No. 13-1220

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONSOL OF KENTUCKY, INC.,

Petitioner

v.

ORA ATWELL; 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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF RELATED CASES

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

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

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- Hobet Mining, LLC v. Epling, No. 13-1738
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- West Virginia CWP Fund v. Gump, No. 11-2416

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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

JURISDICTIONAL STATEMENT

Consol of Kentucky, Inc. (Consol) petitions this Court for review of a Benefits Review Board decision affirming an administrative law judge's award of Ora Atwell's claim for benefits under the Black Lung Benefits Act (BLBA or Act),

30 U.S.C. §§ 901-944 (2006 & Supp. VI 2012).[1] Atwell filed this claim on November 3, 2008. Joint Appendix (JA) at 1. On November 8, 2011, the ALJ awarded Atwell federal black lung benefits. JA at 29-48. Consol timely appealed to the Benefits Review Board on December 7, 2011. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On December 21, 2012, the Board issued a final order affirming the ALJ's award of benefits. JA at 49-57. On February 19, 2013, Consol timely petitioned this Court to review the Board's Order. JA at 58-63; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions).

This Court has jurisdiction over Consol's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) – Atwell's exposure to coal dust – occurred, in part, in West Virginia, within the jurisdictional boundaries of this Court.[2]

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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 dispute – were amended in 2010. *See* infra at 11.

[2] Though he worked for the majority of his career in West Virginia, Atwell's last coal mine employment was in Kentucky. JA at 5. While this Court has not yet addressed the issue in a published decision, other circuits have held that

STATEMENT OF THE ISSUES

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain claimants who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

The questions presented are:

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

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jurisdiction is appropriate in any circuit in which the miner was exposed to coal mine dust. *See Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 970-71 (7th Cir. 1984); *Hunter v. Director, OWCP*, 861 F.2d 516, 517 n.1 (8th Cir. 1988). Accordingly, the Director does not contest this Court's jurisdiction over this case.

2. Whether, after finding the presumption of pneumoconiosis unrebutted, an ALJ can give less weight to opinions of medical experts who did not diagnose pneumoconiosis.[3]

STATEMENT OF THE CASE

Because the Director addresses only Consol's legal challenges to the ALJ's decision, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (which is recounted in some detail *infra* at 10-17) and their application in the decisions below.

A. ALJ Lesniak's Decision and Order Awarding Benefits

ALJ Michael Lesniak awarded BLBA benefits to Atwell in a decision issued November 8, 2011. JA at 29. Every testifying expert (including Consol's experts, Drs. Hippensteel and Rosenberg) opined that Atwell suffers from a totally disabling lung condition, a conclusion corroborated by all four pulmonary function tests in the record.[4] Based on this evidence, the ALJ found that Atwell was totally

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

[4] JA at 120 (Hippensteel), 139 (Rosenberg), 32 (ALJ's summary of pulmonary function tests). Pulmonary function tests, also called spirometry, are tests that show how well miners move air in and out of their lungs. These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the

disabled. JA at 39.[5] He also found, based on the miner's uncontradicted testimony, that Atwell worked in underground coal mines for twenty-six years. JA at 31 (citing JA at 22). Based on these findings, the ALJ determined that Atwell had invoked the fifteen-year presumption. JA at 39. He therefore turned to rebuttal, considering whether Consol had proved that Atwell "does not suffer from either clinical or legal pneumoconiosis" or that "coal mine employment was not a contributing factor to [Atwell's] impairment."[6] JA at 41, 40.

After weighing the mixed x-ray, CT scan, and medical-opinion evidence, the ALJ concluded that Consol had proved the absence of clinical pneumoconiosis. JA at 43. But he found that Consol had failed to prove that Atwell does not have legal pneumoconiosis. JA at 45. The ALJ recognized that both Dr. Hippensteel and Dr.

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ratio between those two data points. *See* Occupational Safety and Health Administration, U.S. Dept. of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), available at https://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=277. Pulmonary function tests resulting in certain values established in the regulations are evidence of total disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i).

[5] Miners are "totally disabled" for purposes of the BLBA if they suffer from a respiratory or pulmonary impairment that prevents them from performing their usual coal mine work or work requiring comparable skills or abilities. 20 C.F.R. § 718.204(b)(1).

[6] "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).

Rosenberg attributed Atwell's lung disease entirely to smoking. JA at 37-38. But he found their opinions unconvincing because, in the ALJ's view, they relied on premises inconsistent with the BLBA's implementing regulations and their explanatory preamble. JA at 43-44.

On the issue of disability causation, the ALJ observed that miners seeking benefits without the aid of a presumption are generally required to show that pneumoconiosis is a "substantially contributing cause" of disability. JA at 40 (citing 20 C.F.R. § 718.204(c)). But he noted that employers attempting to rebut the presumption must satisfy a higher standard by showing that pneumoconiosis "was not a contributing factor" to the miner's impairment, *i.e.*, that it did not contribute at all to the miner's disability. *Id.* (citing, *inter alia*, 20 C.F.R. § 718.305 (2011); *Gibas v. Saginaw Min. Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984)).[7] While Drs. Rosenberg and Hippensteel testified that coal dust exposure did not contribute in any way to Atwell's disability, the ALJ rejected their opinions on credibility grounds. JA at 40-41. The ALJ found that Dr. Hippensteel's opinion – that Atwell's "partially reversible obstructive lung disease is not

[7] The ALJ and Board applied Sixth Circuit law to the case. JA at 51 (Board), 40 (ALJ) (both citing *Shupe v. Director, OWCP*, 12 Black Lung Rep. 1-200, 1-202, 1989 WL 245231, *3 (BRB 1989) (en banc) (The Board "will apply the law of the . . . Circuit in which the miner most recently performed coal mine employment. Our holding in this case in no way detracts from the right of an affected or aggrieved party to initiate an appeal in any circuit in which the miner was engaged in coal mine employment. . ."). The Director believes that the Sixth Circuit's law is consistent with this Court's own precedents on all issues relevant to this case.

compatible with the fixed and irreversible obstruction expected from coal mine dust exposure" – was poorly reasoned because the doctor "did not explain whether Claimant's residual impairment was still totally disabling or why coal dust exposure could not be a contributing cause of the irreversible component of the impairment." JA at 41. As for Dr. Rosenberg's testimony that Atwell's disability "does not relate in whole or in part to past coal mine dust exposure," the ALJ found it unconvincing because it was based on the doctor's erroneous view that Atwell did not have legal pneumoconiosis. JA at 41. Finding the presumption invoked and not rebutted, the ALJ awarded BLBA benefits to Atwell.

B. The Benefits Review Board's Decision and Order Affirming the Award

Consol appealed to the Benefits Review Board, which affirmed. JA at 49-56. Consol argued that the restored fifteen-year presumption was unconstitutional, that applying the fifteen-year presumption was premature because the Department had not yet promulgated new implementing regulations, that the ALJ had improperly limited its ability to rebut the presumption, and that the ALJ had improperly weighed its rebuttal evidence. JA at 50-51. The Board rejected Consol's various legal challenges as inconsistent with Board precedent. JA at 51-52. The Board then affirmed, as supported by substantial evidence, the ALJ's evaluation of the conflicting medical evidence and conclusion that Consol had not

rebutted the fifteen-year presumption. JA at 52-56. The Board accordingly affirmed the award, and this appeal followed. JA at 56, 59-69.

SUMMARY OF THE ARGUMENT

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

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976). *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner's disability is unrelated to pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows

for rebuttal on that ground. Contrary to Consol's suggestion, *Usery* does not hold that employers must be allowed to rebut the presumption merely by proving that pneumoconiosis is not a "substantial" cause of a miner's disability. Like the statute itself, *Usery* is silent on that point.

Consol also argues that the ALJ, after finding that it had failed to rebut the presumption that Atwell has legal pneumoconiosis, improperly discredited Dr. Rosenberg's opinion on disability causation because that doctor did not diagnose pneumoconiosis. In Consol's view, this was improper because Atwell's pneumoconiosis was merely presumed rather than affirmatively found. But this argument misunderstands the role of presumptions. The ALJ's finding that Consol had failed to rebut Atwell's presumed legal pneumoconiosis is effectively a finding that Atwell has legal pneumoconiosis, and the ALJ's decision to give Dr. Rosenberg's opinion less weight for this reason was well within his discretion.

ARGUMENT

A. Standard of Review

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

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted); *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The rule-out standard in context

Consol's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Atwell's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Consol Br. at 11-19. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is simple: in light of the statute's silence on the topic, is the Department's regulation permissible under *Chevron*. Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather that discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Consol's challenge to the regulatory rule-out standard.

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

The BLBA, originally enacted in 1969, is designed to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors.

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 683-84 (1991). Recognizing the difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)'s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . ." 30 U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.[8] In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[9] It therefore applies to Atwell's claim, which was filed in 2008 and remains pending. JA at 1.

On September 25, 2013, the Department of Labor promulgated a regulation ("revised section 718.305" or "revised 20 C.F.R. § 718.305") implementing the fifteen-year presumption.[10] The regulation specifies what an employer (or the

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

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

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

Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.[11] *See* infra at 14-16; Consol Br. at 16. Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses Consol's petition through the lens of revised section 718.305.[12]

2. Elements of entitlement

Miners seeking BLBA benefits are generally required to establish four elements of entitlement: ***disability*** (that they suffer from a totally disabling

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

[11] 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress's removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. *See* 20 C.F.R. § 718.305 (2011).

[12] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). Consol does not argue that the revised regulation should not be applied. Nor could it. The revised regulation does not change the law, but merely reaffirms the Department's longstanding interpretation of 30 U.S.C. § 921(c)(4). Regulations that do not "replace[] a prior agency interpretation" can be applied to "antecedent transactions" without violating the general rule against retrospective rulemaking. *Smiley v. Citibank*, 517 U.S. 735, 744 n.3 (1996); *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir. 1999).

respiratory or pulmonary condition); ***disease*** (that they suffer from pneumoconiosis); ***disease causation*** (that their pneumoconiosis was caused by coal mine employment); and ***disability causation*** (that pneumoconiosis contributes to the disability). 20 C.F.R. § 725.202(d)(2) (listing elements); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[13] Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.[14]

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[13] This has been true since 1978, when the current statutory definition of pneumoconiosis – "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" – was enacted. 30 U.S.C. § 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239 § 2(b), 92 Stat. 95 (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as "a chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. § 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 29-30.

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

3. The fifteen-year presumption and methods of rebuttal

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

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

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

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

> (d) *Rebuttal*—(1) *Miner's claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—
>
> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115. While it was phrased less clearly, the previous regulation similarly allowed employers to rebut the presumption by attacking any of the three presumed elements (disease, disease causation, and disability causation).[15]

4. The rule-out standard

The revised regulations also explain what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. § 718.305(d)(i).[16] But if the employer fails to rebut the presumption that a totally disabled miner has pneumoconiosis, it faces

[15] From 1980 until 2013, 20 C.F.R. § 718.305(a) provided that the presumption could be rebutted "only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted." 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107; *see* Consol Br. at 16.

[16] For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a "*substantially* contributing cause" of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner's pneumoconiosis and disability, however, the employer must "establish that ***no part*** of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" Revised section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R § 718.305(d)(2011) (The presumption "will be considered rebutted" if the liable party establishes that "the cause of death or total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment.") (emphasis added). This "no part" or "in whole or in part" standard is often referred to as the "rule-out" standard.[17] The primary dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii), is a permissible interpretation of the Act.

[17] The Sixth Circuit sometimes describes it as a "contributing cause" standard. *See Ogle,* 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding "substantially contributing cause" standard Consol advocates. ALJ Lesniak, relying on Sixth Circuit caselaw, stated that an employer must show that pneumoconiosis is "not a contributing factor" to the miner's impairment to establish rebuttal. JA at 40. While he did not use the words "rule out," it is clear that he applied that standard.

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

Consol argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that "pneumoconiosis did not *substantially* contribute to the Claimant's disability." Consol Br. at 11 (emphasis added).[18] Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Consol's challenge is governed by *Chevron's* familiar two-step analysis.[19] As this Court explained in upholding another BLBA regulation, "In applying *Chevron*, we first ask 'whether Congress has directly spoken to the precise question at issue.' Our *Chevron* analysis would

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[18] While the ALJ articulated the rule-out standard in his statement of governing legal standards, it is unlikely that the rule-out standard played a role in the outcome of his decision. The ALJ did not reject the opinions proffered by Consol's medical experts because they were insufficient to meet the rule out standard; he concluded that those opinions were generally not credible due to various analytical flaws. *See* JA at 40-41. To the contrary, the ALJ clearly understood that Consol's experts ruled out any relationship between coal dust exposure and Atwell's disability. *See, e.g.*, JA at 36 ("Dr. Hippensteel did find that miner's 'obstructive lung impairment is sufficient by itself to keep him from going back to' work, but that his pulmonary and cardiac impairment was not affected by his coal dust exposure."); JA at 37 ("[Dr. Rosenberg] concluded that Claimant is 'disabled from a pulmonary perspective, [but that] this disability does not relate in whole or in part to past coal mine dust exposure.'"). The Director nevertheless requests that the Court address Consol's legal challenge to revised section 718.305(d)(1)(ii), which has been challenged in a number of other cases pending before this Court. *See* Statement of Related Cases, *supra* at vii-viii.

[19] At times, Consol describes this as a "third method" of rebuttal. Consol Br. at 14. The substantial contribution standard is "not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain – that pneumoconiosis caused total disability." *Ogle*, 737 F.3d at 1070.

end at that point if the intent of Congress is clear, 'for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Elm Grove Coal*, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' In that regard, the courts have 'long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44).[20]

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

Applying *Chevron's* first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.[21] Congress has therefore left a gap for the Department to fill.

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[20] Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove Coal*, 480 F.3d at 292. The regulation falls within the Secretary of Labor's statutory authority "to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]" 30 U.S.C. § 936(a). *See also Bethlehem Mines Corp. v. Massey ("Massey")*, 736 F.2d 120, 124 (4th Cir. 1984) ("The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.").

[21] The statute addresses rebuttal only in the context of claims in which the government is the responsible party, explaining that the Secretary can rebut the

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

The only remaining question is whether the regulatory rule-out standard is a permissible way to fill this statutory gap. The fact that Consol's "substantial contribution" standard may also be a permissible interpretation is irrelevant.[22] "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.[23]

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presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. § 921(c)(4). The second method encompasses disability causation. *See supra* at 14-15. But it does not specify what showing the government must make to establish rebuttal on that ground.

[22] The Director's rule-out standard and Consol's "substantial contributing cause" standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a "significant," "necessary," or "primary" cause of a miner's disability might also be permissible. So long as the rule-out standard the Director actually adopted falls within the range of permissible alternatives, it must be upheld.

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

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

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

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106.[24] Congress amended the BLBA in 1972 because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86.

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

Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" those miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17).

Revised section 718.305(d)(1)(ii) appropriately furthers that goal by imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis. The rule-out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. § 718.305(d)(1)(i); c*f. Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore relevant only if claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.[25]

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[25] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (rejecting constitutional challenge to BLBA regulation; explaining "[u]nless the inference from the predicate facts of coal-mine employment and pulmonary function values to the presumed facts of total disability due to employment-related

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

The Department adopted the rule-out standard by regulation over thirty years ago. *See* 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if "the cause of . . . total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment.") (emphasis added). This fact alone supports the Department's claim for deference. *See, e.g., Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

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

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pneumoconiosis is 'so unreasonable as to be a purely arbitrary mandate,' we may not set it aside. . .") (quoting *Usery*, 428 U.S. at 28).

This choice can only be interpreted as an endorsement of the Director's longstanding adoption of the rule-out standard.

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

The only court of appeals to address the rule-out standard since section 921(c)(4) was revived in 2010 affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (Agreeing with the Director that an employer "must show that the coal mine employment *played no part* in causing the total disability."). The issue was presented to this Court in *Owens*, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.[26]

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App'x. 563, 567 (4th Cir. 2003). For example, the deceased miner in *Rose* had

[26] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery.* 724 F.3d at 559. Consol advances the same argument, which is addressed *infra* at 28-35. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.[27] The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant had not demonstrated a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that "it is the [employer's] failure effectively to *rule out* such a relationship that is crucial here." *Id.* (emphasis added). After concluding that the employer's evidence was "clearly insufficient to meet the statutory burden" because its key witness "did not rule out the possibility of such a connection [between the miner's disabling cancer and pneumoconiosis or his mining work]," this Court reversed the Board and awarded benefits. *Id.* at 939. *Accord Colley & Colley Coal Co.,*59 F. App'x. at 567 ("[T]he rebuttal standard requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.") (citation and quotation omitted). Consol has given no reason for this Court to depart from *Rose*.

[27] *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. § 921(c)(4) ("[T]here shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis.")

The fact that this Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the now-defunct "interim presumption" established by 20 C.F.R. § 727.203 (1999) is yet further evidence that it is a permissible rebuttal standard.[28] The interim presumption was substantially easier to invoke than the fifteen-year presumption, being available to any miner who could establish ten years of employment (or, in some circumstances, even less) and either total disability or clinical pneumoconiosis. *See* 20 C.F.R. § 727.203(a) (1999); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the interim presumption could be rebutted if the operator proved that the miner's death or disability did not arise "*in whole or in part* out of coal mine employment[.]" 20 C.F.R. § 727.203(b)(3) (1999) (emphasis added).[29] This, of course, is the same language that the initial version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard. *See supra* at 17. As this Court held in *Massey*, "[t]he underscored

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

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

language makes it plain that the employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption." 736 F.2d at 123.[30] In *Massey*, this Court rejected an employer's argument that the rule-out standard was impermissibly restrictive, explaining that "[t]he wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate" because there is "nothing in the Black Lung Act to indicate that the Secretary's rebuttal evidence rule exceeds its congressional mandate." 736 F.2d at 124.[31] If rule-out is an appropriate rebuttal standard for the

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

[31] Consol cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the section 921(c)(4) presumption are not similarly situated to claimants who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim

easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

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

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

Consol repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Consol Br. at 13-16. From Consol's brief, one might expect to find, in *Usery*, a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because

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can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. § 718.202(a)(1), (b).

every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same language that the prior version of section 718.305 used to describe rebuttal options for employers as well as the government. As explained *supra* at 14, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

But this was not true when section 921(c)(4) was enacted in 1972 or when *Usery* was decided in 1976. Before the statutory definition of pneumoconiosis was expanded in 1978, only miners disabled by *clinical* pneumoconiosis were generally entitled to BLBA benefits. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) ("When the BLBA was originally enacted," the definition of pneumoconiosis encompassed "only those diseases the medical community

considered pneumoconiosis[,]" *i.e.* clinical pneumoconiosis.); *Usery*, 428 U.S. at 6-7.[32]

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits. This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner's disability did not arise from the miner's exposure to coal dust (it

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[32] This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. § 718.201(a)(1) (2013) ("***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis") (emphasis added) *with* 20 C.F.R. § 410.110(o) (1970) ("***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis") (emphasis added) *and* 20 C.F.R. § 410.110(o)(1) (1976) ("***pneumoconiosis*** . . . includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis") (emphasis added). After several presumptions (including the fifteen-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. *See* 20 C.F.R. § 410.110(o)(2)-(3) (1976). But the general regulatory definition of pneumoconiosis did not include what is now called "legal" pneumoconiosis until after the statutory definition was broadened in 1978. *See* 20 C.F.R. § 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

did, via the disabling emphysema). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, certain miners were effectively entitled to benefits even though they were not disabled by clinical pneumoconiosis.

This is the precise scenario animating *Usery's* discussion of the fifteen-year presumption. The operator-plaintiffs in *Usery*, concerned that section 921(c)(4)'s rebuttal-limiting sentence would be applied to private employers as well as the government, argued that the sentence effectively created an unconstitutional irrebuttable presumption "because it establishes liability even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability" and "that the disability was wholly a product of other disease" caused by coal dust exposure, that "is not otherwise compensable under the Act."[33] 428 U.S. at 34-35. The Court recognized this problem, *Usery*,

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[33] Although the quoted sentences of *Usery* do not specify that the disabling disease was caused by coal dust, it is clear from the first sentence of that paragraph that the Court is discussing a miner who is "totally disabled by some respiratory or pulmonary impairment arising in connection with his employment[.]" 428 U.S. at 34. It is equally true from context. If the disabling disease was not caused by exposure to coal dust, the employer could rebut the presumption by proving that the miner's disability was unrelated to coal mine employment – one of the two rebuttal methods allowed under section 921(c)(4)'s rebuttal-limiting sentence.

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

It is true that *Usery* "confirmed the existence of *a limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in § 921(c)(4) are not logically equivalent to the methods that would otherwise be available." *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring) (quoted in Consol. Br. at 15-16). Due to section 921(c)(4)'s rebuttal-limiting sentence, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any "chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[34] As a result, the scenario

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[34] *See supra* at n.13.

motivating *Usery's* discussion of the rebuttal-limiting sentence became moot. Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every lung disease caused by coal dust exposure is legal pneumoconiosis.[35] To the contrary, because an employer must rebut legal as well as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.[36]

Most importantly for present purposes, *Usery* has nothing at all to do with the rule-out standard. At most, *Usery* stands for the proposition that operators must be allowed to rebut the fifteen-year presumption by proving that a miner's disability is caused by a disease other than pneumoconiosis. Both the old and

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[35] Similarly, the Court's observation that the rebuttal-limiting sentence effectively "grant[s] benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis[,]" 428 U.S. at 34, is now irrelevant, because every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis.

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

revised version of 20 C.F.R. § 718.305 allow operators to rebut the presumption on disability-causation grounds and are therefore consistent with *Usery*. But nothing in *Usery* even suggests that an operator must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a "substantial" contributing cause of a miner's disability. To the contrary, the words the Court used to frame the operators' argument – the rebuttal-limiting sentence can prevent rebuttal "even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability [and] that *the disability was* ***wholly*** *a product of other disease*" – are not only consistent with the rule-out standard, they essentially articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a "substantial" cause of a miner's disability.[37] It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption by disproving disability causation should be governed by a rule-out standard, a

[37] As a result, Consol's extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Consol Br. at 16-19. In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. 428 U.S. at 37 and n.40.

substantially-contributing-cause standard, or any other standard.[38] Consol's argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

E. The ALJ permissibly discredited Dr. Rosenberg's disability-causation analysis because that doctor did not diagnose legal pneumoconiosis.

Consol also argues that the ALJ improperly limited its ability to rebut the presumption by discounting Dr. Rosenberg's conclusion that Atwell's disability "does not relate in whole or in part to past coal mine dust exposure." JA at 41; Consol Br. 40-44. The ALJ gave that testimony little weight because Dr. Rosenberg had "erroneously dismissed the possibility of legal pneumoconiosis." JA at 41. In the ALJ's view, Dr. Rosenberg's conclusion that Atwell's disability was unrelated to pneumoconiosis was based on the premise that Atwell did not have pneumoconiosis in the first place. The premise turned out to be false because the ALJ found that Atwell did have pneumoconiosis (or, more precisely, that Consol had not rebutted the statutory presumption that Atwell has pneumoconiosis), fatally undermining the doctor's conclusion.

[38] To the extent that Consol's brief could be read to suggest that the rule-out standard itself is an interpretation of the text of section 921(c)(4)'s rebuttal-limiting sentence, it cites nothing in *Usery* or any other case supporting that claim. Such an interpretation would also be inconsistent with the Director's explanation for adopting the rule-out standard in the revised regulation and the fact that the rule-out standard also applied to 20 C.F.R. § 727.203's interim presumption, which did not derive from section 921(c)(4)'s text.

Consol concedes that "a physician's opinion may properly be deemed ill-reasoned where the opinion is premised on factual error (i.e., disagreement with the predicate factual findings of the ALJ fact-finder)," Consol Br. at 41-42, but argues that it is improper to discredit an expert's opinion because it conflicts with a *presumed* rather than an affirmatively-found fact. *Id.* But it cites no authority for that position. Moreover, it understates the role of presumptions under the Act. One way to "determin[e] the existence of pneumoconiosis" is for the fifteen-year presumption to be invoked and not rebutted. Revised 20 C.F.R. § 718.202(a)(3), 78 Fed. Reg. 59114. The ALJ's determination that Consol had failed to disprove Atwell's presumed legal pneumoconiosis is essentially a finding that Atwell has pneumoconiosis.

As the Sixth Circuit recently explained in rejecting a similar argument, Consol's position is "based on the view that the ALJ merely presumed legal pneumoconiosis." *Ogle*, 737 F.3d at 1074. That court explained that, "[w]hile the fifteen-year presumption did at first allow the ALJ to presume pneumoconiosis, the Fund . . . fought vigorously to rebut the presumption, while Ogle strived to buttress it." *Id.* In finding the presumption of legal pneumoconiosis unrebutted, the "ALJ determined that it was at least as likely as not that Ogle suffered from legal pneumoconiosis[,]" a determination the ALJ permissibly used to discredit the opinions of doctors who did not diagnose legal pneumoconiosis. *Id.*

In this case, as in *Ogle*, legal pneumoconiosis (i.e., whether Atwell's lung disease was caused solely by smoking or some combination of smoking and coal dust) was a hotly contested issue. The ALJ considered the opinions of six different experts on the question, and of those six, he attributed the greatest weight to two experts who concluded that Atwell had legal pneumoconiosis. JA at 43. Because Atwell was entitled to the fifteen-year presumption, there was no need for the ALJ to make an affirmative finding that Atwell has legal pneumoconiosis. Instead, the ALJ concluded that "the preponderance of the evidence does not affirmatively establish that Claimant does not suffer from legal pneumoconiosis." JA at 45. It was not error for the ALJ to discredit Dr. Rosenberg's opinion because it conflicted with that finding. *Id.*

Further, given his findings about Dr. Rosenberg's opinion on legal pneumoconiosis, the ALJ's conclusion about disability causation is the only rational one he could reach. Dr. Rosenberg contended that Atwell was totally disabled by chronic obstructive pulmonary disease (COPD). JA at 37. If the ALJ had credited Dr. Rosenberg's opinion that Atwell's COPD was caused solely by smoking, then that COPD would not be legal pneumoconiosis. But the ALJ found the doctor's testimony on that point to be unpersuasive. *Id.* Once the ALJ determined (by presumption or otherwise) that Atwell's COPD was legal pneumoconiosis, the ALJ was bound to conclude that Dr. Rosenberg's opinion that

Atwell's disability was unrelated to pneumoconiosis was also unpersuasive. In other words, Dr. Rosenberg's opinion about the cause of Atwell's disabling lung disease was both an opinion about legal pneumoconiosis and an opinion about the cause of Atwell's disability. *See Island Creek Kentucky Mining Co. v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013).

This does not lead, as Consol suggests, to a world where any operator failing to show that a miner does not have pneumoconiosis will necessarily fail to establish rebuttal on disability-causation grounds, effectively limiting operators to only one method of rebuttal. Consol Br. at 42-44.[39] It merely means that, where the only seriously disputed medical issue in a case is whether the claimant's disabling lung disease was caused by coal dust, the employer can only establish rebuttal by proving that it was not. *See Ramage*, 737 F.3d at 1062. This is hardly a "drastic result" that "overrides the statutory framework[.]" Consol Br. at 44. It is simple common sense.

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[39] It is not difficult to imagine scenarios where a doctor's discussion of a miner's alleged pneumoconiosis is entirely distinct from his disability-causation analysis. Consider a case where the miner has very mild emphysema and severe lung cancer. The operator's medical expert testifies that both diseases were caused solely by smoking and that the miner's disability is entirely due to the cancer. The ALJ finds (via presumption or otherwise) that the miner's emphysema was caused, in part, by coal dust exposure, and is therefore legal pneumoconiosis. This finding would not undercut the expert's opinion that the cancer was the sole cause of the miner's disability.

CONCLUSION

Consol's legal challenges to the regulatory rebuttal standard and the ALJ's decision to give little weight to Dr. Rosenberg's opinion on disability causation should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration.

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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 9,637 words as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 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 (2006 & Supp. VI 2012) – Regulations and presumptions

* * *

(c) Presumptions

* * *

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

Revised section 718.305

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

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

(a) Applicability. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

* * *

(c) Facts presumed. Once invoked, there will be rebuttable presumption—

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

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

(d) Rebuttal—

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

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

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

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

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201

* * *

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

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

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

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

(e) This section is not applicable to any claim filed on or after January 1, 1982.[40]

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