No. 16-2436

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZURICH AMERICAN INSURANCE GROUP
(Insurer for CANNELTON INDUSTRIES, INCORPORATED),

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and SYLVESTER J. LINTON,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

NICHOLAS C. GEALE
Acting Solicitor

MAIA S. FISHER
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

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BRIEF FOR THE FEDERAL RESPONDENT

This case involves Sylvester J. Linton's claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44. Mr. Linton is a retired coal miner, who spent at least 17 years in the mines. A Department of Labor (DOL) administrative law judge awarded his claim, and the Benefits Review Board affirmed that determination. Zurich American Insurance Group—which insured Cannelton Industries, Incorporated, Mr. Linton's most recent coal-

mine employer and the party responsible for paying his benefits—has petitioned the Court to review the Board's decision.[1] The Director, Office of Workers' Compensation Programs, hereby responds to address whether the ALJ and the Board correctly determined that Mr. Linton invoked the presumption at 30 U.S.C. § 921(c)(4).[2]

STATEMENT OF JURISDICTION

This Court has both appellate and subject matter jurisdiction over this appeal under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). Cannelton petitioned for review of the Board's October 26, 2016, decision on December 20, 2016, within the sixty-day limit prescribed by section 921(c). Moreover, the "injury" as contemplated by section 921(c)—Mr. Linton's exposure to coal-mine dust—occurred in West Virginia, within this Court's territorial

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[1] For ease of reference—and especially since Mr. Linton actually worked for Cannelton Industries—we will refer to the petitioner in this brief as Cannelton. Cannelton's status as the responsible operator is not at issue in this appeal.

[2] Cannelton also alleges that the ALJ and Board erred in determining that it did not rebut the presumption. *See* 20 C.F.R. § 718.305(d)(1). We take no position on the rebuttal issues raised by the company.

jurisdiction.

The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3), as incorporated. The ALJ issued her decision on October 28, 2015. Cannelton filed a notice of appeal with the Board on November 23, 2015, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated.

STATEMENT OF THE ISSUES

A totally disabled miner invokes the section 921(c)(4) presumption if he worked for at least 15 years either i) in underground mines or ii) at aboveground mines in dust conditions "substantially similar" to underground mines. Here, Cannelton conceded total disability and the ALJ found that all of Mr. Linton's work was underground or—alternatively—if at aboveground mines, in conditions substantially similar to those in underground mines. The Board affirmed the former finding, but did not reach the latter. On appeal, Cannelton contends that 20 C.F.R. § 718.305(b)(2) (defining when aboveground mining conditions are substantially similar to underground conditions) is invalid and, in any event, that the ALJ erred in finding that Mr. Linton worked in dusty conditions at aboveground mines. The issues now are:

1. By conceding that Mr. Linton is totally disabled and failing to challenge the ALJ's finding, as by affirmed the Board, that Mr. Linton worked as an underground miner for 17 years, has Cannelton waived any objection to the ALJ's invocation of the section 921(c)(4) presumption?

2. Is section 718.305(b)(2) a valid regulation?

3. Is the ALJ's finding that Mr. Linton was regularly exposed to coal-mine dust throughout his mining career supported by substantial evidence?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. 30 U.S.C. § 921(c)(4) (15-year presumption)

The BLBA provides compensation 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[3]; *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 133 (4th Cir.

[3] Unless otherwise noted, all regulatory citations are to the 2016 Code of Federal Regulations. The regulation at issue in this case—20 C.F.R. § 718.305—was revised in 2013, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013), but has not been changed since.

2015). In 1972, Congress added the section 921(c)(4) presumption to the BLBA to aid miners in establishing that they are totally disabled by pneumoconiosis. Black Lung Benefits Act of 1972, Pub. L. 92-303 § 4(c), 86 Stat. 154 (1972); *see Bender*, 782 F.3d at 133. The presumption is invoked when the miner (1) "was employed for 15 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). If invoked, the miner presumptively "is totally disabled due to pneumoconiosis" and therefore entitled to benefits. *Id.*

Congress revoked the presumption in 1981, but restored it in 2010. Black Lung Benefits Amendments of 1981, Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (1981); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a), 124 Stat. 119, 260 (2010); *see Bender*, 782 F.3d at 134. This restoration applies to claims, such as this one, that were filed after January 1, 2005, and were pending on or after March 23, 2010. Pub. L. No. 111-148, § 1556(c).

B. 20 C.F.R. § 718.305

On September 25, 2013, DOL promulgated a regulation, 20 C.F.R. § 718.305, implementing the 15-year presumption as restored in 2010. 78 Fed. Reg. 59114-15. The revised regulation applies to all claims affected by the statutory amendment, s*ee* 20 C.F.R. § 718.305(a); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 489 (6th Cir. 2014), and provides standards governing how the presumption is invoked and rebutted.

The statute does not elaborate on how aboveground miners can prove that they worked in conditions "substantially similar" to those in underground mining. That gap is filled by the regulation, which provides that conditions in an aboveground 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." 20 C.F.R. § 718.305(b)(2) (emphasis added).

The previous version of section 718.305 did not specifically address this issue.[4] It was, however, interpreted consistently with

[4] The original section 718.305 was promulgated in 1980. 45 Fed. (cont'd . . .)

the express language of the current version. *See Central Ohio Coal*, 762 F.3d at 489-90 ("The 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption. . . . It also reflects an interpretation of the regulation that has been accepted by both of the courts of appeals that have considered the issue.") (citations omitted).

II. Statement of the Facts

The factual issue addressed in this brief is whether Mr. Linton worked for at least 15 years in underground mines or at aboveground mines where the conditions were "substantially similar to conditions in an underground mine." There is no dispute that Mr. Linton's total coal-mine employment lasted for at least 17 years (1975-82, 1994-2004), or that his initial employment (1975-77) occurred in underground mines or at "substantially similar" aboveground mines. *See* Joint Appendix (JA) 69-70 & n.5. The

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(. . . cont'd)
Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for revocation of the presumption in claims filed after 1981, the regulation remained unchanged until 2013. *See* 20 C.F.R. § 718.305 (2012).

question now is whether his later work (1977-82 and 1994-2004) occurred in either underground mines or at "substantially similar" aboveground mines.

A. Documentary Evidence

Mr. Linton completed a form describing his history of coal-mine employment when he filed his claim. JA 5. There, he indicated that he worked as a jack-setter for Southern Appalachian Coal from 1975 to 1976; as a general laborer for Central Appalachia Coal from 1976 to 1977[5]; and as a shuttle-car operator for Cannelton (1977-80), Hawks Nest Mining (1980-81), and Central Appalachian again (1981-82), before returning to the same work at Cannelton from 1994 to 2004. *Id.* He also indicated that he was exposed to dust during all of his work in the mines. *Id.*

He also completed a description of his work at Cannelton from 1994 to 2004. JA 7. He indicated that he was an "offside" shuttle-car operator, and that he "hauled coal from miner to belt," with "[a] curtain down most of time." *Id.* He also noted that the offside

[5] Mr. Linton later clarified that his work for Central Appalachian was as a shuttle-car operator. JA at 38.

shuttle-car operator "gets most of the coal dust." *Id.*

In addition, one of the medical reports of record sheds some light on the location of Mr. Linton's coal-mine work. Dr. Gaziano stated (based on the history provided by Mr. Linton) that Mr. Linton's lung disease arose (at least in part) from 20 years of underground mining.[6] JA 123. The remaining medical reports are silent on this point.

Cannelton presented no evidence whether the mine where Mr. Linton worked was underground or aboveground nor any evidence regarding the dust conditions of his work, even though Cannelton was potentially liable for Mr. Linton's benefits and employed him for a total of approximately 13 years—including the final decade of his mining career.

B. Testimony

Mr. Linton testified at the ALJ hearing that his initial work as a jack setter in a "low vein" mine (where the roof was only 31 inches above the floor) was so dusty that he could only see the glow of a

[6] Dr. Gaziano recorded a 20-year history of coal-mine employment (JA 120), whereas the ALJ found 17 years. JA 69.

light where a nearby mining machine was in operation. JA 37-38. He further testified that his subsequent work as a shuttle-car operator was also dusty, although not as dusty as when he was a jack setter. JA 38-39. Mr. Linton's wife testified that her husband was covered with so much dust when he returned home from his coal-mine work that he had to take two showers, and that his work clothes required two washings to clean them. JA 47-48.

III. Procedural History and Prior Decisions

A. Early Proceedings

Mr. Linton filed his claim under the BLBA in 2009. JA 1. A DOL district director issued a proposed decision and order denying his claim in 2010. JA 16. Mr. Linton then asked for a hearing before an ALJ, which—after several continuances—was held in 2013. JA 27.

B. The ALJ's Decision

The ALJ issued her decision in 2015. JA 64. She accepted the stipulation of the parties that Mr. Linton worked as a coal miner for at least 17 years, and Cannelton's concession that Mr. Linton has a totally disabling pulmonary impairment. JA 69, 71; *see* 20 C.F.R. § 718.204(c). Because he worked more than 15 years in the

mines, the ALJ then addressed whether Mr. Linton's coal-mine work entitled him to invocation of the section 921(c)(4) presumption. She found that he was entitled to the presumption either because all of his work occurred in underground mines or because any non-underground work was performed at aboveground mines in conditions substantially similar to underground mines. JA 70.

She first found that the mining jobs that Mr. Linton held—jack setter and shuttle-car operator—"most likely indicate employment at an underground coal mining site."[7] *Id.* Alternatively, she found that even if most of his work was at aboveground mines, his dust exposure was substantially similar to underground mining. JA 70-71. In so finding, she relied on Mr. Linton's description of his work as a shuttle-car operator (in both his employment-history form and his testimony) as occurring in dusty conditions. JA 71. She also relied on Mr. Linton's wife's testimony that he and his clothes were

[7] Indeed, Cannelton conceded that his work as a jack setter was in an underground mine and that his work as a shuttle-car operator for Southern Appalachian (1976-77) was, at least, performed in conditions substantially similar to underground mining. JA 70 n. 5.

so dusty after work that he required two showers and his clothes had to be washed twice to remove all the dust. *Id.*

Because Mr. Linton thus had at least 15 years of qualifying employment and suffers from a totally disabling pulmonary impairment, the ALJ invoked the section 921(c)(4) presumption. JA 71; *see* 20 C.F.R. § 718.305(b). She also found that Cannelton failed to rebut the presumption and, accordingly, awarded benefits. JA 73-90; *see* 20 C.F.R. § 718.305(d)(1). Cannelton then appealed to the Board. JA 95.

C. The Board's Decision

The Board affirmed the ALJ's decision in 2016. JA 97. With respect to Mr. Linton's coal-mine work, the Board affirmed the ALJ's finding that all of his work occurred in underground mines. JA 99-101. In so doing, the Board noted that a shuttle-car operator is a position associated with underground mining, and that Mr. Linton's reference to the use of a curtain and a ribbing machine further confirmed that his work occurred underground. JA 100 n.5. The Board therefore declined to address any of Cannelton's substantial-similarity arguments. JA 101 n.6. The Board also affirmed the ALJ's findings that Mr. Linton invoked the section

921(c)(4) presumption, and that Cannelton failed to rebut it. JA 99 n.3, 101-04. Cannelton subsequently petitioned this Court for review. JA 107.

SUMMARY OF THE ARGUMENT

A miner with a totally disabling respiratory impairment may invoke the section 921(c)(4) presumption based on either employment in an underground mine or work at an aboveground mine in conditions substantially similar to underground mining. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b)(1)(i).

Cannelton has not challenged the ALJ and Board determination that Mr. Linton's coal-mine work occurred entirely underground. It has therefore waived any objection to that finding. Accordingly, the Court should affirm the conclusion that Mr. Linton's 17 years of coal-mine work were sufficient to invoke the section 921(c)(4) presumption.

Cannelton's substantial-similarity arguments regarding aboveground employment are therefore of no consequence, and the Court should not reach them. If it does consider them, the Court should uphold the validity of section 718.305(b)(2). Section 921(c)(4) does not define how substantial similarity should be

established. The regulation, which allows aboveground miners who were regularly exposed to coal-mine dust to invoke the 15-year presumption, fills that gap and is valid under *Chevron*. It is a codification of the Director's longstanding interpretation of the BLBA, has been adopted by both courts of appeals to consider the issue, and was implicitly reaffirmed by Congress when it re-enacted the presumption in 2010. It is also consistent with the intent of Congress. Finally, the ALJ's finding that Mr. Linton was exposed to dust throughout his career is supported by substantial evidence, and should be affirmed.

ARGUMENT

I. Standard of Review

The issues addressed in this brief are both factual and legal in nature. In reviewing an ALJ's factual findings, the Court's review is "limited," and "ask[s] only whether substantial evidence supports the factual findings . . . ." *Hobet Mining, LLC, v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015) (quotation and citation omitted). The Court defers to the ALJ's determination of the credibility of witnesses and her weighing of evidence. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013).

The Court generally reviews legal questions *de novo*. *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 310 (2012) (citation omitted). Here, however, Cannelton challenges the validity of 20 C.F.R. § 718.305(b)(2). A properly promulgated regulation is presumptively valid so long as it is "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal quotation omitted). Thus, Cannelton bears a heavy burden to demonstrate that the regulation is invalid. *Mourning,* 411 U.S. at 369.

The Court applies the familiar two-step *Chevron* framework in determining whether Cannelton has met this burden. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *Bender*, 782 F.3d at 137-38. First, the Court looks to "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But if

> Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if 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.

Id. at 843 (footnotes omitted). The agency is empowered to fill gaps left by Congress, and "[i]f the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (citations omitted). Deference to DOL's regulations is particularly appropriate in the "complex and highly technical regulatory program" produced by the BLBA. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

II. The ALJ and the Board properly determined that Mr. Linton's coal-mine employment qualified for purposes of invoking the section 921(c)(4) presumption.

A. The ALJ and the Board found that all of Mr. Linton's work occurred in underground mines, and Cannelton does not challenge that determination.

A miner may invoke the section 921(c)(4) presumption based on either employment in an underground mine or work at a aboveground mine in conditions substantially similar to underground mining. 30 U.S.C. § 921(c)(4); 20 C.F.R. §

718.305(b)(1)(i). Here, the ALJ found that Mr. Linton's work "most likely" occurred at underground mine sites. JA 70. The Board affirmed her invocation of the presumption (and her resulting award of benefits) on that basis.[8] JA 99-101.

Cannelton does not challenge (indeed, does not even mention) this determination. Rather, the company only challenges the ALJ's alternative finding that even if most of Mr. Linton's work was at

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[8] All relevant evidence of record, particularly Mr. Linton's description of his work, supports this determination. As the ALJ found and the Board held, shuttle-car operator is an occupation in underground mining. *See* Bureau of Labor Statistics Employment Classification 53-7111 (2015) (available at https:// www.bls.gov/oes/ current/oes537111.htm) (mine shuttle car operator "[o]perate[s] diesel or electric-powered shuttle car in *underground mine*") (emphasis added). And Mr. Linton's references to the use of curtains and ribbing machines support the inference that his work was underground. *See* DOL ALJ Benchbook: Black Lung Benefits Act, Glossary of Coal Mining Terms (2008) 4, 6, 19 (available at http://www.oalj.dol.gov/PUBLIC/BLACK_LUNG/ REFERENCES/REFERENCE_WORKS/USDOL_OALJ_BLACK_LUNG _BENCHBOOK_GLOSSARY_OF_MINING_TERMS_(2008).PDF) ("curtain" refers to fireproof partition used to direct airflow in underground mine; "rib" refers to a solid wall of coal in an underground mine passage). Moreover, Dr. Gaziano's report (attributing Mr. Linton's lung disease to underground mining based on the history he provided) also corroborates the determination. JA 123. Notably, there is no contrary evidence, as Cannelton—which owned the mine where Mr. Linton did most of his work and certainly knew whether that mine was underground or aboveground—introduced no evidence on this point.

aboveground mines, conditions at the mines were substantially similar to underground mining. Pet. Br. at 9-21. Because Cannelton's opening brief does not challenge the Board's holding that all of Mr. Linton's work was underground, Cannelton has waived judicial review of the issue, and the Court should affirm the Board's holding on that basis. *See Brown v. Nucor Corp.*, 785 F.3d 895, 918 (4th Cir. 2015) ("Failure of a party in its opening brief to challenge an alternate ground for a district court's ruling waives that challenge."); *Yousefi v. INS,* 260 F.3d 318, 326 (4th Cir. 2001) (issue not raised in opening brief is waived).

Moreover, even if the Court does not affirm the Board's holding of 17 years of underground coal-mine work, the Court still may be precluded from reaching Cannelton's challenge to the validity of section 718.305(b)(2). Because the Board held that Mr. Linton worked underground, it did not address the validity of the regulation (or the ALJ's substantial-similarity findings). *See* JA 101 n.6. Under this Court's interpretation of *SEC v. Chenery*, 318 U.S. 80 (1943), "[the Court's] review [of Board decisions] is *confined exclusively to the grounds actually invoked by the Board*." *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006)

(emphasis added) (citations omitted). Under this rule, the Court would have to remand this case for the Board to pass on the substantial-similarity issues if it does not affirm the holding that all of Mr. Linton's work occurred underground.[9] *See id.* at 427.

B. In any event, 20 C.F.R. § 718.305(b)(2) is a valid regulation, and the ALJ and Board correctly determined that Mr. Linton's work was in conditions substantially similar to underground mining.

Because Mr. Linton's 17 years of underground coal mine employment are unchallenged and satisfy the section 921(c)(4) presumption, Cannelton's substantial-similarity arguments regarding aboveground employment are of no legal consequence, and the Court should decline to consider them. If it reaches the issue, however, the Court should uphold the validity of section 718.305(b)(2).[10] The 15-year presumption is available to miners

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[9] At present, there are no published Board opinions addressing the validity of section 718.305(b)(2).

[10] Cannelton complains that between DOL's notice of proposed rulemaking and the final version of section 718.305(b)(2), DOL fundamentally changed how the ALJ makes the substantial-similarity determination. Pet. Br. 15. This is incorrect. Notwithstanding minor linguistic differences in DOL's commentary to the proposed and final rules, the ALJ's role remained unchanged. Indeed, her current role is the same as under the prior rule (cont'd . . .)

who worked in aboveground mines 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 implementing regulation explains that conditions in aboveground mines "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." 20 C.F.R. § 718.305(b)(2).

Cannelton argues that the regulation is invalid because, according to the company, it eliminates the statutorily-mandated comparison between conditions at aboveground and underground mines. Pet. Br. 9-16. The Tenth Circuit, however—the only court to have squarely addressed this issue—upheld the revised regulation's "regularly exposed" standard as a permissible construction of the BLBA. *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014). In so holding, the

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(. . . cont'd)
(implementing the pre-1981 version of section 921(c)(4)). The ALJ determines whether claimant credibly establishes that he was regularly exposed to dust at an aboveground mine. If so, the miner has shown substantial similarity because conditions in underground mines are known to be dusty. *See infra* at 22-24.

Tenth Circuit correctly recognized, *inter alia*, that section 718.305(b)(2) reflects DOL's longstanding statutory interpretation, and that this interpretation has received judicial acceptance for nearly 30 years. 743 F.3d at 1342 (citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir.1995); *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988)). *Accord Central Ohio Coal*, 762 F.3d at 489-90.

Because that long-held interpretation of the presumption's substantial-similarity requirement is now expressed in a regulation promulgated after notice-and-comment procedures, Cannelton's challenge is governed by the familiar two-step *Chevron* analysis. Under that analysis, DOL regulations implementing BLBA section 921(c)(4) will be upheld if i) Congress has not spoken directly on the issue and ii) DOL's regulation is a permissible interpretation of the statute. *Bender*, 782 F.3d at 137 (quoting *Chevron,* 467 U.S. at 842-43; other citations omitted). Like the petitioner in *Antelope Coal*, Cannelton has fallen far short of the showing necessary to invalidate the regulation.

1. *Chevron* step one (Congress has not spoken directly)

The first step of the *Chevron* analysis is straightforward. 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 provision, the Seventh Circuit confessed that "[it could] discern no plain meaning of the requirement of 'substantial similarity,'" noting that "immediately apparent [was] the fact that the [BLBA] 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. Nor does the statute 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 DOL to fill.

Cannelton now complains that section 718.305(b)(2) improperly removes the necessity of a comparison of underground and aboveground mining conditions. Pet. Br. 9-16. During the rulemaking process, three commenters similarly argued that the

regulation 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 specific dust conditions in a particular underground mine.[11] 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 BLBA is predicated on the fact that dusty conditions exist in underground mines and that these conditions are the cause of

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[11] Cannelton cites a snippet of legislative history from the 1977 amendments to BLBA to support its contention that Congress, in 1972, required a direct, specific comparison. Pet. Br. 10. Congress, however, relied on the cited statement to pass a 25-year presumption favoring eligble survivors (codified at 30 U.S.C. § 921(c)(5)). *See* H. Rep. 95-151 (1977) (*reprinted in* Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 (Committee Print, 1979) 508, 515). Congress did not make any changes to section 921(c)(4)'s substantial-similarity provision, and Cannelton provides no history indicating that the substantial-similarity provision required a direct, specific comparison of underground and aboveground mining conditions.

black lung disease.[12] *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-mine dust. Aboveground miners who are regularly exposed to that 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.[13]

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[12] 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).

[13] While the "regularly exposed to dust" standard is not onerous, aboveground miners (unlike their underground peers) do bear the burden of proving that they were exposed to coal-mine dust for the requisite 15 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 minimis amount) for a substantial period of aboveground employment. If so, that period cannot be used to establish the required 15 years. As the Director made clear in the preamble to the (cont'd . . .)

2. *Chevron* step two (DOL's interpretation is reasonable)

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

In the preamble to the revised regulation, DOL explained why it rejected competing interpretations of section 921(c)(4)'s "substantial similarity" language. For example, the agency 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

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regulation, "[t]he term 'regularity' [was] added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105. Miners who worked aboveground for more than 15 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). Here, Cannelton produced no evidence that Mr. Linton's dust exposure was sporadic or infrequent. Rather, the documentary and testimonial evidence unanimously indicates that he was consistently exposed to dust throughout his mining career.

prove[.]" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976).

The other side of the proposed comparison—establishing what conditions prevail in underground mines—presents similar impracticalities for claimants. The dust conditions in different underground coal mines, and in different sections of the same underground mine (which includes areas on the aboveground as well as underground), vary significantly. In any event, aboveground miners are unlikely to have access to detailed information about dust conditions in underground mines. Nor could DOL 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 DOL to "develop an objective, and therefore dissimilar, benchmark of underground mine conditions for comparison purposes." *Id.*

b. The Director's interpretation of section 921(c)(4) was adopted by the only court of appeals to address the issue before the revised regulation.

The interpretation of section 921(c)(4)'s substantial-similarity requirement in revised section 718.305(b)(2) is not new. Rather, it merely codifies DOL's longstanding interpretation of the substantial-similarity requirement. *Central Ohio Coal*, 762 F.3d at 489-90. Indeed, even before the regulation, "[t]he only court of appeals to address the issue ha[d] long held that aboveground miners do not need to provide evidence of underground mining conditions to compare with their own working conditions." *Antelope Coal*, 743 F.3d at 1342 (citing *Freeman United Coal,* 272 F.3d at 479; *Blakley*, 54 F.3d at 1319; *Midland Coal*, 855 F.2d at 512); *see also* 78 Fed. Reg. 59104-05. As the Tenth Circuit explained in upholding the regulation against a similar challenge, those Seventh Circuit decisions "validate [DOL's] longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions" to invoke the 15-year presumption. *Antelope Coal*, 743 F.3d at 1342.

In *Midland Coal*, the Seventh Circuit rejected an employer's argument that aboveground miners must present evidence

addressing the conditions in underground mines to prove "substantial similarity." 855 F.2d at 512. Instead, an aboveground miner "is required only to produce sufficient evidence of the aboveground mining conditions under which he worked." *Id.* *Accord*, *Blakley*, 54 F.3d at 1319 (holding that an ALJ, "relying on the testimony of two witnesses, who both testified that Blakley was exposed to coal dust while [an aboveground] 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 aboveground mine employment'") (quoting *Midland Coal*, 855 F.2d at 512-13); *Freeman United Coal*, 272 F.3d at 479-80 (holding that miner's "unrebutted testimony" that "clearly delineated, in objective terms, the awful conditions on the aboveground of the mine[]" was "sufficient" to support a finding of substantial similarity).[14]

[14] 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 (cont'd . . .)

Moreover, the Seventh Circuit reaffirmed this position in a case applying the 15-year presumption as revived in 2010. *Consolidation Coal Co. v. Director, OWCP*, 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).[15] And, as mentioned above, the only court of appeals to

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Director's and the Seventh Circuit's interpretation of section 921(c)(4)'s "substantial similarity" inquiry before the new regulation was promulgated. *See Freeman United Coal*, 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"). Although unclear, Cannelton seems to argue that the presumption of dust exposure afforded coal construction and transportation workers, 20 C.F.R. § 725.202(b), relieves them of the burden of proving regular dust exposure. Pet. Br. 13. Simply put, nothing in section 718.305 suggests that coal transportation and construction workers are exempt from the substantial-similarity burden, and there would be no reason to treat them more favorably than coal miners.

[15] *Consolidation Coal* conclusively refutes Cannelton's contention 14-15) that the Seventh Circuit had previously adopted a more exacting standard than that advocated by the Director. *See* 732 F.3d 732-33. Moreover, we note in this context that *Freeman United Coal's* caution against relying on a "scintilla" of evidence referred to claimant's assertion that mere proof of presence at a (cont'd . . .)

consider the revised regulation's validity since its promulgation (the Tenth) upheld it as a permissible interpretation of the statute. *Antelope Coal*, 743 F.3d at 1344.

c. Congress endorsed the Director's interpretation of section 921(c)(4) when it re-enacted the 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). And this is particularly true with respect to section 921(c)(4). *See Bender*, 782 F.3d at 140 ("We therefore may assume, in the absence of a contrary showing, that Congress intended to retain the agency's interpretation of the prior version of the statute.") (citing *Lorillard*). When it re-enacted section 921(c)(4) in 2010, Congress was therefore presumed 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

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mine site was sufficient, not proof of exposure to dust. *See* 272 F.3d at 480.

establishing that they were regularly exposed to coal-mine dust in the course of their aboveground-mining employment. If Congress was dissatisfied with that administrative and judicial interpretation of section 921(c)(4), it could have imposed a different standard. 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.

d. The regulation is consistent with congressional intent.

There is limited legislative history for section 921(c)(4)'s "substantial similarity" requirement as originally enacted in 1972, and the most that can be said is that Congress did not make its intent clear. On the other hand, the legislative history of section 921(c)(4) as a whole is clear and consistent with the Director's interpretation of the "substantial similarity" requirement. "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 aboveground miners attempting to invoke the presumption—especially a quantitative standard requiring evidence that BLBA claimants rarely have access to, *see supra* at 25-26—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 an aboveground miner worked in conditions "substantially similar" to conditions underground is only a small part of the puzzle. 15 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 aboveground miners as a gatekeeping mechanism.[16]

[16] If conditions in aboveground mines are, on the whole, (cont'd . . .)

In sum, the Director's regular-exposure standard is a reasonable interpretation of section 921(c)(4)'s substantial-similarity requirement and is entitled to this Court's deference. Cannelton's argument that the revised regulation is invalid because the statute requires the ALJ to make a more direct or quantifiable comparison between an aboveground miner's work and conditions in a real or hypothetical underground mine should be rejected.

3. The ALJ's finding

Finally, Cannelton contends that the ALJ erred in finding that Mr. Linton was exposed to coal-mine dust throughout his mining career. Pet. Br. at 16-21. This argument need not long detain the Court. Although the evidence is not extensive, it plainly establishes the requisite dust exposure. Mr. Linton testified that he was exposed to dust both as a jack setter and shuttle-car operator. JA

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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.

37-39. His wife's testimony and the documentary evidence corroborate this. JA 5, 7, 47-48. There is no contrary evidence. Since it is within the ALJ's discretion to determine the credibility of witnesses and weigh evidence, the Court should affirm her finding of dust exposure as supported by substantial evidence. *See Mingo Logan Coal*, 724 F.3d at 557.

In sum, either because it all occurred underground or at aboveground mines with substantially-similar dust conditions, the ALJ and Board properly concluded that Mr. Linton's 17 years of coal-mine employment (combined with his totally disabling pulmonary condition) sufficed to invoke the section 921(c)(4) presumption.

CONCLUSION

The Director requests that the Court affirm the ALJ's finding that all of Mr. Linton's coal-mine work qualified for purposes of invoking the section 921(c)(4) presumption.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor

MAIA S. FISHER
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and 2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, an electronic copy of the this brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

Cheryl L. Intravaia, Esq.
FEIRICH/MAGER/GREEN/RYAN
P.O. Box 1570
Carbondale, Illinois 62901
cintravaia@fmgr.com

Tamra Harris, Student Caseworker
Timothy C. MacDonnell, Esq.
Black Lung Legal Clinic
Washington & Lee University School of Law
Lewis Hall, Room 106
Lexington, Virginia 24450
harris.t@.wlu.edu
macdonellt@wlu.edu

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

ADDENDUM

30 U.S.C. § 921(b)(4):

> 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, * * * *. 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. * * * *

20 C.F.R. § 718.305(b):

> (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;
> >
> > * * * *
>
> (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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> * * * *