 2012) (citing *Midland*, 358 F.3d at 490).

235 *Helen*, 650 F.3d 248.

236 *Consolidation Coal Co.* 521 F.3d 723.

237 *Adams*, 694 F.3d at 800.

238 *Id.* at 800-01.

239 *Id.* at 800.

240 *Id.*

241 *Id.*

coal dust exposure, and for espousing a theory, that the absence of a positive chest x-ray can be the basis for an opinion, as plainly contrary to the regulations.[242] 20 C.F.R. § 718.202(a)(4) provides that a miner can have pneumoconiosis under the Act without a positive chest x-ray. The ALJ referred to the Preamble two times, first directly and the second indirectly. First, the ALJ credited the opinion of Dr. Rasmussen because it reflected the data "acknowledged to be well documented" that is contained in the Preamble and, thus, Rasmussen's opinion was, likewise, "very-well documented."[243] Second, the ALJ discredited the opinion of Dr. Jarboe because he relied on studies that had "specifically been discredited in the regulations."[244] Accordingly, the ALJ awarded Adams benefits and the BRB affirmed, holding that "the ALJ permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis."[245]

On appeal, A&E raised the specter of the APA, averring that the ALJ violated the APA by reference to the Preamble for the same reasons Harman objected before the Fourth Circuit: binding rules must have gone through notice and comment; not part of the administrative record; ALJ failed to articulate its findings and conclusions.[246] The Sixth Circuit, like the Fourth, uniformly rejected A&E's arguments.

First, the court ruled that the Preamble is not binding, that ALJ reference to it is simply permissive, and therefore need not have gone through notice and comment.[247] The court wrote:

> The ALJ simply looked to the preamble, in addition to the applicable regulations, to assess Dr. Jarboe's and Dr. Rasmussen's credibility. The ALJ found that Dr. Jarboe's opinion conflicted with the Department's position that a negative X-ray alone should not preclude an award of benefits. The ALJ also found that Dr. Jarboe's conclusion was based on a study that was in turn premised on a proposition—that coal-dust exposure cannot cause COPD—inconsistent with the regulations, as explained in the preamble. The ALJ similarly credited Dr. Rasmussen's opinion because it was consistent with the medical and scientific premises underlying the amended

242 *Id.*

243 *Id.* at 801.

244 *Id.*

245 *Adams*, 694 F.3d at 800-01.

246 *Id.* at 801-02.

247 *Id.*

> regulations, as expressed in the preamble. We therefore reject the premise of A & E Coal's argument: that the ALJ treated the preamble as binding in his decision here.[248]

The court explained that the preamble "merely explains why the regulations were amended" and "does not expand [the regulation's] reach."[249] Agreeing with the Fourth Circuit in *Harman*, the court ruled that while an ALJ need not look to the Preamble, it is entitled to.[250]

The court also swept away A&E's objection that the Preamble is not contained in the record, as without any basis in law upon which to ground the proposition that public documents ought to be on the record.[251] Finally, the *Adams* court found that the ALJ had "thoroughly" discussed the opinions and explained its decision to discredit the opinion of Dr. Jarboe for inconsistency with the regulations.[252] The court declined to criticize the ALJ for failing to examine or explain the studies underlying the medical information contained in the Preamble, and ultimately denied A&E's petition.[253]

A&E, like *Harman* appears to have adopted the position that contrariness or accord with the Preamble is contrariness or accord with the regulations. First, the court approved the ALJ's decision to discredit "Dr. Jarboe's conclusion [because it] was based on a study that was in turn premised on a proposition—that coal-dust exposure cannot cause COPD—inconsistent with the regulations, as explained in the preamble." [254] Jarboe's opinion was hostile to 20 C.F.R. § 718.202(a)(4), concerning the probative value of an x-ray, so the court is in complete accord with the line of reasoning that began with *Midland* as to the deference that scientific facts deserve when expressed in the regulation.

The court also approved the ALJ's decision to credit "Dr. Rasmussen's opinion because it was consistent with the medical and scientific premises underlying the amended regulations, as expressed in the preamble." [255] In crediting Rasmussen's opinion, the court approved the ALJ's direct reliance on the Preamble apart from the regulations, marrying the authority of facts contained in the Preamble with the authority of the regulations. The court found that the Preamble reflects the regulations directly.

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248 *Id.*

249 *Id.* at 802.

250 *Id.*

251 *Id.*

252 *Id.* at 802-03.

253 *Id.* at 803.

254 *Adams*, 694 F.3d at 801-02.

255 *Id.*

Cent. Ohio Coal Co. v. Dir., O.W.C.P., (6th Cir. 2014)

Two years after *A&E*, Central Ohio Coal Company ("Central") appealed an award of benefits to Mr. Larry Sterling in *Cent. Ohio Coal Co. v. Dir., O.W.C.P.*, 762 F.3d 483 (6th Cir. 2014). Among other complaints, Central contended that the ALJ improperly discredited the opinion of Dr. David Rosenburg, which espoused that Mr. Sterling's COPD was caused by smoking – rather than exposure to coal dust – because Sterling's disease reflected a severe reduction in FEV_1/FVC[256] ratio, while a miner's FEV_1/FVC ratio is generally preserved when he or she suffers from COPD caused by coal dust exposure.[257] The ALJ gave less weight to Dr. Rosenburg's opinion because it was contrary to "the DOL's position set forth in the Preamble that coal mine dust exposure may cause COPD, with associated decrements in FEV_1/FVC."[258]

Central's objection to the ALJ's rejection of Dr. Rosenburg's opinion raised an issue similar to the one anticipated by the Fourth Circuit in *Harman*. How should the court resolve conflict between the medical assertions in the Preamble and those of a qualified medical physician?

Dr. Rosenburg seemed to have directly contested the DOL's conclusions as reflected in the Preamble, as opposed to simply offering a medical opinion out of step with that data. Dr. Rosenburg took great pains to discuss the effects of smoking and coal dust exposure on a patient's FEV_1/FVC ratio, expressly refuting the findings of the DOL and the Global Initiative for Chronic Obstructive Lung Disease.[259] Additionally, he argued that both authorities' definition of COPD as a simple reduction in FEV_1/FVC values was an "oversimplistic definition," suggesting – as summarized by the court – that "there may be forms of COPD that are not correlated with a reduced FEV_1/FVC ratio, and those forms of COPD are much more likely to be associated with coal-dust exposure."[260]

The court had to confront the apparent conflict between two apparently qualified sources of medical information. The Sixth Circuit wrote:

> Dr. Rosenburg may be right as a matter of scientific fact, but his analysis plainly contradicts the DOL's position that COPD caused by coal-dust exposure may be associated with decrements in the FEV_1/FVC ratio. The ALJ was entitled to consider the

256 *Cent. Ohio Coal Co*, 762 F.3d at 491 n.3 "FEV_1 is 'forced expiratory volume' in one second. FVC is 'forced vital capacity.' Both are pulmonary-function tests that measure the volume of air that can be blown out of the lungs after taking a full breath: FVC tests total volume, and FEV_1 tests how much air is emitted in one second."

257 *Id.*

258 *Id.* (citing Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 89920, 79943 (Dec. 20, 2000)).

259 *Cent. Ohio Coal Co*, 762 F.3d at 491.

260 *Cent. Ohio Coal Co.*, 762 F.3d at 491.

> DOL's position and to discredit Dr. Rosenburg's testimony because it was inconsistent with the DOL position set forth in the preamble to the applicable regulations.[261]

Echoing the comments in *Harman*[262] and (concerning direct refutation of the Preamble), the court further noted that *Central* and *Rosenburg* did not wholly refute the specific substance of the Preamble, that COPD caused by coal dust exposure is correlated with diminished FEV_1/FVC ratios.[263] Rather, Dr. Rosenburg argued that the DOL's position in the Preamble was simply not specific enough to capture the true relationship between smoking/coal dust (cause) and reduced FEV_1/FVC ratio (effect). Had *Rosenburg* and *Central* completely refuted the Preamble, the court wrote, "this court would need to engage the substance of that scientific dispute," which the court could only do if "Central Ohio submitted 'the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute.'"[264] *Central* did not provide that type of directly contradictory evidence in this case.

Relying on *Harman*, *Helen* and *Consolidation Coal Co.*,[265] the Sixth Circuit joined the Fourth, Third, and Seventh Circuits, concluding that the ALJ is "unequivocally" entitled to discredit a medical opinion for inconsistency with the DOL position set forth in the Preamble.[266] *Central* also reiterated a concept that serves as a backstop to challenges of the validity of the Preamble. Medical literature at odds with the Preamble must be powerful enough to invalidate the regulations themselves if it is to override the propriety of an ALJ's decision to discredit an opinion based on the Preamble.

Peabody Coal Co. v. Dir., O.W.C.P., (9th Cir. 2014)

In 2014, the Sixth and Ninth Circuits doubled down in opposing the contra-APA theory. That year – the same year as *Central* – Peabody Coal Company ("Peabody") presented an iteration of the contra-APA theory to the Ninth Circuit in *Peabody Coal Co. v. Dir., O.W.C.P.*, 746 F.3d 1119, 1124–25 (9th Cir. 2014). Mimicking prior petitioners, Peabody objected that ALJ's reliance on the Preamble was improper under the APA.[267] The court found that the ALJ had simply, "and not improperly," considered the Preamble and when evaluating medical opinions.[268] The Ninth Circuit found that "[a] preamble

261 *Id.*

262 *Harman*, 678 F.3d at 316 n. 3 (citing *Midland*, 358 F.3d at 490 ("[T]he court would credit the position adopted . . . by the [DOL] on a question of scientific fact unless the [petitioner] produced the type and quality of medical evidence that would invalidate a regulation.") (internal quotations omitted)).

263 *Cent. Ohio Coal Co.,* 762 F.3d at 491.

264 *Id.* (quoting *Midland*, 358 F.3d at 490.

265 *Harman*, 678 F.3d at 315 (4th Cir. 2012); *Helen*, 650 F.3d at 256 (3rd Cir. 2011); *Consolidation Coal Co.*, 521 F.3d at 726 (7th Cir. 2008).

266 *Cent. Ohio Coal Co.*, 762 F.3d at 491.

267 Peabody Coal Co. v. Dir., O.W.C.P., 746 F.3d 1119, 1125 (9th Cir. 2014).

268 *Id.*

may be used to give an ALJ understanding of a scientific or medical issue."[269] The court found that the Preamble neither "rewrites" nor "significantly supplements" the regulations.[270]

Arch on the Green, Inc. v. Groves, (6th Cir. 2014)

Also in 2014, the Sixth Circuit again upheld judicial reliance on the Preamble in *Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014). The court upheld an ALJ's reference to the Preamble in crediting medical opinions. The court wrote:

> The preamble is an instructive resource that explains the DOL's evaluation of conflicting medical and scientific literature on the same complex issues with which the ALJ in this case was confronted. In the face of conflicting opinions from two credible sources, it was reasonable for the ALJ to give greater weight to the testimony of the medical expert whose opinion was supported by the prevailing view of the medical and scientific community as reflected in the regulatory preamble.[271]

Noting again that the Preamble may be an improper source of law under the APA if binding, the court found "no such indication" in *Arch*.[272]

Blue Mountain Energy v. Dir., O.W.C.P, (10th Cir. 2015)

The Tenth circuit reviewed its first challenge to judicial reliance on the Preamble in *Blue Mountain Energy v. Dir., O.W.C.P.*, 805 F.3d 1254 (10th Cir. 2015). Petitioners ("Blue Mountain") sought to distinguish the issue, suggesting that the ALJ's reference to the Preamble "undeniably changed the outcome," and that the only difference between an initial ALJ decision, for the petitioners, and the later opposite decision, was a reference to the Preamble. [273] Such reliance, Blue Mountain argued, was improper under the APA because the Preamble had not been subjected to notice and comment.[274]

The ALJ referenced the Preamble two times. First, the ALJ discredited a medical opinion for failure to address whether coal dust exposure and smoking could have been additive causes of the claimant's lung disease.[275] Second, the ALJ credited a physician's opinion that linked the claimant's symptoms "to the documented effects of coal mine exposure and cited to literature that has

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269 *Id.*

270 *Id.*

271 Arch on the Green, Inc. v. Groves, 761 F.3d 594, 601 (6th Cir. 2014) (quoting *Little David Coal Co. v. Dir., O.W.C.P.*, 532 Fed.Appx. 633, 636 (6th Cir 2012).

272 *Groves*, 761 F.3d at 601.

273 Blue Mountain Energy v. Dir., O.W.C.P., 805 F.3d 1254, 1260 (10th Cir. 2015).

274 *Blue Mountain*, 805 F.3d at 1260-61.

275 *Id.*

been approved by the Department in the Preamble."[276] Blue Mountain argued that the ALJ had "imbued the preamble with the force and effect of law, by declaring and/or relying on a consistency with the Preamble rule to determine which opinion will be afforded greater weight."[277] The court disagreed.

> We do not read the ALJ's ruling as invoking the preamble as his only guide. There is 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. Rather, the ALJ appears merely to have used the preamble's summary of medical and scientific literature as one of his tools in determining whether the experts' medical analyses of [the claimant'] condition were credible.[278]

The court approved of the ALJ's two limited invocations of the Preamble, finding that the ALJ was merely analyzing the evidence in the case and not "declaring or applying some broader legal principle."[279] The court also noted that the second ALJ decision had been more rigorous than the first and that the Preamble was not the only difference in the two decisions nor the only basis for the ALJ's second decision.[280]

The Tenth Circuit in *Blue Mountain* referred to, and adopted the position of the Third, Fourth, Sixth, Seventh, and Ninth Circuits in finding that an ALJ was entitled to consult the Preamble when determining a medical opinions probative value.[281] As for *Blue Mountain* in 2015, each of the U.S. Circuit Courts of Appeals to review a challenge under some iteration of the contra-APA theory concluded that the theory had no merit.[282]

Quarto Min. Co. v. Marcum, (6th Cir. 2015)

The Sixth Circuit's 2015 *per curium* decision in *Quarto Min. Co. v. Marcum*, 604 F. App'x 477 (6th Cir. 2015) again affirmed an ALJ's authority to credit or discredit the probative value of medical opinions based on those opinion's alignment or disagreement with the Preamble.[283] On appeal from an ALJ award of benefits to Mr. Clifford Marcum Sr., Quarto Mining Company ("Quarto") alleged that the ALJ improperly discounted medical opinions that attributed Marcum's disability and COPD to smoking and not to coal dust exposure.[284]

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276 *Id.*

277 *Id.* at 1261 (internal quotations omitted).

278 *Id.*

279 *Id.* (internal quotations omitted).

280 *Id.*

281 *Id.* at 1260.

282 To this author's knowledge, no species of the contra-APA theory has been raised to challenge an award of benefits under the Act in the First, Second, Fifth, Eighth, nor Eleventh Circuits.

283 *Marcum*, 604 F. App'x at 484.

284 *Id.* at 478-80.

Marcum had both worked in coal mines and smoked cigarettes for more than 20 years.[285] The ALJ determined that Marcum suffered from legal pneumoconiosis, which is a separate class of disease from that of purely medical or clinical CWP that exists to expand the number of miners who can qualify for benefits under the Act.[286] Accordingly, the issue was not whether Marcum had a particular medical condition, but whether he met a legal threshold, which the ALJ determined he did.

The medical opinion at the heart of the issue in *Quarto* was that of Dr. David M. Rosenburg.[287] Although, Dr. Rosenburg did not diagnose Marcum with legal nor clinical CWP, he wrote:

> While there is no question coal mine dust exposure can cause significant airflow obstruction which is disabling, just because a given miner has airflow obstruction does not automatically mean that legal CWP is present. . . . In order to ascertain whether a given miner's disease represents legal CWP versus obstruction caused by other factors, the specific characteristics of the miner's airways disease need to be assessed. [288]

Dr. Rosenburg summarized how a number of more modern epidemiological studies show that it is possible to discern whether COPD was caused by coal dust exposure versus cigarette smoking. [289] Additionally, Dr. Rosenburg opined that Marcum's symptoms were not characteristic of coal dust exposure and concluded that Marcum's disability and COPD was due to smoking only.[290] Specifically, Dr. Rosenburg based his conclusion on FEV1/FVC ratio results.[291,] The ALJ interpreted Rosenburg's opinion as an aversion that "a reduction in the FEV1/FVC ratio1 cannot be caused by coal dust exposure."[292]

The ALJ assigned little weight to Rosenburg's opinion because it was "inconsistent with the preamble to the Regulations, which recognizes that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."[293] The relevant portion of the Preamble reads as follows:

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285 *Id.* (In *Marcum*, the 15-year presumption applied and established Quarto's burden of disproving the applicable presumptions).

286 *Id.* at 480-82.

287 *Id.* at 482.

288 *Id.* at 480-82. (quoting Dr. Rosenburg's opinion).

289 *Id.* at 480.

290 *Id.*

291 *Id.* at 482.

292 *Id.*

293 *Id.* (internal quotations omitted).

> In addition to the risk of simple CWP . . ., epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present. . . An exposure-response relationship between respirable coal mine dust exposure and decrements in lung function has been observed in cross-sectional studies and confirmed in longitudinal studies.[294]

Because Rosenburg's opinion was at odds with the conclusions in the Preamble, the ALJ found his opinion to be less credible. The BRB affirmed the ALJ's reliance on the Preamble, and the Sixth Circuit ultimately denied Quarto's petition.[295] The court affirmed both the ALJ's authority to consider the Preamble in evaluating Rosenburg's opinion and the ALJ's authority to discredit that opinion for inconsistency with the DOL's position as reflected in the Preamble.[296]

Energy West Mining Co. v. The Estate of Morris E. Blackburn, (10th Cir. 2017)

At first blush, the case of *Energy West Mining Co. v. The Estate of Morris E. Blackburn*, 857 F.3d 817 (10th Cir. 2017), poses an additional question for the contra-APA debate. On appeal before the Tenth Circuit, Energy West Mining ("Energy West") argued that an ALJ had misunderstood the Preamble's position as to whether smoking and coal dust exposure *have* additive effects or *can have* additive effects.[297]

In an award to the estate of miner claimant Morris Blackburn – a longtime smoker – an ALJ discredited the medical opinion of Dr. Farney for failure to consider the possibility that smoking and exposure to coal dust do have an additive effect.[298] The ALJ gave Dr. Farney's opinion less weight, contrary to the Preamble's position, because he opined that coal dust *can* cause legal CWP independently from smoking, and therefore regarded Blackburn's risk of CWP to be low.[299] Energy West argued that the ALJ must have misunderstood the Preamble.[300]

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294 *Marcum*, 604 F. App'x at 482-83 (quoting 65 Fed.Reg. 79920, 79943 (Dec. 20, 2000)).

295 *Marcum*, 604 F. App'x at 482-84.

296 *Id.* at 484.

297 *Blackburn*, 857 F.3d at 827.

298 *Id.* at 820-27.

299 *Id.* at 827-28.

300 *Id.* at 827.

The Tenth Circuit disagreed and concluded that the Preamble favorably cites to studies that stand for the proposition that the two factors *are* additive.[301] For example, the court referred to passages from the Preamble:

> Lung function decline occurs at a similar rate in smokers and nonsmokers, although the loss of lung function overall is greater in smokers, the two effects *being* additive....
>
> ...
>
> The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk *is* additive with cigarette smoking.[302]

The Court ultimately rejected Energy West's challenge. Did this change from "can have" to "does have" affect the contra-APA debate? It does not. The issue is the authority of the Preamble and the privilege of an ALJ to look to it, not the nature of what the ALJ finds when it does. The non-binding nature of the Preamble did not change after *Blackburn*.

Consolidation Coal Co. v. Shipley, (4th Cir. Feb. 9, 2022)

In a recent case (preceding *Huscoal* and Thapar's concurrence by mere months), *Consolidation Coal Co. v. Shipley*, No. 19-1738, 2022 WL 402432 (4th Cir. Feb. 9, 2022), the Fourth Circuit reiterated the proposition that an ALJ's permissive reference to the Preamble for the purpose of evaluating the credibility of a medical opinion does not violate the APA.[303]

The issue and holding in *Shipley* tracked the now-familiar pattern. Consolidation Coal appealed from an ALJ award of benefits to Terry L. Shipley after the ALJ found that the testimony of Consolidation Coal's medical experts failed to rebut the statutory presumption that Shipley's respiratory impairment arose from his more than 15 years as a coal industry employee.[304] Additionally, Shipley had smoked cigarettes for more than 30 years.[305] The medical opinions advanced by Consolidation attributed Shipley's disabling lung disease to cigarette-smoking and asthma, and not to coal dust exposure.[306]

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301 *Id.* at 828.

302 *Blackburn*, 857 F.3d at 828 (*quoting* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920, 79939-41(Dec. 20, 2000)).

303 *Shipley*, No. 19-1738 at *3.

304 *Id.* at *1-2.

305 *Id.* at *1.

306 *Id.*

The ALJ determined that Consolidation's experts were less credible because their medical opinions were inconsistent with the Preamble's explanation that inhalation of coal dust and smoking cigarettes can reduce lung function, and that many medical tests cannot differentiate between the two etiologies.[307] Initially, an ALJ ruled against Shipley, only to be vacated by the BRB based on the Sixth Circuit's holding in *Central Ohio Coal*, and instructed the ALJ to consider Shipley's argument that Consolidation's experts were out of alignment with the Preamble.[308] Ultimately the ALJ discredited Consolidation's experts because they were "entirely at odds with the preamble and its cited medical literature."[309] The ALJ accordingly found that Consolidation had failed to rebut the presumption that Shipley's disease arose, at least in part, from his coal mine employment.[310]

On appeal, Consolidation failed to revive a modified iteration of the contra-APA theory. Consolidation argued that the BRB had erred in directing the ALJ to consult the Preamble.[311] Had the BRB required the ALJ to adhere to the Preamble, Consolidation argued, then it would have effectively transformed the Preamble into a binding rule by removing the ALJ's privilege to consult it or not.[312] The Fourth Circuit rejected Consolidation's argument, responding that the BRB had merely instructed the ALJ "to *consider* Shipley's argument about the preamble".[313]

The *Shipley* court added to the words of preceding courts characterizing the Preamble as proper nonbinding guidance, permissible under the APA:

> The Administrative Procedure Act allows agencies to adopt rules carrying the force of law. . . . But agencies can also publish nonbinding guidance. *See Perez v. Mortg. Bankers Ass'n.*, 575 U.S. 92, 96–97 (2015). The preamble to the 2000 black lung regulation amendments is nonbinding guidance. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801–02 (6th Cir. 2010). Nonetheless, we have said that "the preamble is entirely consistent with the [Black Lung Benefits] Act and its regulations and simply explains the scientific and medical basis for the regulations." *Harman*, 678 F.3d at 315, n.4.[314]

307 *Id.* at *2.

308 *Id.* at *2; *see also Cent. Ohio Coal Co.*, 762 F.3d 483.

309 *Shipley*, No. 19-1738, at *2.

310 *Shipley*, No. 19-1738 at *2.

311 *Id.*

312 *Id.* at *2-3.

313 *Id.* at *3 (internal quotations omitted).

314 *Id.*

The Fourth Circuit further explained that the BRB had not required the ALJ to consult the Preamble. The ALJ could have followed the Board's instructions and nonetheless declined to defer to the DOL's stance contained in the Preamble if the ALJ explained its reasoning.[315] Ultimately, the court reasoned, because the ALJ retained complete discretion to consult the Preamble or not, the BRB's instruction to the ALJ was not in error.[316]

Reaffirming the ALJ's authority to refer to the Preamble, the Fourth Circuit in *Shipley* explained that reference to the Preamble was simply a sub-part in an ALJ's determination of expert credibility:

> Consistency with the preamble is one aspect of an expert's credibility in black lung cases. It informs an ALJ's analysis of experts' medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusion.[317]

As the most modern case, aside from *Huscoal*, *Consolidation* concludes the historiography of the contra-APA theory. The following section explores caselaw outside of the BLBA context to give context to the administrative nature of the contra-APA debate.

VII. Administrative Authority of a Preamble

The Preamble at issue here is not the only preamble. Courts have considered the authoritative nature of preambles to other regulations in other contexts. A series of principles have emerged. A preamble cannot be expressly contrary to regulations or a statute, nor can one be construed in a way that is contrary to regulation or statute, but a preamble can serve as information about the statute or an agency's stance regarding a regulation. As the Fourth Circuit noted in *Harman*, while "the preamble does not control the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent."[318]

In *Wy. Outdoor Council*, the D.C. Circuit considered the authoritative nature of the preamble to the Forest Service's regulations and the degree to which the preamble reflected the agency's intent.[319] Commenting on the authority of the preamble, the court noted that "[w]hile language in the preamble of a regulation is not controlling over the language of the regulation itself, . . . we have often recognized that the preamble to a regulation is evidence of

315 *Id.*

316 *Id.* at *3.

317 *Shipley*, No. 19-1738 at *4 (internal quotations omitted).

318 *Harman*, 678 F.3d at 315–16 (*citing Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3d at 53).

319 *Wy. Outdoor Council.*, 165 F.3d at 46-53.

an agency's contemporaneous understanding of its proposed rule."[320] For the purpose of statutory construction, the court compared the utility of a preamble in interpreting a statute versus a regulation.

> The preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by the language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.[321]

The D.C. Circuit held that the utility of a preamble in discerning the meaning of a regulation is no different; a preamble offers a general understanding of a statute but is not an operative part of the rules.[322]

A preamble, no matter its relative authority, cannot be construed in a way that is contradictory to the regulation or statute it precedes. The Tenth Circuit in *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019), reviewed an ALJ's reliance on the preamble to Mine Safety and Health Administration ("MSHA") regulations.[323] The ALJ referred to a list of six examples of what MSHA considered to be "traditionally accepted construction methods" to judge whether the petitioner's method was also "traditionally accepted."[324] The agency Secretary insisted that only the examples listed in the preamble to the regulations could be "traditionally accepted."[325] Reversing the ALJ's order, the court declined to enforce the Secretary's interpretation because it was inconsistent with the plain language of the regulation. The court held that "[w]hile the preamble can inform the interpretation of the regulation, it is not binding and cannot be read to conflict with the language of the regulation itself."[326] The court declined to "engraft . . . limitations [of the preamble] onto the" regulation where those limitations "do not appear in the language of the regulation."[327]

320 *Id.* at 53.

321 *Id.* (quoting Association of Am. Railroads v. Costle, 562 F.2d 1310, 1316 (D.C.Cir.1977).

322 *Wy. Outdoor Council,* 165 F.3d at 53.

323 Peabody Twentymile Mining, LLC v. Sec'y of Lab., 931 F.3d 992, 994 (10th Cir. 2019)

324 *Id.*

325 *Id.* at 997-98.

326 *Id.* at 998.

327 *Id.*

Likewise, in *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 569 (D.C. Cir. 2002), the D.C. Circuit held that the regulatory definition of "new source" could not be augmented by language in the preamble to the applicable regulations.

> To the extent the preamble suggests a change in EPA's "new source" determinations, that suggestion is rejected. The preamble to a rule is not more binding than a preamble to a statute. 'A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'[328]

The court found that if the controlling language in a proper source of law is unambiguous "the meaning . . . cannot be controlled by language in the preamble."[329]

Courts reviewing the contra-APA theory have not overlooked these principles. In *A&E* and in *Harman*, the Sixth and Fourth Circuits responded to petitioner's arguments that an ALJ's reliance on the Preamble to the DOL's 2000 Regulation was inconsistent with the regulations they precede. In both cases, petitioners attempted to justify the proposition with *Home Concrete & Supply LLC v. United States*, F.3d 249 (4th Cir. 2011).[330] In *Home Concrete*, the Internal Revenue Service's position, reflected in the preamble to a tax regulation was improper because it amounted to an "attempt to re-draft" the Internal Revenue Code.[331] In both *A&E* and *Harman*, petitioner's averred that *Home Concrete* ought to invalidate an ALJ's reliance on the Preamble. The *Harman* court responded:

> Harman points to our opinion in *Home Concrete* . . ., as supporting its position. That case provides a clear example of a regulatory preamble on which any reliance would be problematic. For there we concluded that the preamble *contradicted* the plain statutory language. . . . For this reason, we properly refused to defer to the IRS's interpretation of the statute contained in the preamble. By contrast, here, the preamble is entirely consistent with the Act and its regulations and simply explains the scientific and medical basis for the regulations.[332]

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328 Nat'l Wildlife Fed'n v. E.P.A.,, 286 F.3d 554, 569 (D.C. Cir. 2002), *supplemented sub nom. In re* J. Kagan, 351 F.3d 1157 (D.C. Cir. 2003) (quoting *Costle,* 562 F.2d at 1316).

329 *Id.*

330 *See Adams*, 694 F.3d at 802.

331 *Home Concrete & Supply LLC v. United States*, 634 F.3d at 256–57 *aff'd*, 566 U.S. 478, 132 (2012).

332 *Harman*, 678 F.3d at 315 n. 4.

The Sixth Circuit in *A&E* quoted the preceding passage directly and rejected petitioner's identical argument.[333]

While preambles can be, as discussed, evidence of an agency's intent, the Preamble's reflection of the DOL's intent appears relevant only to the degree that the Preamble supports the rules and basis for the rules that the regulations provide. The agency's intent in crafting the regulations is likely irrelevant to the contra-APA debate. In 2014, the Sixth Circuit reviewed a challenge to an ALJ's decision based on what petitioners called "relying on regulatory intent," *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 601 (6th Cir. 2014).[334]

> Arch also faults the ALJ for relying on "regulatory intent." It is not entirely clear what the ALJ meant by this phrase. Arch seems to imply that by regulatory intent, the ALJ was invoking a "miners win" rule, *i.e.,* a presumption in favor of granting benefits. Because no such rule exists, invoking such a presumption would clearly be error. But there is nothing to indicate that the ALJ was invoking such a presumption. In context, it seems far more likely that the ALJ was using regulatory intent to refer to the language that the decision quoted from the preamble, which was not in error.[335]

Clearly, the courts have concluded that an ALJ may consult the Preamble to determine the value of a medical opinion. A court would not find otherwise unless the Preamble were invoked in a way that contradicted the regulations they precede. In this sense, Judge Thapar was correct. If an ALJ applied the Preamble in a way that truly shifted the burden of proof from a miner to the responsible operator, that application would indeed be contrary to the regulations. The remaining question is whether an ALJ, legally, has relied (or could rely) on the Preamble in a way that was outside these limits.

VIII. When the Preamble Most Appears to be a Rule: The Rule Out Standard

On the most extreme end, there is one scenario where application of the regulations – in tandem with an ALJ's reference to the Preamble – most clearly creates the appearance that the medical information in the Preamble can operate as a rule: the "rule out" standard. Claimants have argued that reference to the Preamble in the context of the rule out standard and the 15-year presumption creates an impossible burden. For all the reasons stated, none transform the preamble into anything more than guidance.

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333 *See Adams*, 694 F.3d at 802.

334 *Groves*, 761 F.3d at 601.

335 *Id.*

In *West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015), the Fourth Circuit approved the rule out standard. Recall the 15-year presumption, under which the burden shifts from the miner to the RO to show that a miner does not suffer from CWP, or disprove any causal relationship between disease and disability, if the miner can show that he or she has at least 15 years of qualifying coal mine employment.[336] 30 U.S.C. § 921, amended by the ACA in 2010, supplied the 15-year presumption, but not the standard which an RO must satisfy to overcome the presumption.[337] The DOL regulation 20 C.F.R. § 718.305(d)(1) filled in the gap and provided that, under the 15-year presumption standard, an RO may rebut the presumption that the miner does not, or did not, have either legal or clinical CWP by "[e]stablishing that no part of a miner's respiratory or pulmonary total disability was caused by pneumoconiosis."[338]

The court addressed the propriety of the DOL's rule and the application of its standard. The court upheld the DOL's authority to craft Section 718.305(d)(1) to fill the silence under the *Chevron* doctrine.[339] Further, the court approved of applying the rule out standard to 15-year presumption cases. Because "an operator must establish that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis,'"[340] and an RO must meet the "rule out" standard under which "an operator opposing an award of black lung benefits affirmatively must establish that the miner's disability is attributable exclusively to a cause or causes other than pneumoconiosis."[341] The court concluded:

> Thus, to make the required showing when a miner has qualified for the statutory presumption, a medical expert testifying in opposition to an award of benefits must consider pneumoconiosis together with all other possible causes, and adequately explain *why* pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability.[342]

The court ultimately located the "no part" or "rule out" standard and the 15-year presumption within Congress' mission with the BLBA. The court found that the standard "unquestionably advances Congress' purpose in enacting the statutory presumption," which Congress "instituted to make it

336 *Blackburn*, 857 F.3d at 822; *see also* 30 U.S.C. § 921(c)(4) and 20 C.F.R. § 718.305(b)-(c).

337 W. Virginia CWP Fund v. Bender, 782 F.3d 129, 138 (4th Cir. 2015) ("We conclude that Section 921(c)(4) is silent regarding the standard that an operator must meet to rebut the presumption.").

338 20 C.F.R. § 718.305(d)(1)*; see also* W. Virginia CWP Fund v. Bender, 782 F.3d 129, 137 (4th Cir. 2015).

339 *Bender*, 782 F.3d at 138 (4th Cir. 2015).

340 *Id.* at 132 (quoting 20 C.F.R. § 718.305(d)).

341 *Id.* at 144; *see also* Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123-24 (4th Cir. 1984) (to rebut the presumption, an operator must "rule out the causal relationship between the miner's total disability and his coal mine employment").

342 *Bender*, 782 F.3d at 144.

easier for those miners most likely to be disabled due to coal dust exposure to obtain benefits, in response to the high rate of claim denials that miners experienced without the statutory presumption."[343]

Following *Bender*, in *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663 (4th Cir. 2017), the Fourth Circuit affirmed an ALJ's application of the rule out standard, approving an ALJ's decision to discredit a medical opinion that failed to rule out any causal connection between the coal miner's disability and CWP.[344] In *Stallard*, the claimant Herskel Stallard had both smoked and worked in mines, and qualified for the 15-year presumption.[345] The ALJ discounted medical opinions that averred to distinguish between CWP caused by dust-exposure and CWP caused by smoking based on FEV_1/FVC ratios, and which opinioned that Stallard would have been equally disabled if he had ever worked for coal mine companies.[346] The RO objected on both the ALJ's reliance on the Preamble to discount those opinions and to the ALJ's application of the rule out standard.[347] The RO argued that the rule out standard, applied in tandem with the Preamble, created an "impossible" standard.

> Specifically, Westmoreland argues that the ALJ held Drs. Rosenberg and Zaldivar to an impossible standard in assessing whether their opinions categorically ruled out black lung disease as a cause of Stallard's breathing impairment. In Westmoreland's view, the ALJ relied on the Preamble's discussion of the additive effects of various risk factors to conclude that exposure to coal dust necessarily has *some* effect on a miner's lung functioning. So construed, Westmoreland posits, the Preamble would make it impossible to definitively rule out black lung disease as a substantially contributing factor to a miner-smoker's disabling lung disease.[348]

The court did not pretend that the RO's burden under such circumstances was substantial. "Consistent with Congress's purpose, the 'rule out' standard imposes a 'strict' and 'significant burden on operators seeking to rebut the statutory presumption."[349]

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343 *Bender*, 782 F.3d at 141.

344 Westmoreland Coal Co. v. Stallard, 876 F.3d 663, 672–73 (4th Cir. 2017), *as amended* (Dec. 21, 2017).

345 *Id.* at 673.

346 *Id.* at 666-73.

347 *Id.*

348 *Id.*

349 *Id.* (quoting *Bender*, 782 F.3d at 144).

The Fourth Circuit nonetheless explained that this argument contradicts both the regulations and prior decisions upholding the ALJ's reliance on the Preamble.[350] The court noted that an "'ALJ is not bound to accept the opinion or theory of any medical expert,' but instead 'evaluate the evidence, weigh it, and draw his own conclusions.'"[351] The court upheld the ALJ's determination that the opinions were due less weight because they did not "rule out" the contribution of dust exposure to Stallard's disease. Rather, "The [ALJ's] decision . . . carefully laid out the components of each doctor's diagnosis and underlying rationales[, . . .] then meaningfully engaged with the medical science, relevant caselaw, and applicable regulations."[352]

Also, recall the substantial evidence standard of review through which an appellate court considers the factual findings of an ALJ. The court wrote:

> Although many of Westmoreland's objections impliedly ask this Court to reweigh the medical opinions presented to the ALJ, we decline to do so. . . . Because the ALJ is the trier of fact, we defer to the ALJ's evaluation of the proper weight to accord conflicting medical opinions. . . . Accordingly, . . . Westmoreland undeniably faces a substantial burden in challenging the underlying conclusion that Stallard is entitled to benefits.[353]

Without misapprehending the uphill battle that any RO faces when confronted with the 15-year presumption, the rule out standard, and an ALJ's privilege to refer to the Preamble, the Court still found that the ALJ nonetheless has the authority to refer to the Preamble and that the ultimate decision to credit a medical opinion lies with the ALJ.[354] It is the "ALJ's general prerogative to discount medical opinions at odds with the conclusions adopted by the agency itself."[355]

Even in cases like that described in *Stallard*, where the RO has the lowest chance of prevailing, the strictures of the RO's position come from the statute and the regulations that flow from the statute. The Preamble is no more or less binding in such cases than it is in a standard claim. Thus, despite the appearance of automatic award for claimants that qualify for the 15-year presumption, and also smoked, the Preamble does not operate as a rule so long as the ALJ explains his or her decision.

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350 *Stallard*, 876 F.3d at 673.

351 *Stallard*, 876 F.3d at 673 (quoting *Bender*, 782 F.3d at 144).

352 *Id.* at 674.

353 *Id.* at 673 (internal quotations and citations omitted).

354 *Id.* at 671-74.

355 *Id.* at 672.

Conclusion

While Judge Thapar is not wrong, that the Preamble may not contradict the regulations or the Act, his fear that the Preamble operates as a kind of illegal medical cannon with the force of law is unfounded. It is not that the Preamble is not a legally authoritative medical canon, but that this particular medical canon was created at Congress' behest, by the agency Congress believe best suited to do so. The preamble is not a law, but it has legal authority.

Nor is Judge Thapar's fear that the public is deprived of its input founded. The regulations, which reflect the Preamble's literature, did go through notice and comment. Some disagreed with the DOL's conclusion, but the DOL followed the law, the regulations are valid, and the Preamble is nothing more than information about the regulations. Where else should an ALJ look to ascertain the meaning of the regulations?

From the perspective of those who fear that the Preamble operates as a rule, it is fair to ask why the medical "facts" in the Preamble carry more weight than the medical "facts" posited by medical professionals whose opinions are advanced in opposition to a claim. As, this author has attempted to make clear, because Congress entrusted the DOL with the responsibility and authority to determine which medical science best reflects the nature of coal workers pneumoconiosis, the medical literature the DOL arrived at reflects that authority. The limited authority of the Preamble – limited in that it does nothing more than reflect which science the DOL believes is the best science –is tracible to the Congress itself.

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