No. 13-3712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL OHIO COAL COMPANY

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; LARRY STERLING

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The petitioner requested oral argument in its opening brief. Pet. br. at 48. The federal respondent agrees that oral argument may aid this Court in its deliberations.

IN THE UNITED STATES COURT OF APPEALS
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CENTRAL OHIO COAL COMPANY

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v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; LARRY STERLING;

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

STATEMENT OF JURISDICTION

Central Ohio Coal Company (Central or employer) petitions this Court for review of a Benefits Review Board decision affirming the award of Larry Sterling's claim for benefits under the Black Lung Benefits Act (BLBA or the

Act), 30 U.S.C. §§ 901-944 (2006 & Supp. VI 2012).[1] This Court has both appellate and subject matter jurisdiction over Central's petition for review pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Act, 30 U.S.C. § 932(a).

Sterling filed this claim for benefits on October 11, 2006. Joint Appendix (JA) 1. On April 23, 2013, Central petitioned the United States Court of Appeals for the Fourth Circuit for review of the Benefits Review Board's February 28, 2013 Decision and Order, within the sixty-day time limit set forth in section 21(c). JA 86; 33 U.S.C. § 921(c). The injury contemplated by 33 U.S.C. § 921(c)—Larry Sterling's exposure to coal mine dust—occurred in Ohio, within the jurisdictional boundaries of this Court. JA 5, 77 n.5. Therefore, upon Central's motion, the Fourth Circuit transferred this matter to the jurisdiction of this Court.

The Board had jurisdiction to review the administrative law judge's (ALJ) decision pursuant to section 21(b)(3) of the Longshore Act. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). Central appealed the ALJ's February 15, 2012, decision to the Board on February 27, 2012, within the thirty-day period

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[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 appeal—were amended in 2010.

prescribed by section 21(a) of the Longshore Act. 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUES

Former miners who (1) have a totally disabling respiratory or pulmonary condition and (2) worked for at least fifteen years in either underground coal mines or other coal mines with conditions "substantially similar to conditions in an underground coal mine" are rebuttably presumed to be entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4). The ALJ found that Sterling, a totally disabled former coal miner who worked for more than fifteen years in various aboveground mines, had successfully invoked section 921(c)(4)'s fifteen-year presumption and that Central's medical evidence failed to rebut it. He therefore awarded benefits.

The issues presented are:

1. Whether the ALJ permissibly found that Sterling worked for at least fifteen years in aboveground mines with conditions "substantially similar" to those in underground mines and, thus, successfully invoked the fifteen-year presumption.

2. Whether the ALJ's finding that Central did not rebut the presumption by proving that Sterling does not have pneumoconiosis is supported by substantial evidence.

STATEMENT OF THE CASE

Coal miner Larry Sterling filed his first claim for federal black lung benefits, which was deemed abandoned and denied, in 2000.[2] He filed this claim, his second, in 2006. JA 1. While it was pending before the ALJ, Congress revived 30 U.S.C. § 921(c)(4)'s fifteen-year presumption in pending claims filed after January 1, 2005. Pub. L. No. 111-148, § 1556 (2010). ALJ Merck, applying the presumption, awarded benefits in a decision dated February 15, 2012.[3] JA 39-74. Central appealed to the Board, which affirmed on February 28, 2013. JA 75-84. This appeal followed.

A. Uncontested background findings.

Sterling was sixty-six years old at the time of the administrative hearing in 2011. JA 20. He was employed as a miner at aboveground strip mines for at least twenty-three years, ending in 1999. JA 1, 21-24; Petitioner's Brief (Pet. Br.) at 5. Sterling had a significant cigarette smoking history between 1966 and 2005. The

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[2] A claim may be denied "by reason of abandonment where a claimant fails: … (3) To pursue the claim with reasonable diligence[.]" 20 C.F.R. § 725.409(a).

[3] Between 2007 when Sterling's claim was referred to the Office of Administrative Law Judges for a hearing and the ALJ's 2012 decision, there was an ALJ remand order directing the Department of Labor to provide Sterling with a complete pulmonary evaluation pursuant to 20 C.F.R. § 725.406(a), Central's interlocutory appeal of that order to the Benefits Review Board, and the Board's August 28, 2009 decision vacating the ALJ's remand order and returning the case to the ALJ for adjudication of the merits. JA 40.

accounts differ on the intensity of that history, ranging from one to three packs of cigarettes a day at different periods of Sterling's life. JA 27, 29, 137, 217, 229, 236, 282, 294. The ALJ found that Sterling had a smoking history of at least fifty-seven pack-years.[4] JA 43.

B. Statutory and regulatory background.

1. Definition of pneumoconiosis.

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (explaining clinical and legal pneumoconiosis); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995) (explaining there is a difference between "the particular medical affliction 'coal workers' pneumoconiosis' [and] the broader legal definition of pneumoconiosis").

Clinical (or "medical") pneumoconiosis refers to a collection of diseases

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[4] The number of pack years is calculated by multiplying the number of packs of cigarettes smoked per day by the number of years the claimant smoked. Here, Sterling testified that he averaged smoking one and a half packs a day for thirty-eight years (JA 29), so that is considered fifty-seven pack-years.

recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs[.]" 20 C.F.R. § 718.201(a)(1). One species of clinical pneumoconiosis is "coal workers' pneumoconiosis" or "CWP." *Id.* It is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2); *see Cumberland River Coal,* 690 F.3d at 482; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003).

Legal pneumoconiosis is a broader category referring to "any chronic lung disease or impairment … arising out of coal mine employment," 20 C.F.R. § 718.201(a)(2), and may be diagnosed by a physician "notwithstanding a negative X-ray," 20 C.F.R. § 718.202(a)(4). Any chronic lung disease (whether obstructive or restrictive) or respiratory impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust "arises out of coal mine employment" and therefore is legal pneumoconiosis; coal mine dust need not be the sole or even primary cause of the disease. 20 C.F.R. § 718.201(b); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000).

Pneumoconiosis (both types) is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c); *Cumberland River*, 690 F.3d at 482.

2. Section 921(c)(4)'s fifteen-year presumption.

Coal miners seeking federal black lung benefits must prove (1) that they suffer from pneumoconiosis; (2) that their pneumoconiosis arose out of coal mine employment; (3) that they are totally disabled by a respiratory or pulmonary impairment; and (4) that their pneumoconiosis contributed to their total disability. 20 C.F.R. § 725.202(d); *see Cumberland River*, 690 F.3d at 482. These four elements can be established either directly or by the Act's various presumptions. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416 (6th Cir. 1997) (A claimant "bears the burden of proving each element of his claim by a preponderance of the evidence, except insofar as he is aided by a presumption."); *see generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act … prescribes several 'presumptions' for use in determining compensable disability.").

One such presumption, the "fifteen-year presumption," is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in aboveground 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) (Addendum A-2, attached).[5] If so, there is a rebuttable presumption that the miner "is totally

[5] 30 U.S.C. § 921(c)(4) also requires that at least one "chest roentgenogram" [*i.e.*,
(continued…)

disabled due to pneumoconiosis" and therefore entitled to benefits. *Id*.

The fifteen-year presumption was added to the BLBA in 1972. Pub. L. No. 92-303 § 4(c), 86 Stat. 154 (1972). In 1981, the presumption was eliminated for all claims filed after that year. Pub. L. No. 97-119 § 202(b)(1), 95 Stat. 1643 (1981). In 2010, while Sterling's current claim was being considered by the ALJ, Congress restored the fifteen-year presumption in Section 1556 of the Affordable Care Act. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). This restoration applies to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, the ACA's enactment date. *Id.*; *see also Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011). The presumption therefore applies to Sterling's claim, which was filed in 2006 and remains pending.

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

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(…continued)
x-ray] submitted in connection with the claim" must be interpreted as negative for complicated pneumoconiosis—a particularly advanced form of clinical pneumoconiosis—for the claimant to invoke the presumption. If the x-ray evidence uniformly demonstrates complicated pneumoconiosis, the claimant is entitled to an irrebuttable presumption of entitlement, 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304, and "there would have been no need to invoke the [rebuttable fifteen-year] presumption." *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), *quoted in Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011). This requirement has been met; the ALJ found that "the x-ray evidence does not establish complicated pneumoconiosis" in this record. JA 49.

fifteen-year presumption.[6] *See* Addendum A-3, attached. The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a).[7] The revised regulation provides standards governing how the presumption can invoked and rebutted.

Particularly relevant is revised section 718.305(b)(2), which explains how aboveground miners can prove that their employment is "substantially similar" to conditions in underground coal mines and thereby invoke the fifteen-year presumption. It provides that "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." *See* Revised 20 C.F.R. § 718.305(b)(2).[8] The language of

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[6] 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).

[7] 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 BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650, 657-58 (6th Cir. 2006). The revised regulation does not change the law, but merely reaffirms the Department's longstanding interpretation of 30 U.S.C. § 921(c)(4). *See* 78 Fed. Reg. 59104, 59107; *infra* at 36-38.

[8] 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e)

(continued…)

this new subsection is consistent with the Director's longstanding interpretation, as articulated by the Seventh Circuit in *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988), and adopted by the Board.

The regulation also specifies how employers (or the Director, in a case where the Black Lung Disability Trust Fund is responsible for the payment of benefits) can rebut the presumption. There are two methods of rebuttal. The first is to prove that the miner does not have either (a) legal pneumoconiosis or (b) clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. § 718.305(d)(1)(i). The second is to prove that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. § 718.305(d)(2)(ii).

C. Evidence addressing the conditions of Sterling's work as a coal miner.

Sterling worked as a coal miner between 1966 and 1999. Director's Exhibit (DX) 4 at 1.[9] He testified that all of his coal mine employment occurred above

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(…continued)
to account for Congress's removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. *See* 20 C.F.R. § 718.305 (2012). The former version of section 718.305, which was originally adopted in 1980, does not explicitly address invocation beyond parroting the statute. *See* 20 C.F.R. § 718.305(a) (2012) (Addendum A-5, attached).

[9] The Director's Exhibits that have not been included in the Joint Appendix are included in the Board's June 5, 2013, Index of Documents, JA 96-99, and are cited as "DX" with reference to the exhibit number and page number within that exhibit.

ground. He worked at a cleaning facility, strip mines, strip pits and haul roads. JA 21, 30. Asked to describe his work, Sterling said he "would maybe run a loader and load coal, load trucks. Or I might be driving trucks[,]" but that "Most of the time I run a bulldozer." JA 30. He stated that his duties included maintenance responsibilities for the bulldozer. JA 22-23. As a bulldozer operator, he was exposed to "a lot of dust" while "[r]emoving overburden and putting it back on."[10] JA 30.

Sterling testified that his coal mine work was very dusty. JA 26, 30. He stated that for "probably five years" he operated bulldozers without enclosed cabs. JA 34. He explained that, when the mines purchased new machines with enclosed cabs, they only kept dust levels down until their seals failed:

> When they were new they done a pretty good job keeping the dust down, but that would only last for, as I said, probably a year. Then, the seal, they just wouldn't seal.

JA 28. Asked about the dust conditions on a typical day, Sterling said, "if it was a hot day and dry, you would get a lot of dust from the machine just pushing dirt. If there [were] trucks hauling by on the haul road past you[,] you would get dust off of those." JA 35. He stated this occurred "[a] lot. All the time, really." *Id*. He

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[10] "Overburden" is the earth, rock and other material that lies above or around a coal seam and, in surface mining, is removed to expose the coal. *See* 20 C.F.R. § 725.101(a)(30); *Holmes Limestone Co. v. U.S.*, Nos. 97-3075, 97-3129; 1998 WL 773890, *1 (6th Cir. 1998) (unpub.).

emphasized, "you always had dust." *Id*. When it rained or snowed, he said that "there'd be less dust" but "if there wasn't any rain or snow, something to keep the dust down, you're going to have dust." JA 36. Sterling described his work clothes at the end of the shift as "very dirty" from "dust and grease or oil, and other stuff." JA 35-36.

Central deposed Dr. Paul Knight, who had examined Sterling in November 2006. JA 247, 255. When asked what Sterling had told the doctor about his work, Dr. Knight answered that Sterling provided a thirty-year history of aboveground coal mine work at strip mines, primarily as a bulldozer operator. JA 257, 258. Dr. Knight stated that Sterling would have exposure to dust as a bulldozer operator and that, to his knowledge, Sterling did not wear any personal breathing protection when working. JA 258-59. Asked by employer's counsel for any information concerning Sterling's coal mine dust exposure, Dr. Knight testified that Sterling said he "was covered with dust because of the clouds of dust that get stirred up in the course of [his] driving the – the machinery." JA 257-58.

D. Medical evidence

Central does not dispute that Sterling has a totally disabling lung disease, only whether any of the respiratory disease or disability was due to dust exposure during his aboveground coal mine employment. Pet. Br. at 11. The ALJ's resolution of that disputed issue—and hence the employer's challenge to the ALJ's

award—centered on the x-ray evidence and the opinions offered by four medical experts: Dr. Forrestal and Dr. Diaz, who each concluded that coal dust exposure was a significant contributing factor to Sterling's cigarette-induced disabling respiratory impairment; Dr. Grodner, who opined that Sterling severe chronic obstructive pulmonary disease (COPD)[11] was caused by smoking and genetic factors; and Dr. Rosenberg, who testified that coal dust exposure played no role in Sterling's severe COPD.[12]

1. Readings of the three x-rays considered by the ALJ.

The ALJ considered numerous readings of three x-rays. A November 9, 2006 x-ray was classified as positive for pneumoconiosis and for emphysema by Dr. Muchnok, a Board-certified radiologist and B-reader.[13] JA 226. Dr. Meyer,

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[11] Chronic obstructive pulmonary disease, commonly abbreviated "COPD," is a lung disease characterized by airflow obstruction. *The Merck Manual* 568 (17th ed. 1999). It encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000). The inhalation of coal-mine dust can cause COPD. *See* 65 Fed. Reg. 79939-43 (Dec. 20, 2000) (summarizing medical and scientific evidence of link between COPD and coal mine work). If so, that COPD is legal pneumoconiosis, 20 C.F.R. § 718.201(b) (2).

[12] The record also contains the November 6, 2006, examination report from Dr. Knight. JA 216. The ALJ, however, found that his opinion on both clinical and legal pneumoconiosis was not well-reasoned. JA 72. No party has challenged the ALJ's assessment of the probative value of Dr. Knight's medical opinion; therefore, it will not be summarized.

[13] A Board-certified radiologist has been certified either by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R.

(continued…)

also a Board-certified radiologist and B-reader, interpreted the film as negative for pneumoconiosis but agreed it was positive for emphysema. JA 227-28. Dr. Miller, a Board-certified radiologist and B-reader, classified the film as positive for pneumoconiosis (profusion 1/1), while Dr. Tarver, also a Board-certified radiologist and a B-reader, found the film negative for pneumoconiosis. JA 229-32; DX 13 at 6.

The March 29, 2007 film was read as positive for pneumoconiosis and emphysema by Dr. Ahmed, a Board-certified radiologist and B-reader. JA 233-34. Dr. Fox, a B-reader, classified the film as negative for pneumoconiosis. JA 243.

Dr. Rosenberg, a B-reader, interpreted a May 11, 2011 film as negative for pneumoconiosis. JA 310 (best available copy).

2. Dr. Grodner's 2007 examination report.

Dr. Grodner examined Sterling on March 29, 2007, at Central's request. JA 235. He recorded a 30-year aboveground coal-mine-work history that ended in 1999. *Id*. He also reported a thirty-eight year cigarette smoking history of a pack-

(…continued)
§ 718.202(a)(1)(ii)(C). A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); *see also Morrison*, 644 F.3d at 476 n.1. A doctor who is both Board-certified and a B-reader is "dually qualified."

and-a-half a day. JA 236. Dr. Grodner stated that pulmonary function testing revealed severe chronic obstructive airway disease that was totally disabling.[14] JA 237, 239. He reported there was no evidence of coal workers' pneumoconiosis because the chest x-ray he interpreted "does not indicate evidence of parenchymal abnormalities nor of any pleural changes." JA 238. Questioned whether any of Sterling's severe chronic obstructive airway disease arose in whole or in part from his coal mine employment, Dr. Grodner answered, "Not applicable since he does not have coal workers' pneumoconiosis." JA 238. Similarly, the doctor stated that Sterling "does not have evidence of coal workers' pneumoconiosis and therefore, none of his impairment can be attributed to pneumoconiosis," and "[s]ince coal workers' pneumoconiosis is not present at this time, it is my opinion that the disability is not caused in any part as a result of coal workers' pneumoconiosis."

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[14] A pulmonary function (or ventilatory) test is one measure of a miner's pulmonary capacity. The test measures three values: the FEV_1 (forced expiratory volume), the FVC (forced vital capacity), and the MVV (maximum voluntary ventilation). The FEV_1 value measures the amount of air exhaled in one second on maximum effort. It is expressed in terms of liters per second. Obtaining a FVC value requires the miner to take a deep breath and then exhale as rapidly and forcibly as possible. The FEV_1 value is taken from the first second of the FVC exercise. The MVV value measures the maximum volume of air that can be moved by the miner's respiratory apparatus in one minute, and is expressed in liters. 20 C.F.R. § 718.103; 20 C.F.R. Part 718 App. B. Pulmonary function study results meeting prescribed regulatory criteria establish presumptive total respiratory disability. *See* 20 C.F.R. §§ 718.204(c)(2)(i); 20 C.F.R. Part 718 App. B; *Slusher v. Director, OWCP*, 983 F.2d 1068 (6th Cir. 1992).

JA 238, 239.

3. Dr. Diaz's 2009 examination report and 2011 deposition.

Dr. Diaz, the Director of Ohio State University's COPD Program, examined Sterling on December 2, 2009. JA 280, 354. He recorded that "Sterling worked as an above ground coal miner in Ohio for 31 years from 1968 through 1999," that Sterling "was exposed to substantial coal dust during this time period," and that he has "a 57 pack-year history of cigarette smoking ending in 2005." JA 280. Based on pulmonary function results, Dr. Diaz diagnosed "very severe COPD." JA 280, 361. Dr. Diaz opined "that occupational dust exposure has contributed significantly to [Sterling's] disease," that Sterling is disabled from his lung disease, and that 31-years of coal mine dust exposure "contributed significantly to this disability." JA 280-81. The doctor elaborated that "[t]here is now substantial scientific evidence demonstrating that coal dust exposure can combine with cigarette smoking to cause the development of COPD and coal dust can contribute to disease progression." JA 280.

When deposed, Dr. Diaz explained that Sterling "has severe COPD, the emphysema variety that is secondary to cigarette smoke exposure and coal dust exposure." JA 363-64. He stated that the two exposures both contributed "probably in an additive fashion" to Sterling's disabling COPD. JA 368. Dr. Diaz explained that he relied on his experience and expertise treating people with COPD

to determine that Sterling's aboveground coal dust exposure was a contributing cause of his disease and disability:

> When [Sterling] started developing symptoms, when he was started on oxygen was really at a fairly young age, and he is very severe. So in my opinion, there was another factor in addition to the cigarette smoke that contributed to his impairment and disability.
>
> This is based on years of experience and seeing people with COPD because that's what he has, COPD.

JA 376.

4. Dr. Forrestal, Sterling's treating physician.

Dr. Forrestal stated that Sterling had been a patient for fifteen years and that he has very severe COPD that prevents him from doing his last coal mine job. JA 279. Dr. Forrestal opined that "the dust exposure that Mr. Sterling experienced while working in the mines for 31 years highly contributed to this disability." *Id.* Treatment records from Dr. Forrestal indicate that he treated Sterling at least from August 2000 through December 2006. JA 103, 215. The records contain diagnoses of COPD, recommendations to stop smoking (JA 103, 104), and a notation that he stopped smoking following a February 13, 2005 operation (JA 176, 181).

5. Dr. Rosenberg's 2011 examination reports and deposition testimony.

At Central's request, Dr. Rosenberg reviewed provided medical records and examined Sterling on May 11, 2011. JA 290. He recorded that Sterling reported a

31-year coal mine employment history and a smoking history that averaged one and a half packs per day for thirty-eight years. JA 294. Based on his review of the available information, Dr. Rosenberg stated that Sterling does not have clinical coal workers' pneumoconiosis but he does have severe, disabling COPD. JA 295-96.

Addressing the cause of Sterling's COPD, Dr. Rosenberg explained that, based on the pulmonary function testing, Sterling's COPD is smoking-related, not a coal mine-related disorder, because he has "a marked reduction of his FEV_1 coupled with a severe reduction of his FEV_1/FVC ratio" and "the appearance of his flow-volume curve" are "classic for a smoking-related form of COPD" and "uncharacteristic of the pattern of obstruction observed in relationship to past coal mine exposure." JA 298. Dr. Rosenberg also stated that Sterling's "emphysematous pattern," his "marked oxygenation abnormality," and "hypoventilation" are classic for a smoking-related form of COPD and "not airflow obstruction developing in relationship to past coal mine dust exposure." *Id.* Dr. Rosenberg reiterated these conclusions when deposed. JA 331-33, 338-39, 342-43. He stated that his views are "totally consistent" with the Department of Labor's regulations, "coal mine dust exposure causes obstructive lung disease, … it causes a decrease in the FEV_1." JA 340. Although "miners can develop obstructive lung disease," Dr. Rosenberg concluded that the specifics of Sterling's obstructive lung

disease showed that it was due to smoking and that "less than one percent … no significant amount is from coal dust exposure." JA 347.

E. Decisions below.

1. ALJ Merck's award of benefits.

The ALJ awarded benefits in a decision dated February 15, 2012. JA 39-74. Based on his review of Sterling's employment records and the parties' stipulation, the ALJ found that Sterling worked as a coal miner for at least twenty-three years. JA 45. The ALJ determined that Sterling had established a change in his condition because the medical evidence established, and Central conceded, that the miner has a totally disabling respiratory impairment, an element of entitlement decided against him in the prior claim.[15] JA 46. After concluding that Sterling's condition had changed, the ALJ reviewed all the additional evidence in the record to assess the claim on the merits.

a. The ALJ finds that Sterling successfully invoked the fifteen-year presumption.

Based on the 2006 claim filing date and the employer's concession of total respiratory disability, the ALJ noted that Sterling could invoke the fifteen-year

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[15] Because Sterling's first claim was denied as abandoned, it is treated as if every element of entitlement was decided against him. 20 C.F.R. § 725.409(c). He could therefore prove a change in condition by establishing (with evidence addressing his current condition) any element of entitlement. *See* 20 C.F.R. § 725.309(d)(3).

presumption if he established that at least 15 years of his 23 years of aboveground coal mine employment occurred in substantially similar conditions to an underground mine. JA 47 (citing 20 C.F.R. § 718.305(a) (2012)). The ALJ determined that Sterling proffered sufficient evidence of the dust conditions in his aboveground work environment by testifying that his work was "very dust[y]," that operating the bulldozer "generated a lot of dust," that new enclosed cabs only kept the dust levels down for about one year, and that "at the end of each work day his clothes would be dirty from dust, grease and oil." JA 47. The ALJ also credited Dr. Knight's testimony that, in the course of his examination of the miner, Sterling stated he would be covered by "clouds of dust" while working as a bulldozer operator. JA 48.

The ALJ determined that "Claimant's and Dr. Knight's testimony establishes that while Claimant was working in surface mine employment he was exposed to a heavy amount of dust to include coal dust." JA 48. The ALJ noted the similarity of Sterling's uncontradicted testimony about the conditions of his work clothes when he left the mine to testimony of underground miners concerning the condition of their clothes at the end of the workday. *Id*. The ALJ concluded, "based on Claimant's uncontradicted testimony regarding the work he performed when working aboveground, and his uncontradicted testimony regarding his dust exposure," that "Claimant has established that his surface mining conditions were

substantially similar to those of an underground mine." JA 48. Accordingly, the ALJ concluded that Sterling established the requisite 15 years of qualifying coal mine employment needed to invoke the Section 921(c)(4) presumption of entitlement. JA 49; *see* Revised 20 C.F.R. § 718.305(b)(1)(i), (b)(2).

b. The ALJ finds that Central failed to rebut the fifteen-year presumption.

The ALJ then considered whether Central had rebutted the presumption by proving that Sterling does not have pneumoconiosis, or by showing that his respiratory disability did not arise in whole or in part out of dust exposure during coal mine employment. JA 49; *see* Revised 20 C.F.R. § 718.305(d)(1). He concluded that the employer failed to demonstrate that Sterling did not suffer from clinical or legal pneumoconiosis, or that his disabling impairment was not due, in part, to coal dust exposure. JA 71, 73.

i. The ALJ's analysis of clinical pneumoconiosis.

Considering whether the evidence rebutted the presumption of clinical pneumoconiosis, the ALJ accorded little probative weight to various x-rays and CT-scans in Sterling's treatment records as these films and scan were not taken, or read, for the purpose of diagnosing pneumoconiosis. JA 52, 70. He also accorded little weight to the medical opinions of Dr. Knight and Dr. Forrestal diagnosing clinical pneumoconiosis as each doctor simply restated an x-ray reading. JA 63-64. Therefore, the ALJ found that there was no well-reasoned medical opinion that

demonstrated that Sterling suffers from clinical pneumoconiosis. JA 70.

The ALJ weighed the interpretations of the three x-rays taken for the purpose of diagnosing pneumoconiosis. The ALJ found that the November 9, 2006 x-ray was inconclusive for determining the presence or absence of clinical pneumoconiosis because an equal number of equally-qualified physicians provided credible but contradictory interpretations of that film. JA 51. The ALJ found the March 29, 2007 x-ray was positive for pneumoconiosis because the positive interpretation by the dually-qualified Dr. Ahmed, merited greater weight than the negative reading by Dr. Fox, who is not a Board-certified radiologist. JA 52. Crediting the single interpretation of the May 11, 2011 x-ray, the ALJ found that it was negative for pneumoconiosis. JA 52. The ALJ concluded that the conflicting x-rays (one positive, one negative and one inclusive) failed to show that Sterling does not have clinical pneumoconiosis. JA 52.

Considering all the relevant evidence, the ALJ found that Central "failed to rebut the presumption by a preponderance of the evidence that Claimant suffers from clinical pneumoconiosis." JA 70.

***ii. The ALJ's analysis of legal pneumoconiosis*.**

Analyzing the medical opinion evidence relevant to the legal pneumoconiosis issue, the ALJ summarized the physicians' opinions in considerable detail. JA 54-69.

The ALJ found that Dr. Grodner's opinion was not well-reasoned. JA 59. The ALJ explained that Dr. Grodner diagnosed Sterling with severe COPD caused by smoking and genetic factors but, when questioned whether Sterling's respiratory condition was related to coal mine dust, the doctor repeatedly responded that the question was not applicable because coal workers' pneumoconiosis was not diagnosed. JA 58-59. The ALJ interpreted Dr. Grodner's opinion (JA 235) as precluding coal dust from being a contributing cause of COPD absent evidence of clinical pneumoconiosis, a view the ALJ noted was inconsistent with the Department of Labor's regulatory position. JA 59. Therefore, the ALJ accorded Dr. Grodner's "inadequately reasoned" opinion little weight on the issue of legal pneumoconiosis. JA 59.

On the other hand, the ALJ determined that Dr. Diaz credibly explained why he diagnosed Sterling's COPD as being due to both his significant smoking history and his coal dust exposure in terms of the objective evidence and his examination findings. The ALJ found that Dr. Diaz's opinion "account[ed] for Claimant's coal dust exposure, without ignoring his significant smoking history." JA 62. Therefore, the ALJ concluded that "Dr. Diaz's diagnosis of COPD, which he found is significantly related to coal dust exposure, is a reasoned and documented diagnosis of legal pneumoconiosis." JA 62. The ALJ accorded the opinion full probative weight. The ALJ similarly found that Dr. Forrestal, Sterling's treating

physician, provided a credible opinion drawn from both objective evidence and his examinations that Sterling's COPD is due to smoking and coal mine dust exposure. JA 64.

Finally, the ALJ determined that Dr. Rosenberg's finding of no legal pneumoconiosis was not well-reasoned because Dr. Rosenberg's several justifications for attributing Sterling's COPD solely to cigarette smoking—decreased FEV_1/FVC values, the associated diffusing capacity reduction that presents in smoking-related emphysema, and airflow improvement upon the administration of bronchodilators—were contrary to the positions of the Department of Labor. JA 67-69. The ALJ also found that Dr. Rosenberg did not provide a sufficient explanation in either his written reports or his deposition testimony for his opinion that coal dust played no contributing role in Sterling's obstructive lung impairment; therefore, the ALJ accorded the doctor's opinion little probative weight. JA 69.

Weighing all the evidence, the ALJ concluded that the credible opinions from Drs. Diaz and Forrestal established the presence of legal pneumoconiosis and therefore precluded Central from rebutting the presumption by showing the absence of pneumoconiosis. JA 69.

iii. The ALJ's analysis of disability causation.

Turning to disability causation, the ALJ noted that, contrary to his findings,

Drs. Grodner and Rosenberg found Sterling did not have pneumoconiosis, consequently, those doctors' opinions warranted little weight on the issue of whether Sterling's disabling respiratory impairment was due to pneumoconiosis.[16] JA 72. In contrast, the ALJ noted that Drs. Diaz and Forrestal had credibly explained their opinions that pneumoconiosis "significantly" and "highly" contributed to Sterling's totally disabling respiratory impairment. JA 72-73. The ALJ found that a preponderance of the evidence established that Sterling is totally disabled due to pneumoconiosis. JA 73. Accordingly, the ALJ concluded that Central "failed to meet its burden to rebut the presumption pursuant to § 718.305" and awarded benefits. JA 73.

2. The Benefits Review Board's February 28, 2013 affirmance.

Central appealed to the Benefits Review Board, which affirmed. JA 85. Central argued that the ALJ erred in finding that Sterling's aboveground coal mine employment was substantially similar to that of an underground mine, in determining the length of Sterling's smoking history, and in weighing the medical

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[16] The ALJ incorrectly applied a "substantially contributing cause" standard, rather than the "rule-out" standard, to disability causation rebuttal. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. § 718.305(d)(1)(ii) (2013). The ALJ's error, however, is harmless because the use of that standard could only benefit Central, and it nevertheless was unable to produce sufficient evidence to meet that more lenient rebuttal standard.

evidence to find the presumption was not rebutted.

On the "substantially similar conditions" issue, the Board held that claimant "need only show that the miner was exposed to sufficient coal mine dust during his employment," that "'[s]ufficient' exposure relates to a miner's personal exposure to coal dust," and that "a claimant's unrefuted testimony is sufficient to support a finding of similarity." JA 78 (citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001), *Blakely v. Amax Coal Co*., 54 F.3d 1313 (7th Cir. 1995), and *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988)). The Board concluded that substantial evidence in the form of Sterling's credible and uncontradicted testimony about his dust exposure supported the ALJ's finding that Sterling established at least fifteen years of aboveground coal mine employment in conditions substantially similar to underground mines. JA 78. The Board affirmed as unchallenged the ALJ's determination that Sterling is totally disabled, JA 77 n.4; therefore, the Board affirmed the ALJ's finding that Sterling successfully invoked the Section 921(c)(4) presumption. JA 78.

Central challenged the ALJ's determination of the magnitude of Sterling's smoking history. The Board agreed with Central that the ALJ did not fully explain how he resolved the conflicts in the evidence concerning the extent of Sterling's smoking history; however, the Board concluded that a remand was not required because the ALJ's reasons for discrediting the opinions of Central's medical

experts on the legal pneumoconiosis issue, 20 C.F.R. § 718.202(a)(4), were unrelated to the ALJ's finding regarding the extent of Sterling's smoking history. JA 79-80. The Board held that "error, if any, in the administrative law judge's conclusion that claimant had a fifty-seven pack year history of smoking is harmless." JA 80.

The Board then affirmed the ALJ's conclusions that Central had failed to rebut the fifteen-year presumption. The Board held that the ALJ acted within his discretion in weighing the conflicting x-ray evidence and in finding that Central failed to prove the absence of clinical pneumoconiosis by x-ray. JA 81. The Board held that the ALJ provided valid rationales for finding that the opinions of Drs. Grodner and Rosenberg were not sufficiently reasoned or documented when addressing whether coal mine employment exposure was a contributing cause of Sterling's COPD. JA 81-83. Therefore, the Board affirmed the ALJ's determination to discredit these doctors' opinions on both the issue of the presence of pneumoconiosis and the cause of Sterling's respiratory disability. JA 83-84. Accordingly, the Board affirmed the finding that Central failed to rebut the presumption that Sterling is totally disabled due to pneumoconiosis and entitled to benefits. JA 85.

SUMMARY OF THE ARGUMENT

The ALJ's findings that Sterling successfully invoked section 921(c)(4)'s fifteen-year presumption and that Central failed to rebut it, are correct and supported by substantial evidence. Central challenges the ALJ's finding that Sterling worked for at least fifteen years in conditions "substantially similar to conditions in an underground mine," as required by section 921(c)(4). The ALJ properly relied on Sterling's uncontradicted testimony about his personal dust-exposure experience to determine that his aboveground coal mine employment occurred in conditions substantially similar to an underground mine. The ALJ's determination comports with the longstanding standard for proving "substantially similar" conditions that is now set forth in revised 20 C.F.R. § 718.305(b)(2). Thus, the ALJ correctly invoked Section 921(c)(4)'s presumption of entitlement based on his finding that Sterling worked for at fifteen years in qualifying coal mine employment and suffers from a totally disabling respiratory impairment.

The ALJ then properly imposed the burden of rebutting that presumption on Central by showing that Sterling did not have pneumoconiosis or that pneumoconiosis did not cause his disability. The ALJ permissibly determined that the weight of the medical evidence was insufficient to rebut the presumption and, therefore, that Sterling was entitled to benefits.

ARGUMENT

A. The ALJ properly found that Sterling successfully invoked Section 921(c)(4)'s fifteen-year presumption.

1. Standard of review.

Central argues that Sterling was not entitled to the fifteen-year presumption because he did not labor in conditions "substantially similar to conditions in an underground mine" for at least fifteen years, as required by 30 U.S.C. § 921(c)(4). Pet. Br. 14-24. Central's challenge to the ALJ's (and the Director's) interpretation of this provision presents a question of law. This Court reviews the Board's legal conclusions de novo. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1056 (6th Cir. 2013); *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA is, however, entitled to deference.

The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Caney Creek Coal*, 150 F.3d at 572. The Director's interpretation of those implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation[,]" *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted), even if they are expressed in a brief, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

Central also challenges the ALJ's credibility determinations, which must be affirmed if they are supported by substantial evidence, *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997), "even if the facts permit an alternative conclusion," *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995). To satisfy the substantial evidence standard, the ALJ must adequately explain why he weighed the evidence as he did. *Morrison,* 644 F.3d at 478. "A remand or reversal is only appropriate when the ALJ fails to consider all of the evidence under the proper legal standard or there is insufficient evidence to support the ALJ's finding." *McCain v. Director, OWCP*, 58 F. Appx. 184, 201 (6th Cir. 2003).

2. To invoke the fifteen-year presumption, disabled aboveground miners must prove that they were regularly exposed to coal mine dust, but they are not required to prove anything about conditions in underground mines.

The fifteen-year presumption is available to aboveground miners who worked underground if "the conditions of [the] miner's employment" were "substantially similar to conditions in an underground mine." 30 U.S.C. § 921(c)(4). The ALJ and Board found that Sterling's uncontradicted testimony about his exposure to coal dust as an aboveground miner was sufficient to invoke the presumption. JA 48-49, 78. Central argues that Sterling should have been required to prove what conditions prevail in underground mines, and that the ALJ

should have compared those conditions to Sterling's surface mining employment. Pet. Br. 16-17, 22-23. Central is incorrect. The Director has long interpreted 33 U.S.C. § 921(c)(4)'s "'substantially similar' language … [to] require[] only a showing that the conditions under which the miner worked exposed him to coal dust." *Midland Coal Co.*, 855 F.2d at 511. That position was accepted by the only court of appeals to consider the issue, *id.* at 512, and is incorporated in revised 20 C.F.R. § 718.305(b)(2). This Court should defer to the Director's interpretation of the Act's "substantially similar" requirement.

Revised section 718.305(b)(2) provides:

> The 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.

78 Fed. Reg. 59114.[17] Because this interpretation of "substantially similar" is expressed in a regulation promulgated after notice-and-comment procedures, Central's challenge is governed by *Chevron's* familiar two-step analysis. As this Court recently explained, regulations implementing the BLBA will be upheld "as long as [1] Congress has not spoken directly on the issue and [2] the agency's interpretation is reasonable." *Ramage*, 737 F.3d at 1058 (citing *Chevron*, 467 U.S. at 843-43).

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[17] This regulation governs this claim. *See supra* note 7.

a. Chevron step one.

The first step is simple. Section 921(c)(4) provides no guidance about what factors to consider in determining whether an aboveground miner worked under conditions "substantially similar" to conditions in underground mines. When called upon to interpret this requirement, a Seventh Circuit panel confessed that "we can discern no plain meaning of the requirement of 'substantial similarity.' Indeed, immediately apparent is the fact that the Act does not specify whether a claimant must establish similarity to a particular underground mine, a hypothetical underground mine, the best, worst, or an average underground mine." *Midland Coal*, 855 F.2d at 511. Moreover, the statute does not explain *how similar* an aboveground miner's working conditions must be to conditions underground to qualify as "substantial[ly]" similar, another source of ambiguity. Congress therefore left a gap for the Department to fill.

During the rulemaking process, three commenters argued (as Central suggests here) that revised section 718.305(b)(2) was contrary to section 921(c)(4)'s text because "it does not require the claimant to prove any type of similarity between exposures in underground and non-underground work." 78 Fed. Reg. 59104. This is not so. It is true that the revised regulation does not require a comparison between an aboveground miner's dust exposure and dust conditions in a particular underground mine. Instead, it requires a comparison

between the aboveground miner's dust exposure and a legislative fact about working conditions in underground coal mines: that they are dusty. *Id.* at 59104-05 (citing *Midland Coal*, 855 F.2d at 512). The Act is predicated on the fact that dusty conditions exist in underground mines and that these conditions are the cause of black lung disease.[18] *See Midland Coal*, 855 F.2d at 512 ("Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis."). The crucial condition that exists in underground mines, for purposes of the BLBA, is coal dust. Aboveground miners who are regularly exposed to coal dust are therefore experiencing conditions similar—in the respect relevant to the BLBA—to conditions in underground mines. *See* 78 Fed. Reg. 59104-05. Revised section 718.305(b)(2)'s "regularly exposed to dust" standard is therefore consistent with the statutory text.[19]

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[18] When the BLBA was originally enacted as Title IV of the Federal Coal Mine Safety and Health Act of 1968, benefits were limited to miners who worked in underground coal mines. *See* 30 U.S.C. § 902(d) (1970) (defining "miner" as "any individual who is or was employed in an underground coal mine"); *see also* 30 U.S.C. §§ 901, 902(b), (d), 932(h) (1970). Coverage was generally expanded to aboveground miners in 1972. *See* 30 U.S.C. § 902(d) (1972).

[19] While the "regularly exposed to dust" standard is not onerous, aboveground miners do bear the burden of proving that they were exposed to coal dust for the requisite fifteen years. *Midland Coal*, 855 F.2d at 512. An employer is also free to develop evidence establishing, for example, that the miner was not exposed to coal dust (or was only exposed to a de minimus amount) for a substantial period of surface employment. If so, that period cannot be used to establish the required

(continued…)

b. Chevron step two.

i. <u>The Director's "regularly exposed to dust" standard is a reasonable and practical interpretation of section 921(c)(4).</u>

In the preamble to the revised regulation, the Department explained why it rejected competing interpretations of section 921(c)(4)'s "substantial similarity" language advanced by various commenters. For example, the Department rejected suggestions to "adopt technical comparability criteria, such as requiring a claimant to produce scientific evidence specifically quantifying the miner's exposure to coal dust in non-underground mining" as impractical because many miners do not have access to such information. 78 Fed. Reg. 59105. 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).

The other side of the proposed comparison—establishing what conditions exist in underground mines—presents similar impracticalities. 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)

(…continued)
fifteen years. Miners who worked aboveground for more than fifteen years can fail to invoke the presumption. *See, e.g.*, *Hansbury v. Reading Anthracite Co.*, BRB No. 11-0236 BLA, 2011 WL 6140714 (DOL Ben. Rev. Bd., Nov. 29, 2011).

vary significantly.[20] In any event, aboveground miners are unlikely to have access to detailed information about dust conditions in underground mines. Nor could the Department avoid this problem by developing an objective, universal standard representing conditions in underground mines, effectively setting a target that aboveground miners must hit to establish substantial similarity. Because there is no practical way for most aboveground miners to objectively quantify their dust exposure, their "dust exposure evidence will be inherently anecdotal[.]" 78 Fed. Reg. 59105. As a result, "it would serve no purpose for the Department to "develop an objective, and therefore dissimilar, benchmark of underground mine conditions for comparison purposes." *Id.*

Notably, while three commenters stated that the Department should develop "an objective standard for proving substantial similarity," none of them actually

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[20] An "underground coal mine" includes not only the underground coal deposit but "all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto." 20 C.F.R. § 725.101(a)(30). This was even true before 1972, when the Act covered only miners working at underground mines. *See* 20 C.F.R. § 410.110 (i) (1971) (defining "underground coal mine" to include "all land, buildings, and equipment appurtenant thereto"). Because section 921(c)(4) defines miners by the type of mine they work in rather than whether they actually work on the surface or belowground, claimants who work on the surface of underground mines for fifteen years are entitled to the fifteen-year presumption without demonstrating "substantially similar" conditions. *See Ramage*, 737 F.3d at 1058. Their surface work took place, for BLBA purposes, in an underground mine.

suggested such a standard. 78 Fed. Reg. 59104. Nor did Central. The Department can hardly be faulted for not adopting an alternative interpretation of the Act that was not presented to it. And the commenters' inability to articulate any workable competing standard reinforces the conclusion that revised section 718.305(b)(2) is a reasonable interpretation of the Act entitled to *Chevron* deference.

ii. The Director's interpretation of section 921(c)(4) was adopted by the Seventh Circuit, the only court of appeals to consider the issue.

Revised 718.305(b)(2) is a new regulation, but its interpretation of section 921(c)(4)'s "substantial similarity" requirement is not new. While the previous version of section 718.305(d) did not explicitly address the issue, the Director advanced the same interpretation of the statute in litigation long before the revised regulation was promulgated. *See* 77 Fed. Reg. 19461.[21] And, even without a regulation on the issue, the only court of appeals to address the issue adopted the Director's construction of section 921(c)(4).

In *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 511 (7th Cir. 1988), that court rejected an employer's argument that surface miners must present evidence addressing the conditions in underground mines to prove "substantial

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[21] Central suggests that the ALJ erred by relying on the former version of section 718.305 rather than relying directly on the statute. Pet. Br. at 16. But the relevant portion of the former regulation is essentially identical to the language in the statute. *Compare* 20 C.F.R. § 718.305(a)(2012) with 30 U.S.C. § 921(c)(4).

similarity." 855 F.2d at 512. Instead, an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id. Accord*, *Blakely*, 54 F.3d at 1319 (holding that an ALJ, "relying on the testimony of two witnesses, who both testified that Blakely was exposed to coal dust while a surface miner," permissibly concluded that the miner was "exposed to dust conditions substantially similar to those underground"; explaining that the claimant "'bears the burden of establishing comparability' but 'must only establish that he was exposed to sufficient coal dust in his surface mine employment'") (quoting *Midland Coal*, 855 F.2d at 512-13); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001) (holding that miner's "unrebutted testimony" that "clearly delineated, in objective terms, the awful conditions on the surface of the mine[]" was "sufficient" to support a finding of substantial similarity).[22]

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[22] The revised regulation's requirement that aboveground miners prove that they were "regularly" exposed to dust was added to the regulation "to clarify that a demonstration of sporadic or incidental exposure [to coal dust] is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105. But it is entirely consistent with the Director's and the Seventh Circuit's interpretation of section 921(c)(4)'s "substantial similarity" inquiry before the new regulation was promulgated. *See Summers*, 272 F.3d at 480 (rejecting claimant's argument that "a miner can prove substantial similarity simply by showing that he was in or around a coal mine for at least 15 years.").

The Seventh Circuit recently reaffirmed this position in a case applying the fifteen-year presumption as revived in 2010. *Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 732-33 (7th Cir. 2013) (holding that the 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 an underground coal mine). The Benefits Review Board, which has nationwide jurisdiction over BLBA claims, applies the same standard in cases outside the Seventh Circuit's jurisdiction. *See, e.g.,* JA 78; *Harris v. Cannelton Indus., Inc.*, 24 Black Lung Rep. (MB) 1-217, 1-223 nn.3, 5, 2011 WL 1821519 (Ben. Rev. Bd. 2011) (claim within the Fourth Circuit's jurisdiction). This Court should do the same.

iii. Congress endorsed the Director's interpretation of section 921(c)(4) when it re-enacted that provision without alteration.

"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, 581 (1978); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *U.S. v. O'Flanagan*, 339 F.3d 1229, 1235 (10th Cir. 2003). When it re-enacted section 921(c)(4) in 2010, Congress was therefore aware that the administrator of the BLBA and the only court of appeals to consider the issue had both concluded that aboveground miners can prove that they labored in "substantially similar conditions" by establishing that

they were exposed to coal mine dust in the course of their surface-mining employment. If Congress was dissatisfied with that administrative and judicial interpretation of section 921(c)(4), 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 decision can only be interpreted as an endorsement of the Director's and the Seventh Circuit's longstanding interpretation of the "substantial similarity" requirement.

Congress's decision, in 1978, to extend the Act's coverage to coal mine construction workers also supports the Director's interpretation of section 921(c)(4). *See* Pub. L. 95-239 § 2(b) (March 1, 1978) (expanding definition of "miner" to include "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, *to the extent such individual was exposed to coal dust* as a result of such employment") (emphasis added). The legislative history of that amendment indicates that Congress intended to cover coal mine construction workers "when they work in conditions *substantially similar* to conditions in underground coal mines." S.Rep. No. 95-209, 95th Cong., 1st Sess. (1977) (emphasis added), quoted in *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 870 (3d Cir. 1979). The employer in *Williamson Shaft* argued, based on this expression of legislative intent, that construction workers were covered by the Act only if they actually worked in an

underground mine. The Third Circuit disagreed, observing that those workers "labor in conditions *substantially similar* to those of miners when they spend extended periods of time *exposed to dusts* in the coal mine environment." *Williamson Shaft*, 794 F.2d at 870 (emphasis added). The Third Circuit's interpretation of "conditions substantially similar to conditions in underground coal mines," as used in the 1977 amendment's legislative history, is on all fours with the Director's and Seventh Circuit's interpretation of the same phrase in section 921(c)(4).

Finally, the Director's construction of section 921(c)(4) furthers the statute's purpose. "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" 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). Imposing a demanding standard on surface miners attempting to invoke the presumption—especially a quantitative standard requiring evidence that BLBA claimants rarely have access to, *see supra* at p. 34—would hardly be consistent with that intent. The Director's "regularly exposed to dust" standard is. It is also important to consider the limited impact this standard has in any individual claim. Proving that a surface miner worked in conditions "substantially similar" to conditions underground is only a small part of the puzzle. Fifteen years of qualifying work does not, standing alone, trigger anything. Miners must also prove

that they suffer from a totally disabling respiratory or pulmonary impairment to invoke section 921(c)(4)'s presumption of entitlement. Moreover, an employer can rebut that presumption by showing either that the miner does not have pneumoconiosis or that pneumoconiosis does not contribute to the miner's disability. Given these other substantial impediments to a successful claim, it is unnecessary to impose an onerous dust-exposure requirement on surface miners as a gatekeeping mechanism.[23]

In sum, the Director's "regularly exposed to dust" standard is a reasonable interpretation of section 921(c)(4)'s "substantially similar" requirement and is entitled to this Court's deference. Central's argument that the statute requires a more direct or quantifiable comparison between an aboveground miner's work and conditions in underground mines should be rejected.

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[23] If conditions in aboveground mines are, on the whole, substantially less dusty than conditions in underground mines, aboveground miners will be able to invoke the presumption less frequently (because fewer will suffer from totally disabling respiratory impairments) and their employers will be able to rebut the presumption more frequently (by showing that miners do not have pneumoconiosis) than in cases involving underground coal miners.

3. **Substantial evidence supports the ALJ's determination that Sterling's more than fifteen years of aboveground coal mine work occurred in dusty conditions that were substantially similar to conditions underground.**

   a. ***The ALJ permissibly credited Sterling's testimony regarding his exposure to coal dust as an aboveground miner.***

The ALJ, relying on Board and Seventh Circuit decisions adopting the Director's construction of section 921(c)(4), correctly stated that surface miners are "only required to proffer sufficient evidence of dust exposure in [their] work environment" to invoke the fifteen-year presumption. JA 47. He ruled that Sterling had made the necessary showing, finding that the miner "was exposed to a heavy amount of dust" in his aboveground work. JA 48. This ruling is supported by substantial evidence and should be affirmed.

Central did not introduce any evidence addressing the conditions at the mines where Sterling worked. The only evidence on the subject was testimony by Sterling and Dr. Knight. The ALJ found Sterling's testimony—that his coal mine employment was "very dust[y]" (JA 20), that "you always had dust" unless it rained or snowed (JA 35, 36), that his usual work of operating a bulldozer generated a lot of dust (JA 30), that the enclosed cab of a new bulldozer only kept the dust down for a year until the seals broke (JA 28), and that at the end of the workday his clothes were "very dirty" "from dust and grease" (JA 35-36)—to be credible. JA 47. The ALJ also permissibly relied on Dr. Knight's testimony on the

subject, which corroborates Sterling's testimony. JA 48, 257-259.[24]

This evidence is sufficient to establish that Sterling's surface-mining work took place in conditions substantially similar to conditions underground, for purposes of invoking the presumption. *See* 78 Fed. Reg. 59105 (credible evidence, which may be lay testimony, of regular exposure to coal mine dust is sufficient to establish the aboveground conditions are substantially similar to underground conditions); *see also Summers*, 272 F.3d at 480 (finding claimant's testimony about his exposure to coal dust as an aboveground miner sufficient to establish substantial similarity).

Central objects that Sterling did not state that his work conditions were "awful," as allegedly required by *Summers*. Pet. Br. at 20-21. While *Summers* noted that the miner's testimony "clearly delineated, in objective terms, the awful conditions on the surface of the mine[,]" nothing in the decision suggests that the court was adopting an "awful conditions" standard. Nor does revised section

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[24] Dr. Knight did not directly witness Sterling's mining work; he only testified to what Sterling had told him about that work. JA 257-58. Hearsay evidence is admissible in BLBA proceedings because ALJs are not "bound by common law or statutory rules of evidence, or by technical or formal rules of procedure." 33 U.S.C. § 923(a), as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.455(b); *see Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021 (3d Cir. 1986) (affirming ALJ's denial of BLBA benefits, which was largely based on hearsay evidence; explaining that "hearsay evidence is freely admissible in administrative proceedings.") (citations omitted)

718.305(b) require such a showing.

b. The ALJ's reference to testimony by underground miners in other BLBA cases was harmless error.

Central challenges the ALJ's statement that Sterling's testimony is "typical [of] testimony by underground coal miners, who similarly complain about being exposed to dust while in the mines and having significant dust on their clothes when they return home from work." JA 48. Central asserts that the ALJ erred in relying on his personal experience with the testimony of underground miners in other cases. Pet. Br. at 22. The Director agrees. The ALJ likely misread the case law as requiring him to compare Sterling's testimony with his personal knowledge of conditions in underground mines. Some statements in *Midland Coal*, considered in isolation, support this view. For example, the decision states that "[i]t is … the function of the ALJ, based on his expertise and, we would expect, certain appropriate objective factors … to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." 855 F.2d at 512. But the relevant condition known to prevail in underground mines is dustiness. 78 Fed. Reg. 59104-05. A claimant is therefore required only to demonstrate that the miner was regularly exposed to coal dust in order to establish substantial similarity to conditions underground.

If the decision turned on this error, Central would admittedly be entitled to a remand. But, in the absence of any evidence other than Sterling's and Dr. Knight's

testimony, it is far from clear that the ALJ could have permissibly reached any other conclusion. Moreover, the ALJ's conclusion on the "substantial similarity" issue was based primarily on that testimony, rather than the ALJ's knowledge of underground mining conditions. JA 48. The Court should therefore affirm the ALJ's finding that Sterling successfully invoked the fifteen-year presumption.

B. The ALJ's conclusion that Central did not rebut the fifteen-year presumption is supported by substantial evidence.

1. Standard of review.

Central's arguments regarding rebuttal raise substantial evidence issues. In particular, the employer challenges the ALJ's evaluation of the conflicting x-ray evidence, his assessment of the medical opinions offered by Drs. Rosenberg and Grodner, and his length of smoking history finding. Pet. Br. at 24-43. As previously stated, the ALJ's credibility determinations must be affirmed if they are supported by substantial evidence, *Hill*, 123 F.3d at 415, "even if the facts permit an alternative conclusion," *Webb*, 49 F.3d at 246. To satisfy the substantial evidence standard, the ALJ must adequately explain why he weighed the evidence as he did. *Morrison,* 644 F.3d at 478. When an ALJ explains his reasoning and does not rely on an impermissible basis, this Court must defer to his discretion and judgment in assessing the conflicts in the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because Sterling invoked the fifteen-year presumption, Central bears the

burden of proving that Sterling is ***not*** entitled to benefits. It can do so by proving (1) that Sterling does not have pneumoconiosis or (2) that pneumoconiosis played no part in Sterling's disability. Revised 20 C.F.R. § 718.305(d)(1)(i), (ii); *see Morrison*, 644 F.3d at 480 n.5 (employer must affirmatively prove the absence of pneumoconiosis to rebut the presumption); *Ogle*, 737 F.3d at 1071 (to establish rebuttal, employer must show that coal mine employment played no part in causing the miner's totally disabling respiratory impairment).

2. The ALJ permissibly concluded that the medical opinion evidence failed to disprove either legal pneumoconiosis or disability due to pneumoconiosis.

There is no dispute that Sterling suffers from disabling COPD. The key disputed medical issue is whether Sterling's COPD was caused, in part, by his exposure to coal dust. If so, Sterling is totally disabled by legal pneumoconiosis and entitled to BLBA benefits.[25] Because Sterling invoked the fifteen-year presumption, the burden of proof was on Central to prove that Sterling's COPD was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Central argues that the

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[25] Central agrees that Sterling's disability is attributable to his COPD. Pet Br. 11. Thus, if it fails to prove that Sterling's COPD is not legal pneumoconiosis, it necessarily fails to establish rebuttal by disproving the link between pneumoconiosis and disability. *See Ramage*, 737 F.3d at 1062. The ALJ therefore did not err by discussing the two issues simultaneously. *See* JA 54-59, 71-73.

testimony of Drs. Rosenberg and Grodner satisfied this burden.

The ALJ reasonably determined that neither Dr. Rosenberg nor Dr. Grodner provided a reliable or persuasive basis on which to rebut the presumption of total disability due to pneumoconiosis. The ALJ reached this conclusion because their opinions were inconsistent with the regulatory definition of pneumoconiosis and were inadequately explained and thus insufficient to affirmatively rebut the presumption that Sterling has pneumoconiosis. JA 56-59, 67-69, 72. This determination is supported by substantial evidence and should be affirmed. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) ("We may reverse the ALJ's conclusion only if it is not supported by substantial evidence.").

Dr. Rosenberg: The ALJ reasonably found Dr. Rosenberg's testimony insufficient to exclude Sterling's twenty-three years of coal mine dust exposure as a contributing cause of, or additive factor to, his primarily tobacco-induced COPD. Central's arguments to the contrary simply amount to a call to reweigh the evidence, which this Court does not do. *See, e.g.*, *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1120-21 (6th Cir. 1987). The ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion that coal mine dust exposure played no part in Sterling's disabling COPD. Dr. Rosenberg concluded Sterling's COPD was due solely to his extensive smoking history because his testing showed severe reduction of his FEV_1 and FEV_1/FVC ratio. JA 296. Reductions in these values,

however, are not exclusive to smoking-induced COPD. Referencing the preamble to the regulations, ALJ pointed out that coal mine dust may cause COPD, with associated decrements in FEV_1/FVC, a scientific premise with which "Dr. Rosenberg apparently disagrees." JA 67. *A&E Coal Co. v. Adams*, 694 F.3d 798 (6th Cir. 2012) ("Although the ALJ was not required to look at the preamble to assess the doctors' credibility, we agree with the Fourth Circuit 'that the ALJ was entitled to do so and the Board did not err in affirming [his] opinion.'" (quoting *Harman Mining Co. v. Dir., Office of Workers' Comp. Programs*, 678 F.3d 305, 312 (4th Cir. 2012)).

Dr. Rosenberg also stated that he attributed Sterling's COPD only to smoking because Sterling's airflow improved after the administration of bronchodilators which is not, according to the doctor, expected when coal dust causes fibrosis within the airways. JA 298. The ALJ found this portion of Dr. Rosenberg's opinion to be neither reasoned nor documented. The ALJ explained that the pulmonary function tests showed only partial reversibility in airflow following administration of bronchodilators, which did not rule out the possibility that coal dust contributed to the irreversible portion of the impairment. Moreover, the ALJ found that the pulmonary function tests that Dr. Rosenberg reviewed were still qualifying (*i.e.*, still demonstrated a totally disabling impairment) even with bronchodilators. JA 69. Thus, the ALJ determined that "treatment with

bronchodilator agents is not sufficient evidence that Claimant's impairment is entirely reversible, and therefore, is not sufficient evidence to opine that coal dust played no contributing role in Claimant's obstructive lung impairment." *Id.*

Dr. Grodner: The ALJ permissibly dismissed Dr. Grodner's opinion on the cause of Sterling's COPD because of the doctor's largely irrelevant focus on the absence of clinical pneumoconiosis. The ALJ read Dr. Grodner's report as not adequately addressing the relevant question: whether Sterling's COPD was causally related to coal dust exposure (*i.e.*, whether Sterling suffers from legal pneumoconiosis). JA 58-59. A review of Dr. Grodner's report lends support to the ALJ's interpretation. *See* JA 238 ("There is no evidence of coal workers' pneumoconiosis. The chest x-ray taken at this time and interpreted by myself … does not indicate evidence of parenchymal abnormalities nor any pleural changes."), *id.* (asked if Sterling's COPD arose in whole or in part from his coal mine employment, answered "[n]ot applicable since he does not have coal workers' pneumoconiosis").

Although Central believes Dr. Grodner's opinion is not premised on the absence of clinical pneumoconiosis, it has not demonstrated why the ALJ's interpretation of Dr. Grodner's statements is plainly wrong. Addressing a similar situation where an expert's report could be variously interpreted, the Seventh Circuit explained that "[w]e agree with [the coal company] that it is possible to

understand [its expert's] statement in a different way, namely, simply as support for his conclusion that it was [the miner's] smoking history, and not pneumoconiosis, that was causing his obstructive impairment. Nevertheless, on substantial evidence review we would have to find that the latter interpretation was the only permissible one, not that it was one of several. In that light, the ALJ's inference of hostility to the Act was permissible." *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 492 (7th Cir. 2004). The ALJ thus provided a valid and sufficiently explained reason for according diminished weight to Dr. Grodner's opinion, and the Court should defer to it, even if it is possible to interpret Dr. Grodner's testimony another way.

Consequently, the ALJ's determination that neither Dr. Rosenberg nor Dr. Grodner provided a credible opinion sufficient to rebut the presumption is supported by substantial evidence.[26] So is the award of benefits that followed from that determination.

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[26] Since the issue is whether Central proffered sufficient probative evidence to disprove the presence of legal pneumoconiosis or disability due to pneumoconiosis, Central's complaints about the ALJ's consideration of Drs. Diaz and Forrestal's opinions are irrelevant. Pet. Br. at 39-42. Both doctors opined that coal dust exposure contributed to Sterling's totally disabling COPD and thus support, rather than rebut, the presumption of total disability due to pneumoconiosis.

3. **Central's various attacks on the ALJ's finding that it did not prove the absence of clinical pneumoconiosis are irrelevant in light of the ALJ's finding that Central failed to prove the absence of legal pneumoconiosis.**

Central also attacks the ALJ's finding that it failed to prove the absence of clinical pneumoconiosis on various grounds, most of which focus on the ALJ's evaluation of the x-ray evidence. *See* Pet Br. 24-29. There is no need for the Court to address these arguments. To rebut the fifteen-year presumption, Central must prove the absence of both clinical and legal pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); *see also Big Branch Resources, Inc. v. Ogle,* 737 F.3d 1063, 1071 n.5 (6th Cir. 2013). Because the ALJ's findings on legal pneumoconiosis are supported by substantial evidence, the existence of clinical pneumoconiosis is irrelevant.

4. **Any error in the ALJ's determination of the length and intensity of Sterling's smoking history is harmless.**

Finally, Central challenges the ALJ's finding of "a smoking history of at least 57 pack-years" (JA 43) as unexplained and arbitrary. Pet. Br. at 43-46. While the ALJ could have been clearer on this point, the findings underlying his pack-year calculation (one and one-half packs per day from November 1996 through February 2005) cohere exactly with Sterling's hearing testimony. JA 43, 26-30. It would certainly be within the ALJ's discretion to credit Sterling's testimony on this issue.

In any event, this finding caused Central no harm. The company contends generally that Sterling's smoking history was more than fifty-seven pack years. Pet. Br. at 45. It does not, however, suggest what an accurate smoking history would be. Nor has it shown how the ALJ's smoking history finding influenced his assessment of the medical opinions, other than to speculate that the supposedly understated smoking history "influences the ALJ's resolution of the physician opinions[.]" Pet. Br. at 46. The ALJ did not discredit any of Central's testifying doctors for relying on a smoking history greater than fifty-seven pack years. As the Board correctly held, the ALJ's failure to quantify Sterling's smoking history more precisely was harmless error because the ALJ provided rationales for discrediting Central's medical experts that were unrelated to his findings regarding Sterling's smoking history. JA 79-80.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's award of benefits to Larry Sterling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 12,142 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption,
30 U.S.C. § 921(c)(4) (2006 & Supp. VI 2012) A-2

Department of Labor regulations implementing 30 U.S.C. § 921(c)
(relevant portions)

Revised section 718.305,
78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013)
(to be codified at 20 C.F.R. § 718.305) A-3

Former 20 C.F.R. § 718.305 (1980-2013) A-5

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.

(b) Invocation. (1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) The miner or survivor cannot establish entitlement under § 718.304 by means of chest x-ray evidence; and

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) does not apply.

(2) The 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.

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(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

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(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-October 24, 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.

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(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.[27]

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