No. 17-9515

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SPRING CREEK COAL COMPANY,

Petitioner

v.

SUSAN McLEAN, o/b/o BRADFORD McLEAN

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
(Oral Argument Not Requested)

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The Director is unaware of any prior or related appeals.

GLOSSARY

BLBA: Black Lung Benefits Act

Board: Benefits Review Board, United States Department of Labor

DOL: Department of Labor

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STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2011 claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Bradford McLean. Mr. McLean worked as a coal miner for at least twenty-eight years and died in 2011. His widow, Susan McLean (Claimant), now pursues his claim.

On October 6, 2015, United States Department of Labor (DOL) Administrative Law Judge William S. Colwell issued a decision awarding benefits and ordering Spring Creek Coal Company (Spring Creek or the coal company), the miner's former employer, to pay them. Spring Creek appealed the ALJ's decision to DOL's Benefits Review Board on November 5, 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 decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award in a final decision on February 16, 2017, and Spring Creek petitioned this Court for review on April 13, 2017. 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. The miner had exposure to coal-mine dust—the injury contemplated by 33 U.S.C. § 921(c)—in the state of Wyoming, within this Court's territorial jurisdiction. Consequently, the Court has jurisdiction over Spring Creek's petition for review.[1]

[1] The miner's last exposure to coal mine dust occurred in Montana, within the jurisdiction of the Ninth Circuit Court of Appeals. By order dated April 26, 2017, this Court ordered the parties to state whether the case should be transferred to the Ninth Circuit based upon the miner's last exposure. In response, the Director stated that a transfer was not required because jurisdiction lies in any circuit where the claimant worked as a coal miner within the meaning of the BLBA and was exposed to coal-mine dust. By order dated May 10, 2017, the Court referred the

STATEMENT OF THE ISSUES

Former coal miners who have a totally disabling respiratory condition are rebuttably presumed to be entitled to BLBA benefits if they worked at least fifteen years in either underground coal mines or surface mines with conditions "substantially similar" to those in an underground coal mine. 30 U.S.C. § 921(c)(4). This is known as the fifteen-year presumption.

By regulation, a claimant can satisfy the presumption's "substantially similar" test for surface miners by showing that "the miner was *regularly exposed to coal-mine dust* while working [in surface mines]." 20 C.F.R. § 718.305(b)(2) (emphasis added). This Court in *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014), upheld the validity and applicability of this regulation, specifically citing with approval a line of Seventh Circuit decisions holding that to satisfy the statute's "substantially similar" requirement, surface miners had to prove they worked in dusty conditions but did not additionally have "to provide evidence of underground mining conditions to compare with their own working conditions." *Id.*

Here, the ALJ found that the miner was regularly exposed to coal-mine dust for at least fifteen years during his twenty-eight years as a surface miner, and that

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jurisdictional issue to the panel of judges assigned to the case's appeal on the merits.

he therefore satisfied the "substantially similar" requirement. Given this, and the miner's undisputed total respiratory disability, the ALJ found the fifteen-year presumption of entitlement invoked. Because Spring Creek failed to rebut this presumption, the ALJ awarded benefits. The Benefits Review Board affirmed the award, specifically citing the regulation and *Antelope Coal* in support of the ALJ's finding that the miner's surface mining satisfied the "substantially similar" requirement.

In its opening brief, Spring Creek asserts that the Court's *Antelope Coal* decision is "tenuous," and that the regulation is invalid because it does not require an actual comparison between the dust levels in underground mines with those to which the miner was exposed as a surface miner. In the alternative, the coal company asserts that the ALJ erred in finding the evidence sufficient to satisfy the regulation's requirement of regular coal-mine dust exposure. The issues therefore are:

1. Whether the Court should grant Spring Creek's request to reverse the Court's published decision in *Antelope Coal*.
2. Whether the ALJ's finding of at least fifteen years of "regular coal-dust exposure" is supported by substantial evidence.[2]

[2] Spring Creek also alleges that the ALJ and the Board erred in determining that the company did not rebut the presumption. The Director takes no position on this issue.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background

The BLBA, originally enacted in 1969 as Title IV of the Federal Coal Mine Safety and Health Act, is designed to provide compensation to coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and to the survivors of miners whose death was caused or hastened by the disease. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1214 (10th Cir. 2009).

Recognizing the medical and scientific difficulties miners and their survivors face in affirmatively proving entitlement to benefits, Congress has enacted various presumptions over the years to aid claimants. One of these is the fifteen-year presumption at 30 U.S.C. § 921(c)(4), enacted in 1972. Black Lung Benefits Act of 1972, Pub. L. 92-303 § 4(c), 86 Stat. 154 (1972); *Antelope Coal*, 743 F.3d at 1336. This presumption is invoked when the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine," and (2) suffers from "a totally disabling respiratory or pulmonary impairment." 30 U.S.C. § 921(c)(4). If invoked, the miner is presumptively "totally disabled due to pneumoconiosis" and therefore entitled to benefits. *Id*.

Congress revoked the presumption in 1981, but restored it in 2010 for all claims filed after January 1, 2005, and pending on or after March 23, 2010. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Antelope Coal*, 743 F.3d at 1336. It therefore applies to this claim, which was filed in 2011 and remains pending. JA 4.

The statute does not elaborate on how surface miners can prove that they worked in conditions "substantially similar" to those in underground mining so as to qualify for the fifteen-year presumption. DOL's first implementing regulation provided little direct guidance because it largely mimicked the language of the statute. *See* 20 C.F.R. § 718.305 (2012). From the outset, however, the Director espoused a two-part interpretation: that the requirement was satisfied if the claimant could prove sufficient exposure to coal-mine dust, and that the claimant was not required to prove the degree of exposure in underground coal mines for comparison purposes. *See Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988) (reporting the Director's position that "the claimant need not present evidence of conditions prevailing in an underground mine," and that "[t]he claimant is required only to produce sufficient evidence of the surface mining conditions under which he worked").

The Seventh Circuit—the only court to consider the issue in the presumption's first statutory incarnation—accepted the Director's position in

Midland Coal, 855 F.2d at 512 ("We agree [with the Director] that the ALJ improperly placed on the claimant the burden of producing evidence of conditions prevailing in an underground mine and hold that, in order to qualify for the presumption of § [9]11(c)(4), a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment."). That court reiterated its conclusion in two other published decisions: *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001); and *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995).

After the presumption was revived in 2010, and after notice and comment, the Director revised the implementing regulation at 20 C.F.R. § 718.305 to clarify the presumption by providing guidance concerning the manner claimants can satisfy the "substantially similar" requirement.[3] 78 Fed. Reg. 59104-05 (Sept. 25, 2013). Section 718.305(b)(2) now provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was *regularly exposed to coal-mine dust* while working there." *Id.* (emphasis added).

The preamble to the revised regulation makes clear a number of points relevant to the issues now before the Court. First, the preamble explains that it is

[3] The revised regulation also provided guidance concerning the rebuttal of the presumption. 20 C.F.R. § 718.305(d).

not necessary for claimants "to prove anything about dust conditions existing at an underground mine" because it is a legislative fact that "underground coal mines are dusty." 78 Fed. Reg. at 59104-05 (citing the Seventh Circuit's decision in *Midland Coal*). By showing regular coal-mine dust exposure, the preamble explains, the comparison requirement is met. *Id.* Second, while it would be an "insurmountable hurdle[]" for claimants "to produce scientific evidence specifically quantifying the miner's exposure to coal mine dust during non-underground mining," the revised regulation does not "preclude a coal mine operator from introducing evidence—including any technical data within its control—showing that the particular miner was not regularly exposed to coal mine dust during his non-underground coal mine employment." 78 Fed. Reg. at 59105. And third, the regulation requires "regular" coal-mine dust exposure so as to prevent the qualification of "sporadic or incidental exposure." *Id.*

2. <u>Appellate Review of the Revised Regulation</u>

This Court addressed the validity of the revised regulation in *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014). It found the regulation valid and affirmed an ALJ's invocation of the fifteen-year presumption based upon proof of the miner's regular coal-dust exposure in surface coal mining. The Sixth Circuit also upheld the revised regulation. *Central Ohio*

Coal Co. v. Director, OWCP, 762 F.3d 483, 489-90 (6th Cir. 2014). *See infra* at 18-19 and 25-26 for a full discussion of these decisions.

3. Relevant Facts

The miner filed his claim in 2010 and died in 2011. JA 4, 192. It is undisputed that the miner suffered from a totally disabling respiratory impairment at the time of his death. JA 247-48. He was employed in surface coal mining for at least twenty-eight years, from 1978 to 2006. JA 243, 264. Twenty of those years were with Spring Creek (1986 to 2006). JA 243.

The ALJ's administrative hearing occurred in September 2013. JA 193. Because it was held after the miner's death, the record does not contain the miner's testimony concerning his exposure to coal-mine dust. The medical report and deposition of Dr. Eva B. Gottschall, however, provides a detailed narrative of the miner's exposure.[4] JA 14, 49. In addition, both the miner's widow and his son testified at the hearing concerning the miner's dust exposure. JA 210-37.

As reported by Dr. Gottschall, the miner's early work as a plant laborer involved keeping the galleys free of coal dust, resulting in "a fair amount of dry sweeping which created a large amount of dust." JA 14. After the early years, the majority of the miner's work involved operation of an electric drill at open pit coal

[4] Dr. Gottschall examined the miner pursuant to DOL's obligation under the BLBA to provide each miner claimant with a complete pulmonary examination. *See* 30 U.S.C. § 923(b); 20 C.F.R. § 725.406.

mines. JA 12, 71. The drill was mounted below a truck and the miner worked the controls as he sat in the truck's cab. The drill had a dust collector attached to it which "worked fine when there was no wind, . . . but as soon as the wind blew, which happened on many days, it did not work well and there was a fair amount of dust around the drill at all times." JA 12. From her own knowledge, the doctor stated that "drillers are some of the more significantly exposed workers in surface min[ing]," JA 71, and "are thought to have high-risk exposures," JA 79.

Claimant, the miner's widow, testified at the hearing but had difficulty in answering questions because of "issues with memory." JA 212. She did, however, report without prompting that the miner was "dark . . . and dirty all over" when he came home from work. JA 215-16.

Matthew McLean, the miner's son, testified that his father's face, ears, hands and clothes were always dirty when he came home from work, even though the coal company gave him coveralls to wear while working. JA 225. He stated that when his father blew his nose, the tissue would be black from dust even after he had been off work a couple of days. JA 226. The son usually visited the miner at work two or three days a year, and there was "always a fair amount of dust around his drill." JA 233. The miner's son explained that his father was meticulous about wanting to keep his work environment clean, which was difficult because the cab's filter had cracks and leaks:

> [The miner] would talk about getting [his work area] clean and then within an hour or two having a light coating of dust all over his instrument panel. His response to me, or his talking to me about it was the cabin filter, that they had on the machine, it could filter all it wanted, but there were so many cracks and leaks in the doors and the windows, that let dust in, that it just wasn't about to do its job. So, he was constantly cleaning the inside of his cab, making it a pleasant environment for him to work in.

JA 229.

The miner's son also provided details about the miner's activities after he drilled a hole in the coal. JA 227-28. The miner loaded the hole with explosives and then covered it with nearby coal or dirt. *Id.* The son admitted he did not see "a whole lot of dust in the air when he visited the mines," but explained there was dust in the air when the machines were working, especially the drill and the coal loaders. JA 231-32. Finally, the son discussed the miner's work hours. JA 229-30. He explained the miner did not have a "normal work week," but instead would "work[] a lot of overtime, 10, 12 hours a day, five, six, seven days in a row, without taking a day off." JA 230.

Spring Creek presented the report of A.J. Tomer (Manager, Occupational Health, at Cloud Peak Energy), dated November 6, 2003. JA 91. The report was based on a search of the mine's records by Ms. Tomer and Kean Johnson (the Health and Services Manager at Spring Creek Mine). *Id.* These records appear to have been incomplete. *Id.* ("Through several changes in ownership and databases, we did not find as many records as we had hoped.").

Ms. Tomer's report identified the drills that the "best information we can get from old equipment lists" indicated the miner used, and then spoke in general terms about a driller's protection from coal-mine dust:

> When drilling, the majority of the driller's time is spent in the cab. Drills have many items designed into the machine, to keep dust and noise to a minimum. Operator cabs pressurized with a heating and cooling system. Drills are equipped with a dry dust collection system. The drill is also equipped with an auxiliary water tank to allow for water injection while drilling, to minimize dusts. Drills have dust curtains.

JA 91. This report also summarized the results of a number of dust-sampling tests at the Spring Creek mine. JA 91-92. These included a November 6, 2003 sampling of the miner's work area by a private consultant showing "a lack of significant exposure," and 23 samples by Mine Safety and Health Administration (MSHA) inspectors taken at positions identical or similar to the miner's drill operator position, which reported dust levels below the legal maximum.

Spring Creek also presented the report of Drew Van Orden, a mineral engineer with expertise in industrial hygiene. JA 96. On the coal company's behalf, Mr. Van Orden reviewed airborne dust sample data from 1989 to 2006 from forty-four western surface and underground mines, including Spring Creek, and he compared that information to data of underground mine samples. Mr. Van Orden concluded that underground mines have "much higher dust levels than surface mines." JA 96.

4. Decisions Below[5]

a. ALJ's Award, October 6, 2015 (JA 241)

In his decision awarding benefits, the ALJ first considered whether the miner was eligible for the fifteen-year presumption, 30 U.S.C. § 921(c)(4), as implemented by the revised regulation at 20 C.F.R. § 718.305. Because it was undisputed that the miner suffered from a totally disabling respiratory impairment, the operative issue was whether, during the miner's twenty-eight years of surface coal mining, he was employed for at least fifteen years in conditions "substantially similar" to underground coal mining. To resolve this issue, the ALJ set out the description of the miner's work and work environment provided by Dr. Gottschall and the miner's wife and son. The ALJ also reported the results of the Tomer and Van Orden reports. JA 246-47.

Citing, *inter alia*, the revised regulation, JA 245, the ALJ concluded that the miner had established at least fifteen years of qualifying coal mine employment. JA 247. While acknowledging that the miner was enclosed in a "cab with an attached dust collector," the ALJ found that the miner "was regularly exposed to coal dust when he worked for Spring Creek Coal Company." *Id.* Finally, the ALJ found the reports and studies of Ms. Tomer and Mr. Van Orden unpersuasive

[5] Because this brief addresses invocation of the fifteen-year presumption but not rebuttal of that presumption, the following description of decisions discusses rebuttal only in summary terms.

because the measurements they relied on were taken only sporadically: they "consider[ed] only coal dust exposure at certain times, and cannot account for daily exposure to coal mine dust at Spring Creek Coal Mine from 1986 to 2006." *Id.* Accordingly, the ALJ concluded that the fifteen-year presumption was invoked. *Id.* Finding Spring Creek's evidence insufficient to rebut the presumption, the ALJ awarded benefits.[6]

b. Benefits Review Board's Affirmance, February 16, 2017 (JA 263)

On appeal to the Board, Spring Creek argued that the ALJ erred in using the revised regulation's "regular exposure" standard. In the alternative, the coal company argued that the ALJ failed to give adequate consideration to the company's technical and scientific data when concluding that the miner was regularly exposed to coal-mine dust. JA 267-68. The Board rejected both arguments. JA 268. It found that the ALJ's use of the "regular exposure" standard was mandated by the revised regulation at 20 C.F.R. § 718.305 and this Court's 2014 decision in *Antelope Coal* upholding that regulation. JA 267-68. The Board then concluded that substantial evidence supported the ALJ's "[finding] that employer's scientific and technical evidence was too sporadic, both in time and in location, to establish that the miner was not regularly exposed to coal mine dust."

[6] Although not noted in the ALJ's decision, the award of the miner's claim resulted in his widow's automatic entitlement to survivor's benefits pursuant to 30 U.S.C. § 932(*l*).

JA 268. Accordingly, the Board affirmed the ALJ's invocation of the fifteen-year presumption, and after affirming the ALJ's finding of no rebuttal, the Board affirmed the ALJ's award of benefits.

SUMMARY OF THE ARGUMENT

To be eligible for the fifteen-year presumption, Claimant was required to prove that at least fifteen years of her husband's surface mining took place in conditions "substantially similar" to those in underground coal mining. The implementing regulation explains that she can satisfy the "substantially similar" criterion by proving that the miner was "regularly exposed to coal-mine dust" while performing his coal mine work on the surface. Here, the ALJ found that the evidence proved the required exposure and therefore invoked the fifteen-year presumption.

Spring Creek asserts that the regulation is invalid. This panel, however, need not and in fact cannot address this issue because a panel of the Court specifically upheld the regulation in *Antelope Coal v. Goodin*, a 2014 published decision. It is well-settled that a panel of this Court cannot reverse another panel's published decision.

The coal company characterizes *Antelope Coal*'s holding as "tenuous" and suggests that the panel would have decided differently had there been technical data in the record concerning the exact amount of dust in underground mining

verses that in surface mining. The decision, however, cannot be ignored. The panel specifically reported the liable coal company's allegation that the regulation was invalid, explained why it found the regulation valid, and affirmed the award because the miner "provided substantial evidence of regular exposure to dust." And had the panel believed that technical data was needed to satisfy the "substantially similar" criterion, it could have so held, regardless of whether the record contained such evidence.

In an alternate method of attack, Spring Creek asserts that the ALJ erred in finding that the miner had regular coal-mine dust exposure. The coal company argues that the ALJ should have credited its technical data—which allegedly showed insignificant coal-mine dust exposure in the miner's job and in surface coal mining in general—rather than the miner's statements (as told to Dr. Gottschall) and those of his widow and son concerning the miner's regular dust exposure. But the ALJ made that call, and his decision is supported by substantial evidence. As such, the Court must affirm the ALJ's award.

ARGUMENT

1. Standard of Review

The first issue addressed in this brief is legal in nature, the second is factual. The Court exercises *de novo* review over the Board's legal conclusions. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006). As the administrator of

the BLBA, the Director's interpretation of its provisions, as expressed in implementing regulations, is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as is her interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

With respect to questions of fact, the Court reviews the ALJ's findings under a substantial-evidence standard. *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009). The Court "will not reweigh the evidence considered by the agency, but only inquire into the existence of evidence in the record that a reasonable mind might accept as adequate to support its conclusion." *Id.* at 1217 (quotation and emphasis omitted).

2. Section 718.305(b)(2)'s "regular exposure" invocation standard is valid.

a. This Court has already upheld the regulation's "regular exposure" standard in a binding published decision, *Antelope Coal v. Goodin*.

DOL's revised regulation at 20 C.F.R. § 718.305(b)(2) explains how surface coal miners can prove that they worked in conditions "substantially similar" to those in underground mining so as to invoke the fifteen-year presumption. It states that substantial similarity is established where "the miner was regularly exposed to coal-mine dust while working" in a surface mine or mines.

The Court addressed the applicability and validity of this regulation in *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014). There, the ALJ had applied the prior version of the regulation and, following the Seventh Circuit's lead, found the substantial similarity requirement met based upon the miner's testimony proving sufficient coal dust exposure. *Antelope Coal*, 743 F.3d at 1343.

The Court affirmed the ALJ's ruling that the miner had invoked the fifteen-year presumption. It first considered whether the revised regulation—which became effective on October 25, 2013, the day the Court heard oral argument—applied to the claim. The Court found it applicable because the regulation "[did] not change existing law and [was] substantially consistent with prior regulations and agency practices." *Antelope Coal*, 743 F.3d at 1342. In this regard, the Court observed that the Director's revised regulation—providing "that consistently dusty working conditions are sufficiently similar to underground mining conditions"—"codifie[d] [the Director's longstanding interpretation] by making regular exposure to coal mine dust the standard to determine substantial similarity of surface working conditions to those in underground mines." *Id*. The Court observed further that the new regulation was consistent with the decisions of the Seventh Circuit, the only circuit to consider the issue, which "has long held that surface

miners do not need to provide evidence of underground mining conditions to compare with their own working conditions."

The Court in *Antelope Coal* then addressed the coal company's argument that the Director's interpretation "[was] arbitrary and [gave] the Review Board and this court no meaningful basis to evaluate the ALJ's decision." *Antelope Coal*, 743 F.3d at 1343-44. While the Court "[found] some merit in this argument" as it related to the Director's initial regulation, it concluded that the revised regulation provided the required guidance: "[The new regulation] instructs ALJs to find substantial similarity if the miner was regularly exposed to coal dust. The clarified standard—regular dust exposure—provides sufficient guidance to measure similarity." *Id.* Explaining that the miner's testimony about the nature of his work "provided substantial evidence of regular exposure to coal dust[,]" the Court affirmed the ALJ's invocation of the fifteen-year presumption. *Antelope Coal*, 743 F.3d at 1344.

The panel's upholding of the revised regulation is binding on this panel. *United States v. White*, 782 F.3d 1118, 1126-27 (10th Cir. 2015) ("One panel of this court cannot overrule the judgment of another panel absent en banc consideration or an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." (internal quotation marks omitted)).

Consequently, the Court must reject Antelope Coal's request to revisit the validity of the revised regulation.

b. Spring Creek's suggestion that *Antelope Coal* can be ignored is false.

In its opening brief, Spring Creek acknowledges *Antelope Coal* but suggests it may be ignored because it is "tenuous" and, according to the coal company, may have been decided differently had the record contained the technical data that the company submitted in this case. Petitioner's opening brief (OB) 34-35. The coal company is wrong on both counts.

First, there is nothing tenuous about the decision. It is clear and leaves no unanswered questions. The Court set out the issue: "Did the ALJ Err in Finding that Mr. Goodin Is Entitled to the 15-Year Presumption?" *Antelope Coal*, 743 F.3d at 1343. The Court then described the regulation's provisions; explained that the regulation represented the long-held position of the Director and was supported by the Seventh Circuit, the only court to address the issue; concluded the regulation provided sufficient guidance to the finder of fact and reviewing court; and affirmed the ALJ's finding of sufficient similarity based solely on the fact that the miner worked in dusty conditions. There was nothing more the Court needed to do.

Spring Creek does not explain how or why it attacks *Antelope Coal* as tenuous. Indeed, the coal company's first action after branding the decision as tenuous is to quote the Court's observation in the decision that, while the

Director's prior regulation arguably lacked sufficient guidance, the revised regulation was acceptable. OB 34. This hardly suggests uncertainty. To the contrary, the Court's decision clearly and forcefully upholds the revised regulation.

Spring Creek is also misguided in suggesting that the Court in *Antelope Coal* would have decided differently if it had had the technical data now present in the record. When deciding *Antelope Coal*, the Court had before it testimonial evidence devoid of technical data concerning the amounts of dust exposures in underground coal mining and surface coal mining. If the Court believed that technical data was required in order to implement the BLBA presumption, it could have held just that, even if there was no such evidence before the Court. But the Court did not. Instead, it concluded that the evidence required by the revised regulation was sufficient to satisfy the presumption's "substantially similar" requirement.

c. Even if *Antelope Coal* could be ignored, the "regular exposure" standard is consistent with the statute and should be upheld.

Even if Spring Creek could somehow avoid *Antelope Coal's* binding effect, its challenge to the regulation should be rejected. The company's main argument against the revised regulation is its claim that the regulation is not faithful to the statute's requirement of a comparison between underground and surface mining conditions. Spring Creek asserts: "Regular exposure only reflects a usual or customary exposure without the necessary comparison between the different

mining environments," OB 25-26; "A regular exposure standard eliminates the necessary comparability element," OB 43. According to the coal company, the best way—the only way—to properly compare the two conditions is to actually quantify the amount of dust a miner is exposed to in each type of coal mining. *See* OB 25 (faulting the revised regulation for not "inquir[ing] into whether the quantity of dust exposure was 'substantially similar'. . . ").

Spring Creek is wrong. As explained in the preamble to the revised regulation, there is a comparison: it is a legislative fact that underground coal mines are dusty; consequently, a surface miner can show substantial similarity to that condition if his work environment is also dusty on a regular basis. 78 Fed. Reg. at 59104-05. The preamble not only explains the nature of the comparison, it also explains why DOL rejected the "technical comparability criteria" Spring Creek champions to this Court. 78 Fed. Reg. at 59105. DOL found such criteria impractical because "claimants, who must bear the burden of proving substantial similarity to invoke the presumption, generally do not control this type of technical information about the mines in which the miner worked." *Id.* As the Supreme Court explained, "a showing of the degree of dust concentration to which a miner was exposed [is] a historical fact difficult for the miner to prove[.]" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976).

DOL also found that it was impractical for claimants to provide technical data concerning underground coal mines. The dust conditions in different underground coal mines, and in different sections of the same underground mine (which includes areas on the surface as well as underground), vary significantly. Surface miners are also unlikely to have access to detailed information about dust conditions in underground mines. 78 Fed. Reg. at 59105. And even if DOL could develop an objective, universal standard representing conditions in underground mines, there was no practical way for most surface miners to quantify their dust exposure in the same manner, since their "evidence will be inherently anecdotal." *Id.*

Spring Creek extensively quotes the preamble's analysis of the problems a technical comparability standard would create. OB 26-28. But instead of answering the preamble and pointing out any flaws in its logic, Spring Creek follows with the assertion that the regulation fails to give guidance in how technical data may be weighed against a claimant's "inherently anecdotal" lay evidence. OB 29. That accusation, however, reflects Spring Creek's disagreement and disappointment with how the ALJ in this case weighed the company's technical data against Claimant's lay evidence. But that is a question of fact not relevant to the legal issue concerning the validity of the revised regulation.

Spring Creek also complains that promises made in the preamble—that not just "any" coal-mine dust exposure qualifies and that a liable coal mine operator can submit evidence (technical or otherwise) showing that a surface miner was not regularly exposed to coal-mine dust—were broken here. OB 22, 30 n.74, 43. Not so. The ALJ did not find substantial similarity by relying on sporadic or incidental exposure. *See supra* at 13-14. He specifically considered whether the evidence established that the miner was *regularly* exposed to coal-mine dust, as required by the regulation. *Id.* And, in making that determination, he considered the technical evidence that the company submitted. JA 247. He just found it to be unpersuasive. *Id.; see infra* at 13-14.

Finally, Spring Creek fails to appreciate the standard of review in a regulatory challenge. The company's attraction to a technical comparability standard blinds it to the fact that it cannot win simply by proposing an interpretation of the statute that it believes is better than the interpretation adopted by DOL in the regulation. Spring Creek instead must show that DOL's implementation is not reasonable. As this Court has explained, "[t]he agency's interpretation need not persuade with elegant clarity of thought; it need not speak to our highest sense of fair dealing; it need not even appear to us very wise. Our deference is not so dearly purchased. We require only reasonableness from the agency." *Barrera-Quintero v. Holder*, 699 F.3d 1239, 1246 (10th Cir. 2012); *see*

generally Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Spring Creek, however, has failed to prove the regulation unreasonable. And "agencies are not required to consider alternatives they have 'in good faith rejected as too remote, speculative, or . . . impractical or ineffective[,]'" as DOL did here. *Wildearth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013).

Given this deferential standard, it is no surprise that this court upheld 20 C.F.R. § 718.305(b)(2) in *Antelope Coal*. *See supra* at 18-19. The only other circuit to consider a challenge to that rule reached the same conclusion. In *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 489-90 (6th Cir. 2014), the liable employer argued to the Sixth Circuit that the ALJ had erroneously invoked the fifteen-year presumption without comparing the miner's surface coal mine work with underground coal mine work. As that court summarized, "[i]n [the employer's] view the comparison of the conditions in two separate places requires the ALJ to explain what conditions are prevalent in each of those places before comparing them." *Central Ohio*, 762 F.3d at 489-90. The court rejected this argument and held the miner "needed only to establish that he 'was regularly exposed to coal-mine dust while working[.]'" The court applied the revised regulation (which had not been promulgated at the time of the ALJ's decision) because it was consistent with DOL's "longstanding interpretation of the statutory

presumption[,]" as well as with this Court's decision in *Antelope Coal* and earlier Seventh Circuit decisions on the subject (*Freeman United Coal*, 272 F.3d at 479-80, and *Midland Coal*, 855 F.2d at 512).[7] *Id.* Thus, even if this Court finds that it is not bound by *Antelope Coal*, it should follow the reasoning of that decision, as well as that of the Sixth Circuit's and uphold 20 C.F.R. § 718.305(b)(2) as a valid regulation.

3. Contrary to Spring Creek's assertion, substantial evidence supports the ALJ's finding that the miner was regularly exposed to coal-mine dust for at least fifteen years.

The ALJ found that the evidence—the miner's statements as told to Dr. Gottschall, as well as the testimony of Claimant and the miner's son—satisfied the revised regulation's "regular exposure," and that Spring Creek's evidence to the contrary was not persuasive. While Spring Creek's primary argument is that the "regular exposure" standard is illegitimate, it also suggests that the ALJ's finding of regular coal-mine dust exposure is not supported by substantial evidence. OB 40. In doing so, the coal company goes through the motions of attacking

[7] The Seventh Circuit has yet not faced a direct challenge to 20 C.F.R. § 718.305(b)(2). However, in cases decided after the fifteen-year presumption was restored in 2010 but before the revised regulation became effective, it adhered to the standards it developed in *Freeman United Coal* and *Midland Coal*. *See, e.g.*, *Consolidation Coal Co. v. Director, OWCP*, 732 F.3d 723, 732-33 (7th Cir. 2013) (finding miner's credible testimony that he was exposed to coal and rock dust "all the time" was "more than enough evidence" to support the ALJ's finding that the miner worked in conditions substantially similar to those in underground coal mining).

Claimant's evidence. It asserts that Claimant's testimony is valueless because she has memory problems, and that the son's testimony is questionable because he admitted that some parts of the miner's job did not expose him to significant coal-mine dust exposure. OB 41-42. But Spring Creek's main grievance is that the ALJ, in the company's view, "disregarded the scientific and technical information about the amount of dust exposure provided by Spring Creek." OB 30; *see also* OB 36.

The coal company's grievance is without merit. The ALJ considered the evidence but reasonably found it unpersuasive on the question of whether the miner was "regularly exposed to coal mine dust" as required by the regulation. For instance, Spring Creek's witnesses reported that, over twenty-two years, twenty-three dust samples taken at the driller position showed dust levels lower than the maximum limit established by MSHA. JA 103. The ALJ noted this information but reasonably gave it little credit, stating: "M[s]. Tomer and Mr. Van Orden's reports consider only coal dust exposure at certain times, and cannot account for daily exposure to coal mine dust at Spring Creek Coal Mine from 1986 to 2006." JA 247.

Spring Creek argues that the ALJ's evaluation was unfair, and that the ALJ should have assumed that these annual dust measurements accurately reflected conditions at its mine during all of the miner's employment. OB 36. But this was

the ALJ's determination to make. Ultimately, Spring Creek is asking the Court to reweigh the evidence. This the Court cannot do. *See Antelope Coal*, 743 F.3d at 1350 ("We may not reweigh the evidence but can only determine whether substantial evidence supported the decision."); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 873 (10th Cir. 1996) ("[I]n deciding whether substantial evidence exists to support the ALJ's decision, the court cannot reweigh the evidence, but may only inquire into the existence of evidence to support the trier of fact.") (internal quotation marks omitted).

Finally, it is difficult to see how Spring Creek's technical data could have carried the day for the company even if the ALJ had credited it. At most, the evidence shows that the miner was regularly exposed to coal-mine dust at levels below the maximum exposure permitted by MSHA's regulations and, arguably, below the levels of the average underground mine. But compliance with mandatory dust-control standards is not a safe harbor from black lung liability. And under the revised regulation, the question is whether the miner was regularly exposed to coal-mine dust, not whether he was exposed to coal-mine dust in concentrations exceeding the legal limit or at levels matching those in underground mining. *See Antelope Coal*, 743 F.3d at 1342 (explaining that "regular exposure to coal mine dust" is "the standard to determine substantial similarity of surface working conditions to those in underground mines."). Thus, even if the ALJ had

credited Spring Creek's evidence as reflective of conditions in its mine for all of the miner's employment, that evidence would have done the company no good because it does not refute the evidence showing that the miner was regularly exposed to coal-mine dust.

In sum, the ALJ used the right legal standard and reasonably weighed the evidence to determine that Mr. McLean worked in conditions substantially similar to those in underground coal mining. The ALJ's resultant invocation of the fifteen-year presumption should be affirmed.

CONCLUSION

In view of the foregoing, the Court should affirm the ALJ's invocation of the fifteen-year presumption.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

The Director does not request oral argument because the validity of 20 C.F.R. § 718.305(b)(2) has already been upheld by this Court in *Antelope Coal*. She takes no position on the necessity of oral argument to resolve Petitioner's challenge to the ALJ's weighing of the evidence.

If the Court believes that oral argument will aid its resolution of the case, we stand ready to participate.

CERTIFICATE OF COMPLIANCE CONCERNING PRIVACY REDACTIONS

Pursuant to 10th Cir. R. 25.5, I certify that all required privacy redactions have been made.

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CERTIFICATE OF COMPLIANCE CONCERNING HARD COPIES

Pursuant to the ECF User Manual, I certify that the hard copies to be submitted to the court and parties to the case will be exact copies of the version submitted electronically today.

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CERTIFICATE OF COMPLIANCE CONCERNING VIRUSES

Pursuant to the ECF User Manual, I certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 6,798 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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