No. 12-2387 (L)

In The

United States Court of Appeals
For The Fourth Circuit

MARY L. FOX, on behalf of Gary N. Fox, deceased,
Petitioner,

v.

ELK RUN COAL COMPANY,
Respondent,

and

DIRECTOR, OWCP, U.S. DEPARTMENT OF LABOR,
Party in Interest

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD, U. S. DEPT. OF LABOR

OPENING BRIEF OF PETITIONER MARY L. FOX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 12-2387 (L)   Caption: Mary L. Fox v. Elk Run Coal Co. and DOWCP

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mary L. Fox, who is the appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publically held corporation or other publically held entity?
   ___ YES _X_ NO

2. Does party/amicus have any parent corporations?
   ___ YES _X_ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publically held corporation or other publicly held entity?
   ___ YES _X_ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ___ YES _X_ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
   ___ YES _X_ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
   ___ YES _X_ NO
   If yes, identify any trustee and the members of any creditors' committee:

/s/ John Cline   January 25, 2013
(signature)   (date)
Counsel for Mary L. Fox

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JURISDICTIONAL STATEMENT

This appeal arises from a Decision and Order issued by the Benefits Review Board ("BRB" or "Board"), United States Department of Labor ("DOL") under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, most commonly known as the Black Lung Benefits Act ("BLBA"). 30 U.S.C. §§ 901-44. This Court has authority to review decisions by the BRB pursuant to 33 U.S.C. § 921(c), as incorporated by §422(a) of the BLBA, 30 U.S.C. § 932(a).

The BRB issued a Decision and Order on September 18, 2012, affirming in part and vacating in part, a Decision and Order Awarding Benefits issued by the administrative law judge ("ALJ"). Joint Appendix ("JA") 413. Mary Fox, on behalf of her deceased husband, Gary Fox, filed a Petition for Review with the Fourth Circuit Court of Appeals on November 14, 2012. JA 449. Elk Run Coal Company ("Elk Run") cross-appealed on November 15, 2012. JA 453. Gary Fox last worked as a coal miner in West Virginia. JA 250. Thus, jurisdiction is properly before this Court.

I. STATEMENT OF THE ISSUES

Whether the BRB Decision erred in applying the test for "fraud on the court" to the factual findings of the ALJ where, in a black lung claim, the ALJ vacated a 2001 decision denying benefits to the claimant based on the ALJ's conclusion that counsel for the coal mine employer had engaged in fraud on the court?

- **i. Whether the BRB Decision erred in reversing the ALJ's determination that Elk Run's misconduct rises to the level of "fraud on the court" where that conclusion is well-reasoned and supported by the facts in evidence?**

- **ii. Whether the BRB Decision erred in failing to consider the serious public injury represented by a scheme by the employer's attorneys to undermine the integrity of the black lung system and instead concluding that the conduct of the employer's attorneys involved a dispute between two private parties and did not involve a public harm?**

- **iii. Whether the BRB Decision erred in failing to consider the role of Elk Run's attorneys in assessing whether the fraud at issue rose to the level of fraud on the court.**

- **iv. Whether the BRB Decision erred in failing to defer to the ALJ's factual findings which were supported by substantial evidence.**

II. STATEMENT OF THE CASE

This is an appeal of the BRB's reversal, in a 2-1 decision, of a decision by the ALJ reopening a 2001 hearing decision denying black lung benefits to Gary Fox. Mr. Fox, a coal miner, appeared *pro se* in the 2000 hearing. After losing his black lung claim, Mr. Fox continued to work until July 2006. By the time he left

work, Mr. Fox's black lung disease progressed to the point where he had to be evaluated for a lung transplant.

In 2006, Mr. Fox reapplied for black lung benefits. This time he was able to obtain counsel. As discussed below, Elk Run initially contested Mr. Fox's claim, but eventually withdrew its protest. During the course of the case, with the aid of discovery orders issued by the ALJ, Mr. Fox demonstrated that, in the earlier case, Elk Run[1] and/or its counsel knew and understood that Mr. Fox had Complicated Coal Workers Pneumoconiosis ("Complicated CWP"), but nonetheless prevailed in the claim by a litigation strategy that, in the opinion of the ALJ, constituted "fraud on the court." February 9, 2009 Decision and Order Awarding Benefits, Reopening Prior Claim, and Setting Entitlement Date (02/09/09 Decision and Order), JA357 *et. seq.* Based on the finding that Elk's Run's conduct in opposing the earlier application for benefits constituted "fraud on the court," the ALJ vacated the earlier decision and awarded retroactive benefits in a decision dated February 9, 2009. *Id*. Elk Run appealed the decision, and the BRB vacated the decision and remanded the case to the ALJ instructing him to have the parties submit evidence, make the necessary evidentiary rulings and reconsider whether Elk Run's conduct constituted "fraud on the Court." JA 389-390.

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[1] Throughout this brief, Mrs. Fox refers to Elk Run since Elk Run is the proper party. However, Mrs. Fox notes that the conduct at issue is really that of Elk Run's agents, the attorneys who represented it in her husband's claims.

The ALJ complied with the BRB's remand order, developed the record, and issued a new decision again vacating the 2001 denial of benefits based on his finding of "fraud on the court." On appeal, the BRB, in a 2-1 decision, held that the conduct at issue did not constitute "fraud on the court." Mary Fox appeals that decision.[2]

III. STATEMENT OF THE FACTS

Gary Fox worked as a coal miner for 32 years between 1974 and 2006, mostly underground as a roof bolter until his later years when he worked as a "scoop outside utility" man. *See* JA 250, 252, 256-58.[3] In July of 2006, at the age of 56, Mr. Fox ceased work entirely. JA 250. As Dr. Boustani explained, Mr. Fox "had to take an early retirement because he could not breathe." JA 261. He died as a result of his occupational pneumoconiosis, age 58, in April of 2009, while awaiting a lung transplant. JA 378, 614.

[2] The BRB also addressed Elk Run's appeal of the ALJ's denial of its recusal motion and upheld the ALJ. It also refused to reconsider Elk Run's contention that the ALJ erred in compelling employer to produce reports from its non-testifying, consulting experts because Elk Run "has not demonstrated any exception to the law of the case doctrine." JA 439.

[3] The District Director calculated only 22.37 years of coal mine employment but omitted the time with Elk Run Coal Company in 1980 and from 1998 to 2006. *Compare* DOL's employment calculation page (JA 259) with the claimant's Social Security record (JA 256-58).

Mr. Fox's Pulmonary Disease

In January of 1997, the West Virginia Occupational Pneumoconiosis ("WVOP") Board found that Mr. Fox, then a 46 year old working coal miner, had x-ray changes "consistent with progressive massive fibrosis with a large opacity in the right upper lobe" and a "15% pulmonary impairment attributable to this disease." JA 577. To rule out the possibility that the opacity was a tumor, Dr. Scott Kilmer performed a needle biopsy in September 1998. JA 39. A local pathologist, Dr. Gerald Koh, who found no evidence of a tumor, diagnosed the mass as an "inflammatory pseudotumor." JA 40-41. Three weeks later, Dr. Kilmer performed an "exploratory right thoracotomy with a right upper lobectomy" (JA 34), and again, Dr. Koh concluded that the mass lesion was an "inflammatory pseudotumor, 5.0 cm in greatest dimension." JA 37. In his microscopic description, Dr. Koh noted "anthracotic deposits" and "aggregates of anthracotic pigment containing macrophages." *Id.* There is no evidence that Elk Run's counsel ever reached out to Dr. Koh, whose report was most likely focused on ruling out cancer, to determine whether he actually intended to rule out pneumoconiosis.

Mr. Fox's Initial Claim

On May 4, 1999, while still working as a coal miner, Mr. Fox filed a claim for federal black lung benefits.[4] JA 1. He was evaluated by Dr. Donald Rasmussen who found "evidence of possible complicated pneumoconiosis, Category B," with only minimal loss of pulmonary function at that time. JA 21.[5] On January 14, 2000, the District Director determined that Mr. Fox was eligible for benefits under the Act (presumably based on the findings of complicated pneumoconiosis). JA 44. On January 24, 2000, the employer requested a hearing. JA 45.

Elk Run sent Mr. Fox to its chosen medical expert, Dr. James Castle for an evaluation. JA 49. The examination occurred on January 19, 2000, but, for reasons not disclosed by the record, Dr. Castle's report was not written until May 9, 2000 (*id.*) and was not submitted by Elk Run until May 15, 2000 (JA 48). Between the date of Dr. Castle's examination of Mr. Fox and the date of his report, Elk Run obtained opinions from at least two and probably three expert pathologists

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[4] Mr. Fox explained in a DOL questionnaire, that he continued to work, "[b]ecause I have a family to support and I'm trying to get a daughter through college." JA 7.

[5] The DOL x-ray was interpreted by Dr. Manu Patel as consistent with both simple and complicated pneumoconiosis, Category B; by Dr. Mohammed Ranavaya as consistent with simple pneumoconiosis with a right hilar mass; and by Dr. Dominic Gaziano as consistent with both simple and complicated pneumoconiosis, Category A. JA at 25-30.

with extensive expertise in the field of occupational pneumoconiosis, who reviewed the pathology slides, x-ray readings and Mr. Fox's work record.[6]

In a report dated April 20, 2000, Dr. Naeye, a co-author of the Pathology Standards for Coal Workers' Pneumoconiosis (JA 493, No. 155), stated:

> The 4x5 cm lesion from [Mr. Fox's] right lung has enough very tiny birefringent crystals and zones of irregular hyalinized collage in it to suggest *at least a partial silicotic origin* . . . This man's *many years of working at the coal face and as a roof bolter increase the risk of such a lesion*. [7]

JA 465 (emphasis added). Likewise, in a report dated May 4, 2000, Dr. Caffrey, said in pertinent part:

> It is my opinion, from a review of these documents [x-ray readings and DOL claim forms], the Surgical Pathology Report and the surgical pathology slides, that the mass in the right upper lung is definitely not a carcinoma, as was originally suspected before surgery. The surgical pathologist, Gerald S. Koh, has made a diagnosis of benign mesenchymal lesion and certainly this is a benign lesion. He notes that it is an inflammatory pseudotumor and lists

[6] After receiving the pathology reports from Drs. Naeye and Caffrey, Elk Run sent the slides to Dr. Grover Hutchens at Johns Hopkins. Eight years later, in 2008, after counsel for Mr. Fox repeatedly requested those slides, Elk Run determined that the pathology slides were still in Dr. Hutchens' office at Johns Hopkins. Elk Run said it had no record of a report from Dr. Hutchens. *See* JA 384. It is reasonable to infer, however, that if Dr. Hutchens had disagreed with Drs. Naeye and Caffrey's findings, the employer's counsel would have requested a report.

[7] Although the term "Complicated CWP" or "complicated pneumoconiosis" does not appear in the report, the description of a "4x5 cm lesion" and the references to a "partial silicotic origin" and the observation that Mr. Fox's "many years at the coal mine face and as a roof bolter increase the risk of such a lesion" leave no doubt that Dr. Naeye is describing what he considers to be complicated pneumoconiosis. To date, Elk Run has never suggested otherwise.

> numerous synonyms. It is possible that this could be a fibrous histiocytoma, but *in view of the histology of this lesion, the patient's history, and the x-ray findings, I believe that this lesion most likely represents complicated pneumoconiosis*.

JA 468 (emphasis added). Dr. Caffrey also noted in his review of the x-ray reports that there was radiographic evidence of additional "densities likely representing Category B large opacities of complicated pneumoconiosis" on an x-ray *taken after the lobectomy*.[8] *Id*. Neither Dr. Naeye nor Dr. Caffrey agreed with Dr. Koh's diagnosis of a pseudotumor, and, as shown above, both prepared reports which diagnosed and/or described complicated pneumoconiosis.

Drs. Naeye and Caffrey both have greater expertise than Dr. Koh in diagnosing black lung from biopsies of lung tissue. Dr. Naeye has authored or co-authored thirteen published, peer-reviewed articles on coal workers pneumoconiosis, including the Pathology Standards of Coal Workers' Pneumoconiosis. *See* JA 489-93 (Nos. 79, 86-89, 93, 95-96, 103-04, 118, and 155). Dr. Caffrey has been a "Consultant [for] Legal Firms Relating to Occupational Pneumoconiosis" since 1979. JA 502. In contrast, Dr. Koh

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[8] Since the x-ray was taken after the lobectomy, the lobectomy clearly did not remove Mr. Fox's disease.

specialized in immunopathology and pediatric pathology, and his curriculum vitae reveal no specialized experience with pneumoconiosis.[9] *See* JA 512-17.

Notably, for years prior to Mr. Fox's 2000 hearing, Elk Run's law firm, including Douglas Smoot, one of the attorneys involved in Mr. Fox's first claim, relied on Drs. Caffrey and Naeye and promoted their credentials when their opinions opposed the claims of coal miners. *See, e.g., Consolidation Coal Co. v. Latusek,* 1999 U.S. App. LEXIS 18351, *4 (4th Cir. 1999) (relying on Naeye); *Sewell Coal Co. v. Bragg,* 1997 U.S. App. LEXIS 17397, *2-3 (4th Cir. 1997) (relying on both pathologists); *Kirk v. Director, Office of Worker's Compensation Programs,* 1996 U.S. App. LEXIS 11855, *13-14 (4th Cir. 1996) (attorney Smoot and others relying on opinions of both Caffrey and Naeye); *Consolidation Coal Co. v. Freme,* 1995 U.S. App. LEXIS 3100, *5-6 (4th Cir. 1995) (arguing that Dr. Naeye was a member of the Committee that established the Pathology Standards for Coal Workers' Pneumoconiosis and published numerous papers on "the effects of coal dust"); *Dickson v. Director, Office of Workers' Compensation Programs,* 1994 U.S. App. LEXIS 2172, *4-5 (4th Cir. 1994) (attorney Smoot relying on both pathologists for opinions adverse to claimant).

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[9] There also is no evidence in the record that Elk Run ever asked Dr. Koh whether his report should be interpreted as ruling out complicated pneumoconiosis.

Given the reports from Dr. Naeye and Dr. Caffrey, Elk Run and its attorneys knew that experts upon whom they relied in their defense of black lung cases had provided reports that entitled Mr. Fox to black lung benefits under the Act and DOL regulations.[10] Elk Run, however, ignored the opinions of Drs. Naeye and Caffrey (and probably Dr. Hutchens), withheld their highly probative reports, and developed an alternative strategy to contest the claim knowing that their employee had a progressive lung disease.[11] Despite knowing, from their own experts, that Mr. Fox suffered from a progressive occupational lung disease, Elk Run contested Mr. Fox's claim, as explained below, by developing other "medical opinions" that they knew would present a misleading impression of Mr. Fox's medical condition.

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[10] Elk Run was represented by attorneys who specialize in the defense of federal black lung claims and would have known that the opinions of Drs. Naeye and Caffrey supported a finding of complicated pneumoconiosis that entitled Mr. Fox to the irrebuttable presumption of total disability due to pneumoconiosis *See* 30 U.S.C. § 921(c)(3) ("If a miner is suffering or suffered from a chronic dust disease of the lung which…(B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung…then there shall be an irrebuttable presumption that he is totally disabled by pneumoconiosis").

[11] "Complicated pneumoconiosis, generally far more serious, involves *progressive* massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment and marked respiratory disability." *Usery v. Secretary, U.S. Dep.t of Labor*, 428 U.S. 1, 7, 96 S. Ct. 2882, 2888-2889 (1976) (emphasis added) .

Knowing from its history of litigating black lung claims that x-ray readings are less probative than pathology evidence,[12] Elk Run nevertheless obtained more negative x-ray readings from Drs. Gregory Fino, Paul Wheeler, Young Kim, and William Scott.[13] Elk Run then provided those negative x-ray readings and Dr. Koh's discredited pathology report to its four reviewing pulmonologists, Drs. Castle, Dahhan, Fino, and Hippensteel, who in turn opined that Mr. Fox did not have complicated pneumoconiosis based upon the evidence Elk Run gave them, and without knowledge of the most reliable pathology reports, which opined that Mr. Fox did have complicated CWP. *See* JA 48-62, 74-99, 108-16, 159-88.

Based solely on the discredited pathology report of Dr. Koh and less probative x-ray reports, without the benefit of the expert pathology opinions of Drs. Naeye and Caffrey, Dr. Castle concluded that "[t]here is adequate pathologic evidence to render a diagnosis of complicated coal workers' pneumoconiosis *erroneous and untenable*." JA 58-59 (emphasis added).

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[12] It has long been recognized that pathology "is the most reliable evidence of the existence of pneumoconiosis." *See Terlip v. Director, OWCP*, 8 BLR 1-363, 364 (1985) (citations omitted). Pathology findings are more reliable because they "allow for more complete examination of the lungs." *Gray v. SLC Coal Co.,* 176 F 3d 382 (6th Cir 1999).

[13] The x-rays submitted by Elk Run are found at JA 63-68, 71-73, 77-79, and 100-07.

Likewise, Dr. Dahhan concluded that there was *no pathology* evidence of complicated pneumoconiosis based solely on Dr. Koh's report. JA 84. Dr. Fino noted that the resected lung pathology "did not show changes consistent with coal workers' pneumoconiosis," and therefore, he concluded that there was insufficient evidence to justify a diagnosis of pneumoconiosis. JA 99. In similar fashion, Dr. Hippensteel concluded that there was "*no finding pathologically of coal workers' pneumoconiosis*" and, therefore, x-ray findings consistent with CWP "have actually pathologically been found to be secondary to a benign pseudotumor formation." JA 116.

On September 7, 2000, the employer took the deposition of Dr. Wheeler (one of its expert radiologists) who concluded after reviewing four x-ray films and Dr. Koh's pathology report that the lesions did not arise out of the miner's exposure to coal mine dust. *See* JA 155. Dr. Wheeler knew pathology evidence is superior to radiographic evidence as demonstrated by his deposition testimony in this claim:

> Q Why does it help to study pathology if you want to become Board-certified in . . . radiology?
>
> A *Pathology is the final diagnosis* of many disease conditions and the radiologist basically has to deal with indirect evidence in the form of X-rays, whereas the pathologist has the organs directly.

JA 123 (emphasis added). Later in the deposition, Elk Run's attorney used Dr. Koh's discredited pathology report to lead Dr. Wheeler to a conclusion that benefited Elk Run's position but was inconsistent with the facts known to Elk Run's counsel:

> Q *Does knowledge of the pathology results also call into doubt any classification of this as a complicated pneumoconiosis or massive lesions consistent with exposure to coal mine dust?*
>
> A Yes . . . So it's neither on, in my opinion, on the X-ray due to the fact there were no background nodules, *nor on the pathology slides*.

JA 156-57 (emphasis added).

Additional evidence submitted by Elk Run included multiple negative x-ray readings by Dr. Wiot and Dr. Myer, but in each case the radiologists qualified their interpretations by deferring to pathology. JA 616-24, 640-43. For example, Dr. Wiot said that "the pathology [from previous surgery] would give an answer as to whether there is any evidence of coal worker's pneumoconiosis" (JA 641), and Dr. Meyer said, "[g]iven the sequellae of prior lung resection, correlate with pathology specimen" (JA 619). In fact, Dr. Wiot testified that "the answer is obviously . . . in the resection of . . . the right upper lung field . . . pathology is the gold standard . . . we depend upon the pathologist to tell us what it is." JA 658.

Dr. Naeye and Dr. Caffrey would have cast an entirely different light on this case, and the questioning of Dr. Castle by Elk Run's attorney reveals a clear

understanding of how they would have impacted the "medical" opinions of their reviewing pulmonologists:

> Q Do you think that Dr. Rasmussen would have been aided by having *all of the biopsy medical evidence* at his hand when he reviewed this case?
>
> A I think that he would have, and I would certainly hope so, because *all of the evidence*, as I've outlined, clearly indicates that this is not complicated disease. I believe that Dr. Rasmussen would have reviewed that data and come to the same conclusions that this is not complicated pneumoconiosis.

JA 185 (emphasis added). Only Elk Run's attorney knew that Dr. Castle did not have a complete or accurate record.

At the hearing held before ALJ Miller on September 19, 2000, Mr. Fox appeared *pro se* and submitted no exhibits. Mr. Fox testified that he was unable to find an attorney to represent him and that he had no experience with the hearing process. JA 195-96. Mr. Fox, who was still working in the mines, had been re-assigned to a job that was "not as hard" but where he was still exposed to the same amount of coal dust. JA 206.

Elk Run appeared by counsel, and submitted fourteen exhibits. JA 224. When Mr. Fox mentioned the possibility of submitting the interpretation of a CT scan, Elk Run's attorney demonstrated her knowledge that pathology trumps radiographs in black lung claims, "Your Honor, I would point out that in many cases the availability of a CT Scan is very probative, *but in this particular case*

there is pathology available, so a CT scan will be less probative than pathology."

JA 227 (emphasis added).

On January 5, 2001, ALJ Miller issued a Decision and Order – Denying Benefits which relied heavily on the pathology opinion of Dr. Koh:

> Based on the fine needle aspiration biopsy of September 2, 1998, and surgical biopsy of September 28, 1998, pathologist S. Gerard Koh concluded that the former procedure revealed an inflammatory pseudotumor with no evidence of malignancy or coal workers' pneumoconiosis, and that the latter procedure confirmed the prior diagnosis . . . In addition, *the pathology reports convinced Drs. Castle, Dahhan, Fino, Hippensteel, and Wheeler that the existence of the pseudotumor effectively ruled out the existence of pneumoconiosis*. Because anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis, and because of the unanimous opinions of the reviewing physicians, who are either board-certified pulmonary specialists or radiologists, *this tribunal finds that the pathology evidence does not establish the existence of pneumoconiosis* under § 718.202(a)(2).

JA 241 (emphasis added). The ALJ also discredited the finding of complicated pneumoconiosis by Dr. Rasmussen because Dr. Rasmussen had not reviewed Dr. Koh's pathology reports. JA 242. Instead, as Elk Run intended, the ALJ credited the opinions of Drs. Fino and Hippensteel that Mr. Fox did not have pneumoconiosis at all because they were "supported by the *most probative evidence of record, i.e.* the [Koh pathology] reports, and the preponderance of [negative] x-ray readings." *Id.* (emphasis added).

After the ALJ's decision denying benefits, Mr. Fox continued to work in the mines until July 31, 2006. JA 250. He did so, as stated in his response to a DOL questionnaire, "because I have a family to support and I'm trying to get a daughter through college." JA 7. Mr. Fox was not granted total disability under the state workers' compensation system by the WVOP Board until December 12, 2006. JA 575. Elk Run's workers' compensation insurance carrier did not issue the permanent total disability award until August 5, 2008. JA 612.

Mr. Fox's Subsequent Claim

On November 8, 2006, Mr. Fox filed a second or subsequent claim for federal black lung benefits. JA 246. Dr. Rasmussen again performed the DOL exam, and this time, he determined that Mr. Fox not only had x-ray changes consistent with complicated pneumoconiosis, Category B, but by then, his pulmonary impairment had progressed from mild to "marked loss of lung function." JA 275.

This time, Mr. Fox was able to obtain representation, and on May 15, 2007, his attorney submitted the following evidence in support of his claim: (1) progress notes from his treating pulmonologist, Dr. Boustani, who ordered another lung biopsy and diagnosed "Complicated CWP"; (2) Dr. Miller's reading of an x-ray dated 6/19/06 (t/q, 2/3, Category B, possible cancer, id, ih, ax); and (3) and the West Virginia Occupational Pneumoconiosis Board's reading of an x-ray dated

10/3/03, which was compared to the Boards previous studies of 3/13/01 and 1/23/97 and interpreted as "progressive massive fibrosis in the upper lobes…progressed slightly in the interim " with 40% impairment in pulmonary function. JA 260-268, 592.

On June 25, 2007, the DOL issued a Proposed Decision and Order awarding benefits based on the evidence establishing that Mr. Fox was 'disabled due to pneumoconiosis" and that he had complicated pneumoconiosis. JA 283-291. Elk Run nevertheless contested liability and asked for a hearing. JA 292. Elk Run was represented by in this second claim by the same law firm that had represented it in Mr. Fox's first claim. JA 190-191, 336-337.

Discovery in the Subsequent Claim

As early as January of 2007, claimant's counsel requested information about the pathology evidence from Mr. Fox's 1998 lobectomy. On January 20, 2007, the claimant's counsel sent the employer interrogatories asking in pertinent part:

> Interrogatory #4: Are you, your attorney, your insurance carrier, or your agent in possession of any interpretations of pathology slides that were generated by either the employer or the carrier in Mr. Fox's present claim or his prior claim for federal black lung benefits that have not been exchanged with the claimant?

JA 306. Two and a half months later, on April 5, 2007, Elk Run's counsel provided claimant's counsel with the following response:

> The undersigned is not yet in possession of Mr. Fox's prior claim for benefits. Otherwise, see Response to Interrogatory 2 (JA 311) [which said in pertinent part]:
>
> The Employer and its attorneys are *not in possession of any reports of x-ray readings, arterial blood gas studies, or other diagnostic tests of any kind generated by the Employer, which have not been previously submitted or provided to Claimant's counsel in his claim….*
>
> Medical evidence which consists of expert opinions requested by the Employer in evaluating a claim and which was requested in the Employer's preparation of its defense but is not the opinion of any expert expected to "testify" (including the submission of a report in this matter) is privileged information and is not subject to discovery under the Federal Rules of Civil Procedure or the Rules of Practice and Procedure for administrative hearings before the Office of Administrative law Judges. Such evidence includes medical consultations and re-readings of x-rays or CT scans.

JA 310 (emphasis added).

On May 14, 2009, counsel for Mr. Fox sent a letter to Elk Run's counsel asking whether Elk Run had the pathology slides:

> To date, I have not been able to obtain the pathology slides from Mr. Fox's lobectomy that was performed at Raleigh General Hospital on September 25, 1998. I am writing to ask if the employer has those slides. If so, could you please send them to me as soon as possible.

JA 321. Elk Run's counsel did not respond, so on May 31, 2008, counsel for Mr. Fox made another attempt to obtain information about the pathology slides by serving the employer with interrogatories, which included:

> <u>Interrogatory # 2</u>: Did you, your attorney, your insurance carrier, or your agent ever obtain pathology slides from the claimant's lobectomy performed

> at Raleigh General Hospital in Beckley, West Virginia, on or about September 25, 1998? Yes ___ No ____.
>
> Interrogatory #3: If the answer to Interrogatory # 2 is yes, when did you, your attorney, your insurance carrier, or your agent obtain the pathology slides?
>
> Interrogatory # 4: If the answer to Interrogatory # 2 is yes, are you, your attorney, your insurance carrier, or your agent still in possession of the slides? Yes ___ No ____.
>
> *If the answer* to Interrogatory # 4 is *yes, the claimant renews his request that the slides be sent to his representative as soon as possible*.[14]
>
> Interrogatory #5: If the answer to Interrogatory # 4 is no, when and where were the pathology slides last sent?

JA 326. Over two months passed with no response from Elk Run's counsel, so on August 5, 2008, claimant's counsel wrote to the ALJ asking him to "direct the employer to cooperate with the claimant's effort to locate the 1998 pathology slides." JA 328-30.

Finally, in a letter to the ALJ dated August 11, 2008, almost three months after counsel for Mr. Fox requested the pathology slides, Elk Run's counsel acknowledged that the 1998 lobectomy slides were in Elk Run's possession:

> [T]he Claimant's counsel requests this Court to order Elk Run to produce pathology slides from a lobectomy Mr. Fox underwent at Raleigh General Hospital in September 25, 1998. Raleigh General Hospital informed the

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[14] The claimant explained in a footnote to Interrogatory #4, "[t]o date, the claimant has been unable to obtain the pathology slides from Raleigh General Hospital because they have been either destroyed or lost." It now is apparent that Elk Run's counsel obtained and never returned the original slides.

> undersigned counsel that those pathology slides may be destroyed if returned to the hospital because of their age. We can send those slides to Mr. Cline by courier tomorrow if he is available to sign a statement of receipt.

JA 340. As explained below, this acknowledgment that the slides were in Elk Run's possession did not occur until after the ALJ had granted Claimant's Motion to Compel Discovery (JA 315), after the ALJ had denied Elk Run's Motion for Reconsideration of the discovery order (JA 331), and after Elk Run had accepted liability for Mr. Fox's claim (JA 336).

Pathology Reports of Drs. Naeye and Caffrey

As noted above, on January 20, 2007, claimant's counsel served Elk Run with interrogatories and requests for production of interpretations of radiographs and pathology slides that were generated by Elk Run but not exchanged with the claimant. JA 306-07. Over a year later, on February 14, 2008, claimant's counsel filed a Motion to Compel Discovery, and on April 28, 2008, the ALJ granted the Claimant's Motion and ordered Elk Run to produce the requested materials within seven (7) days of receipt of his Order. JA 315-19. Elk Run filed a Motion for Reconsideration with the ALJ that was received on May 5, 2008. *See* JA 331 (referenced by ALJ). On May 5, 2008, Elk Run also filed a Notice of Interlocutory Appeal with the Board. *See* JA 331 (referenced by ALJ). On May 28, 2008, the Board dismissed Elk Run's interlocutory appeal as premature because of its motion for reconsideration was still pending before the ALJ. JA 322. On July 14, 2008,

the ALJ denied Elk Run's request for reconsideration of his discovery order and directed Elk Run to produce the requested documents by August 4, 2008. JA 331-34.

On August 4, 2008, Elk Run withdrew its request for a hearing, accepted liability for Mr. Fox's claim, and requested that the claim be remanded to the District Director for a pay order with the understanding that its "acceptance of liability *renders [the ALJ's]July 14, 2008 discovery order "null and void*." JA 336 (emphasis added). On August 28, 2008, the ALJ issued an Order granting the claimant's request to retain jurisdiction, recognizing that the withheld evidence may support an earlier entitlement date or reconsideration of the prior denial by the ALJ, and setting September 19, 2008 as the deadline for compliance with his prior discovery order. JA 350-53.

On September 19, 2008, Elk Run finally complied with the ALJ's discovery order by producing the pathology reports of Dr. Naeye (JA 465) and Dr. Caffrey, along with two negative x-ray readings by Dr. Stewart (JA 482-83), a negative x-ray reading by Dr. Wiot[15] (JA 641), and a serial reading of 13 x-rays by Dr. Renn that showed a progression from negative in 1974, to simple pneumoconiosis in

[15] Dr. Wiot also said, "In view of the fact that this patient has had previous surgery on the right, the pathology would give an answer as to whether there is any evidence of coal workers' pneumoconiosis." JA 641.

1993, to complicated pneumoconiosis, Category A, in 1997, to Category B in 2001, and Category C in 2006. JA 469-80.

Fraud on the Court

On February 9, 2009, the ALJ found that Elk Run had committed "fraud on the court" by misrepresenting evidence and engaging in a strategy that "instills uncertainty and cynicism into a [remedial] program intended to compensate miners disabled from black lung disease." JA 373. Accordingly, the ALJ set aside the prior ALJ's denial and awarded benefits back to September of 1998. *Id.*

On appeal, the BRB issued a decision rejecting Elk Run's argument that the ALJ abused his discretion in granting claimant's motion to compel discovery of the Naeye and Caffrey pathology reports, but vacated the ALJ's finding of fraud on the court after concluding that the ALJ failed to identify the admissible evidence upon which he relied. JA 389. The BRB remanded the case for the ALJ to provide the parties with an opportunity to submit and mark the admissible evidence pertinent to fraud on the court. JA 389.

On July 20, 2011, the ALJ issued a Decision and Order on Remand – Awarding Benefits, Reopening Prior Claim and Setting Entitlement Date (07/20/11 Decision and Order on Remand). JA 413. Again, the ALJ found that "Employer's actions, taken as a whole, constitute a scheme to defraud within the parameters of

Hazel-Atlas [Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997 (1944)]." JA371 As the ALJ explained:

> Employer's evidentiary development, subsequent denials of the existence of the pathology reports, and capitulation only when the evidence was to be revealed indicate a course of conduct designed to conceal contrary probative evidence. Of crucial importance in the instant case is the fact that Employer was in possession of two pathology reports by expertly-qualified pathologists whose opinions directly contradicted the report of Dr. Koh. Employer's knowledge of the contrary probative evidence, combined with its understanding of the importance of the pathology in the development of the medical opinion evidence, demonstrates an intent to present false and misleading evidence to the court. Employer then pursued all steps possible to prevent disclosure of the contrary evidence. As such, Employer has misled not only its own physicians but a *pro se* Claimant and the court.

JA 429.

On appeal, the BRB concluded that the ALJ did have the authority to consider whether an otherwise final decision was procured by fraud on the court, but held in a 2-1 decision that the conduct at issue did not constitute "fraud on the court." JA 436-47.

IV. SUMMARY OF THE ARGUMENT

The Black Lung Benefits Act is a remedial system designed to ensure benefits to coal miners who become disabled due to pneumoconiosis. The ALJ found that the litigation conduct undertaken by Elk Run's counsel in an earlier case constituted "fraud on the court" where Elk Run's counsel misrepresented evidence to the court, its own experts and the *pro se* claimant and engaged in a strategy that "instills uncertainty and cynicism into a [remedial] program intended to compensate miners disabled from black lung disease." JA 373. Based on that finding he vacated the earlier decision denying benefits and awarded the claimant benefits back to the date of the earlier case.

The BRB Decision nonetheless dismissed the ALJ's determination that Elk Run's misconduct rises to the level of "fraud on the court" even though that determination is well-reasoned and supported by the facts in evidence. In so doing, the BRB Decision failed to consider the serious public injury represented by the employer's attorneys' scheme to undermine the integrity of the black lung system and instead determined that the conduct of the employer's attorneys involved a dispute between two private parties and did not pose a harm to the public. The BRB Decision also failed to consider the role of Elk Run's attorneys in assessing whether the fraud at issue rose to the level of fraud on the court. Finally, the BRB Decision failed to defer, as it was obliged to do, to the ALJ's factual findings

which were supported by substantial evidence. For these reasons, as set forth more fully below, the BRB Decision must be reversed.

V. ARGUMENT

A. Standard of Review

This case involves a review of a decision of the BRB reversing an ALJ where the ALJ reopened a prior decision denying black lung benefits based on his finding that the prior decision had resulted from "fraud on the court." In reviewing a decision of the BRB, this Court must apply "the same standard the Board applies when reviewing an ALJ's decision." *Boyd & Stevenson Coal Co. v. Dir., OWCP*, 407 F.3d 663, 666 (4th Cir. 2005). *See also, Walker v. Dir., Office of Workers' Compensation Programs*, 927 F.2d 181, 183 (4th Cir. 1991) ("Our review of a decision of the Benefits Review Board is governed by the same standard the Board applies when it reviews the ALJ's decision.").

Pursuant to this standard of review, a "factual determination [by the ALJ] will be upheld if the record contains 'substantial evidence' supporting the ALJ's decision." *Boyd,* 407 F. 3d at 66. *See also, Walker*, 927 F.2d at 183. "As long as substantial evidence supports an ALJ's findings, the Court "must sustain the ALJ's decision, even if [it] disagree[s] with it." *Id.* citing *Smith v. Chater*, 99 F.3d 635, 637-38 (4th Cir. 1996). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol.*

Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998). With regard to review of the factual findings of the ALJ, "[a]s in all agency cases, [the Court] must be careful not to substitute [its] judgment for that of the ALJ." *Id. citing Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990) ("Ultimately, it is the duty of the [ALJ] reviewing a case and not the responsibility of the courts, to make findings of fact and to resolve conflicts in the evidence.").

Although this Court reviews factual determination pursuant to the substantial evidence standard, it "review[s] conclusions of law de novo." *Boyd,* 407 F. 3d at 666; *Walker,* 927 F.3d at 183. Any conclusions of law by the ALJ and the BRB are reviewed *de novo* to insure "they are rational and consistent with applicable law." *Hicks* 138 F. 3d at 528.

B. Introduction

The Black Lung Benefits Act ("Act") is designed "to ensure that benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis." 30 U.S.C. § 901. The Act recognized that coal miners are exposed to coal dust that causes an occupational disease known as Coal Workers Pneumoconiosis ("CWP") or, more commonly, black lung. Those afflicted with CWP suffer from a *progressive* and *irreversible* lung disease that can and does permanently disable coal miners and that appears to be affecting

increasing numbers of miners.[16] *See, e.g., Mullins Coal Co. v. Director, OWCP, United States Dep't of Labor,* 484 U.S. 135, 151, 108 S. Ct. 427, 436 (1987) *quoting Elkins v. Beth-Elkhorn Corp.,* 2BLR 1-683, 1-686 (Ben. Rev. Bd. 1979) ("[P]neumoconiosis is a progressive and irreversible disease.").

Under the Act, a coal miner, such as plaintiff's decedent, can qualify for monthly benefits if he has pneumoconiosis arising out of coal mine employment and a pulmonary disability substantially caused by pneumoconiosis that would prevent him from performing his usual coal mine work or comparable work. There is an irrebuttable presumption of disability due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung with x-ray evidence of one or more large opacities greater than one centimeter in diameter or pathology evidence of massive lesions greater than one centimeter in diameter. These large opacities

[16] Although it was once thought that the disease would be prevented by the control of coal dust in the mines, there is reason to believe that the incidence of the disease has increased in recent years. *See, e.g.,* M D Attfield, K M Bang, E L Petsonk, P L Schleiff, J M Mazurek, *Trends in pneumoconiosis mortality and morbidity for the United States, 1968–2005, and relationship with indicators of extent of exposure*, JOURNAL OF PHYSICS: CONFERENCE SERIES 151 (2009), available at www.msha.gov/S&HINFO/BlackLung/Reports/Attfield2009.pdf. The abstract notes that "although CWP prevalence in working coal miners declined substantially from 1970 to 1994, it increased from 1995 to 2006." It also reports that "[i]n the much larger bituminous region, deaths have declined over time but may be increasing among younger individuals." *See also* M. Attfield, Ph.D., A. Wolfe, and E. L.. Petsonk, M.D., *Faces of Black Lung,* NIOSH SCIENCE BLOG, available at http://spilus.rssing.com/browser.php?indx=1520207&last=1&item=6 ("Since 1995, the prevalence of black lung cases has more than doubled. Many current underground miners (some as young as in their 30s) are developing severe and advanced cases.").

or lesions are known as complicated coal workers pneumoconiosis ("complicated CWP"). Thus, in many cases, the difference between winning and losing a case may turn on the decision of an ALJ as to whether the radiology or, in this case, the pathology evidence, demonstrates that the coal miner has complicated CWP.

In the present case, Gary Fox appeared *pro se* in his first black lung claim including the hearing in September 19, 2000. JA 190 *et. seq.* This is not surprising because claimants for black lung benefits often have difficulty obtaining attorneys to represent them in their claims. A GAO report on the Black Lung Benefits Program noted that it had not obtained statistics on the number of claimants who were represented by counsel, but that

> a number of DOL officials told us that finding representation is a significant challenge for many claimants. For example, program officials cited claimants' lack of representation, particularly in the early stages of a claim, as a significant barrier to successful claims. OALJ officials told us that few attorneys will represent black lung claimants and that lack of legal representation limits OALJ's ability to process cases quickly.

GAO-10-7, Report To Chairman, Subcommitttee On Health Care, Committee On Finance, Senate, Black Lung Benefits Program, 25-26 (Oct. 2009). On the other hand, coal companies such as Elk Run are routinely represented by attorneys from major law firms who have developed an expertise in defending coal companies against black lung claims.

The ALJ certainly understood that misconduct in the representation of coal companies is particularly egregious where it occurs in a forum where coal miners,

such as Gary Fox , appear *pro se.* He also understood that litigation conduct of Elk Run not only lead to the denial of Gary Fox's initial black lung claim, it required him to continue working until his progressive and irreversible lung disease so damaged his lungs that he needed a lung transplant. [17]

C. The Benefits Review Board erred in reversing the ALJ's determination regarding "fraud on the court."

i. The BRB Decision erred in reversing the ALJ's determination that Elk Run's misconduct rises to the level of "fraud on the court" because that conclusion is well-reasoned and supported by the facts in evidence.

Elk Run's counsel learned, early in its representation of Elk Run against Gary Fox, that Mr. Fox suffered from Complicated CWP. As experienced black lung attorneys, they also knew that Mr. Fox's illness was progressive and irreversible. They knew that, under the applicable law, a confirmed diagnosis of Complicated CWP would lead to an award of black lung benefits that would allow Mr. Fox to retire from the coal mines. At least two, and more likely three, pathologists whom Elk Run turned to for an expert opinion provided reports that confirmed the diagnosis. As noted above, Elk Run's attorneys were familiar with these experts, having relied upon their opinions in other cases. Nonetheless, instead of withdrawing Elk Run's protest, they pursued a deceptive, but successful,

[17] Mr. Fox continued to be exposed to dust working as a "scoop outside utility" man from 2002 until 2006 when he could no longer work at all. JA 250.

litigation strategy that led Mr. Fox, who could not afford to retire, to continue working until his progressive occupational lung disease destroyed his lungs.

This is not a case where an attorney obtains differing opinions and relies on those who support his case. Rather this is a case where Elk Run's attorneys solicited opinions from three pathologists with expertise in black lung, but were unable to get a single one of them to offer an opinion favorable to Elk Run. They then turned to a pathology report that had been prepared by Dr. Koh, a pathologist who was not an expert in black lung, and, as far as the record shows, they never even bothered to speak with him to clarify whether he really intended to rule out CWP.

Then, to bolster the record, attorneys for Elk Run provided the Koh report to four pulmonologists, assuring each of them that they had reliable pathology evidence, knowing that the pulmonologists would consider the pathology evidence to be the best evidence as to whether Mr. Fox had Complicated CWP. They even used the depositions of Dr. Castle and Dr. Wheeler to emphasize the importance of the Koh pathology evidence and the reasons why Dr. Rasmussen's contrary diagnosis should be rejected. *See* discussion in Statement of Facts, *supra,* at 11-13.

Moreover, there is little doubt that Elk Run's attorneys knew and understood that the pathology evidence unequivocally demonstrated that Mr. Fox had complicated pneumoconiosis. They sought the opinions of three pathologists

without getting a single one to opine that the pathology slides supported Elk Run against Mr. Fox. Then, instead of continuing to search for another pathology opinion, they gave up and, instead, relied on four pulmonologist, none of whom had the expertise to opine on what the pathology slides demonstrated and all of whom relied on representations by Elk Run's counsel that the Koh report was the only available pathology evidence. Certainly, given the ease with which they retained pulmonologists, they could and would have retained additional pathologists if they actually believed that they could find a pathologist who would give them the opinion they wanted.

Elk Run's counsel knew, when they engaged in this strategy, that it was likely to be effective given that they were opposed by a *pro se* claimant, and they were correct. The ALJ in the earlier claim, as noted above, denied Mr. Fox's claim relying, substantially if not totally, on the importance of Dr. Koh's pathology report that they knew to be misleading and wrong. Then, when Mr. Fox filed a second claim, they never identified the Naeye and Caffery reports in response to interrogatories from claimant's counsel. JA 308. They also ignored requests from Mr. Fox's counsel for the Koh pathology slides who requested the slides so that he could have them independently reviewed and continued to do so until after the ALJ granted Claimant's Motion to Compel Discovery (JA 315), after the ALJ denied

Elk Run's Motion for Reconsideration of the discovery order (JA 331), and after Elk Run had accepted liability for Mr. Fox's claim (JA 336).

Based on these and other facts, the ALJ's finding of "fraud on the court" is well reasoned and anchored to the facts before him. Nonetheless, two members of the BRB rejected the ALJ's findings based on their conclusion that Elk Run "in withholding the pathology reports of Drs. Naeye and Caffrey from its own experts, did not engage in a deliberate scheme to directly subvert the judicial process, sufficient to constitute fraud on the court." JA 444. They mistakenly reasoned that Elk Run's conduct in this case "primarily concerns the two private parties involved, and does not threaten the public injury that a fraudulently obtained legal monopoly did in *Hazel-Atlas* [*Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944)] [and] employer's behavior falls short of the undisputed perjury and outright fabrication of evidence in *Great Coastal* [*Express, Inc. v. Int'l Brhd. Teamsters*, 675 F.2d 1349 (4th Cir. 1982)], conduct which was held to be not sufficiently egregious to constitute fraud on the court." JA 444.

The Board's decision, however, is predicated on at least two errors. First, the majority of the Board failed to properly apply the law to the facts of the case and, second, the majority failed to defer to the factual findings of the ALJ.

ii. The BRB Decision erred in failing to consider the serious public injury represented by a scheme by the employer's attorneys to undermine the integrity of the black lung system and instead concluding that the conduct of the employer's attorneys involved a dispute between two private parties and did not involve a public harm.

The BRB Decision failed to consider the serious public injury represented by a scheme to undermine the integrity of the black lung benefit system, and instead treated this as a case where there was merely a failure of one party in a private dispute to disclose some of the evidence it developed. In reality, the conduct of Elk Run's attorneys was a cynical scheme whereby they manipulated the evidence so that, unimpeded by a *pro se* claimant, they could convince an ALJ that Mr. Fox did not have CWP.[18]

Mr. Fox acknowledges that "fraud on the court" required proof of elements that go beyond common law fraud. The distinction between "fraud on the court" and common law fraud is recognized in Rule 60 of the Federal Rules of Civil Procedure and in Rule 60 of the West Virginia Rules of Civil Procedure. Pursuant to Rule 60, a party may request the reopening of a judgment that is based on fraud or misrepresentation no later than one year "after the entry of the judgment or

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[18] This cynicism, noted by the ALJ in his recent opinion (JA 373) , is most evident in having their experts opine on how important pathology evidence is, knowing that those experts had been misled about what the pathology evidence really showed. The cynicism is also evident in retaining four separate pulmonologists knowing that they could not find a credible pathologist to give them the opinion they wanted.

order or the date of the proceeding." *See* Fed. R. Civ. Proc. 60(b)(3) and (c)(1). However, there is no time limit for a party to request reopening of a judgment based on "fraud on the court." *See id*. at 60(d) (3).

The Supreme Court has defined "fraud on the court" as "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-AtlasGlass Co. v. Hartford-Empire Co.* 322 U.S. 238, 246 (1944). In *Hazel-Atlas*, the plaintiff glass company sought a patent that would protect a particular glass-blowing process, and the Patent Office did not believe that the patent was valid. An attorney for the company wrote an article extolling the virtues of the "new" process, convinced an officer of the glass-workers' union to sign it as the author, and had it published in a trade journal without disclosing the attorney's authorship of the article. *Id*. at 240. The article subsequently helped the glass company to secure a patent for its process, and the Third Circuit relied heavily on the article in determining the validity of the patent during subsequent litigation. *See id*. at 240-41. The Supreme Court determined that this was not simply a case of after-discovered perjury but was instead "a deliberately planned and carefully executed scheme" to defraud the Patent Office and the Circuit Court of Appeals. *Id.* at 245. As such, it raised "issues of great moment to the public in a patent suit." *Id.* at 246.

In *Great Coastal Express, Inc. v. Int'l Bhd. Of Teamsters*, the Fourth Circuit considered whether "instances of either perjury or fabricated evidence" by a party to litigation constituted "fraud on the court." 675 F.2d 1349, 1352 (4th Cir. 1982). In *Great Coastal*, a dispute between a union and an interstate truck carrier over damages to the carrier caused by purported union violence and illegal secondary boycotting, the union learned, years after a verdict finding it liable to the carrier, that employees of the carrier had deliberately sabotaged its equipment and committed other acts of violence which it hoped would be blamed on the union. *Id*. at 1352. Two of the carrier's witnesses also admitted that they had lied at the trial. *Id*.

In assessing whether the conduct rose to the level of "fraud on the court" or was, instead, simply "fraud" subject to the one-year time limitation in Rule 60(b), the Fourth Circuit observed "'fraud on the court' is typically confined to the most egregious cases, such as bribery of a judge or juror, *or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged*." *Id*. at 1356 (emphasis added). The Court recognized that "'fraud on the court' should . . . embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are present for adjudication." *Id*.

(citing 7 Moore's Federal Practice § 60.33 at 515 (1071). The Court ultimately concluded that the perjury and fabricated evidence in *Great Coastal* did not rise to the level of a "deliberate scheme to directly subvert the judicial process" and instead "primarily concern[ed] the two parties involved and [did] not threaten the public injury that a fraudulently-obtained legal monopoly did in *Hazel-Atlas*." *Id*. at 1356.

In reaching its conclusions in this case, the BRB majority failed to evaluate and properly consider the impact of the scheme of Elk Run's attorneys on the integrity of the black lung system, an expressly remedial system which often involves *pro se* claimants. Instead, the BRB concluded that the employer's conduct was not "a deliberate scheme to directly subvert the judicial process" and "does not threaten the public injury that a fraudulently obtained legal monopoly did in *Hazel-Atlas.*" It did so without discussing or apparently otherwise considering the impact of the conduct of the attorneys representing Elk Run on the Congressional scheme to provide financial benefits to miners who had developed complicated pneumoconiosis so that they retire from coal mine employment. BRB Decision, JA 444.

First, the fraudulent conduct of Elk Run's attorneys was "a deliberate scheme to directly subvert the judicial process." Elk Run's attorneys defeated the bona fide claim of a coal miner, knowing he had a progressive and irreversible

disease, thereby depriving him of the benefits necessary to allow him to retire from the mines and requiring him to continue working until his lungs were effectively destroyed. Elk Run's attorneys implemented a scheme to undermine the adjudication process with false evidence that was perhaps more sophisticated but otherwise analogous to the fraudulent conduct in *Hazel-Atlas*. Rather than using a ghost-written article to obtain a favorable ruling from the Patent Office, Elk Run's lawyers knowingly used a discredited and unreliable pathology report to obtain favorable "medical" opinions from its reviewing experts and then relied on the intentionally skewed opinions of those experts to defeat the federal black lung claim of a *pro se* miner.

Second, the issues, as the ALJ well understood, go beyond a private dispute between the late Gary Fox and Elk Run. For years, companies like Elk Run have employed attorneys to defeat the black lung claims of *pro se* litigants. In 2000, the *pro se* claimant was Gary Fox, but the situation was not unique to his case. The same law firm that defeated Gary Fox in his initial claim was involved in a disciplinary action in West Virginia where the attorney, Douglas Smoot, received an examination report from one of its experts, Dr. George Zaldivar, removed a six page narrative summary that was favorable to the *pro se* claimant, and submitted the sanitized remainder to the ALJ and claimant as the "Exam report of George L. Zaldivar." The West Virginia Supreme Court found that Mr. Smoot "acted with a

dishonest and selfish motive by advancing the interests of his client above the integrity and fairness of the litigation process" and that "[t]he deceptive conduct engaged by Mr. Smoot, in essence, constituted an attempt to commit fraud upon an administrative tribunal." *Lawyer Disciplinary Bd. v. Smoot*, 716 S.E.2d 491, 506 (W. Va. 2010), *cert. denied*, 132 S. Ct. 94 (2011). It is no coincidence that the very same attorney disciplined by the West Virginia Supreme Court of Appeals was also involved in the litigation of Mr. Fox's 1999 application for black lung benefits. *See* Letters from Douglas Smoot submitting evidence to DOL dated December 29, 1999, JA 31; January 7, 2000, JA 42; May 22, 2000, JA 63; August 7, 2000, JA 80; August 22, 2003, JA 100; September 12, 2000, JA 159. *See also* Deposition, Dr. James Castle by Douglas Smoot, JA 160 *et. seq.*; Letter/Report from Dr. Castle to Douglas Smoot, JA 0049 *et. seq.*

The scheme pursued by Elk Run's counsel not only undermined the adjudication process in this particular case but also, as noted by the ALJ, "instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease." JA 431. As the ALJ noted, Elk Run "breached a duty to the court by withholding the results of the pathology interpretations by Drs. Caffrey and Naeye and instead offering reports of medical experts that were not probative of Claimant's pulmonary condition because the experts were not provided with the most probative evidence." JA 431. If employers can

intentionally and knowingly mislead their medical experts by giving them a skewed selection of unreliable and discredited evidence in order to obtain favorable medical opinions, then, as the ALJ aptly noted, “an expert medical opinion could never be accepted as a reliable diagnosis.” JA at 430. He acted because he knew that, if practices such as those in this case persist unchecked, they will continue to undermine the purpose intended by Congress in creating a system of black lung benefits and would also undermine confidence in the evidence produced in the cases in which he presided, particularly where the claimant appeared pro se.

The ALJ also recognized that the inconsistency between a remedial black lung program and an attitude that it is important to defeat a coal miner’s claim rather than disclose that he has, in fact, contracted a serious occupational disease. *See* 07/20/11 Decision and Order on Remand, JA 430 (explaining a purpose of workers compensation programs and employer’s duty of disclosure when it knows its employee has occupational disease). Although this case involved a single miner, the ALJ knew that there was no reason to believe that the conduct of the employer and its counsel in this case was unique or unusual.

Indeed, this is not an isolated case of withholding evidence and fraud against *pro se* miners seeking federal black lung benefits.[19] As noted above, the West Virginia Supreme Court suspended the law license of a lawyer from the same law firm that represents Elk Run in the present case for removing misconduct in another black lung case involving a *pro se* claimant. Likewise, the ALJ noted that, in yet another case, "the employer did not turn over to an unrepresented claimant, or offer into evidence a report by Dr. Zaldivar diagnosing simple . . . and complicated pneumoconiosis." JA 318, n. 2 (citing *Cline v. Westmoreland Coal Co.,* 21 BLR 1-71(1997)).

Elk Run's law firm has yet to acknowledge any wrongdoing and insists that it has the right to continue defending cases, including those it defends against *pro*

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[19] Common features of the federal black lung claims process include "adversarial proceedings between a corporation with experienced legal counsel and a miner who may or may not be represented . . . dominance by the coal operator in producing medical evidence; [and] the operator's suppression of evidence favorable to the miner until forced to produce it by order of an ALJ." Brian C. Murchison, *Due Process, Black Lung, and Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1030 (2002). Professor Murchison is the Charles S. Rowe Professor of Law at Washington and Lee University and a former Supervising Attorney of the School of Law's Black Lung Law Clinic. *See* http://law.wlu.edu/faculty/profiledetail.asp?id=35. Note , Mr. Murchison acknowledges one of the counsel in this case, John Cline, for his work on behalf of black lung claimants at fn. a.1.

se claimants, in the same manner. This attitude is evident in this case and was equally evident in *Smoot* where Elk Run's law firm refused to acknowledge that there was anything wrong with removing conclusions favorable to the *pro se* claimant from their expert report and then sending that report to their expert and the ALJ as if it were the entire report. 716 S.E. 2d at 506 ("It is apparent that [Mr. Smoot] lacks remorse and has refused to acknowledge the wrongful nature of his conduct.").

The ALJ and the dissenting member of the BRB understood the importance of the issues raised by this case and the impact of the ALJ's decision on other cases. As Board member Hall noted, quoting from the ALJ's opinion, "[c]laimant, having been diagnosed with complicated pneumoconiosis at the time of his first claim [was] unquestionably qualified to receive black lung benefits, and [was] the paradigm of the man Congress intended to compensate." JA 447, n. 12 (Hall, J., dissenting) (citing *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 1359 (4th Cir. 1996) (*en banc*)). The dissenting opinion concludes that "the fact that the fraud involved employer's counsel, was found to be directed at the judicial process, and that its effects go beyond the parties involved in the case, distinguishes this case from *Great Coastal.*" JA 446-447.

The BRB erred in reversing the ALJ's finding of fraud on the court without considering the critical issues of judicial integrity, public policy and public harm to

a federal program to provide benefits for those afflicted with a progressive and irreversible respiratory illness. Instead, the Board simply concluded, without explanation, that Elk Run's actions were "not sufficient to constitute fraud on the court." JA 9. This was plain error.

iii. The BRB Decision erred in failing to consider the role of Elk Run's attorneys in assessing whether the fraud at issue rose to the level of fraud on the court.

The BRB Decision also misapprehends the requirements to demonstrate fraud on the court in failing to recognize that well-established case law contemplates that an attorney's role in perpetrating fraud during litigation can elevate what would otherwise constitute mere fraud to fraud on the court. *See Hazel-Atlas*, 322 U.S. 238; *Great Coastal*, 675 F.2d 1349.

In this case, the BRB quoted the language in *Great Coastal* that "improper influence exerted on the court by an attorney" could constitute fraud on the court, but failed to assess whether the conduct at issue in this case, the conduct it attributed to Elk Run, was in fact, the conduct of Elk Run's attorneys. Instead, the BRB Decision rests on a superficial analysis of the "employer's conduct," concluding that it did not rise to the level of fraud on the court. In doing so, the BRB majority failed to address the role of Elk Run's attorneys or to analyze their scheme to mislead the ALJ [the court] as to the nature of the actual evidence by effectively manufacturing the opinions of four pulmonologists by leading them to

believe that the Koh report was reliable, when they knew unequivocally that it was not. The BRB's failure to assess the attorney's role in the fraud was the result of either a misapprehension of the well-established case law on fraud on the court, or a failure to defer to the factual findings of the ALJ, who recognized both implicitly and explicitly that the relevant conduct was that of Elk Run's counsel in creating a record that it understood to be misleading to both the *pro se* claimant and the ALJ.

Because it failed to assess the significance of the knowing and purposeful attorney participation in the fraud, the BRB wrongly found that Elk Run's conduct did not rise to the level of fraud on the court. Had the BRB's Decision properly analyzed the conduct of Elk Run's attorneys, it would have been compelled to conclude that the conduct of Elk Run's attorneys constituted "improper influence exerted on the court by an attorney." *See Great Coastal*, 675 F.2d at 1356.

Just as in *Hazel-Atlas*, and unlike *Great Coastal*, the present case involved a scheme by attorneys to manipulate and present evidence that they knew to be false and misleading in a context where an unrepresented lay person would have no ability to detect, let alone expose, the scheme. Although the scheme did not involve outright perjury, the manner in which Elk Run's attorneys led their own experts to the believe there was no pathology evidence of complicated CWP when the attorneys knew the opposite to be true should not be treated any differently than the subornation of perjury by an attorney which this Court has recognized to

constitute "fraud on the court." *Great Coastal* 675 F.2d at 1357 ("Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court.").

Although the scheme at issue differs from that in *Hazel-Atlas,* that difference is not dispositive of the issue. As the Supreme Court said in *Hazel-Atlas*, equitable relief against fraudulent judgments "has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention. *See* 322 U.S. at 247. The fact that the fraud in this case employed a different mechanism than that in *Hazel-Atlas*, the result of the fraud in both cases is the same and should be treated the same. Moreover, the context of the fraud, using a scheme to deprive a *pro se* claimant in a remedial federal program of the benefits Congress mandated for victims of a progressive and irreversible disease calls for the flexibility mandated by the Supreme Court.

The role of the attorneys in the fraudulent conduct is a fact that the BRB either dismissed as insignificant, which constitutes a misapplication of the law, or simply overlooked, which constitutes a failure to defer to the factual findings of an ALJ whose own experience in dealing with attorneys and *pro se* claimants in black lung claims informed his analysis of the egregiousness of the attorney conduct.

iv. The BRB Decision erred in failing to defer to the ALJ's factual findings which were supported by substantial evidence.

The BRB Decision failed to provide proper deference to the factual findings of the ALJ. As noted above, the "factual determination [by the ALJ] will be upheld if the record contains 'substantial evidence' supporting the ALJ's decision." *Boyd,* 407 F. 3d at 66. *See also, Walker*, 927 F.2d at 183. In the present case, the ALJ evaluated the facts and, in particular, the scheme engaged in by Elk Run's attorneys to obtain a decision they knew to be factually incorrect and they did so knowing that the *pro se* claimant would be unable to understand, let alone oppose, what they were doing. He concluded that the "Employer's knowledge and behavior is tantamount to a scheme intended to defraud its experts, the *pro se* Claimant, and the court." JA427. The facts set forth in the Statement of Facts are more than enough to demonstrate "substantial evidence" to support the ALJ's analysis of the fraudulent scheme. The BRB erred in failing to defer the ALJ's decision on the evidence before him.

Likewise, the ALJ concluded that the "[e]mployer's knowledge of the contrary probative evidence, combined with its understanding of the importance of the pathology in the development of the medical opinion evidence, demonstrates an intent to present false and misleading evidence to the court." JA 429. Again, there was substantial evidence to support this conclusion. The apparent failure of Elk Run's counsel to actually seek a report from Dr. Koh, relying instead on a

report he prepared to rule out cancer; counsel's knowledge and realization that they could not even get one of their usual pathology experts to give them the opinion they wanted for the case, the questions that counsel asked at the depositions discussed above and counsel's experience and expertise as black lung attorneys provides substantial evidence to support a conclusion that this was a knowing intentional scheme as described in the conclusions of the ALJ.

Equally important in evaluating whether there is substantial evidence to support the ALJ's conclusion is the evidence that Elk Run's counsel "engaged in a course of conduct designed to obscure its actions and prevent the contrary opinions of Drs. Caffrey and Naeye from being disclosed." JA 429. The ALJ explained that counsel initially denied that it had any other reports. However, when Mr. Fox's counsel moved to compel, Elk Run's counsel argued that the documents were privileged. *Id.* Then, when the ALJ ordered Elk Run's to disclose the reports, Elk Run, by its counsel, "conceded liability and requested that the claim be remanded to the district director."[20] *Id.* All of the ALJ's findings and conclusions are supported by substantial evidence in the record of this case, and the BRB, in failing to defer to these findings in reaching its conclusions, committed error.

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[20] Elk Run expected that the order to disclose the reports would become moot once Elk Run conceded liability.

VI. CONCLUSION

For all of the foregoing reasons, the BRB decision should be reversed and the decision of the ALJ should be reinstated.

Respectfully submitted by,

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VII. Certificate of Compliance

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/s/ John Cline

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Dated: January 25, 2013

VIII. Certificate of Service

The undersigned hereby certifies that on January 25, 2013, the Response Brief of the Petitioner, Mary L. Fox, was served upon the following by electronic filing via the CM/ECF system:

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