No. 17-15782

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. STEEL MINING COMPANY, LLC and U.S STEEL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and CASSANDRA TERRY, o/b/o and widow of LUTHER TERRY
Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

The Director, Office of Workers' Compensation Programs, has identified the following interested persons in this matter:

1. Ball, Theresa, Esq., Associate Regional Solicitor, U.S. Dep't of Labor
2. Belcher, Roger, District Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor
3. Boggs, Judith S., Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor
4. Chance, Michael, District Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor
5. Cox, Helen H., Esq., U.S. Dep't of Labor (retired)
6. Dragoo, Joshua A., Claims Examiner, Office of Workers' Compensation Programs, U.S. Dep't of Labor
7. Freeman, Cecelia B., Esq., Counsel for Cassandra Terry
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10. Gilligan, Ryan, Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor
11. Hall, Betty Jean, Chief Administrative Appeals Judge, Benefits Review Board, U.S. Dep't of Labor
12. Harris, Lystra A., Administrative law Judge, U.S. Dep't of Labor
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21. Terry, Cassandra A., Individual Respondent/Claimant

22. Terry, Luther, Coal Miner (deceased)

23. U.S. Steel Corporation, Petitioner

24. U.S. Steel Mining Co., LLC, Petitioner

25. Walker, J. Thomas, Esq., Counsel for Cassandra Terry

26. Wolfe, Kary Bryant, Esq., Counsel for U.S. Steel Mining Co., LLC

STATEMENT REGARDING ORAL ARGUMENT

The Director, Office of Workers' Compensation Programs, believes oral argument is unnecessary because the two issues on appeal have been fully presented in the briefs. The first issue is a straightforward case involving the question of whether the Petitioner's evidence, as weighed by the ALJ, is sufficient to establish rebuttal by an undisputed method. The answer – "no" – is obvious. The second issue presents a narrow legal issue and the legal arguments have been fully set forth in the briefs.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This appeal involves two claims for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944: a January 2013 claim for disability benefits filed

by Luther Terry, a former coal miner, and a September 2013 claim for survivor's benefits filed by Cassandra M. Terry, his widow.

On October 11, 2016, Administrative Law Judge Lystra A. Harris awarded benefits in both claims and ordered the miner's former employer, U.S. Steel Company (U.S. Steel or employer), to pay them. U.S. Steel appealed the ALJ's decision to the United States Department of Labor Benefits Review Board on November 7, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On October 30, 2017, the Board affirmed both awards in a final decision. U.S. Steel petitioned this Court for review on December 29, 2017. The Court has jurisdiction over U.S. Steel's petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The miner's exposure to coal mine dust - the injury contemplated by 33 U.S.C. § 921(c) - occurred in Alabama, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

1. In order to be entitled to BLBA benefits, miners must prove that they are totally disabled by pneumoconiosis arising out of coal mine employment. They are

rebuttably presumed to have satisfied this criterion if, *inter alia*, they worked for at least fifteen years in underground coal mines and have a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4). The regulation implementing this "fifteen-year presumption" provides that the party opposing entitlement can rebut the presumption by showing that (1) the miner does not have "clinical" and "legal" pneumoconiosis, or (2) no part of the miner's disability is due to pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i),(ii).

The ALJ awarded benefits in the miner's claim because the miner's evidence invoked the fifteen-year presumption, and Employer's evidence failed to rebut it. The first issue is whether the ALJ's finding that Employer did not rebut the presumption is supported by substantial evidence and in accordance with law.

2. The BLBA also provides survivor's benefits to certain dependents of miners. Dependent survivors may obtain benefits in two ways. The first is by proving that the miner's death was due to pneumoconiosis. The second is by showing that the miner "was determined to be eligible to receive benefits . . . at the time of his or her death." 30 U.S.C. § 932(*l*). Under this second method, the dependent survivor is entitled to automatic derivative benefits without having to prove that the miner's death was due to pneumoconiosis and without having to file a new claim or otherwise revalidate the miner's approved claim. *Id.*; *U.S. Steel Min. Co., LLC v. Dir., OWCP*, 719 F.3d 1275, 1284 (11th Cir. 2013) ("*Starks*").

In this case, the miner died before his claim was approved. Based on 30 U.S.C. § 932(*l*), the ALJ awarded the widow automatic derivative benefits. The second issue is whether the widow must be denied automatic derivative benefits simply because her husband's claim was awarded posthumously.

STATEMENT OF THE CASE

I. Statutory and regulatory background

The BLBA provides disability compensation and certain medical benefits to former coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment. 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Benefits are also provided to the surviving dependents of a miner "whose death was due to pneumoconiosis or "who was determined to be eligible to receive benefits . . . at the time of his or her death." 30 U.S.C. §§ 901(a), 932(*l*); *see infra* at 28-35 (detailing § 932(*l*)'s statutory and regulatory background).

A claimant is entitled to the payment of benefits upon the issuance of an award, notwithstanding the pendency of further proceedings. (These are called "interim benefits.") *See* 20 C.F.R. §§ 725.420(a), 725.502(a)(1), 725.522(a). If the non-final award is overturned, the party paying the interim benefits can seek to recover the overpayments from the claimant. *See* 20 C.F.R.. § 725.522(b). Benefits are payable to an awarded miner beginning with the month of onset of total disability due to pneumoconiosis (typically the month in which the claim was filed). 20

C.F.R. §§ 725.203(a), 725.503(b). A survivor's entitlement date begins with the month of the miner's death. 20 C.F.R. § 725.503(c).

Pneumoconiosis. Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368 (11th Cir. 1997) (explaining clinical and legal pneumoconiosis); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (same).

Clinical (or medical) pneumoconiosis refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1). It includes the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP." *Id*. Clinical pneumoconiosis is typically diagnosed by chest x-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).

Legal pneumoconiosis, by contrast, is a broader category including "any chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease or impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust is considered to have "arise[n] out of coal mine employment," and is therefore

considered to be legal pneumoconiosis. 20 C.F.R. §§ 718.201(b); 718.202(a)(4); *Lewis Coal Co. v. Director, OWCP*, 373 F.3d 570, 577 (4th Cir. 2004).

The fifteen-year presumption. The Act contains several presumptions designed to aid miners in establishing that they are totally disabled by pneumoconiosis arising out of coal mine employment. *See generally Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 10 (1976). One such presumption, 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," is invoked if the miner worked for at least fifteen years in underground coal mines and has a totally disabling respiratory or pulmonary condition. 30 U.S.C. § 921(c)(4). If invoked, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis," and is therefore entitled to benefits. *Id*., *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013). The BLBA provides that the fifteen-year presumption may be rebutted by proof that the miner does not suffer from pneumoconiosis or that the respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. § 921(c)(4).

In 2013, the Department of Labor promulgated a regulation, 20 C.F.R. § 718.305, effective October 25, 2013, implementing the fifteen-year presumption. *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1341-42 (10th Cir. 2014). The regulation applies to all claims "filed after January 1, 2005,

and pending on or after March 23, 2010," 20 C.F.R. § 718.305(a), and provides standards governing how the presumption can be invoked and rebutted.[1]

The regulation provides two alternate methods for rebutting the presumption. The first method requires the liable party to establish that the miner has neither clinical pneumoconiosis arising out of coal mine employment nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(2)(i). *See supra* at 4-5 (discussing clinical and legal pneumoconiosis). The second rebuttal method requires the liable party to prove that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. § 718.305(d)(2)(ii). This second method is frequently called the "rule out standard." *Antelope Coal*, 743 F.3d at 1336; *Drummond Co. v. Director, OWCP*, 650 Fed. Appx 690, 693 (11th Cir. 2016).

II. Factual background

A. General facts

The miner worked in underground mining in the state of Alabama for at least 29 years, ending in 2003. A1 17 n.3, 160.[2] He smoked at least one pack of cigarettes

[1] Employer does not dispute that the ALJ properly invoked the fifteen-year presumption. Petitioner's Opening Brief ("OB") 8 n.3. Nor does Employer dispute that applicability and validity of the regulation's two methods of rebuttal. *Id*.

[2] Because Employer did not consecutively paginate its five-volume Appendix, we cite to the Appendix ("A") volume number and the ECF header.

per day for over 50 years. A1 22. The miner had totally disabling respiratory condition, and he died at home on August 18, 2013 at the age of 72. A1 165. Dr. Reid Christopher, the miner's primary care physician, reported that cardiopulmonary arrest caused the miner's death. A1 37, 65.

B. Medical evidence

Employer does not challenge invocation of the fifteen presumption. Thus, we summarize only the medical evidence relevant to rebuttal, namely existence of pneumoconiosis and disability causation.

1. X-ray readings

The ALJ considered eight readings (four positive for pneumoconiosis and four negative) of four different chest x-rays.

October 2010. Dr. Groton, a B-reader and board-certified radiologist, read this x-ray as positive for pneumoconiosis.[3] A1 13 (Claimant's Exhibit 1). Dr. Goldstein, a B-reader, read this x-ray as negative for pneumoconiosis. A1 141.

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[3] A "B-reader" is a "physician [who] has demonstrated ongoing proficiency . . . in the use of the [International Labour Organization Classification] for interpreting chest [x-rays] for pneumoconiosis . . . by . . . passing a specially designed proficiency examination . . .." 20 C.F.R. § 718.102(e)(2)(iii) (cross-referencing 42 C.F.R. § 37.51(b)(2)). Board-certified refers to certification in the practice or radiology by either the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.102(e)(2)(i).

Employer failed to include in the Appendix this and several other relevant exhibits admitted into the administrative record. We cite to the index of the certified case record and describe the exhibit.

April 2011. Dr. Goldstein read this x-ray as negative. A1 140

February 2013. Dr. Groton read this x-ray as positive. A1 180. Dr. Meyer, a B-reader and board-certified radiologist, read it as negative. A2 63. Dr. Smith, also a B-reader and board-certified radiologist, read it as positive. A1 13 (Claimant's Exhibit 2).

July 2013. Dr. Meyer read this x-ray as negative (A1 13 (Employer's Exhibit 1)), while Dr. Alexander, who is a B-reader and a board-certified radiologist, read it as positive. A1 13 (Claimant's Exhibit 6).

2. Medical opinions

Dr. Barney. Dr. Barney, examined the miner for the Department of Labor, and diagnosed clinical pneumoconiosis, relying on Dr. Groton's February 2013 positive x-ray reading. A1 167. He also diagnosed severe airflow obstruction with arterial hypoxemia. The doctor stated that the miner had severe chronic obstructive pulmonary disease (COPD) and apportioned the respiratory impairment as 80% related to smoking and 20% related to coal dust exposure.[4] He explained that "[t]here is a substantial body of evidence that patients with extensive smoking related COPD and work exposures to coal dust can have synergistic effects on their respiratory disease." A1 201.

[4] Chronic obstructive pulmonary disease, known as COPD, is an umbrella term encompassing chronic bronchitis, emphysema, and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000).

Dr. Goldstein. Dr. Goldstein examined the miner for Employer, reviewed treatment records and Dr. Barney's report, and read two x-rays. He interpreted the x-rays as showing emphysema, not pneumoconiosis. A1 138. His examination and medical records review confirmed that the miner suffered from COPD, which he believed was secondary to smoking. A2 81. By way of explanation, he tersely remarked, "[t]he most common cause of COPD is smoking." He thus "totally disagreed" with Dr. Barney's assessment that 20% of the miner's impairment was due to coal dust exposure. A2 82.

Dr. Postma. Dr. Postma treated the miner from 2006 until 2009, and during his hospitalization for respiratory arrest and pneumonia in July, 2013. A2 176, 185, 186. According to the doctor, the miner was chronically hypoxic (low oxygen levels), meaning that his organs, brain, and tissues were not receiving enough oxygen to adequately function and work properly. A2 176, 181. She diagnosed chronic respiratory failure, COPD and sleep apnea. A2 181, 188. She admitted that she (1) did not have any particular experience diagnosing occupational lung diseases; (2) did not assess the miner "in depth or in detail" for pneumoconiosis; (3) was not a radiologist or a B-reader; and (4) did not review any x-ray reports by a B-reader or radiologist. A2 175-76, 191. Despite this lack of expertise, she nonetheless asserted that the treatment x-rays, a CT scan, and a bronchoscopy did not show pneumoconiosis. A2 183-85. The doctor opined that the miner's

smoking history explained his COPD, underlying hypoxemia, and other symptoms. A2 188. But when asked whether the miner's exposure to coal dust could have contributed to the miner's COPD, she answered "It's potential." A2 191.

C. Decisions below

1. Proceedings before the OWCP District Director

The miner filed his claim for benefits on January 11, 2013. A1 160. He died, however, in August 2013, before it was decided. A1 165. The widow elected to continue with the miner's claim, which after an initial denial, was awarded by the district director in November 2014 - fifteen months after the miner's death. A2 103.

The widow filed her own claim for survivor's benefits following the miner's death. The district director issued a proposed decision and order in December 2014, awarding her automatic derivative benefits based on the miner's award pursuant to 30 U.S.C. § 932(*l*). A2 163.

Employer requested a hearing before an ALJ on both claims, which were consolidated for hearing before ALJ Harris.

2. ALJ Harris's award of benefits

The ALJ first considered the miner's claim. A1 22. She found the miner entitled to the fifteen-year presumption because he worked in underground coal

mining for at least 29 years and suffered from a totally disabling respiratory impairment. A1 26.

The ALJ then considered whether the medical evidence rebutted the presumption, and found it lacking. With respect to clinical pneumoconiosis, the ALJ concluded that the chest x-ray readings were positive for pneumoconiosis. In evaluating the conflicting readings, she considered the physicians' radiological qualifications and accorded more weight to the interpretations by the "better credentialed" readers, *i.e.*, those dually qualified as both board-certified radiologists and B-readers. A1 31; *see* 20 C.F.R. § 718.202(a)(1) ("where two or more x-ray reports are in conflict … consideration must be given to the radiological qualifications of the physicians interpreting such x-rays").

In particular, she found the October 2010 x-ray positive because the dually qualified Dr. Groton's positive reading outweighed B-reader Dr. Goldstein's negative reading. The April 2011 x-ray was negative, however, based on Dr. Goldstein's uncontradicted negative reading (it was not reread). She found the February 2013 x-ray positive because it resulted in two positive readings by dually qualified physicians, Drs. Groton and Smith, as opposed to one negative reading by dually qualified Dr. Meyer. Finally, the ALJ found the July 2013 x-ray inconclusive because it resulted in one positive reading by Dr. Alexander and one negative reading by Dr. Meyer, and both physicians were dually qualified. The

ALJ then focused on the interpretations by the dually qualified (*i.e.* most qualified) physicians only, finding that "two x-rays are positive and one is inconclusive." She concluded that the weight of the x-ray evidence was positive for pneumoconiosis and, thus, insufficient to disprove clinical pneumoconiosis. A1 31.

The ALJ then turned to the medical opinions regarding clinical pneumoconiosis. She found the opinions of Drs. Goldstein and Postma not well-reasoned or documented, and thus insufficient to disprove the existence of clinical pneumoconiosis, primarily because the doctors were unaware of the miner's recent positive x-ray readings which the ALJ credited. A1 43-44.

With regard to legal pneumoconiosis, the ALJ discounted the opinions of Drs. Goldstein and Postma that smoking was the sole cause of the miner's respiratory impairment. She did so mainly because the doctors provided no explanation for excluding the miner's 29 years of underground coal mine dust exposure as a factor. A1 46. The ALJ explained that the doctors' reliance on the miner's significant smoking history did not obviate the possibility that coal mine dust could have also contributed to the miner's impairment "as the science underlying the regulations recognizes the additive impact of coal mine dust and smoking on lung disease." *Id*. (citing 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000)). The ALJ found Dr. Postma's opinion further compromised as rebuttal evidence because the doctor

acknowledged the "potential" that the miner's coal mine dust exposure may have contributed to his respiratory impairment. *Id*. Finally, the ALJ observed that because the miner's hospital and treatment records did not address whether the miner's COPD and respiratory failure arose out of his coal dust exposure, this evidence was insufficient to refute any presumed connection. A1 47. The ALJ thus found that Employer failed to rebut the presumption of pneumoconiosis in either of its clinical or legal manifestations.

Because both Drs. Goldstein and Postma wrongly assumed that the miner did not have pneumoconiosis, the ALJ gave their opinions no weight on disability causation and accordingly concluded that Employer failed to rule out pneumoconiosis as a cause of the miner's disability. A1 48. She thus awarded the miner's claim. A1 50.

Based on the award of the miner's lifetime claim, the ALJ determined that his widow was automatically entitled to derivative benefits under § 932(*l*). A1 51. Employer appealed the ALJ's decision to the Board.

3. The Board's affirmance of the award of benefits

The Board affirmed the ALJ's decision awarding benefits. *Terry v. U.S. Steel Corp.*, 2017 WL 5898736 (Ben. Rev. Bd. 2017). It held that the ALJ permissibly discredited the opinions of Dr. Goldstein and Postma on legal pneumoconiosis for failing to explain their exclusion of the miner's 29 years of underground coal mine

dust exposure as a source of his COPD. *Id*. at *4 (citing, *inter alia*, *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 668 (6th Cir. 2015)). Accordingly, the Board affirmed the ALJ's finding that Employer failed to disprove the existence of pneumoconiosis under the first rebuttal method.[5] *Id*.

It then upheld the ALJ's finding that the doctors' failure to diagnose legal pneumoconiosis undermined their opinions on the cause of the miner's disability, and affirmed her determination that Employer had failed to rule out pneumoconiosis as a cause of disability under the second rebuttal method. *Id*. (citing *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995)).

The Board thus affirmed the award of the miner's lifetime claim and, based on that award, affirmed the ALJ's finding that his widow was automatically entitled to derivative benefits under § 932(*l*). *Id*. at *5.

Employer then petitioned the Court for review.

SUMMARY OF THE ARGUMENT

The Court should affirm the miner's award of benefits as supported by substantial evidence. It is undisputed that the miner was presumptively entitled to

[5] The Board did not reach the ALJ's clinical pneumoconiosis finding. 2017 WL 5898736 at *4.

benefits based on his more than fifteen years of qualifying coal mine employment and total disability. To rebut this presumption, Employer was required to prove that the miner did not have pneumoconiosis, or that his pneumoconiosis played no part in his disability. The ALJ reasonably found that Employer failed on both counts. She permissibly accorded the greatest weight to the x-ray readers with the best radiological credentials to find clinical pneumoconiosis established. She further reasonably determined that Employer failed to disprove the presumed existence of legal pneumoconiosis because its experts did not explain why they excluded the miner's 29 years of underground coal mine dust exposure as a factor in his COPD. Finally, the ALJ correctly ruled that because Employer's experts wrongly assumed pneumoconiosis did not exist, their opinions – that pneumoconiosis played no part in disability – were inherently flawed, and she properly rejected them.

The Court should also affirm the award of automatic derivative benefits to the widow. Under 30 U.S.C. § 932(*l*), a survivor is entitled to automatic derivative benefits if "the miner was determined to be eligible to receive benefits . . . at the time of his or her death." When Congress reinstated automatic derivative benefits in 2010, it intended to make it easy for dependent survivors to receive benefits based on their associated miners' approved claims. Congress eliminated any requirement that they revalidate their miner's approved claim or that they even file

a new claim. Nothing in the statute requires the widow here, a surviving spouse of a miner with an approved claim, to be treated differently from similarly-situated survivors based solely on the happenstance that her husband died before an adjudicator approved his claim.

Consistent with the statutory text and reflecting Congress's intent, DOL's regulation, 20 C.F.R. § 725.212(a)(3)(ii), entitles surviving spouses to automatic derivative benefits when the miner's claim "results or resulted in a final award of benefits." The regulation encompasses miners' claims that were approved before death ("resulted in a final award") or those that were approved afterwards ("results in a final award"). This regulatory interpretation of § 932(*l*) is reasonable and avoids the inequitable and irrational consequences of Employer's interpretation. Nor is the regulation inconsistent with this Court's decision in *Starks*, which did not address the issue presented here. Accordingly, the Court should defer to DOL's regulation.

ARGUMENT

I. Standard of review

This Court's review of matters of law is plenary. *Jordan v. Ben. Rev. Bd.*, 876 F.2d 1455, 1458-59 (11th Cir. 1989). In an appeal involving a dispute over the correct legal interpretation of the Act or the regulations, the Court defers to the Department of Labor's interpretation unless it is plainly erroneous or inconsistent

with the language of the statute and regulations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Starks,* 719 F.3d at 1279 (11th Cir. 2013) (deference on regulations); *Bradberry*, 117 F.3d at 1366-67 (same).

In an appeal involving a challenge to the ALJ's factual findings, both the Board and this Court review the ALJ decision only to determine whether it is in accordance with the law and is supported by substantial evidence in light of the entire record. *Coleman v. Director, OWCP*, 345 F.3d 861, 863 (11th Cir. 2003). Because the Board and Court apply the same deferential standard of review to ALJ decisions, the Court's review of Board decisions is de novo. *Id*. Thus, although the case comes to the Court from the Board, the Court begins its analysis by reviewing the ALJ's decision.

II. The ALJ correctly awarded benefits in the miner's lifetime claim.

Employer does not contest invocation of the fifteen-year presumption in the miner's claim; thus, to defeat entitlement, Employer must either 1) disprove the existence of both clinical and legal pneumoconiosis, or 2) rule out pneumoconiosis as even a partial cause of his disability. 20 C.F.R. § 718.305(d)(1); *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 134-35, 137-43 (4th Cir. 2015). The ALJ correctly found that the company failed to establish either method of rebuttal.

A. Employer did not disprove clinical and legal pneumoconiosis.

Clinical Pneumoconiosis. Employer first challenges the ALJ's finding that the chest x-ray evidence established the presence of clinical pneumoconiosis. By the company's count, the x-rays are only in equipoise. Op. Br. at 8. This contention, even if true, does not satisfy the company's rebuttal burden to *disprove* the existence of the disease. 20 C.F.R. § 718.305(d)(1)(i)(B); *see Consolidation Coal Co. v. Director, OWCP*, 864 F.3d 1142, 1149 (10th Cir. 2017) (collecting cases; burden shifts "to defendants to establish the lack of pneumoconiosis") (emphasis in original); *see also Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1515-16 (11th Cir. 1984) (explaining that burden of persuasion shifts to employer on rebuttal). Thus, even in the company's view, the presumption of pneumoconiosis still stands after considering the x-ray evidence.

Regardless, the ALJ correctly weighed the conflicting chest x-ray evidence. Factfinders are required to consider the physicians' radiological qualifications when x-ray readings conflict, 20 C.F.R. § 718.202(a)(1), and the ALJ here permissibly accorded the greatest weight to the readings by the physicians with the best radiological credentials – the dually qualified readers (B readers and Board-certified/eligible radiologists). *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 899 (7th Cir. 2003); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993)

(affirming ALJ's crediting of x-ray interpretation by dually qualified board-certified radiologist/B-reader over that of B-reader).

In trying to upset the ALJ's factfinding, Employer argues that the readings of its own doctor -- Dr. Goldstein -- should have been accorded as much weight as those by the dually-qualified readers. OB 7-8. But Employer misconstrues Dr. Goldstein's qualifications and the regulations. There is no evidence that Dr. Goldstein – beyond being a B-reader – received any special training, or has expertise, in reading x-rays. A5 239-241. Moreover, his Board certification in pulmonology is not a *radiological* qualification. *Hammond v. Laurel Creek Mining Co.*, 2007 WL 7629300 (Ben. Rev. Bd. Feb. 27, 2007) (unpub.) (holding that ALJ erred in equating qualifications of "pulmonary specialists" with those of board-certified/eligible radiologists and B-readers).

And radiological qualifications are the relevant benchmark. 20 C.F.R. §§ 718.202(a)(1) (requiring consideration of "*radiological qualifications*" of x-ray readers where interpretations conflict); 718.102(e)(2) (requiring x-ray reader to report qualification as board-certified/eligible radiologist or B-reader); *BethEnergy Mines, Inc. v. Cunningham*, 104 Fed. Appx. 881, 886 (4th Cir. 2004) (explaining that B reader or Board certified/eligible radiologist status is "relevant qualification[]" when addressing conflicting x-ray interpretations). Thus, while radiological qualifications in addition to being a B-reader or board-

certified/eligible radiologist may be taken into account, the qualification must be radiological in nature in the first instance. *Compare Worhach v. Director, OWCP*, 17 Black Lung Rep. (MB) 1-105, 1-108 (Ben. Rev. Bd. 1993) (holding adjudicator may properly consider physician's professorship in radiology in weighing radiological qualifications under § 718.202(a)(1)) *with Melnick v. Consolidation Coal Co.*, 16 Black Lung Rep. (MB) 1-31, 1-37 (Ben. Rev. Bd. 1991) (*en banc*) (stating that Board-certification in internal medicine or having prestigious teaching position outside the field of radiology are not relevant radiological qualifications when evaluating conflicting x-ray readings). In short, Employer is incorrect that the ALJ erred in weighing of the x-ray evidence.

Employer next argues that the ALJ erred in rejecting Drs. Goldstein's and Postma's medical opinions regarding clinical pneumoconiosis. The company points out that Dr. Postma supported her diagnosis of no pneumoconiosis by referring to her treatment notes which contained chest x-ray readings from 2006, 2008 and 2009; a 2009 CT scan, and a 2009 bronchoscopy, none of which revealed clinical pneumoconiosis. OB 10. But the ALJ reasonably questioned the persuasiveness of this documentation because it pre-dated the pivotal 2010 and 2013 positive x-ray readings by the highly qualified readers, which the ALJ credited. A1 43-44; *see* 20 C.F.R. § 718.201(c) (recognizing that pneumoconiosis is a latent and progressive disease). Moreover, the ALJ noted that none of the

treatment x-ray readings were performed by B-readers, and the bronchoscopy was not conducted to assess the existence of pneumoconiosis. A1 44.

The company also charges that the ALJ improperly overlooked Dr. Postma's status as the miner's treating physician. *See* 20 C.F.R. § 718.104(d) (requiring the ALJ to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record" and setting forth the factors in weighing the treating physician's opinion). Not so. The ALJ in fact considered Dr. Postma's treating status. A1 43. She cogently declined to credit the doctor's conclusion regarding clinical pneumoconiosis because the doctor's treating relationship with the miner ended in 2009, and the doctor was unaware of the more recent positive x-ray readings by the highly-qualified readers. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (instructing ALJ to critically analyze a treating expert's opinion just as the opinion of any expert). The ALJ's conclusion in this regard can hardly be faulted: Dr. Postma conceded that she had no experience in diagnosing occupational diseases, no familiarity with the scientific literature on pneumoconiosis, and only casually considered the possibility of pneumoconiosis. A2 175-76, 191. Employer's attempt to prop up Dr. Postma's opinion on clinical pneumoconiosis must fail.

The ALJ also reasonably faulted Dr. Goldstein's opinion that the miner did not have clinical pneumoconiosis because the doctor supported his opinion by stating

that "there were no findings on x-ray consistent with coal workers' pneumoconiosis." A2 82. As the ALJ recognized, this conclusion was contradicted by the preponderance of the chest x-ray evidence in the case, including Dr. Groton's 2010 positive reading that Dr. Goldstein himself reviewed, but neglected to address. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ must examine the validity of a doctor's reasoning in light of the studies conducted and the objective indications on which it is based).

Employer's last complaint about the ALJ's clinical pneumoconiosis determination is that, by dismissing the chest x-rays and CT scan in the treatment records for not specifically addressing the existence of pneumoconiosis, the ALJ incorrectly required Employer to "rule out" clinical pneumoconiosis. OB 13-14. We disagree. The ALJ did not apply an incorrect rebuttal burden. Rather, she properly tasked Employer with affirmatively establishing that the miner did not suffer from the disease. A1 44; *see supra* at 6-7. Observing that none of the miner's medical hospitalization or medical treatment records focused on pneumoconiosis, a fact confirmed by Dr. Postma, the ALJ reasonably declined to find treatment records for COPD probative evidence regarding the presence or absence of clinical pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 Black Lung Rep. (MB) 1-216, 1-218/19 (Ben. Rev. Bd. 1984) (the significance of narrative x-ray readings that make no mention of pneumoconiosis is an issue to be

resolved by the administrative law judge in the exercise of his or her discretion as fact-finder); *Elkay Mining Co. v. Smith*, 712 Fed. App'x 222, 228 (4th Cir. 2017) (ALJ did not err in failing to discuss treatment x-rays that neither included specific findings about pneumoconiosis or ruled it out); *Porter v. Director, OWCP*, 883 F.2d 75 (Table), 1989 WL 96519 at *3 n.3 (6th Cir. 1989) (unpub.) (autopsy report diagnosing pneumoconiosis is evidence of the disease, but report silent on its existence entitled to little weight unless pathologist specifically examined for pneumoconiosis).

Legal Pneumoconiosis. Employer alleges that the ALJ wrongly discredited the opinions of Drs. Goldstein and Postma, that the miner's COPD was related entirely to cigarette smoking, "merely because they did not specifically address literature regarding the contributory effect of coal dust to smoking-induced COPD" or "every study regarding smoking and coal dust." OB 15. This mischaracterizes the ALJ's reasoning. The ALJ rejected the doctors' opinions for a more fundamental defect: they did not explain why they completely excluded the miner's 29 years of underground coal mine dust exposure as a factor in his COPD. A1 46. This oft-repeated criticism is fair. *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018) (upholding ALJ's rejection of doctors' opinions based on "their absolute failure to explain why coal dust exposure could not have contributed in some measure to [the miner's] COPD"); *Westmoreland Coal Co. v. Stallard*, 876

F.3d 663, 673 n.4 (4th Cir. 2017) (upholding ALJ's rejection of doctors' opinions that "solely focused on smoking [and] nowhere addressed why coal dust could not have been an *additional* cause") (emphasis in original); *Brandywine Explosives*, 790 F.3d at 668 (upholding ALJ's rejection of doctor's opinion for "ignoring the possibility that [the miner's] COPD could have multiple causes – smoking and dust exposure"). Indeed, it is certainly reasonable for ALJs to insist on such an explanation where, as here, the miner has a long history of coal mine employment, is totally disabled, and is presumed to suffer from a respiratory impairment that is "significantly related to, or substantially aggravated by" coal mine dust exposure. 20 C.F.R. § 718.201(a)(2) (defining "legal pneumoconiosis"). Moreover, the ALJ astutely recognized that such an explanation was especially warranted here in light of the regulatory preamble's observation that the effects of cigarette smoking and coal dust on COPD and chronic bronchitis are additive. A1 46 (*citing* 65 Fed. Reg. 79943 (Dec. 20, 2000)); *see also Spring Creek*, 881 F.3d at 1225.

Employer's final claim regarding legal pneumoconiosis is that Dr. Postma's ultimate opinion, that the miner's COPD was caused exclusively by cigarette smoking, was not compromised by admitting that, "potentially," coal mine dust could have contributed to the miner's respiratory impairment. To the contrary, the ALJ was understandably troubled by this admission, which completely undercut the doctor's conclusion. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873,

882 (6th Cir. 2000) (ALJ may discredit medical expert's testimony that contains equivocation about the etiology of disease). This credibility call was entirely the ALJ's to make. *Starks*, 386 F.3d at 992.

B. Employer did not rule out pneumoconiosis as a cause of the miner's respiratory disability.

Employer's objections to the ALJ's finding that it failed to establish rebuttal under the second method are easily refuted. To succeed, Employer was required to prove that no part of the miner's disability was caused by pneumoconiosis. *Supra* at 7. It tried to meet this standard with Drs. Goldstein's and Postma's opinions that smoking alone caused the miner's disability. But both doctors wrongly assumed that the miner did not suffer from pneumoconiosis in the first place. This false premise completely undermined their disability causation opinions. *See, e.g.*, *Hobet Mining*, 783 F.3d at 505 (a medical opinion that erroneously fails to diagnose pneumoconiosis is entitled to little, if any, weight on the issue of disability causation unless it includes a "reasoned explanation . . . of why the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present."); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1223 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989). The ALJ properly discredited Drs. Goldstein's and Postma's disability causation opinions.

Employer's challenge to the ALJ's disability-causation finding simply reiterates its failed legal pneumoconiosis argument – *i.e.*, that the miner's condition was wholly unrelated to coal dust exposure. As demonstrated above, the ALJ permissibly rejected this argument in the legal pneumoconiosis context. It fares no better as a disability causation argument. The company also repeats its false charge that the Goldstein and Postma opinions were discredited for not being scholarly enough. OB 17. In fact, it was a lack of explanation, not a lack of scholarship, that doomed their opinions. *Supra* at 24-25.

In sum, the ALJ correctly found that Employer failed to rebut the fifteen-year presumption. As a result, the Court should affirm the award of benefits on the miner's lifetime claim.

III. The ALJ correctly awarded automatic derivative benefits in the widow's claim.

Having approved the miner's claim, the ALJ awarded the widow automatic derivative benefits pursuant to 30 U.S.C. § 932(*l*), which provides for such benefits when "the miner was determined to be eligible to receive benefits . . . at the time of his or her death." Employer contends that simply because the miner died before his claim was awarded, the widow is not entitled to these benefits. Neither precedent (*Starks*), § 932(*l*), legislative purpose, the black lung regulations, nor common sense compels this harsh and inequitable result. Dependent survivors of miners who are awarded posthumously are just as entitled to automatic derivative

benefits as the dependent survivors of miners who live to see their BLBA claim approved.

B. Statutory and regulatory background

Statutory Provisions. Since the BLBA was first enacted in 1969, the BLBA has compensated not only miners who are totally disabled by pneumoconiosis but also certain surviving dependents of coal miners afflicted with pneumoconiosis. *Starks*, 719 F.3d at 1277 (citations omitted). As the BLBA has been amended, the requirements to secure survivor's benefits have changed over time. *See id.* at 1277-79; *B & G Const. Co. v. Dir., OWCP*, 662 F.3d 233, 239 (3d Cir. 2011) ("[T]he statutory background [of the BLBA's survivor's benefits provisions] . . . could hardly be more complicated.") (citation omitted).

In 1969, the declared purpose of the statute was

> to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (codified at 30 U.S.C. § 901 (1970)). The statute directed the Secretary to make benefits payments "in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis." *Id.* § 411(a), 83 Stat. at 793 (codified at 30 U.S.C. § 921(a)

(1970)). A miner's widow would be paid survivor's benefits "[i]n the case of death of a miner due to pneumoconiosis or of a miner receiving benefits under this part." *Id.* § 412(a)(2), 83 Stat. at 794 (codified at 30 U.S.C. § 922(a)(2) (1970)).[6]

During the first twelve years of the black lung program, Congress repeatedly evinced its intent that survivors should have liberal access to benefits. In 1972, Congress amended the BLBA's declaration of purpose to read:

> It is . . . the purpose of this subchapter to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease *or who were totally disabled by this disease at the time of their deaths*; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Black Lung Benefits Act of 1972, Pub. L. No. 92-303, sec. 4(b)(2), § 401, 86 Stat. 150, 154 (codified at 30 U.S.C. § 901 (1976)) (emphasis added). 30 U.S.C. § 921(a) was similarly amended such that the Secretary was directed to pay benefits "in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis *or who at the time of*

[6] 30 U.S.C. § 921(a) and § 922(a)(2) are in Part B of the statute, which, as originally enacted, provided that the federal government would pay benefits on claims filed on or before December 31, 1972. Part C of the statute addresses claims filed after December 31, 1972, which would be paid by approved state workers' compensation programs or the miner's former coal mine employer. *See B & G Constr. Co.*, 662 F.3d at 239 (describing history of Parts B and C). If the former employer is to pay, the statute directs the employer to pay benefits to the persons listed in 30 U.S.C. § 922(a) (miners, widows, children, parents, brothers, sisters). 30 U.S.C. § 932(c); *Starks*, 719 F.3d at 1277.

his death was totally disabled by pneumoconiosis." *See id.* sec. 4(b)(1), § 411(a), 86 Stat. at 154 (codified at 30 U.S.C. § 921(a) (1976)) (emphasis added). Section 922(a)(2) remained the same.

In 1978, Congress enacted 30 U.S.C. § 932(*l*), which provided:

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

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, sec. 7(h), § 422(*l*), 92 Stat. 95, 100 (1978) (codified at 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979)). Sections 901, 921(a), and 922(a)(2) remained the same.

In 1981, Congress reversed course and amended § 901, § 921(a), § 922(a)(2), and § 932(*l*) to restrict survivors' access to benefits. Congress deleted the language added to § 901 by the 1972 amendments, such that the stated purpose of the statute was once again to:

> to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease ~~*or who were totally disabled by this disease at the time of their deaths*~~; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 203(a)(4), § 401(a), 95 Stat. 1635, 1644 (codified at 30 U.S.C. § 901(a) (1982)) (emphasis added). 30 U.S.C. § 921(a) was amended to direct the Secretary to pay benefits

> in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or, *except with respect to claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981,* who at the time of his death was totally disabled by pneumoconiosis.

Id. sec. 203(a)(5), § 411(a), 95 Stat. at 1644 (codified at 30 U.S.C. § 921(a) (1982)) (emphasis added). 30 U.S.C. § 922(a)(2) was similarly amended such that a surviving spouse would be paid survivor's benefits "[i]n the case of death of a miner due to pneumoconiosis or, *except with respect to a claim filed . . . on or after the effective date of the Black Lung Benefits Amendments of 1981 [January 1, 1982]*, of a miner receiving benefits under this part." *Id.* sec. 203(a)(1), § 412(a)(2), 95 Stat. at 1643 (codified at 30 U.S.C. § 922(a)(2) (1982)) (emphasis added).

The same time-limiting language was also added to 30 U.S.C. § 932(*l*):

> 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, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [January 1, 1982]*.

Id. sec. 203(a)(6), § 422(*l*), 95 Stat. at 1644 (codified at 30 U.S.C. § 932(*l*) (1982)) (emphasis added).

Consequently, after the 1981 amendments, survivors were automatically entitled to benefits under § 932(*l*) only if the miner was awarded benefits as a result of a disability claim filed before January 1, 1982. Survivors whose miners

were awarded benefits as a result of a claim filed on or after January 1, 1982, had to independently prove that the miner died due to pneumoconiosis in order to obtain benefits, even though by definition the miner's award meant the miner had been totally disabled due to pneumoconiosis. *See* 20 C.F.R. § 725.201(a)(2)(ii) (1984); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328 (3d Cir. 1988).[7]

There things stood until 2010, when as part of the ACA, Congress once again amended the BLBA and reinstated automatic derivative entitlement (and the fifteen-year presumption). The current 30 U.S.C. § 932(*l*) now states, as it did before the 1981 amendments:

> 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~~, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [December 31, 1981]*~~.

30 U.S.C. § 932(*l*) (2012) (emphasis added); *see* ACA, Pub. L. No. 111-148, sec. 1556(b), 124 Stat. at 260. Congress, however, neglected to rectify § 901(a), § 921(a), and § 922(a)(2). This Court and others have resolved the apparent

[7] The 1981 amendments also tightened the BLBA's eligibility requirements by restricting three statutory presumptions, including the fifteen-year presumption, to claims filed before January 1, 1982. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 202(b)(1), § 411(c)(4), 95 Stat. 1635, 1643 (codified at 30 U.S.C. § 921(c)(4) (1982)). Like § 932(*l*), the ACA restored the fifteen-year presumption. ACA, Pub. L. No. 111-148, sec. 1556(a), 124 Stat. at 260.

tension in the text of the current statute by uniformly holding that survivors who meet the requirements of § 932(*l*) are not required to prove that their miner died of pneumoconiosis. *See Starks*, 719 F.3d at 1285; *Vision Processing, LLC v. Groves*, 705 F.3d 551, 558-59 (6th Cir. 2013); *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 389-91 (4th Cir. 2011), *cert. den.* 568 U.S. 816 (2012); *B & G Constr. Co.*, 662 F.3d at 247-59.

Regulatory Provisions. Prior to the 1981 statutory amendments, DOL's regulation allowed a surviving spouse to obtain benefits if she could show that she met the relationship and dependency criteria and that the deceased miner:

> (i) Was receiving benefits . . . at the time of death; or
>
> (ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis . . . .

20 C.F.R. § 725.212 (1980).[8]

After the 1981 statutory amendments requiring surviving spouses to prove death due to pneumoconiosis, DOL amended its regulation such that, to obtain benefits, a surviving spouse had to show that the deceased miner:

> (i) Was receiving benefits . . . at the time of death *as a result of a claim filed prior to January 1, 1982*; or
>
> (ii) Is determined *as a result of a claim filed prior to January 1, 1982,* to have been totally disabled due to pneumoconiosis at the time of death or to have died

[8] This brief focuses on the statutory and regulatory provisions addressing surviving spouses. Surviving children, parents, and siblings are eligible for survivor's benefits if they meet similar criteria. *See* 20 C.F.R. §§ 725.218-725.225.

> due to pneumoconiosis. *A surviving spouse . . . of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits . . . .*

20 C.F.R. § 725.212 (1984) (emphasis added).

Following the ACA's reinstatement of automatic derivative benefits, DOL again amended § 725.212. To obtain benefits, a surviving spouse must now show that the deceased miner:

> (i) Is determined to have died due to pneumoconiosis; or
>
> (ii) 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, 2010.

20 C.F.R. § 725.212 (2017) (emphasis added).

The current regulation, like all previous versions of the regulation, allows any surviving spouse to obtain benefits by proving the miner died due to pneumoconiosis. For a surviving spouse whose miner never filed a claim or had his claim denied, this is the only way to obtain benefits. However, reflecting the 2010 amendment to § 932(*l*), the current regulation allows the surviving spouse of a miner to make an alternate showing—that the miner's claim results or resulted in a final award of benefits.

B. Dicta in *Starks* is not dispositive of the widow's right to automatic derivative benefits.

As a preliminary matter, neither this Court nor any other court of appeals has squarely addressed the question of whether a miner "was determined to be eligible to receive benefits . . . at the time of his or her death" if he filed a claim during his lifetime but was awarded benefits posthumously.[9] Thus, this panel can address the question on a clean slate. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir. 1992) (where a question was not before a prior panel, the prior panel opinion's discussion of it is dicta and the current panel is "free to give that question fresh consideration").

Starks paraphrased the statutory text "was determined to be eligible to receive benefits . . . at the time of his or her death" as "receiving benefits when he died,"

[9] The court of appeals cases addressing the 2010 amendment to § 932(*l*) have mostly featured miners like Starks, who applied for, were awarded, and received benefits during their lifetime. *See, e.g.*, *Drummond Coal Co. v. Dir., OWCP* ("*Gardner*"), 586 F. App'x 541, 542 (11th Cir. 2014); *Union Carbide Corp. v. Richards*, 721 F.3d 307, 311 (4th Cir. 2013); *Stacy*, 671 F.3d at 382; *B & G Constr. Co.*, 662 F.3d at 245; *see also Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (Ben. Rev. Bd. 1989). Because those cases do not present the critical distinguishing feature here – a posthumous miner's award – they are not binding on this case. Similarly, there have been cases where the miners, like Mr. Terry here, filed claims during their lifetime but were awarded benefits posthumously. *Drummond Coal Co. v. Dir., OWCP ("Allred")*, 650 F. App'x 690, 691 & n.2 (11th Cir. 2016); *Vision Processing*, 705 F.3d at 558-59. In those cases, however, the employers did not challenge the applicability of § 932(*l*) based on the posthumous nature of the miner's award. Thus, no court of appeals has had the occasion to address directly the issue in this case.

but that paraphrasing is dicta. It does not bind this panel because it was not necessary to the result or the reasoning of the case. *See Dantzler v. I.R.S.*, 183 F.3d 1247, 1251 (11th Cir. 1999) (holding that language in prior opinions is dicta "[t]o the extent that [the prior] opinions purport to hold anything extending beyond the facts with which each of those courts was presented"). In *Starks*, the miner applied for, was awarded, and received benefits, all before he died. 719 F.3d at 1279 (noting the miner died six years after being awarded benefits). Because it was indisputable that the miner satisfied the "was determined to be eligible to receive benefits . . . at the time of his . . . death" criterion in § 932(*l*), the *Starks* Court did not consider that question. Rather, the *Starks* Court addressed the broader issue whether "amended § 932(*l*) . . . eliminate[d] a survivor's requirement to prove that the miner spouse died due to pneumoconiosis." *Id*. at 1280.

Here, in contrast, the miner applied for benefits during his lifetime, but the determination of his eligibility was not made and benefits were not received until after he died. Unlike the employer in *Starks*, Employer disputes whether the miner meets the "was determined to be eligible to receive benefits . . . at the time of his . . . death" criterion. The only question before this Court, therefore, is precisely the question not considered by the *Starks* Court.

That *Starks* used the phrase "was receiving benefits when he died" in describing its holding, *see* 719 F.3d at 1284, does not transform the phrase into binding

precedent on the meaning of "was determined to be eligible to receive benefits . . . at the time of his or her death." This Court has "pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (collecting cases). "A holding that *X* + *Y* is enough to [satisfy] a provision does not mean that *X* alone is not enough. And that is true even if we say in the opinion that *X* alone would not be enough." *Id.* Here, although *Starks* held that a survivor could obtain benefits under § 932(*l*) when the miner received benefits ("X") before he died ("Y"), 719 F.3d at 1284, that does not mean that the survivor of a miner, who received benefits ("X") after he died (not "Y") could not also obtain benefits under § 932(*l*).

Nor was the concept of the miner's actual receipt of benefits prior to death necessary to the reasoning behind *Starks*. *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[T]he holding of a case is . . . comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'") (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)). If *Starks* had used the phrase "was determined to be eligible to receive benefits . . . at the time of his or her death" or "filed a claim, which results or resulted in a final award of benefits" in every instance where it mentioned the miner receiving benefits before he died, the result of the case and the reasoning

behind it would have been the same. *Starks* was simply unconcerned with the timing of the miner's death vis-à-vis the timing of his award.

In addition, because DOL's 2013 regulation implementing amended § 932(*l*) was promulgated after *Starks*, the *Starks* Court did not have the occasion to consider giving *Chevron* deference to DOL's regulation. Because *Starks* did not employ a *Chevron* step-one analysis to decide the precise issue here, DOL's post-*Starks* regulation, standing alone, constitutes a sufficient change in the legal landscape to revisit *Starks*.[10] *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet*, 545 U.S. 967, 982 (2005) (reasoning that, under *Chevron*, prior judicial precedent does not foreclose agency from subsequently interpreting ambiguous statute).

In sum, *Starks* does not constrain this Court's consideration of whether the miner here "was determined to be eligible to receive benefits . . . at the time of his . . . death."

[10] *Starks* was issued on June 27, 2013. DOL's final revised regulation was promulgated on September 25, 2013, and became effective October 25, 2013. Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 78 Fed. Reg. 59102 (Sept. 25, 2013) ("2013 Final Rule").

C. A miner's survivor is entitled to automatic derivative benefits under 30 U.S.C. § 932(*l*) if the miner is found eligible for benefits as a result of a claim filed during his lifetime, regardless of when the eligibility determination is made.

1. The text of § 932(*l*) is ambiguous regarding when the miner's eligibility determination must occur.

The phrase in § 932(*l*) "was determined to be eligible to receive benefits . . . at the time of his or her death" is ambiguous regarding when the miner's eligibility determination must occur.[11] The clause "at the time of his or her death" could be understood to modify either the miner's eligibility to receive benefits or the determination of his eligibility. And the two slightly different readings lead to dramatically different results. Under the former reading (modifying when benefits are received), a posthumous award is a determination that the miner was "eligible to receive benefits at the time of his or her death." *See supra* at 4-5 (explaining that benefits are payable on a miner's claim from the onset of disability until death). Under the latter reading (modifying when the determination is made), a posthumous award (by definition) is not a determination at the time of his or her death.

[11] *Starks* described the "was determined to be eligible to receive benefits . . . at the time of his or her death" language in § 932(*l*) as unambiguous. 719 F.3d at 1281; *see also B & G Constr. Co.*, 662 F.3d at 249. However, *Starks* is not binding on this point because, as discussed above, whether the miner met the "was determined to be eligible to receive benefits . . . at the time of his or her death" criterion was not at issue in *Starks*.

The former reading is the better one. It more closely adheres to the actual text and is the more natural reading. The phrase "at the time of his or her death" immediately follows "eligible to receive benefits," and is thus best understood to modify the miner's eligibility to receive benefits. By contrast, for Employer's reading (the latter one) to make good grammatical sense, the phrase "at time of death" would have to be moved and inserted earlier into § 932(*l*), rewriting it as "a miner who was determined [*at the time of death*] to be eligible to receive benefits…"

The former, more-grammatical reading comports with the rule of the last antecedent, a canon of statutory construction, which provides "a limiting clause or phrase (here, the relative clause ["at the time of his death"]) should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Here, Congress placed the limiting clause "at the time of his or her death" after "eligible to receive benefits," not after "determined." Thus, applying the canon yields the same result as the basic rules of grammar:[12] "at the time of his or her death" modifies the miner's eligibility to receive benefits, not the determination date. At a minimum, the last antecedent rule makes the phrase "was determined to be eligible to receive benefits . . . at the

[12] The rule of the last antecedent is a jurisprudential application of an "elementary principle of composition": "Keep related words together." William Strunk, Jr. & E.B. White, *The Elements of Style* 28-31 (4th ed. 1999).

time of his or her death" susceptible to more than one reasonable meaning. *Cf. Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993) (noting that application of last antecedent rule resulted in a statutory construction that was "quite sensible as a matter of grammar," and proceeding to evaluate the reasonableness of the interpretation on other grounds).

Section 932(*l*) is also ambiguous when considered in the context of other statutory provisions in the BLBA addressing survivors' eligibility, namely, 30 U.S.C. §§ 901, and 922(a)(2). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). As noted by this Court and others, the ACA's deletion of 1981 amendment language from § 932(*l*), but not from §§ 901, 921(a), and 922(a)(2), created inconsistencies in the statutory text regarding automatic entitlement.[13] Certainly, these unamended provisions do not

[13] *See Starks*, 719 F.3d at 1280, 1283-84 (having to reconcile "the apparent tension between 932(*l*) as amended and the sections left unamended"); *Vision Processing*, 705 F.3d at 558 (describing Congress's failure to make corresponding changes to §§ 901, 921(a), and 922(a)(2) as "scrivener's misfortune"); *B & G Constr. Co.*, 662 F.3d at 252 (acknowledging that "there is no escape from the reality that the Act contains [] other provisions . . . that are inconsistent with the language of section 932(*l*)"); *Stacy*, 671 F.3d at 390-91 (applying *B & G Constr. Co.*'s analysis to resolve "apparent conflict" between statutory provisions).

speak to the issue here: whether the timing of the miner's award affects the survivor's right to automatic derivative benefits.

Because the statute is ambiguous, the Court must defer to the agency's reasonable interpretation of it.

2. Because § 932(*l*) is ambiguous as to when the miner's eligibility determination must occur, the Court must defer to the Director's reasonable interpretation set forth in 20 C.F.R. § 725.212(a)(3).

Congress has long entrusted the Secretary of Labor with the responsibility of implementing the black lung program and has delegated authority to DOL to issue regulations to administer the program. *See* 30 U.S.C. § 936(a) (1970). Between 2010 and 2013, DOL engaged in notice-and-comment rulemaking and promulgated revised regulations to implement the ACA amendments to the BLBA. 2013 Final Rule, 78 Fed. Reg. 59102 (Sept. 25, 2013). The current regulation provides that a surviving spouse is eligible for benefits if she meets certain relationship and dependency criteria and if the deceased miner:

> (i) Is determined to have died due to pneumoconiosis; or
>
> (ii) 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, 2010.

20 C.F.R. § 725.212(a)(3) (2017). Under the current regulation, the survivor can obtain benefits by proving the miner died due to pneumoconiosis. *Id.* § 725.212(a)(3)(i). Alternatively, the survivor can show that, during his lifetime,

the miner filed a disability claim "which results or resulted in a final award of benefits." *Id.* § 725.212(a)(3)(ii). This alternative showing encompasses the scenario in *Starks*, where the miner filed a claim, was found eligible, and received benefits before he died, namely, the claim "resulted" in an award. The regulation also encompasses the fact pattern presented here, where the miner filed a claim and was found to be eligible for benefits for the last two years of his life, but the determination of eligibility was not made until after he died, namely, the claim "results" in an award. In both cases, the surviving spouse is automatically entitled to benefits without having to prove the miner died due to pneumoconiosis.

Section 725.212(a)(3) is a reasonable construction of 30 U.S.C. § 932(*l*) because, as previously mentioned, grammatically, the clause "at the time of his or her death" would ordinarily modify the more immediate antecedent, "eligible," and not the more distant antecedent, "determined." Accordingly, the regulation reasonably assigns no significance to when the miner dies in relation to when his claim is approved.

Section 725.212(a)(3) is consistent with the "Continuation of Benefits" subheading given to the 2010 amendment to § 932(*l*). *See* ACA, Pub. L. No. 111-148, sec. 1556(b), 124 Stat. at 260. Regardless of whether the miner dies before or after his award is issued, he will receive benefits from the date of onset of total disability due to pneumoconiosis (typically the date of claim filing) until death; a

survivor's automatic derivative benefits will then pick up starting with the month of the miner's death. *See* 20 C.F.R. § 725.503(a)-(b) (2017). As Congress intended, an uninterrupted stream of benefits is achieved.

Section 725.212(a)(3) is also consistent with the history of the BLBA. From the original enactment of the statute until 1981, Congress repeatedly expressed its concern that too many survivors were being denied benefits by emphasizing liberal access to survivor's benefits, especially for survivors of miners with approved claims. *See supra*, 29-30. The enactment of § 932(*l*) in particular demonstrated Congress's commitment to allowing survivors whose miners had approved claims to obtain benefits without requiring them to prove or re-prove anything about the miners' entitlement. Joint Explanatory Statement of the Committee on Conference, *reprinted in* H. Comm. on Education and Labor, 96th Cong., *Report on Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) at 890 (stating Congress's intent that the "eligible survivors of approved claimants would not be required to file a new claim for benefits"); *see also id.* at 621 (stating Congress' intent "to correct an egregious inequity").

Conversely, Congress has not evinced any intent to treat survivors of miners with approved claims differently depending on whether the miner died before or after his claim was approved. It enacted § 932(*l*) "to correct an egregious inequity" that *all* survivors faced, *id*. at 621, and it does just that by providing automatic

derivative benefits whenever the miner "was determined to be eligible to receive benefits . . . at the time of his or her death" and not just when the miner was "receiving benefits." *Compare* 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979) *with* 30 U.S.C. § 922(a)(2) (1970).

Relatedly, § 725.212(a)(3) is a reasonable construction of § 932(*l*) because it is consistent with the principle that, as remedial legislation, the BLBA "should be liberally construed in favor of the claimant." *Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 1299 (11th Cir. 1989). Here, the language of the statute is susceptible to more than one meaning. Given the remedial purpose of the statute, the interpretation that allows all survivors of approved miners to more easily obtain benefits should be used. *See Keating v. Dir., OWCP*, 71 F.3d 1118, 1122 (3d Cir. 1995) ("The courts have repeatedly recognized that the remedial nature of the statute requires a liberal construction of the Black Lung entitlement program to ensure widespread benefits to miners and their dependents.").

3. Employer's arguments against the Director's interpretation of § 932(*l*) are unavailing.

Employer contends that the Director's construction would allow survivors to obtain benefits by showing the miner was totally disabled by pneumoconiosis at time of death, a possibility that was taken out of the statute by the 1981 Amendments and was not explicitly restored by the ACA. *See* OB 25. Employer misapprehends the Director's position. Before the 1981 amendments, survivors

could obtain benefits by proving the miner was totally disabled by pneumoconiosis at time of death, regardless of whether the miner ever filed a claim. 30 U.S.C. §§ 901, 921(a), 922(a)(2) (1976 & Supp. III 1979); 20 C.F.R. § 725.212(a)(3)(ii) (1980). DOL does not interpret § 932(*l*) as restoring survivors' ability to do this. Rather, § 932(*l*) allows survivors to obtain benefits based on the miner's total disability only if the miner filed a claim during his lifetime and that claim results or resulted in an award of benefits. *Compare* 20 C.F.R. § 725.212(a)(3)(ii) (1980) (allowing benefits where the deceased miner "[i]s determined to have been totally disabled") *with* 20 C.F.R. § 725.212(a)(3)(ii) (2017) (allowing benefits where the deceased miner "[f]iled a claim for benefits . . . which results or resulted in a final award of benefits").

In other words, survivors can obtain automatic derivative benefits only through, or as a consequence of, approval of the living miner's claim. Thus, unlike the pre-1981 statute, the survivor whose miner never filed a claim (or whose claim was denied) can no longer obtain benefits by showing that the miner was totally disabled; she must show that the miner died of pneumoconiosis. This interpretation of the statute comports with Congress's 2010 ambiguous deletion of the 1981 language from § 932(*l*) but not from § 921(a) and § 922(a)(2).

Employer also argues that, after the 2010 amendments deleted the 1981 language from 30 U.S.C. § 932(*l*), the Director's only option was to return to the

pre-1981 version of 20 C.F.R. § 725.212(a)(3) because "[n]othing in the text of the relevant statutory provision has changed to justify [a] change in the regulation." OB 27. Employer is incorrect. Section 725.212 needed revision because the pre-1981 version did not account for the 1981 statutory amendments (and the post-1981 version did not account for the 2010 amendments).[14]

Moreover, Employer selectively quotes only subsection (i) of § 725.212(a)(3), which allowed survivors to obtain benefits by showing that their associated miner was receiving benefits at the time of his or her death. OB 26; *see* 20 C.F.R. § 725.212(a)(3)(i) (1980). Employer leaves out subsection (ii) of the same regulation, which allowed survivors to obtain benefits by demonstrating that the deceased miner was totally disabled due to pneumoconiosis at time of death or died due to pneumoconiosis. 20 C.F.R. § 725.212(a)(3)(ii) (1980). Employer seems to think that the only way the widow could have obtained benefits under the pre-1981 statutory and regulatory regime was to prove pursuant to subsection (i) that her husband was actually receiving benefits when he died. But, the widow here would have qualified under subsection (ii), as her husband's posthumous award

[14] In any event, agency interpretations are not carved in stone and agencies are permitted to change their statutory interpretations even when statutes do not change. *Brand X*, 545 U.S. at 981-82 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

necessarily meant that he was totally disabled by pneumoconiosis at the time of his death.

Practically speaking, Employer's statutory construction creates inequitable, irrational, and random distinctions between survivors of miners with approved claims. Under Employer's interpretation, the happenstantial timing of the miner's death in relation to his award is the determining factor in a survivor's right to automatic derivative benefits. On the one hand, if the miner dies before his award, the survivor loses out. On the other hand, if he dies with an interim (appealable) award, the miner is "receiving benefits at the time of death," and therefore, the survivor is presumably entitled to automatic derivative benefits *even if the miner's award is overturned after his death*. And conspicuously absent from Employer's position is any policy justification (or any underlying rationale for that matter) supporting its interpretation. This glaring omission underscores the indefensibility of Employer's position. *Roberts v. Sea-Land Serv., Inc.*, 566 U.S. 93, 109-110 n.10 (2012) (rejecting statutory interpretation of Longshore and Harbor Workers' Compensation Act that arbitrarily distinguishes between classes of beneficiaries, including dependent survivors of injured worker); *CBS Inc. v. Prime Time 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001) (explaining courts will reject statutory interpretations that produce absurd results); *Black's Law Dictionary* (9th

ed.) at 10 ("absurdity: the state or quality of being grossly unreasonable; esp. an interpretation that would lead to an unconscionable result").

But even if Employer's interpretation was reasonable, the Supreme Court has repeatedly held that, to merit *Chevron* deference, the agency's interpretation need not be the only possible interpretation, the best interpretation, or even the most reasonable interpretation. Nor is the agency required to adopt the interpretation preferred by the courts or the regulated industry. An agency interpretation needs only to be reasonable. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *Brand X*, 545 U.S. at 980. The Director submits that the Director's interpretation passes this low bar and thus the Court must defer to it.[15]

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[15] It has been asserted that the Director's interpretation of § 932(*l*) as allowing automatic derivative entitlement based on posthumous miner approvals is impermissible because it renders the phrase "at the time of death" in § 932(*l*) superfluous. Reply Brief of Petitioner Oak Grove Resources, L.L.C. at 6-7, *Oak Grove Resources, LLC, et al v. Director, OWCP*, No. 17-14468 (11th Cir. Mar. 12, 2018). The argument goes that "[i]f a miner was [found] eligible for benefits, such condition would necessarily exist "*at the time of his death*[]" (and so the phrase "at the time of death" would be superfluous). *Id*. at 7 (emphasis in original). Oak Grove cites to no statutory provision to defend this assertion, and it is simply not true that a miner who is found eligible during his lifetime will "necessarily" be eligible to receive benefits at the time of death. A coal company may seek to modify (*i.e.*, reverse) an award anytime within one year of the last payment of benefits. 20 C.F.R. § 725.310 implementing 33 U.S.C. § 922 (as incorporated by 30 U.S.C. § 932); *see generally USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th Cir. 1992). Similarly, a miner "who is engaged in coal mine employment" may be "determined to be eligible for benefits," 30 U.S.C. § 923(d), but the miner must terminate such employment within one year or his "determination of eligibility shall be considered a denial of benefits." 20 C.F.R. § 725.504(b). And a miner's non-final award may be simply overturned, potentially requiring the miner to repay

In sum, the widow is entitled to automatic derivative benefits under § 932(*l*) because her husband was determined by an ALJ to be eligible for benefits starting from August 2013 to his death, which satisfies the criteria that the miner "was determined to be eligible . . . at the time of his . . . death." Employer has provided no good reason why the Court should treat survivors of miners with approved claims differently based solely on whether the miner dies before his claim is approved. The statutory text does not require it, and DOL's regulation is consistent with the statute's text, history, and remedial purpose. Accordingly, the Court should defer to the Director's reasonable interpretation of § 932(*l*) and affirm the widow's award.

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the interim benefits he received during litigation. 20 C.F.R. §§ 725.522(b); *see also* 20 C.F.R. §§ 725.420(a), 725.502(a)(1), 725.522(a) (providing for interim benefits at various stages of litigation).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief was produced using Microsoft Word, in Times New Roman font, 14-point typeface, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief also complies with Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 32-4 because it contains 12,183 words, excluding the material referenced in Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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