No. 13-1193

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISLAND CREEK COAL COMPANY,

Petitioner

v.

LARRY F. HARGETT

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

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
GARY K. STEARMAN
Counsel for Appellate Litigation
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

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STATEMENT OF RELATED CASES

The primary issue raised in the opening brief filed by Island Creek challenges the Department of Labor's interpretation of 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement. In particular, the coal company 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:

- West Virginia CWP Fund v. Reed, No. 12-1104
- Hobet Mining, LLC v. Epling, No. 13-1738
- Laurel Run Mining Co. v. Maynard, No. 12-2581
- Consol of Kentucky, Inc. v. Atwell, No. 13-1220
- West Virginia CWP Fund v. Cline, No. 13-1914
- West Virginia CWP Fund v. Adkins, No. 12-1655
- Consolidation Coal Co. v. Lake, No. 13-1042
- Island Creek Coal Co. v. Dykes, No. 12-1777
- Elk Run Coal Co., Inc. v. Harvey, No. 12-1398
- Logan Coals, Inc. v. Bender, No. 12-2034
- West Virginia CWP Fund v. Gump, No. 11-2416

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BRIEF FOR THE FEDERAL RESPONDENT

JURISDICTIONAL STATEMENT

This case involves a 2008 claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), filed by Larry F. Hargett, who worked in coal mine employment for approximately twenty-four

years.[1] On November 22, 2011, Administrative Law Judge Pamela J. Lakes (the ALJ) issued a decision awarding the miner benefits and ordering his former employer, Island Creek Coal Company (Island Creek or the coal company), to pay them. Appendix, page (A.) 50. Island Creek appealed this decision to the United States Department of Labor Benefits Review Board on December 21, 2011, 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). A.4. 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 December 17, 2012, the Board affirmed the award. A.68. Island Creek petitioned this Court for review on February 11, 2013. A.77. The Court has jurisdiction over this 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. Hargett's exposure to coal dust – the injury contemplated by 33 U.S.C. 921(c) – occurred in Virginia, A.46, within this Court's territorial jurisdiction.

[1] Unless otherwise noted, all citations to the BLBA in this brief are to the 2012 version of Title 30. Two portions of the BLBA – including 30 U.S.C. § 921(c)(4), the primary object of this dispute – were amended in 2010. *See infra* p. 13.

STATEMENT OF THE ISSUES

The BLBA at 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. One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute, however, 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. Island Creek argues that the ALJ erred both in applying the rule-out standard and in weighing the medical evidence relevant to rebuttal.

The questions presented are:

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

2. Whether the ALJ committed legal errors in weighing the medical evidence relevant to rebuttal.[2]

[2] Island Creek also asserts that the ALJ's ultimate decision awarding benefits is not supported by substantial evidence. Opening brief at (Br.) 29-43. The Director addresses only the coal company's legal challenges.

STATEMENT OF THE CASE

Because the Director limits his response to Island Creek's legal challenges to the ALJ's award, a detailed recounting of the procedural history and underlying medical evidence (with the exception of the x-ray readings) is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (which is summarized *infra* pp. 12-19) and the decisions below applying them.

A. The ALJ's November 2011 Award of Benefits (A.50)

At the outset, the ALJ determined that Hargett had approximately twenty-four years of underground coal mine employment and was totally disabled by his respiratory condition. A.55, 58. She therefore concluded that the evidence invoked the fifteen-year presumption of entitlement. A.59.[3]

The ALJ turned next to rebuttal, observing that the coal company had to (1) prove the absence of both clinical and legal pneumoconiosis,[4] or (2) "rule out" any connection between the miner's impairment and his coal mine employment."

[3] Island Creek does not dispute that the ALJ properly invoked the fifteen-year presumption; the dispute involves rebuttal of that presumption.

[4] *See infra* p. 15 (explaining the difference between clinical and legal pneumoconiosis); *see also infra* n.32.

A.64.[5] On the issue of clinical pneumoconiosis, the ALJ had before her the following readings of two x-rays:

Appendix Page	Date/ Date read	Physician	Qualifications[6]	Findings
A.128	2/9/09 2/16/09	Rasmussen	B-reader	1/1 positive
A.129	2/9/09 5/24/09	Alexander	B-reader Bd-certified radiologist	2/1 positive
A.130	2/9/09 8/15/09	Wiot	B-reader Bd-certified radiologist	negative
A.132	2/9/09 5/29/10	Myers	B-reader Bd-certified radiologist	negative

[5] While the ALJ cited the rule-out standard, at another point she suggested a less stringent standard when she observed that the "[e]mployer failed to rebut the presumption that Claimant's long history of coal mine employment caused or *substantially contributed* to his disabling respiratory impairment." A.64 (emphasis added). Island Creek asserts that the ALJ employed a "rule out" standard," Br.11-12, and we suspect Hargett will argue she used a "substantial contribution" standard. To allow for clearer understanding of the "rule out" issue, the Director takes no position on these contentions. *But see infra* n.19 (explaining why Island Creek failed to rebut the fifteen-year presumption regardless of which rebuttal standard is employed).

[6] A Board-certified radiologist is a physician who is "certifi[ed] in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association"; and a "B"-reader "means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis. . . ." 20 C.F.R. § 718.202(a)(1)(ii)(C), (E).

A.136	2/9/09 3/12/11	DePonte	B-reader Bd-certified radiologist	1/1 positive

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A.240	10/8/10 10/11/10	Rasmussen	B-reader	1/2 positive
A.245	10/8/10 2/18/11	Scott	B-reader Bd-certified radiologist	negative
A.244	10/8/10 2/18/11	Wheeler	B-reader Bd-certified radiologist	negative

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The ALJ considered these findings, together with the qualifications of the readers, and determined that the 2009 x-ray was positive for pneumoconiosis: "Of the five interpretations of this x-ray, three found the x-ray to have parenchymal opacities consistent with pneumoconiosis, two of which were made by dually qualified readers." A.60. And she determined that the 2010 x-ray was negative: "Because Drs. Wheeler and Scott are more qualified than Dr. Rasmussen, given that they are dually qualified, I find that the October 8, 2010 x-ray [is] negative for clinical pneumoconiosis." *Id.* She therefore concluded that the x-ray evidence was in equipoise and thus did not rebut the presumption that the miner suffered from clinical pneumoconiosis. A.61.

The ALJ then considered the medical opinions on the issue of clinical pneumoconiosis, where Drs. Rasmussen diagnosed that condition and Drs. Hippensteel and Rosenberg did not. A.61. Finding the doctors equally credentialed – the latter doctors were Board-certified internists and pulmonologists and Dr. Rasmussen was a Board-certified internist with extensive background in pulmonary diseases, A.57 – the ALJ gave less weight to the negative diagnoses. A.61-62. Notably, she discredited Dr. Hippensteel's diagnosis because the doctor attributed the x-ray changes to obesity without explaining why they were not also due to pneumoconiosis. A.61. And she discredited Dr. Rosenberg's diagnosis because, while the doctor admitted that pneumoconiosis "can be a latent and progressive disease," he gave more attention to earlier x-rays submitted in connection with Hargett's prior claims that were read negative for pneumoconiosis rather than concentrating on the readings of the most recent x-rays in his current claim. A.62.

Because the first method of rebuttal requires proof of the absence of both clinical and legal pneumoconiosis, the ALJ concluded that the first method was no longer viable in light of the evidence's failure to prove the absence of clinical pneumoconiosis. She therefore turned to the second method of rebuttal: medical

evidence "'rul[ing] out' any connection between the miner's impairment and his coal mine employment." A.64.[7]

As with the issue of clinical pneumoconiosis, it was again Dr. Rasmussen's opinion versus those of Drs. Hippensteel and Rosenberg. Dr. Rasmussen found a connection between Hargett's respiratory disability and his coal mine employment because the blood gas study revealed emphysema and interstitial fibrosis, with emphysema due to coal mine employment and smoking, and interstitial fibrosis due solely to coal mine employment. In contrast, Drs. Hippensteel and Rosenberg found that Hargett's respiratory disability was due solely to obesity and heart medication. The ALJ found Dr. Hippensteel's opinion undermined by the fact that "[he] did not provide evidence that would rule out coal mine dust exposure as an aggravating or contributing factor." A.64. And she concluded that Dr. Rosenberg's opinion was undermined by his mistaken belief the miner did not suffer from clinical pneumoconiosis ("Because he opined that Claimant does not have clinical pneumoconiosis, he has failed to present evidence which would rule out a connection between Claimant's pneumoconiosis and his coal mine dust exposure." *Id.*). Finding that the fifteen-year presumption of entitlement was not rebutted, the ALJ awarded benefits. A.65.

[7] In support of the "rule out" standard, the ALJ cited case law of the Board and this Court, noting that the Director at that time had not yet issued regulations implementing the revival of the fifteen-year presumption. A.64 n.14.

B. The Board's December 2012 Affirmance (A.68)

Island Creek appealed to the Benefits Review Board, arguing that the ALJ had improperly limited its ability to rebut the fifteen-year presumption, that the application of revived section 921(c)(4) was unconstitutional, and that applying section 921(c)(4) was premature because the Department had not (at that time) promulgated regulations implementing it. A.69-70. The coal company also asserted that the ALJ had erred in not considering the academic qualifications of the x-ray readers, in finding the opinions of Drs. Hippensteel and Rosenberg insufficiently explained, and in requiring Island Creek's doctors to rebut Dr. Rasmussen's opinion rather than the presumption of entitlement when determining whether Hargett's disability was due to coal mine employment. A.72-73. The Board rejected the constitutional and procedural arguments based upon precedent, A.69-70; explained that an ALJ was not required to consider academic qualifications, A.72; and held that the ALJ properly discredited the opinions of Drs. Hippensteel and Rosenberg for failure to sufficiently explain their opinions, A.74. As to the ALJ's requiring the coal company to "rebut" Dr. Rasmussen's diagnosis of disability-causation, the Board determined that any error was harmless since the doctor's diagnosis and the presumed fact were one and the same. A.73. Accordingly, the Board affirmed the ALJ's award of benefits.

SUMMARY OF THE ARGUMENT

The Department of Labor, after notice-and-comment rulemaking, 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*, 428 U.S. 1 (1976). *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 Island Creek'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. Consequently, the ALJ did not err in requiring the coal company to "rule out" pneumoconiosis as a cause of Hargett's disability.

The ALJ also made no legal errors in weighing the medical evidence relevant to rebuttal. Contrary to coal company assertions, the ALJ properly analyzed the x-ray evidence by weighing each x-ray separately and giving more weigh to radiologists who were Board-certified and/or had the "B-reader" status of physicians trained in reading x-rays for pneumoconiosis.

ARGUMENT

A. Standard of Review

This brief addresses only Island Creek's legal challenges to the decisions below. 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. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and

quotation omitted); *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The rule-out standard in context

Island Creeks' primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Hargett's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Br.20-29. 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 than discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Island Creek's challenge to the regulatory rule-out standard.

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

The BLBA, originally enacted in 1969, is designed 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 medical and scientific difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years

to ease their evidentiary burdens. 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 thereafter.[8] In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[9] The presumption therefore applies to Hargett's claim, which was filed in 2008 and remains pending. A.51.

On September 25, 2013, the Department of Labor promulgated a regulation ("revised section 718.305" or "revised 20 C.F.R. § 718.305") implementing the fifteen-year presumption.[10] The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to

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

[9] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (Mar. 23, 2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013).

[10] 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).

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.[11] *See infra* pp. 17-18. Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses Island Creek's petition through the lens of revised section 718.305.[12]

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

[11] The regulation at 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 (2011).

[12] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). Island Creek 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. 1999).

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).[13] Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.[14]

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

[13] 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. No. 95-239 § 2(b), 92 Stat. 95 (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* pp. 32-33.

[14] Miners with clinical pneumoconiosis and at least ten years of coal mine employment are rebuttably presumed to satisfy the disease-causation element by operation of 30 U.S.C. § 921(c)(1). *See* 20 C.F.R. § 718.203(b).

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 the presumed elements (disease, disease causation, and disability causation).

While there are three presumed elements available to rebut, there are in practice 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, *see supra* p. 15) and 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 a second method: attacking the presumed causal relationship between the 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.[15]

4. The rule-out standard

The revised regulations also specify 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).[16] But if the employer cannot rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that the miner's pneumoconiosis contributes to his disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a "*substantially*

[15] Although 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). It 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." 20 C.F.R. § 718.305(a) (2011). The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted." 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107.

[16] 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 aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

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)(2011) (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.[17] 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.

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

Island Creek 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 Mr. Hargett's total disability."

[17] The Sixth Circuit sometimes describes it as a "contributing cause" standard. *See Ogle*, 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding "substantially contributing cause" standard the coal company advocates.

Br.27 (emphasis added).[18] Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Island Creek's challenge is governed by *Chevron's* familiar two-step analysis.[19] As this Court explained in upholding another BLBA regulation:

> In 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."

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[18] At times, Island Creek describes this as a "third method" of rebuttal. Br.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.

[19] While the ALJ articulated the rule-out standard in her statement of governing legal standards, it is unlikely that the rule-out standard played a role in the outcome of her decision. The ALJ did not reject the opinions proffered by Island Creek's medical experts because they were insufficient to meet the rule out standard. To the contrary, she clearly understood that the coal company's experts ruled out any relationship between coal dust exposure and Hargett's disability. *See*, *e.g.*, A.58 (noting Dr. Hippensteel's conclusion that "neither clinical nor legal coal workers' pneumoconiosis has been a cause or contributor to [Hargett's] impairments"; A.58, 64 (noting Dr. Rosenberg's conclusion "that [Hargett] was totally disabled based upon hypoventilation," . . . "which does not relate to clinical pneumoconiosis"); *see also* deposition of Dr. Rosenberg, reporting that Hargett's hypoventilation was unrelated to coal mine employment, A.256). Rather, the ALJ rejected these opinions because she concluded that they were generally not credible due to various analytical flaws. *See*, *e.g.*, A.64. Even though the ALJ's decision may be affirmed on this basis, the Director nevertheless requests that the Court address Island Creek's legal challenge to revised section 718.305(d)(1)(ii), which has been challenged in many other cases pending before this Court. *See* Statement of Related Cases, *supra* p. ix.

Elm Grove Coal, 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 U.S. at 843-44).[20]

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

[20] Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove Coal*, 480 F.3d at 292. That is the case here. 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.").

rebuttal.[21] 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 Island Creek's "substantial contribution" standard may also be a permissible interpretation is irrelevant.[22] "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. §

[21] 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* p. 16. But it does not specify what showing the government must make to establish rebuttal on that ground.

[22] The Director's rule-out standard and the coal company's "substantial contributing cause" 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. So long as the rule-out standard, the standard the Director actually adopted, falls within the range of permissible alternatives, it must be upheld.

718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.[23]

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.").

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

[23] *Cf. Pauley*, 501 U.S. at 702 ("[I]t is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference.") (citations omitted).

presumption. 78 Fed. Reg. 59106.[24] 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. The rule-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 therefore relevant only if claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and

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

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.[25]

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 thirty years ago. *See* 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if "the cause of . . . total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment.") (emphasis added). 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 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.*

[25] *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).

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 Director's longstanding adoption of the rule-out standard.

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

Only one court of appeals has addressed the rule-out standard since section 921(c)(4) was revived in 2010, and it affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1061, 1063 (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.[26]

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.*,

[26] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery*. 724 F.3d at 559. Island Creek advances the same argument, which is addressed *infra* pp. 30-37. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

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.[27] The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant failed to demonstrate 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 here." *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 & 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

[27] *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) ("[T]here shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis.").

quotation omitted). Island Creek 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.[28] 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 Group v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the 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 C.F.R. § 727.203(b)(3) (1999) (emphasis added).[29] This, of course, is the same language

[28] 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).

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

that the initial version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard. *See supra* p. 17.

And as this Court held in *Massey*, "[t]he underscored [in whole or in part] 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.[30] 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 congressional

[30] *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).

mandate." 736 F.2d at 124.[31] 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 fill a statutory gap in a way that advances section 921(c)(4)'s purpose, were implicitly endorsed when Congress re-enacted that provision without change in 2010, and are consistent with this Court's interpretations of both the fifteen-year presumption and the similar interim presumption. The rule-out standard is therefore a reasonable interpretation of the Act entitled to this Court's deference.

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

Island Creek repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Br.17, 23-27. From

[31] Island Creek 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 section 921(c)(4) presumption are not similarly situated to claimants 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). Indeed, the main point underlying congressional enactment (and restoration) of these presumptions was to make it easier for claimants to prove entitlement. The company then can hardly complain about its heavier burden; that's what Congress intended.

its 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 pp. 15-16, 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.[32]

[32] 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) (2013) ("***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 fifteen-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 the 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").

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits.[33] This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the 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 (because the miner in question did suffer from that condition) or (B) that the miner's disability did not arise from the miner's exposure to coal dust (because the miner's disabling emphysema did arise from coal dust exposure). 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, miners invoking against the federal government were effectively 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

[33] Given the long-established judicial acceptance of the concept of "legal pneumoconiosis, *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995), it may be difficult to imagine a time when legal pneumoconiosis was not compensable. But before 1978, that was the case.

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."[34] 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 avoided the constitutional controversy by holding that section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators." *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

[34] Although the quoted sentences of *Usery* do not specify that the disabling disease was caused by coal dust, it is clear from the topic sentence of that paragraph that the Court is discussing a miner who is "totally disabled by some respiratory or pulmonary impairment arising in connection with his employment[.]" 428 U.S. at 34. It is equally true from context. If the disabling disease was not caused by exposure to coal dust, the employer could establish rebuttal by proving that the miner's disability was unrelated to coal mine employment and there would have been no need whatsoever to address the application or constitutionality of the second rebuttal method allowed under section 921(c)(4)'s rebuttal-limiting sentence.

(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). But that observation only underscores the fact that miners disabled by legal pneumoconiosis, who invoked against the Secretary, were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act.

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).[35] 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.[36] To the contrary, because an employer must rebut legal as well

[35] *See supra* n.13.

[36] Similarly, the Court's observation that the rebuttal-limiting sentence effectively "grant[s] 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[,]" 428 U.S. at 34, is now irrelevant, because every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis.

as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.[37]

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 allow operators to do just that.
But nothing in *Usery* even suggests that an operator 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 used to frame the operators' argument – the rebuttal-limiting sentence can prevent

[37] As our understanding of the effects of coal dust exposure had grown, so has the law evolved. *See, e.g., Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 314 (4th Cir. 2012) (observing that regulatory amendments were based on medical and scientific premises found in the preamble). The many authorities applying the rebuttal-limiting sentence's language to operators – including 20 C.F.R. § 718.305 (1981) and this Court's decision in *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 (Since the definition of pneumoconiosis has been 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.").

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 it. *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.[38] 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 by disproving disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.[39] Island Creek's

[38] 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 (observing that "the role of regulations is not merely interpretive; they may instead be designedly creative in a substantive sense, if so authorized").

[39] To the extent that Island Creek'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-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.

argument that the ALJ's use of the rule-out standard was in error should be rejected.

E. The ALJ committed no legal errors when weighing the medical evidence.

In addition to its attack on the rule-out standard, Island Creek also asserts that the ALJ made legal errors in weighing the rebuttal evidence. The coal company's first argument is that the ALJ improperly weighed the x-ray evidence in concluding that Hargett did not suffer from clinical pneumoconiosis. Specifically, Island Creek asserts that the ALJ should have given more weight to those x-ray readers with teaching credentials (Drs. Scott and Wheeler), Br.31-32, and, instead of evaluating the x-rays separately, the ALJ should have merely counted how many credentialed doctors read the x-rays as negative as opposed to positive, Br.33. The Director disagrees. The ALJ considered whether the readers were Board-certified radiologists and/or B-readers, and that is all she was required to do. *See* 20 C.F.R. 718.202(a)(1), .102(c).[40] As to the ALJ's weighing method, this Court has made

[40] Should the Court find to the contrary and remand the case for further consideration of Drs. Scott and Wheeler's professorships at Johns Hopkins University, the ALJ may take judicial notice of the fact that the hospital has suspended its black lung reading program pending review by an internal investigation which arose in response to news reports critical of the program. *See* http://www.hopkinsmedicine.org/news/abc_news_report_b-reads_pneumoconiosis_statement.html; Chris Hamby, et al., *Johns Hopkins Medical Unit Rarely Finds Black Lung, Helping Coal Industry Defeat Miners' Claims*, The Center For Public Integrity (Oct. 30, 2013, 7:00 AM), http://www.publicintegrity.org/2013/10/30/13637/johns-hopkins-medical-unit-rarely-finds-black-lung-helping-coal-industry-defeat.

clear that "counting heads" is a "hollow" and impermissible exercise, *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). And it is equally clear that the ALJ must separately determine whether each x-ray is positive or negative, which is what the ALJ did. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 148-49 (1987) ("[T]he ALJ must weigh conflicting interpretations of the same X-ray in order to determine whether it tends to prove or disprove the existence of pneumoconiosis"); *Copley v. Arch of West Va., Inc.*, 28 F.3d 1208, 1994 WL 276690 at *2 (4th Cir. 1994) (unpublished) (holding that the ALJ must "determine whether each x-ray was positive or negative"); *see also Gray v. Director,* OWCP, 943 F.2d 513, 521 (4th Cir. 1991) (ALJ separately weighed conflicting arterial blood gas tests as required by *Mullins*).

Island Creek next argues that the ALJ erred in not determining whether the evidence disproved the existence of legal pneumoconiosis. Br.38. This argument is without merit. Because the ALJ found that the evidence failed to disprove the existence of clinical pneumoconiosis, it was unnecessary to address legal pneumoconiosis – the company was required to prove the absence of *both* conditions to establish the first rebuttal method. In any event, the opinions of Drs. Hippensteel and Rosenberg, the only doctors to state that Hargett's respiratory condition was not due to coal mine employment, were properly discredited by the

ALJ for their lack of sufficient explanation (Hippensteel) and misunderstanding concerning the existence of clinical pneumoconiosis (Rosenberg).

The coal company's final legal argument is similarly without merit. Island Creek asserts that the ALJ, when determining rebuttal by the second method, mistakenly weighed the opinions of Drs. Hippensteel and Rosenberg against the opinion of Dr. Rasmussen rather than against the presumed fact that Hargett's respiratory disability was due to pneumoconiosis. This argument, however, ignores the fact that medical opinion evidence must be considered and weighed together when determining entitlement. *See Harman*, 678 F.3d at 310 (4th Cir. 2012) (affirming causation finding where ALJ weighed positive medical opinions against negative opinions). Moreover, as the Board determined, Dr. Rasmussen's opinion is consistent with the presumed fact that Hargett's respiratory disability was due to pneumoconiosis.

CONCLUSION

Island Creek's legal challenges to the "rule-out" rebuttal standard and the ALJ's decision to give no weight to the opinions of Drs. Hippensteel and Rosenberg should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration.

REQUEST FOR ORAL ARGUMENT

The Director does not oppose Island Creek's request for oral argument.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5653
Blls-sol@dol.gov
roppolo.rita@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 9437 words as counted by Microsoft Office Word 2010.

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

Joseph E. Wolfe, Esq.
Ryan C. Gilligan, Esq.
Wolfe, Williams, Rutherford & Reynolds
Attorneys and Counselors at Law
P.O. Box 625
Norton, VA 24273

Ashley M. Harmon,
Jackson Kelly PLLC
P.O. Box 619
150 Clay Street, Suite 150
Morgantown, WV 26507

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita@dol.gov

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.[41]

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