No. 12-2581

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LAUREL RUN MINING COMPANY
Petitioner

v.

PATRICIA ANN MAYNARD,
on behalf of and as surviving spouse of
HARMON MAYNARD
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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The primary issue raised in the opening brief filed by the coal company challenges the Department of Labor's interpretation of 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement. In particular, petitioner attacks the Department's regulation governing how that presumption can be rebutted. Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sep. 25, 2013) (to be codified at 20 C.F.R. § 718.305).

At least twelve cases currently pending in this Court raise the same or closely related issues:

- Consol of Kentucky v. Atwell, No. 13-1220
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STATEMENT OF JURISDICTION

The Director adopts Laurel Run Mining Company's statement of jurisdiction.

STATEMENT OF THE ISSUES

30 U.S.C. 921(c)(4) provides a rebuttable presumption that certain claimants

who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits.[1] One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

30 U.S.C. 932(l), provides for automatic entitlement for certain survivors of miners who are determined to be eligible to receive benefits. Having awarded the miner's claim, the ALJ found his widow automatically entitled to benefits and awarded her claim.

Section 725.414, 20 C.F.R., restricts a party's rebuttal case to responding to the opposing side's affirmative case and to the results of the complete pulmonary evaluation that the Director provides to the miner under 30 U.S.C. 923(b). The

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[1] Unless otherwise noted, all citations to the Black Lung Benefits Act in this brief are to the 2012 version of Title 30. As discussed throughout this brief, two portions of the BLBA – 30 U.S.C. 921(c)(4) and 932(l)-- the primary sections in dispute here – were amended in 2010.

ALJ accepted the miner's re-reading of an x-ray film that was part of this evaluation and had been read as positive by a DOL-sponsored physician.

The questions presented are:

1. Whether the regulation adopting the rule-out standard is permissible.

2. Whether the ALJ erred in awarding the widow's claim when the miner's award, although non-final, made him eligible to receive benefits.

3. Whether the ALJ erred in accepting the miner's re-reading of an X-ray that had been read as positive by the DOL-sponsored physician and negative by Laurel's expert.[2]

STATEMENT OF THE CASE

Because the Director addresses only Laurel's legal challenges to the ALJ's decision, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions and their application in the decisions below.

Judge Morgan denies both claims.

In the miner's claim, filed February 2007, the ALJ found that he had

[2] Laurel raises various other challenges to the ALJ's weighing of the conflicting medical evidence which are not addressed in this brief.

established at least thirty-four years of coal mine employment and suffered from a totally disabling pulmonary impairment. JA 30, 45. But he denied the claim because the miner failed to prove the existence of pneumoconiosis. JA 47-51.

The ALJ likewise denied the widow's claim, filed February 2008, because she too failed to establish the presence of pneumoconiosis. JA 97-102.

The Benefits Review Board remands both claims.

Between Judge Morgan's denials and the Board's consideration of the appeals, Congress enacted the Affordable Care Act, which reinstated BLBA sections 411(c)(4) and 422(l), 30 U.S.C. 921(c)(4) and 932(l).[3] The Board summarily vacated the denials and remanded for further consideration under these restored provisions. JA 113-16.

Judge Morgan awards both claims.

Based on his prior unchallenged findings of more than fifteen years of coal mine employment and total respiratory disability, the ALJ invoked the 15-year presumption of total disability due to pneumoconiosis. He then turned to rebuttal,

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[3] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013). As detailed *infra*, section 411(c)(4) affords a rebuttable presumption of total disability due to pneumoconiosis when a miner with 15 or more years of qualifying coal mine employment is totally disabled. section 932(l) provides for automatic entitlement to certain survivors of a miner who is determined eligible to receive benefits, *i.e.*, whose lifetime disability claim is awarded.

assessing first whether Laurel had proved that the miner "did not have pneumoconiosis." JA 136. It had not: the four x-ray films were positive for pneumoconiosis based on the readers' qualifications and the greater number of positive readings and films. JA 134. Moreover, the ALJ discredited the opinions of Laurel's doctors who both diagnosed idiopathic (unknown cause) pulmonary fibrosis instead of pneumoconiosis. According to the ALJ, Dr. Zaldivar impermissibly opined that only complicated pneumoconiosis causes a restrictive impairment (as here), whereas section 718.201(a)(2) "recognize[s] that pneumoconiosis can cause either a restrictive or obstructive pulmonary disease." JA 135. And Dr. Hippensteel's opinion, although facially "credible and well-reasoned," was based on negative readings of x-rays that more qualified readers had read as positive. JA 136. The ALJ then considered whether Laurel had "rule[d] out any causal relationship between a miner's disability and his coal mine employment." JA 139. He found Drs. Zaldivar and Hippensteel's opinions insufficient because they "attribute[d] his lung disease to idiopathic causes" and "an unknown cause cannot rebut presumed causation." JA 140. The ALJ thus concluded that Laurel had failed to rebut the fifteen-year presumption at section 411(c)(4).

One month later, the ALJ granted the widow's claim. Relying on the miner's award, he found that the widow was automatically entitled to benefits

under section 422(l). JA 148.

The Board affirms both awards.

The Board held that section 411(c)(4)'s rebuttal provisions applied to Laurel, and affirmed the ALJ's finding of clinical pneumoconiosis based on the x-ray evidence. JA 162-63. In doing so, it rejected Laurel's contention that the ALJ had improperly admitted into evidence as part of the miner's rebuttal case Dr. Alexander's rereading of an x-ray film that had been part of section 413(b) evaluation and read as positive by a DOL-sponsored physician.[4] The Board also affirmed the ALJ's rationale for discounting Dr. Zaldivar and Hippensteel's opinions on the existence of pneumoconiosis, and then ruled that neither opinion ruled out pneumoconiosis as a cause of disability because a diagnosis of idiopathic pulmonary fibrosis "did not constitute an affirmative exclusion of coal mine employment as a contributing cause of the miner's total disability." JA 166. Based on the award in the miner's claim, the Board also affirmed the award in the survivor's claim under section 422(l) of the Act.

SUMMARY OF THE ARGUMENT

The Department of Labor, after notice-and-comment rulemaking,

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[4] Section 413(b), as implemented by 20 C.F.R. 725.406, requires the Director to provide each miner, upon request, "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. 923(b).

promulgated revised 20 C.F.R. § 718.305(d), which implements the fifteen-year presumption and provides standards governing how it is invoked and rebutted. Like its predecessor, the revised regulation provides that any party attempting to rebut the fifteen-year presumption on disability-causation grounds must rule out any connection – not merely a "substantial" connection – between pneumoconiosis and disability. The statute is silent on this issue, and the regulation fills that gap in a way that faithfully promotes the purpose of section 921(c)(4). Moreover, the regulatory rule-out standard was implicitly endorsed when Congress re-enacted the fifteen-year presumption without change in 2010 and is consistent with this Court's interpretations of that provision and the similar interim presumption. It is therefore a reasonable interpretation of the Act entitled to this Court's deference under *Chevron.*

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*. *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner's disability is unrelated to pneumoconiosis. Revised 20 C.F.R. 718.305(d)(1)(ii) itself allows for rebuttal on that ground. Contrary to Laurel's suggestion, *Usery* does not hold that employers must be allowed to rebut the presumption merely by proving that pneumoconiosis is not a "substantial" cause of a miner's disability. Like the statute itself, *Usery* is silent on that point.

The ALJ properly admitted into evidence the miner's re-reading of a positive x-ray reading obtained by the Director as part of the complete pulmonary evaluation under section 413(b). The Department's evidence-limiting regulation, 20 C.F.R. 725.414, permits the parties to respond to the evidence developed during the 413(b) evaluation, and does not limit the responsive evidence based on the results of the evaluation or associated tests. Moreover, the positive rereading was properly admitted because it rebutted Laurel's negative reading of the same x-ray.

Finally, Laurel argues that the ALJ erred in awarding the widow automatic derivative benefits under section 422(l) because the miner's award is not yet final. The plain language of section 422(l), congressional intent, and the Department's regulations, require only that the miner's claim be in award status for the widow to obtain derivative benefits.

ARGUMENT

I. Standard of Review

This brief addresses only Laurel's legal challenges to the miner and widow's awards. This Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his

interpretation of the BLBA's implementing regulations in a legal brief. *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

II. 20 C.F.R. 718.305 is a permissible interpretation of the Act

A. The rule-out standard in context

Laurel's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between the miner's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Laurel Br. 20-41. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is simple: in light of the statute's silence on the topic, is the Department's regulation permissible under *Chevron*. Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather that discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Laurel's challenge to the regulatory rule-out standard.

1. 30 U.S.C. 921(c)(4) and its implementing regulations

The BLBA was originally enacted in 1969 to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors. *Pauley v.*

BethEnergy Mines, Inc., 501 U.S. 680, 683-84 (1991). Recognizing the difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. 921(c)(4)'s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis[.]" 30 U.S.C. 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.[5] In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[6] It therefore applies to the miner and widow's claims, which were filed in 2007 and 2008 respectively, and remain pending. JA at 1, 5. (Although applicable to the widow's claim, it was not utilized because she was found entitled to derivative benefits under 30 U.S.C. 932(l). by virtue of the miner's award).

On September 25, 2013, the Department of Labor promulgated a regulation

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[5] Pub. L. No. 97-119, § 202(b)(1), 95 Stat. 1635 (Dec. 29, 1981).

[6] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013).

("revised section 718.305" or "revised 20 C.F.R. 718.305") implementing the fifteen-year presumption.[7] The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.[8] *See infra* at 13-15; Laurel Br. at 30. Because the new regulation applies to both claims here and is clearer than its predecessor, this brief primarily discusses Laurel's petition through the lens of revised section 718.305.[9]

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[7] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. 718.305).

[8] 20 C.F.R. 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress's removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. *See* 20 C.F.R. 718.305 (2012).

[9] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. 718.305(a). Laurel does not argue that the revised regulation should not be applied. Nor could it. The revised regulation does not change the law, but merely reaffirms the Department's longstanding interpretation of 30 U.S.C. 921(c)(4). Regulations that do not "replace[] a prior agency interpretation" can be applied to "antecedent transactions" without violating the general rule against retrospective rulemaking. *Smiley v. Citibank*, 517 U.S. 735, 744 n.3 (1996); *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir.

(continued…)

2. Elements of entitlement

Miners seeking BLBA benefits are generally required to establish four elements of entitlement: ***disability*** (that they suffer from a totally disabling respiratory or pulmonary condition); ***disease*** (that they suffer from pneumoconiosis); ***disease causation*** (that their pneumoconiosis was caused by coal mine employment); and ***disability causation*** (that pneumoconiosis contributes to the disability). 20 C.F.R. 725.202(d)(2) (listing elements); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. 718.201(a)(2).[10] Because legal pneumoconiosis encompasses both the disease and

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(…continued)
1999).

[10] This has been true since 1978, when the current statutory definition of pneumoconiosis – "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" – was enacted. 30 U.S.C. 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(b) (March 1, 1978) (enacting current 30 U.S.C. 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as "a chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 27-29.

disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.

3. The fifteen-year presumption and methods of rebuttal

The same four basic elements of entitlement apply in claims governed by section 921(c)(4)'s fifteen-year presumption. To invoke the presumption, a miner must establish (in addition to fifteen years of qualifying mine employment) total disability by a preponderance of the evidence. Once invoked, the miner is presumed to satisfy the remaining elements of entitlement. The burden then shifts to the employer to rebut (again by a preponderance of the evidence) any of those presumed elements (disease, disease causation, and disability causation).

While there are three presumed elements available to rebut, there are only two basic methods of rebuttal. This derives from the fact that, in order to rebut the disease element, the employer must prove that the miner does not have legal pneumoconiosis (which includes the disease-causation element) in addition to proving the absence of clinical pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); 78 Fed. Reg. 59106; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 n.5 (6th Cir. 2013) ("Due to the definition of legal pneumoconiosis, the [methods of rebutting the three presumed elements] are often expressed as 1) 'establishing that the miner does not have a lung disease related to coal mine employment' and 2) 'that the miner's totally disabling respiratory or

pulmonary impairment is unrelated to his pneumoconiosis.'" (quoting 78 Fed. Reg. at 59106)).

The first method is to prove that the miner does not have a lung disease caused by coal mine employment. To do this, the employer must prove (A) that the miner does not have legal pneumoconiosis *and* (B) either that the miner does not have clinical pneumoconiosis, or that the miner's clinical pneumoconiosis was not caused by coal mine employment. These showings would rebut either the disease element (by demonstrating the absence of legal and clinical pneumoconiosis) or the disease-causation element (by demonstrating the absence of legal pneumoconiosis and that the miner's clinical pneumoconiosis was not caused by coal mine employment). If the employer fails to prove the absence of a lung disease related to coal mine employment, it can only rebut by the second method: attacking the presumed causal relationship between that disease and the miner's disability (thus rebutting the disability-causation element).

Unsurprisingly, the revised regulation provides for these same two basic methods of rebuttal:

> (d) *Rebuttal*—(1) *Miner's claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—
>
> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and

> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

Revised 20 C.F.R. 718.305(d), 78 Fed. Reg. 59115. While it was phrased less clearly, the previous regulation similarly allowed employers to rebut the presumption by attacking any of the three presumed elements (disease, disease causation, and disability causation).[11]

4. The rule-out standard

The revised regulations also explain what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. 718.305(d)(1)(i).[12] But if the employer fails

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[11] From 1980 until 2013, 20 C.F.R. 718.305(a) provided that the presumption could be rebutted "only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted," not to reflect any substantive change. 78 Fed. Reg. 59106; *see* Laurel Br. at 30.

[12] For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease "significantly related to, or substantially (continued…)

to rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a "*substantially* contributing cause" of their disability. 20 C.F.R. 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner's pneumoconiosis and disability, however, the employer must "establish that ***no part*** of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" Revised section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R. 718.305(d)(2000) (the presumption "will be considered rebutted" if the liable party establishes that "the cause of death or total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment") (emphasis added). This "no part" or "in whole or in part" standard is often referred to as the "rule-out" standard. The primary dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. 718.305(d)(1)(ii), is a permissible interpretation of the Act.

(…continued)
aggravated by, dust exposure in coal mine employment." 20 C.F.R. 718.201(b).

B. The regulatory rule-out standard is a permissible interpretation of the Act.

Laurel argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that "pneumoconiosis did not *substantially* contribute to total disability." Laurel Br. at 28 (emphasis added). [13] Because revised 20 C.F.R. 718.305(d)(1)(ii) adopts the rule-out standard, Laurel's challenge is governed by *Chevron's* familiar two-step analysis. As this Court explained in *Elm Grove Coal*, "[i]n applying *Chevron*, we first ask 'whether Congress has directly spoken to the precise question at issue.' Our *Chevron* analysis would end at that point if the intent of Congress is clear, 'for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' In that regard, the courts have 'long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Id.* (quoting *Chevron*, 467

[13] While Laurel describes it as a "third method" of rebuttal, Laurel Br. at 25, the substantial contribution standard is "not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain – that pneumoconiosis caused total disability." *Ogle*, 737 F.3d at 1070.

U.S. at 843-44).[14]

1. Chevron step one: section 921(c)(4) is silent on what an employer must prove to rebut the presumption on disability-causation grounds.

Applying *Chevron's* first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.[15] Congress has therefore left a gap for the Department to fill.

2. Chevron step two: the regulatory rule-out standard is a permissible interpretation of the Act.

The only remaining question is whether the regulatory rule-out standard is a permissible way to fill this statutory gap. The fact that Laurel's "substantial contribution" standard may also be a permissible interpretation is irrelevant.[16]

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[14] The regulation falls within the Secretary of Labor's statutory authority "to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]" 30 U.S.C. 936(a). *See also Bethlehem Mines Corp. v. Massey ("Massey")*, 736 F.2d 120, 124 (4th Cir. 1984) ("The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.").

[15] The statute addresses rebuttal only in the context of claims in which the government is the responsible party, explaining that the Secretary can rebut the presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. 921(c)(4). The second method encompasses disability causation. *See supra* at 15. But it does not specify what showing the government must make to establish rebuttal on that ground.

[16] The Director's rule-out standard and Laurel's "substantial contributing cause" (continued…)

"The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.

Deference to this regulation is particularly appropriate because "[t]he identification and classification of medical eligibility criteria [under the BLBA] necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Pauley*, 501 U.S. at 697. The fact that the rule-out standard establishes criteria for rebutting, rather than establishing, a claimant's entitlement does not change the fact that it establishes medical eligibility criteria. *Massey*, 736 F.2d at 124 ("The wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress").

(…continued)
standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a "significant," "necessary," or "primary" cause of a miner's disability might also be permissible.

a. The rule-out standard advances the purpose and intent of section 921(c)(4)

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106.[17] Congress amended the BLBA in 1972 because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86. Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" those miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17).

Revised section 718.305(d)(1)(ii) appropriately furthers that goal by imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis and the rule-

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[17] Notably, this explanation directly responded to comments suggesting that the Department eschew the rule-out standard in favor of the "substantially contributing cause" standard Laurel advocates here. *Id.*

out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. 718.305(d)(1)(i); c*f. Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is relevant only if the claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.[18]

b. Congress endorsed the Department's longstanding interpretation of section 921(c)(4) when it re-enacted that provision without change in 2010.

The Department adopted the rule-out standard by regulation over 30 years ago. *See* 20 C.F.R. 718.305(d) (1981). This fact alone supports the Department's claim for deference. *See, e.g., Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

"Congress is presumed to be aware of an administrative or judicial

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[18] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (Rejecting constitutional challenge to BLBA regulation; explaining "[u]nless the inference from the predicate facts of coal-mine employment and pulmonary function values to the presumed facts of total disability due to employment-related pneumoconiosis is 'so unreasonable as to be a purely arbitrary mandate,' we may not set it aside[.]") (quoting *Usery*, 428 U.S. at 28).

interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990). If Congress was dissatisfied with section 718.305(d)'s rule-out rebuttal standard when it re-enacted section 921(c)(4) in 2010, it could have imposed a different standard in the amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This choice can only be interpreted as an endorsement of the Department's longstanding position.

c. The regulatory rule-out standard is consistent with this Court's case law interpreting the fifteen-year presumption and the similar interim presumption.

The only court of appeals to address the rule-out standard since section 921(c)(4) was revived in 2010 affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (Agreeing with the Director that an employer "must show that the coal mine employment *played no part* in causing the total disability."). The issue was presented to this Court in *Owens*, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.[19]

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[19] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery*. 724 F.3d at 559. Laurel advances the same argument, which is addressed *infra* at 26-32. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was (continued…)

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App'x. 563, 567 (4th Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.[20] The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant had not demonstrated a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that: "it is the [employer's] failure effectively to *rule out* such a relationship that is crucial." *Id.* (emphasis added). After concluding that the employer's evidence was "clearly insufficient to meet the statutory burden" because its key witness "did not rule out the possibility of such a connection [between the miner's disabling cancer and pneumoconiosis or his mining work,]" this Court reversed the Board and awarded benefits. *Id.* at 939. *Accord Colley &*

(…continued)
decided.

[20] *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. 921(c)(4) ("there shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis").

Colley Coal Co.,59 F. App'x. at 567 ("[T]he rebuttal standard requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.") (citation and quotation omitted). Laurel has given no reason for this Court to depart from *Rose*.

The fact that this Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the now-defunct "interim presumption" established by 20 C.F.R. 727.203 (1999) is yet further evidence that it is a permissible rebuttal standard.[21] The interim presumption was substantially easier to invoke than the fifteen-year presumption, being available to any miner who could establish ten years of employment (or, in some circumstances, even less) and either total disability or clinical pneumoconiosis. *See* 20 C.F.R. 727.203(a) (1999); *Pittston Coal v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the now-defunct interim presumption could be rebutted if the operator proved that the miner's death or disability did not arise "*in whole or in part* out of coal mine employment[.]" 20

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[21] The Part 727 "interim" regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. 725.4(d); *Mullins Coal Co.*, 484 U.S. at 139. As this Court has recognized, the interim presumption is "similar" to the fifteen-year presumption, *Colley & Colley Coal Co.*, 59 F. App'x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. 20 C.F.R. 725.4(d).

C.F.R. 727.203(b)(3) (1999) (emphasis added).[22] This, of course, is the same language that the initial version of 20 C.F.R. 718.305(d) used to articulate the rule-out standard. *See supra* at 15 n.11. As this Court held in *Massey*, "[t]he underscored language makes it plain that the employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption." 736 F.2d at 123.[23] In *Massey*, this Court rejected an employer's argument that the rule-out standard was impermissibly restrictive, explaining that "[t]he wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate" because there is "nothing in the Black Lung Act to indicate that the Secretary's rebuttal evidence rule exceeds its

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[22] Rebuttal could also be established by proving that the miner was not totally disabled by or did not have pneumoconiosis, 20 C.F.R. 727.203(b)(1)-(2), (4) (1999).

[23] *See also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339 (4th Cir. 1996) ("This rebuttal provision requires the employer to *rule out* any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence, a standard we call the *Massey* rebuttal standard."). The overwhelming majority of other courts to consider the issue have agreed. *See Rosebud Coal Sales Co. v. Wiegand*, 831 F.2d 926, 928-29 (10th Cir. 1987) (Rejecting employer's argument that rebuttal is established "upon a showing that [claimant's] disability did not arise in whole or in *significant* part out of his coal mine employment" as "wholly at odds with the decisions rendered by six courts of appeals" which "apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal mine employment be ruled out.") (citing cases in the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits).

congressional mandate." 736 F.2d at 124.[24] If rule-out is an appropriate rebuttal standard for the easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

In sum, the rule-out standard adopted in revised section 718.305(d)(1)(ii) and its predecessor fills a statutory gap in a way that advances section 921(c)(4)'s purpose, was implicitly endorsed when Congress re-enacted that provision without change in 2010, and is consistent with this Court's interpretations of both the fifteen-year presumption and the similar interim presumption. It is therefore a reasonable interpretation of the Act entitled to this Court's deference.

C. The rule-out standard is consistent with *Usery v. Turner Elkhorn Mining*

Laurel repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Laurel Br. at 20-35. From

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[24] Laurel cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the presumption are not similarly situated to those who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. 718.202(a)(1), (b).

Laurel's brief, one might expect to find, in *Usery*, a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same language that the prior version of section 718.305 used to describe rebuttal options for employers as well as the government. As explained *supra* at 13-15, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

But this was not true when section 921(c)(4) was enacted in 1972 or when

Usery was decided in 1976. Before the statutory definition of pneumoconiosis was expanded in 1978, only miners disabled by *clinical* pneumoconiosis were generally entitled to BLBA benefits. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) ("When the BLBA was originally enacted," the definition of pneumoconiosis encompassed "only those diseases the medical community considered pneumoconiosis[,]" *i.e.* clinical pneumoconiosis.); *Usery*, 428 U.S. at 6-7.[25]

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits. This

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[25] This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. 718.201(a)(1) ("***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis") (emphasis added) *with* 20 C.F.R. 410.110(o) (1970) ("***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis") (emphasis added) *and* 20 C.F.R. 410.110(o)(1) (1976) ("***pneumoconiosis*** . . . includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis") (emphasis added). After several presumptions (including the 15-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. *See* 20 C.F.R. 410.110(o)(2)-(3) (1976). But the general regulatory definition of pneumoconiosis did not include what is now called "legal" pneumoconiosis until after statutory definition was broadened in 1978. *See* 20 C.F.R. 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to their disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner's disability did not arise from the miner's exposure to coal dust (it did, via the disabling emphysema). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, certain miners were entitled to benefits even though they were not disabled by clinical pneumoconiosis.

This is the precise scenario animating *Usery's* discussion of the fifteen-year presumption. The operator-plaintiffs in *Usery*, concerned that section 921(c)(4)'s rebuttal-limiting sentence would be applied to private employers as well as the government, argued that the sentence effectively created an unconstitutional irrebuttable presumption "because it establishes liability even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability" and "that the disability was wholly a product of other disease" caused by coal dust exposure, that "is not otherwise compensable

under the Act." 428 U.S. at 34-35. The Court recognized this problem, *Usery*, 428 U.S. at 34 ("The effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis."), but held that section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators," *id*. at 35. It therefore had no need to address the constitutional question. *Id*. at 35-37.

It is true that *Usery* "confirmed the existence of *a limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in 921(c)(4) are not logically equivalent to the methods that would otherwise be available." *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring). Due to section 921(c)(4)'s rebuttal-limiting sentence, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any "chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. 718.201(a)(2). As a result, the scenario motivating *Usery's* discussion of the rebuttal-limiting sentence became moot.

Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every lung disease caused by coal dust exposure is legal pneumoconiosis. To the contrary, because an employer must rebut legal as well as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.[26]

Most importantly for present purposes, *Usery* has nothing at all to do with the rule-out standard. At most, *Usery* stands for the proposition that operators must be allowed to rebut the fifteen-year presumption by proving that a miner's disability is caused by a disease other than pneumoconiosis. Both the old and revised version of 20 C.F.R. 718.305 allows operators to rebut the presumption on disability-causation grounds and is therefore consistent with *Usery*. But nothing in *Usery* even suggests that operators must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a "substantial" contributing cause of a miner's disability. To the contrary, the words the Court

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[26] The many authorities applying the rebuttal-limiting sentence's language to operators – including 20 C.F.R. 718.305 (1981) and *Rose*, 614 F.2d at 939 – simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Once the definition of pneumoconiosis was expanded to include legal pneumoconiosis, "[t]he only ways that any liable party – whether a mine operator or the government – can rebut the 15-year presumption are the two set forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements.").

used to frame the operators' argument – the rebuttal-limiting sentence can prevent rebuttal "even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability [and] that *the disability was **wholly** a product of other disease*" – are not only consistent with the rule-out standard, they essentially articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a "substantial" cause of a miner's disability.[27] It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption of disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.[28] Laurel's argument that revised 20 C.F.R.

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[27] As a result, Laurel's extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Laurel Br. at 31-35. In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. 428 U.S. at 37 and n.40.

[28] To the extent that Laurel's brief could be read to suggest that the rule-out standard itself is an interpretation of the text of section 921(c)(4)'s rebuttal-limiting sentence, it cites nothing in *Usery* or any other case supporting that claim. Such an interpretation would also be inconsistent with the Director's explanation for adopting the rule-out standard in the revised regulation and the fact that the rule-

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718.305(d)(1)(ii) is invalid should be rejected.

III. Section 725.414 does not prohibit a party from submitting, as part of its rebuttal case, an x-ray reading that is consistent with a reading obtained during the DOL-sponsored pulmonary evaluation.

In 2000, the Department substantially revised its black lung regulations. 65 Fed. Reg. 79920 (December 20, 2000). Among the changes was the promulgation of section 725.414, which sets forth evidentiary limitations designed to address, *inter alia*, the disparity in some parties' financial resources. *Id*. at 79989. Section 725.414 divides the submission of the parties' evidence into affirmative and rebuttal cases. 20 C.F.R. 725.414(a)(2)(i) and (a)(3)(i) (claimant's and operator's affirmative cases); 725.414(a)(2)(ii) and (a)(3)(ii) (claimant and operator rebuttal cases). Each party's rebuttal case consists of responding to the affirmative "case presented by" the opposing party and to the evidence developed "by the Director pursuant to 725.406." 20 C.F.R. 725.414(a)(2)(ii), (a)(3)(ii).

Section 725.406 implements the Director's statutory obligation under section 413(b), 30 U.S.C. 923(b), to provide the miner with a complete pulmonary evaluation. Section 725.406 cautions, however, that "the results of the complete pulmonary evaluation shall not be counted as evidence submitted by the miner

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out standard also applied to 20 C.F.R. 727.203's interim presumption, which did not derive from section 921(c)(4)'s text.

under 725.414." Rather, the examination is conducted by an "impartial and highly qualified physician" in a "non-adversarial setting." 64 Fed. Reg. 54988.

In this case, the section 413(b) examination included a chest x-ray read by Dr. Rasmussen, a B-reader (but not a Board-certified radiologist), as positive for pneumoconiosis. JA 213. Laurel then had this x-ray re-read as negative by Dr. Wiot, a B-reader and radiologist. JA 214. Following the Board's remand to the ALJ, the miner submitted a rereading of the X-ray by the dually-qualified Dr. Alexander. JA 218.

Laurel argues (Laurel Br. 44-47) that the ALJ erred in admitting the Dr. Alexander's rereading as responsive evidence because it did not rebut, *i.e.*, contradict, Dr. Rasmussen's positive reading. But Laurel's argument is inconsistent with the plain language of section 725.414(a)(2)(ii). The miner's rebuttal case (just like the operator's) is not limited to only disproving the opposing party's affirmative case, but allows a response to the impartial evidence obtained by the Director during the section 413(b) examination.

In any event, Dr. Alexander's re-reading is easily viewed as "in rebuttal of the case presented by the party opposing entitlement," namely, Laurel. Laurel had the Rasmussen x-ray read as negative by Dr. Wiot and Dr. Alexander's positive reading rebutted that negative reading. Thus, the ALJ properly admitted Dr. Alexander's rereading. *Accord J.V.S. v. Arch of West Virginia/Apogee Coal Co.*,

24 BLR 1-78, 1-83, 2008 WL 3860953 (Ben. Rv. Bd. 2008) ("[R]ebuttal evidence submitted by a party pursuant to 20 C.F.R. 725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute "the case" presented by the opposing party.'").

IV. The ALJ properly awarded the widow's claim under section 422(l) of the Act after finding her husband entitled to benefits.

Laurel argues that Mrs. Maynard does not meet the criteria for derivative entitlement under section 422(l) because the award of benefits on her husband's lifetime claim has been appealed and therefore is not final. Laurel Br. 58-60. This argument is without merit. Section 422(l) does not condition derivative survivors' benefits on a final miner award; instead it only requires that the miner has been "determined to be eligible to receive benefits."[29] The Secretary's black lung regulations clearly establish when a miner is "eligible to receive benefits."[30] And those rules establish that any miner whose claim is awarded is not only "eligible"

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[29] Section 422(l) provides that

> In no case shall the eligible survivors of *a miner who was determined to be eligible to receive benefits* under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

30 U.S.C. 932(l) (2013) (emphasis added).

[30] The BLBA authorizes the Secretary to prescribe regulations "to provide for the payment of benefits by [coal mine] operator[s] to persons entitled thereto." 30 U.S.C. 932(a).

to receive benefits, but *entitled* to receive benefits, regardless of whether the award is final.

This is true from the very first determination in the claims process in the miner's favor. If an OWCP district director recommends an award, the responsible operator is free to accept the district director's recommendation, and of course, would then be required to pay the miner's benefits. *See* 20 C.F.R. 725.412(b), .502(a)(2). If the responsible operator rejects the recommendation and requests a formal hearing, the miner is entitled to receive benefits from the Black Lung Disability Trust Fund.[31] 26 U.S.C. 9501(d)(1)(A)(i); 20 C.F.R. 725.419(a), .522(a).

A miner whose claim is awarded by an ALJ, the Benefits Review Board, or a reviewing court (which are referred to as "effective awards") is similarly entitled to benefits regardless of whether the operator appeals that award. Under 20 C.F.R. 725.502(a)(1), "benefits shall be considered due after the issuance of an effective order requiring the payment of benefits."[32] Moreover, benefits awarded by an

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[31] The Trust Fund was established in 1977 to transfer responsibility for the payment of benefits from the Federal government to the coal industry. 20 C.F.R. 725.490. It is financed by an excise tax on the sale of coal. 26 U.S.C. 9501.

[32] Section 725.502(a)(1) is consistent with incorporated provisions of the Longshore Act. Section 21(a) of the Longshore Act, 33 U.S.C. 921(a), which is incorporated into the BLBA by 30 U.S.C. 932(a), provides in pertinent part "[a] (continued…)

effective order are due "notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court," *id*., and they remain due until such time as the order requiring payment is vacated. *Id*. Until then, however, the obligation to pay benefits persists pending a final decision, and payment may be stayed only in cases of irreparable injury. 33 U.S.C. 921(a)(3) incorporated into the BLBA by 30 U.S.C. 932(a); 20 C.F.R. 802.105(a).

Once benefits are due, *i.e.*, when the order becomes effective, the liable operator must immediately pay them. 20 C.F.R. 725.530(a). If it does not, the operator is in default, *id*.; and it risks assessment of a 20% surcharge of additional compensation if the miner does not receive compensation within ten days. *Id*.; 33 U.S.C. 914(f); *see Combs v. Elkay Mining Co.*, 881 F.Supp. 2d 728, 731 (S.D. W.Va 2012); *Nowlin v. Eastern Associated Coal Corp.*, 266 F.Supp. 2d 502, 504

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compensation order shall become effective when filed in the office of the deputy commissioner." 33 U.S.C. 921(a). The term "effective" in section 21(a) is equivalent to the terms "due" and "due and payable" in Longshore Act sections 14(f) and 18(a), 33 U.S.C. 914(f) and 918(a), also incorporated into the BLBA. *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 127 n. 1 (5th Cir. 1983);

When an order becomes "effective" under the black lung regulations depends on the issuer: a district director award is effective after 30 days if no hearing request is made; an ALJ order is effective when filed with the district director; a Board decision is effective when issued; and a court decision becomes effective in accordance with applicable court rules. 20 C.F.R. 725.502(a)(2).

(N.D. W.Va. 2003); *Kinder v. Coleman & Yates Coal Co.*, 974 F.Supp. 868, 871 (W.D. Va 2009). But even when the operator refuses to pay on an effective order, the awarded miner will still receive benefits--the Trust Fund pays instead. 26 U.S.C. 9501(d)(1)(A)(ii) (requiring Trust Fund payment of benefits when the liable operator fails to pay within 30 days after payment is due); 20 C.F.R. 725.522(a) (same).

Thus, at every stage of a black lung proceeding, when a miner is awarded benefits, there is a legal obligation to pay those benefits either on the operator or the Trust Fund. Obviously, a miner who must be paid benefits is eligible to receive them.

Laurel therefore is plainly wrong in equating (Laurel Br. 59) an effective order requiring the payment of compensation with a final order ultimately adjudicating the merits. The cited provision, 20 C.F.R. 725.479(a), which concerns only ALJ decisions, makes an ALJ order "effective" when filed with the district director, and further provides that the effective order becomes "final" when not appealed within 30 days. But that provision says nothing about the duty to pay benefits based on an effective award.

The revised black lung regulation, 20 C.F.R. 725.212(a)(3), 78 Fed. Reg. 59102, 59117 (Sept. 25, 2013), is consistent with the statutory and regulatory scheme mandating payment of benefits following a finding of entitlement. This

regulation implements the ACA's restoration of derivative benefits for surviving spouses under section 422(l). The provision states that a surviving spouse is entitled to benefits if "the deceased miner . . . filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits and the surviving spouse . . . filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2005." The rule's language – which speaks of a miner's claim that "results or resulted in a final award" – plainly encompasses two different situations: an already-final miner award, *i.e.*, "resulted in," and a potentially-final miner award, *i.e.*, a claim that "results in" an award. In both instances, the survivor has met section 725.212(a)(3)'s condition of entitlement.

Apart from rendering the text's plain language meaningless, construing section 725.212(a)(3) as limited to only final miner awards, would be in significant tension with, if not inconsistent, with the authorizing statute, section 422(l), which merely requires that the miner be "eligible to receive benefits." And eligibility to receive benefits, as we have shown, is not dependent on a final order.

Furthermore, having dependent survivors wait years, possibly even decades, for a final resolution of the miner's claim is inconsistent with the purpose of restoring derivative benefits, namely, that there be no cessation in the payment of benefits. *See B & G Constr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 250-51 (3d Cir. 2011) (citing ACA section 1556's title, "CONTINUATION OF

BENEFITS" as evidence of Congress's intent in restoring derivative benefits).[33] Consequently, preconditioning derivative benefits on a final miner award is clearly inconsistent with the Department's stated goal in promulgating the regulation "to ensure that survivors entitled to derivative benefits under ACA-amended section 422(l) begin to receive benefits as soon as possible after filing a claim." 77 Fed. Reg. 19456, 19469 (March 30, 2012). Indeed, the availability of a "certain, *prompt* recovery" is essential to the "central bargain" in the longshore and black lung workers' compensation systems. *Roberts v. Sea-Land Serv., Inc.*, 132 S.Ct. 1350, 1354 (2012) (emphasis added); *Williams v. Jones*, 11 F.3d 247, 254 (1st Cir. 1993) ("Congress anticipated the severe financial hardships that could beset injured employees as a result of lengthy appeals.").

And even if section 725.212(a)(3)'s text is ambiguous, the Director's reading of the regulation is reasonable because, as explained, it squares with the underlying statutory provisions. It is thus entitled to substantial deference.

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[33] The length of the proceedings here is fairly typical and illustrates the long wait for derivative benefits that survivors may face if the miner's claim must first become final. After years of litigation, Laurel now requests that the claims go back to square one for reconsideration. We doubt that Congress, in calling for a continuation of benefits, had this kind of delay in mind before benefits could be "continued." *See Grigg v. Director, OWCP*, 28 F.3d 416, 420 (4th Cir. 1994) (decrying the 19 years taken for the processing of a black lung claim); *Dalton v. OWCP*, 738 F.3d 779, 780 (7th Cir. 2013) (noting claimants' 15-year struggle for black lung benefits).

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 159 (1988) (Director's interpretation of the BLBA's implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation").

Finally, the coal mine operator is not harmed by making it liable for the widow's interim derivative benefits. First, absent the miner's death, it would have been responsible for the *miner's* interim benefits during the litigation. So, it is no worse off in being responsible for the widow's interim benefits while the miner's case proceeds. Moreover, should the coal mine operator in fact pay the widow's interim derivative benefits pending final resolution of the miner's claim, it has the right to initiate overpayment proceedings against the widow to recover sums paid if the miner's award is later reversed. *See* 20 C.F.R. 725.522(b).[34] Of course, here – as is typical – Laurel has made no interim payments, and so, if the miner's award is ultimately denied, it will have lost nothing.

In sum, Laurel's argument must be rejected on the basis of a simple, really

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[34] Section 725.522(b) provides that benefits paid to a claimant whose interim award of benefits is later vacated are recoverable overpayments. But, contrary to Laurel's assertion (Laurel Br. at 59), section 725.522(b) does not require a final determination of entitlement – either an award or a denial – before eligibility is ascertained. Indeed, the miner must first be eligible to receive, and actually be paid, benefits before there can be an "overpayment." Moreover, section 725.522(b) does not even mandate that the later order itself be final to recover the overpayment, and section 725.540(b) allows recovery of an overpayment even when the claimant is later found to be entitled to benefits.

unassailable, proposition: a miner is (at a minimum) eligible to receive benefits when the law demands their payment, and that is the case whenever a miner is entitled to benefits.

CONCLUSION

The Court should rule that 20 C.F.R. 718.305 is a permissible construction of the BLBA, that the ALJ properly admitted into evidence the miner's rereading of the x-ray taken during the Department's section 413(b) examination, and that a miner's award need not be final before a survivor may receive derivative benefits under section 422(l) of the Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 9,887 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption

30 U.S.C. § 921 (2006 & Supp. VI 2012) – Regulations and presumptions

* * *

(c) Presumptions

* * *

(4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

Revised section 718.305

Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule

78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013)
(to be codified at 20 C.F.R. § 718.305)

(a) Applicability. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.
* * *
(c) Facts presumed. Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) Rebuttal—

(1) Miner's claim. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in § 718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (see § 718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201
* * *
(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

Former 20 C.F.R. § 718.305 (1980-2013)

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary impairment of unknown origin.

(e) This section is not applicable to any claim filed on or after January 1, 1982.[1]

[1] Subsection (e) was added on May 31, 1983, by 48 Fed. Reg. 24271, 24288.