No. 02-834

# In the Supreme Court of the United States

JERICOL MINING, INC., ET AL., PETITIONERS

*v.*

EUGENE NAPIER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether the decision of the court of appeals concerning the weight to be accorded the medical opinion of a treating physician in adjudicating a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is proper and consistent with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

2. Whether the Department of Labor's regulation addressing the opinion of a treating physician, 20 C.F.R. 718.104(d), conflicts with Section 7(c) of the APA or otherwise is arbitrary or capricious or not in accordance with law.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 301 F.3d 703. The decisions and orders of the Benefits Review Board (Pet. App. 20-29, 42-53) and the administrative law judge (Pet. App. 30-41, 54-79) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 30, 2002. The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On March 9, 1993, respondent Eugene Napier, who had been a coal miner for 20 years, filed a claim for

benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* Pet. App. 2. The BLBA provides for payment of benefits to "coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a); 20 C.F.R. 718.1. During the administrative consideration of Napier's claim, petitioner Jericol was identified as the coal-mine operator responsible for paying any benefits awarded to him. Pet. App. 2.[1]

a. On May 9, 1996, an administrative law judge (ALJ) awarded Napier benefits. Pet. App. 58-79. The ALJ, relying on x-ray evidence and medical opinion evidence, first determined that Napier suffered from pneumoconiosis. *Id.* at 70-73. The ALJ next found that Napier was totally disabled, based on the opinions of six physicians. *Id.* at 74-75. Finally, the ALJ concluded that Napier's disability was due to pneumoconiosis. *Id.* at 75-76. The ALJ explained that Napier had "worked in the coal mining industry for an extensive period of time," and that, "[b]y comparison, his smoking history was less pervasive." *Id.* at 76. The ALJ thus placed greater weight on the physicians' opinions that found that Napier's disability arose from pneumoconiosis, and less weight on the contrary opinions of Drs. Dahhan and Broudy, who had failed to diagnose pneumoconiosis in the first place. *Ibid.*

b. On February 27, 1998, the Benefits Review Board (Board) remanded the case for further consideration of the evidence. Pet. App. 42-53. The Board vacated the finding that Napier suffered from pneumoconiosis because the ALJ had failed to consider a number of negative x-ray readings and because the ALJ's errors in analyzing the x-ray evidence tainted his analysis of the

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[1] Jericol's insurer, Old Republic Insurance Co., also is a petitioner in this case.

medical opinion evidence. *Id.* at 47-49 The Board also vacated the ALJ's finding of total respiratory disability, concluding that the ALJ had failed to weigh together all of the relevant respiratory evidence and had misunderstood a number of the medical opinions. *Id.* at 49-50. Finally, the Board vacated the ALJ's finding that Napier's disability was caused by pneumoconiosis, explaining that the ALJ had mischaracterized one physician's opinion and had erroneously relied on "non-qualifying" blood gas tests. *Id.* at 51.

2. On remand, the ALJ again awarded benefits. Pet. App. 30- 41. This time, the ALJ determined that the x-ray evidence failed to establish the presence of pneumoconiosis. *Id.* at 33-34. The ALJ still concluded that Napier suffered from pneumoconiosis, however, based on four of the six medical opinions. *Id.* at 35. The ALJ accorded greatest weight to the opinions of Drs. Baker and Kabani, because Dr. Baker had "extensive experience with Mr. Napier's medical history" and Dr. Kabani was Napier's treating physician. *Ibid.* The ALJ also explained that the four physicians who diagnosed pneumoconiosis had relied at least in part on evidence other than x-ray evidence. *Ibid.*

In determining that Napier was totally disabled, the ALJ relied on the pulmonary function studies, all of which demonstrated total disability. Pet. App. 36. The ALJ also based his determination on the physicians' opinions, of which four found total disability, one found a possibility of total disability, and the remaining one made no finding on the issue. *Id.* at 36-37.

Finally, the ALJ concluded that the total disability was due at least in part to pneumoconiosis. Pet. App. 38. The ALJ placed greater weight on the opinion of Dr. Baker, who found that Napier's disability was caused by both pneumoconiosis and smoking, because of

Baker's "extensive history of examining Mr. Napier." *Ibid.* In the ALJ's view, the opinions of Drs. Broudy and Dahhan—who were silent on the question of causation but who the ALJ assumed would attribute the total disability "to a pulmonary problem other than pneumoconiosis"—were "not consistent with the weight of the objective medical evidence." *Ibid.*

3. On June 28, 2000, the Board affirmed the ALJ's award of benefits. Pet. App. 22-29. The Board rejected petitioners' argument that the ALJ erred in finding the existence of pneumoconiosis through a "mechanical[]" application of "the treating physician preference." *Id.* at 25. In the Board's view, the ALJ had permissibly accorded more weight to the opinions of Drs. Baker and Kabani because their examinations and treatment of Napier afforded them greater familiarity with his medical condition. *Id.* at 25-26.

The Board also upheld the ALJ's finding of total respiratory disability, ruling that the ALJ had correctly interpreted and weighed the medical opinions. Pet. App. 26-27. Finally, on the question of causation, the Board found that the ALJ had not erred in according greater weight to Dr. Baker's opinion, because Dr. Baker "had an extensive history of examining the miner" and his opinion "was supported by the medical evidence of record." *Id.* at 28. Moreover, the Board observed, the ALJ permissibly discounted the opinions of Drs. Broudy and Dahhan because they were based on the "faulty underlying premise" that Napier did not suffer from pneumoconiosis. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-19. The court first addressed petitioners' argument the ALJ "improperly relied upon an automatic presumption that a physician's opinion is entitled to greater weight if that physician has treated the claimant." *Id.* at 8. The

court explained that its previous decisions had "rejected the contention" that an ALJ is required "to give absolute deference to the opinion of a treating physician." *Id.* at 9. Instead, the court observed, ALJs are "to examine the medical opinions of treating physicians on their merits" and are to "make a reasoned judgment about their credibility." *Ibid.* (quoting *Peabody Coal Co.* v. *Groves*, 277 F.3d 829 (6th Cir. 2002), cert. denied, No. 02-249 (Jan. 13, 2003)). The court looked for guidance to the Secretary of Labor's recently promulgated regulation addressing the proper weight to be given the opinion of a treating physician, 20 C.F.R. 718.104(d), which the court regarded as instructive although not directly applicable because it became effective only for evidence developed after January 19, 2001. Pet. App. 9. The court quoted a provision of the regulation stating that a treating physician's opinion "may" be given "controlling weight" in "appropriate cases" depending on the opinion's "credibility * * * in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5); Pet. App. 9-10. That framework made clear, the court explained, that petitioner was "mistaken both in its belief that an automatic treating-physician presumption exists and in its position that the opinion of a treating physician is never entitled to added weight." *Id.* at 10.

Applying those standards, the court concluded that the ALJ had erred in giving extra weight to the opinions of Napier's treating physician, Dr. Kabani, and the physician who examined Napier on the greatest number of occasions, Dr. Baker. Pet. App. 10-14. The "only explanation given by the ALJ for attaching greater significance to [Dr. Kabani's] views was that she served as Napier's treating physician," the court explained, and "the record is silent as to the factors that

are relevant in determining whether her opinions as Napier's treating physician are entitled to greater weight, considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment." *Id.* at 10-11. Moreover, the court emphasized, the record contained no documentation or results of tests performed by Dr. Kabani supporting her opinions. *Ibid.*

As for Dr. Baker, the court explained, there was no material difference in the duration and nature of Dr. Baker's and Dr. Dahhan's examinations of Napier—both had examined Napier over the same four-year period and had developed and considered the same sorts of evidence. Pet. App. 12-13. The court found it insignificant that Dr. Baker had examined Napier more frequently over the course of the four-year period, because "nothing in the record supports a conclusion that Dr. Baker's additional examinations gave him a more thorough understanding of Napier's condition." *Id.* at 13. Placing unwarranted reliance on the frequency of examinations, the court cautioned, would enable a claimant to regularly visit a physician who provided a favorable diagnosis and then argue that the opinion of that physician was entitled to an automatic preference. *Id.* at 13-14.

Although the court concluded that the ALJ had erred in according greater weight to the opinions of Drs. Kabani and Baker based solely on the treating-physician relationship and the frequency of examinations, the court affirmed the ALJ's decision on the ground that it was nonetheless supported by substantial evidence. Pet. App. 14-19. The court disregarded the ALJ's reliance on the opinion of the treating physician, Dr. Kabani, "due to the lack of supporting documentation." *Id.* at 16. In the court's view, however, the "record

* * * support[ed] the ALJ's determination to credit the opinions of Dr. Baker, Dr. Frank, and Dr. Miller." *Ibid.* Credibility determinations were for the factfinder to make, the court explained, and the ALJ had discussed the evidence supporting the opinions of those physicians as well as the contrary evidence. *Ibid.* And although the ALJ had erred in attaching additional weight to Dr. Baker's opinion based solely on the frequency of examinations, the court reasoned, that did "not alter the fact that the ALJ was entitled to find that other factors, based on the objective record, made Dr. Baker's views more credible than those of Dr. Broudy and Dr. Dahhan." *Id.* at 16-17. The court recounted the ALJ's discussion of the evidence relied upon by Drs. Baker, Frank, and Miller (other than x-ray evidence), such as pulmonary studies, Napier's medical history, physical examinations, and a spirometry. *Id.* at 15-16.

**ARGUMENT**

Petitioners seek this Court's review of both the court of appeals' discussion concerning the opinion of a treating physician in BLBA adjudications and the Department of Labor's new regulation addressing treating physicians' opinions. Review of petitioners' claims is not warranted. As petitioners acknowledge (Pet. i n.1), *Peabody Coal Co.* v. *Groves*, cert. denied, No. 02-249 (Jan. 13, 2003), which also arose from the Sixth Circuit, raised the same two questions presented by the petition in this case. The Court denied the petition for a writ of certiorari in *Groves*, and there is no reason for a different result here.[2]

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[2] The same questions are also raised by the petition in *Peabody Coal Co.* v. *Gray*, petition for cert. pending, No. 02-585 (filed Oct. 17, 2002).

1. Petitioners contend (Pet. 2-3) that the Sixth Circuit "requires the adjudicator to accord more weight to the opinion of a treating doctor," and (Pet. 10) that the court's approach conflicts with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), by "shift[ing] the burden of persuasion on the credibility of claimant's medical evidence." Those contentions lack merit and do not warrant this Court's review.

a. Because the Sixth Circuit below agreed with petitioners that the ALJ erred in according greater weight to the treating physician's opinion based solely on the fact of the treatment relationship, petitioners' contentions concerning the Sixth Circuit's approach to the opinion of a treating physician are not properly presented for review in this case. The opinion below explains that there is no automatic presumption in favor of a treating physician's opinion, and that a treating physician's opinion may be entitled to greater weight in a particular case if warranted by the evidence in the record and by the opinion's documentation and reasoning. Pet. App. 9-10. Here, the court of appeals concluded, the ALJ had erred in giving greater weight to Dr. Kabani's opinion based solely on her status as the treating physician, in the absence of any record evidence concerning the nature and duration of the relationship or any documentation or tests performed by her that supported her opinion. *Id.* at 10-11. The court thus discounted Dr. Kabani's opinion entirely in assessing whether the ALJ's decision was supported by substantial evidence. *Id.* at 16. Because the court resolved the questions concerning the role of the treating physician's opinion in petitioners' favor, and because Dr. Kabani's opinion played no role in the court's decision to affirm the ALJ's decision, petitioners' contentions con-

cerning the weight to be accorded the opinion of a treating physician are not properly presented for review.[3]

b. Petitioners err in contending (Pet. 9-10) that the Sixth Circuit regards a treating physician's opinion as a "tie-breaker" or "makeweight" and requires the ALJ to "give more weight to the treating doctor for no particular reason." The decision below makes clear that the opinion of a treating physician, if adequately documented and supported, *may* be entitled to greater weight in a particular case where justified by the record, because the treatment relationship might afford the physician superior insight into the claimant's condition. Pet. App. 8-11. But where the treating physician's opinion is not entitled to added weight, the opinion does not serve as a "tie-breaker" or "makeweight" —indeed, as in this case, it might receive no weight at all. See *id.* at 16.

Contrary to petitioners' assertion (Pet. 11), the approach of the Sixth Circuit is consistent with the approach adopted by other courts of appeals. The courts of appeals, including the Sixth Circuit, are in agreement that there is no automatic presumption favoring the opinion of a treating physician, but that the treating physician's opinion, if adequately documented and supported, may be entitled to controlling weight where justified by the record and the specific circumstances of the treatment relationship. Thus, the

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[3] The court of appeals also ruled that the ALJ had erred in according additional weight to the opinion of Dr. Baker based solely on the number of times that he had examined Napier. Pet. App. 11-14. Accordingly, insofar as petitioners seek to raise arguments concerning an "examining physician preference" (Pet. 9) in addition to a treating physician preference, those arguments likewise are not properly presented for review in this case.

D.C. Circuit, in reviewing the decisions of the courts of appeals, found a "consensus among [the] courts * * * that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant." *National Mining Ass'n (NMA)* v. *Department of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002) (per curiam); Pet. App. 10 (quoting *NMA*). In concluding that the courts of appeals agree in their approach to the opinions of treating physicians, the D.C. Circuit relied on the same decisions relied on by petitioners. See 292 F.3d at 861-862 (discussing *Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438 (4th Cir. 1997); and *Peabody Coal Co.* v. *McCandless*, 255 F.3d 465 (7th Cir. 2001)); Pet. 11.

c. Petitioners submit (Pet. 10) that the Sixth Circuit's approach to the opinion of a treating physician violates Section 7(c) of the APA, 5 U.S.C. 556(d), and *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), by shifting the burden of persuasion from the claimant to the adverse party. That contention lacks merit. Section 7(c) of the APA states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). In *Greenwich Collieries*, this Court found that the "true doubt" rule—a rule requiring resolution of Black Lung adjudications in favor of the claimant if the evidence was evenly balanced—shifted the burden of persuasion in violation of Section 7(c) of the APA.

Whereas the true doubt rule at issue in *Greenwich Collieries* relieved the claimant of the burden of persuasion to establish eligibility by a preponderance of the evidence, see 512 U.S. at 272, 281, the Sixth Circuit's approach to a treating physician's opinion does not

entail any burden-shifting presumption. The issue in this case about a treating physician's opinion concerns what weight the ALJ may attach to such an opinion when considered with other evidence in the record. The ALJ may award benefits only if the ALJ finds that the claimant has established eligibility by a preponderance of the evidence, after weighing all of the relevant evidence, including the treating physician's opinion.

The Sixth Circuit made clear in its opinion below that no "automatic treating-physician presumption exists," Pet. App. 10, and that there thus is no reallocation of the claimant's burden of persuasion. *Id.* at 7, 10-12; cf. *NMA*, 292 F.3d at 870 (the Department's codification of the rule does not "reliev[e] claimants of the burden of proving both pneumoconiosis and the credibility of the doctor's opinion"). That burden instead remains with the claimant, who is entitled to an award of benefits only if the weight of medical evidence supports a finding that the miner suffers from pneumoconiosis, that the miner is totally disabled, and that the total disability is due to pneumoconiosis. See Pet. App. 7. Although a well-reasoned and documented opinion of a treating physician familiar with the miner's medical condition over a period of time can contribute to the claimant's proof and result in an award of benefits, the treating physician's opinion does not trump other medical opinions that are better reasoned or documented. Moreover, giving effect to the opinion of a treating physician can work *against* the claimant if the treating physician concludes that pneumoconiosis did not exist or did not cause total disability. The Sixth Circuit's approach to a treating physician's opinion, accordingly, does not shift the burden of proof in violation of Section 7(c) of the APA.

d. The Sixth Circuit's decision does not warrant review for the added reason that, in BLBA cases in which the evidence was developed after January 19, 2001, the weight to be accorded the opinion of a treating physician is governed by the Department of Labor's treating-physician regulation, 20 C.F.R. 718.104(d). The regulation requires the adjudication officer to "take into consideration" a number of specific factors "in weighing the opinion of the miner's treating physician" —*viz*, the "[n]ature of relationship" between the physician and the miner in respect to whether the physician "treated the miner for respiratory or pulmonary conditions," the "[d]uration of [the] relationship," the "frequency of physician-patient visits," and the "types of testing and examinations conducted during the treatment relationship." 20 C.F.R. 718.104(d)(1)-(5). The regulation provides that, "[i]n appropriate cases, the relationship between the miner and his treating physician *may* constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight," but only "provided that the weight given to the [physician's] opinion * * * shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5) (emphasis added). The regulation does not effect "an evidentiary presumption which shifts the burden of production or persuasion." 65 Fed. Reg. 79,934 (2000); see *NMA*, 292 F.3d at 870. Because the regulation will govern in all BLBA cases in which the evidence was developed after January 19, 2001, any flaw in the Sixth Circuit's approach in this case—and any disagreement between the opinion below and the decisions of other courts of appeals—is of little (and diminishing) continuing significance.

2. Petitioners also suggest (Pet. i) that review is warranted to address whether the Department's treating physician regulation, 20 C.F.R. 718.104(d), is arbitrary and capricious and is in conflict with Section 7(c) of the APA. There is no basis for reviewing the regulation in this case. As the court of appeals correctly observed, Pet. App. 9, the regulation does not apply to respondent Napier's claim for benefits. Instead, it applies only in cases in which the evidence was developed after January 19, 2001. 20 C.F.R. 718.101(b). Although the court of appeals discussed the regulation when describing the proper weight to be accorded the opinion of a treating physician, Pet. App. 9-10, the court understood that the regulation does not govern the resolution of the benefits claim in this case. There thus is no basis in this case for reviewing the regulation's validity.[4]

In addition, there is no disagreement among the courts of appeals on the validity of the regulation under the APA. The D.C. Circuit upheld the regulation against a facial challenge, *NMA*, 292 F.3d at 870-871, and no court has reached a contrary conclusion. The regulation's application in a particular case has yet to be reviewed by any court of appeals.[5]

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[4] For the reasons explained in the government's brief in opposition (at 12-16) in *Peabody Coal Co.* v. *Groves*, *supra* (No. 02-249), moreover, there is no merit to petitioners' suggestion that the treating physician regulation is arbitrary and capricious or inconsistent with Section 7(c) of the APA.

[5] There is no need to hold the petition in this case pending the Court's disposition of *Black & Decker Disability Plan* v. *Nord*, cert. granted, No. 02-469 (Jan. 10, 2003). The Ninth Circuit in that case held that an ERISA plan administrator must accept the conclusion of a treating physician unless the administrator gives specific and legitimate reasons for rejecting the treating physi-

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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cian's opinion based on substantial evidence in the record. *Nord* v. *Black & Decker Disability Plan*, 296 F.3d 823, 830 (9th Cir. 2002). This Court granted review in *Nord* to address whether a treating physician presumption governs the administration of disability benefits under ERISA. Respondent Napier's claim for benefits in this case arises under the BLBA, not ERISA. In BLBA adjudications, as explained, there is no automatic presumption in favor of a treating physician's opinion; and the court of appeals in this case gave no weight to the opinion of the treating physician, Dr. Kabani.