No. 16-1058

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HELEN MINING COMPANY,

Petitioner,

v.

JAMES E. ELLIOTT, SR. 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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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a 2012 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by James E. Elliott, Sr., a former coal miner. On October 31, 2014, Administrative Law Judge Drew A. Swank issued a decision awarding benefits and ordering Helen Mining Company (Helen Mining or the company), Mr. Elliott's former employer, to pay them. Appendix, page (A.) 36a. Helen Mining appealed this decision to the United

States Department of Labor Benefits Review Board on November 25, 2014, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on November 23, 2015, A. 14a, and Helen Mining petitioned this Court for review on January 7, 2016, A. 1a - 2a. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury contemplated by 33 U.S.C. § 921(c) – Elliott's exposure to coal-mine dust – occurred in the Commonwealth of Pennsylvania, within this Court's territorial jurisdiction. A. 21a. The Court therefore has jurisdiction over Helen Mining's petition for review.

STATEMENT OF THE ISSUE

The BLBA provides disability benefits to former coal miners who are totally disabled by pneumoconiosis. Claimants can establish their entitlement either with direct evidence or with the aid of various statutory presumptions, including 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption." Under section 921(c)(4), certain claimants who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are rebuttably presumed to be 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 prove this. The Department of Labor's implementing regulation fills that gap by adopting the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability. 20 C.F.R. § 718.305(d)(1)(ii). The question presented is whether section 718.305(d)(1)(ii) is a permissible interpretation of the BLBA.[1]

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[1] Helen Mining also argues that the ALJ's evaluation of the medical evidence and ultimate decision awarding BLBA benefits to Elliott was not supported by substantial evidence. Pet. Br. 14-21. The Director only addresses Helen Mining's challenge to 20 C.F.R. § 718.305(d)(1)(ii).

STATEMENT OF RELATED CASES

This case has not previously been before this Court, and the Director is not aware of any related cases before this or other courts.

STATEMENT OF THE CASE

A. Summary of relevant facts[2]

James Elliott worked as a coal miner for Helen Mining Company for over 23 years from 1969 to 1993. A. 20a. He smoked for four years before quitting at age 21, 46 years before the hearing was held in this case. A. 21a, 59a. He exhibited a chronic cough which began while working in the mines and shortness of breath three or four years after his retirement in 1993. A. 74a, 90a, 182a.

Elliott filed this claim for BLBA disability benefits in 2012. Helen Mining conceded that he suffered from a totally disabling respiratory impairment. A. 28a, 42a - 43a. A dispute developed over the cause of that disabling impairment. Four of the six physicians who offered opinions on the subject – Drs. Donald Rasmussen, Peter Kaplan, Christopher Begley, and Robert Cohen – attributed the disability to chronic obstructive lung disease ("COPD") or chronic bronchitis caused, at least in part, by Elliott's exposure to coal-mine dust.[3] A. 29a-31a, 34a;

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[2] Because the Director addresses only Helen Mining's argument that 20 C.F.R. § 718.305(d)(1)(ii) is invalid, a detailed recounting of the underlying employment and medical evidence is unnecessary. That information is only briefly summarized here. The critical background facts are the history of the relevant statutory and regulatory provisions (which is recounted in some detail *infra* at 13-20) and their application by the ALJ and Board in the decisions below.

[3] Dr. Rasmussen evaluated the miner at the Department of Labor's expense pursuant to its obligation to provide every miner who files a BLBA claim with "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b). Dr. Kaplan was retained by Helen Mining to examine the miner but, after the doctor "attribute[d Elliott's] COPD primarily to his

Director's ALJ Exhibits 8, 24; Claimant's ALJ Exhibits 3-4. Two doctors retained by Helen Mining – Gregory Fino and Samuel Spagnolo – disagreed, attributing Elliott's disability to asthma. Doctors Fino and Spagnolo testified that Elliott's exposure to coal-mine dust did not cause, contribute to, or aggravate that disabling asthma. A. 32a, 33a, 74a-75a, 128a-129a.[4]

B. ALJ Swank's October 31, 2014 Decision and Order awarding benefits.

Administrative Law Judge Drew Swank awarded BLBA benefits to Elliott in a decision dated October 31, 2014. A. 16a. Based on the parties' stipulations that Elliott worked as a miner for twenty-three years and suffered from a totally disabling respiratory impairment, as well as Elliott's testimony about the nature of his work, the ALJ found that Elliott established the employment and total disability pre-requisites to invoke 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of

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coal dust exposure[,]" his report was submitted into evidence by the claimant. A. 31a. Drs. Begley and Cohen were retained by Elliott.

[4] Any chronic lung disease – including COPD, chronic bronchitis, asthma, or any other condition – is "pneumoconiosis" for purposes of the BLBA if it is "significantly related to, or substantially aggravated by" coal-mine employment. *See* 20 C.F.R. § 718.201(b). Thus, the diagnoses of Drs. Rasmussen, Kaplan, Begley, and Cohen (COPD or chronic bronchitis caused, in part, by coal-mine dust) were effectively diagnoses of pneumoconiosis. The diagnoses of Drs. Fino and Spagnolo were not, because they did not attribute any part of Elliott's asthma to his exposure to coal-mine dust.

entitlement. A. 20a, 28a.[5] As a result, Elliott was presumed to be totally disabled by pneumoconiosis, and therefore entitled to BLBA benefits. *See* 30 U.S.C. § 921(b)(4); 20 C.F.R. § 718.305(c).

After finding that Elliott had invoked the fifteen-year presumption of entitlement, the ALJ turned to the question of whether Helen Mining had rebutted it by proving that Elliott's disability was not caused by pneumoconiosis. A. 29a-35a.[6] The ALJ stated that Helen Mining was required to prove that pneumoconiosis was not a "substantially contributing cause" of Elliott's disability to establish rebuttal on that ground. A. 29a.[7] He found the evidence Helen Mining

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[5] To count toward the fifteen-year requirement, a miner's work must take place either in underground mines or in surface mines where the miner was "regularly exposed to coal-mine dust." 20 C.F.R. § 718.305(b)(1), (b)(2). Elliott worked approximately ten years in underground mines and thirteen in surface mines. A. 20a, 52a. Based on the miner's testimony about "the dusty conditions of his aboveground mining positions[,]" the ALJ found that all 23 years of Elliott's coal-mine work qualified for purposes of invoking the fifteen-year presumption. A. 20a, 28a. While the employer unsuccessfully challenged this finding in its appeal to the Benefits Review Board, it did not raise the issue in its opening brief to this Court. It has therefore waived the issue. *See Laborers' Intern. Union of N. Amer., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994).

[6] The ALJ did not separately consider the other method of rebuttal available to Helen Mining under the regulations, which was to prove that Elliott did not actually suffer from pneumoconiosis. *See* 20 C.F.R. § 718.305(d)(1)(i). Helen Mining, however, does not challenge the ALJ's award on this ground.

[7] This was incorrect. To rebut the fifteen-year presumption by disproving the link between pneumoconiosis and disability, an employer must prove that "*no part* of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. § 718.305(d)(1)(ii) (emphasis added). The "substantially contributing cause" standard the ALJ articulated derives from 20 C.F.R. § 718.204(c)(1), which

submitted on that issue – the opinions of Drs. Spagnolo and Fino – insufficient to meet that burden. The ALJ discredited their opinions for a variety of reasons, including that they did not account for the fact that Elliott's cough began while he was working in the mines, were not sufficiently explained, had internal inconsistencies, and relied on medical premises in conflict with the Department of Labor's evaluation of the relevant medical literature as expressed in the preamble to the regulatory definition of pneumoconiosis. A. 32a-34a. He concluded that, "[w]hile Employer's experts are in all probability correct that Claimant has asthma and that his asthma is at least partly responsible for his pulmonary impairments, they have failed to rebut the presumption that his legal coal workers' pneumoconiosis is a 'substantially contributing cause' of his total pulmonary or respiratory disability by sufficiently disassociating his asthma, or its severity, from his coal mine dust exposure." A. 34a. Having found the fifteen-year presumption invoked and not rebutted, the ALJ awarded BLBA benefits to Elliott. A. 36a.[8]

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establishes the disability-causation standard that *claimants* must satisfy in claims that are not governed by the fifteen-year presumption. The ALJ's apparent application of that more relaxed standard to Helen Mining's rebuttal case, however, could only have benefited the company. It is therefore not reversible error.

[8] The ALJ observed that the employer's failure to meet its rebuttal burden rendered it unnecessary for him to evaluate the opinions of the four doctors who affirmatively testified that Elliott suffered from pneumoconiosis and that the disease contributed to his total disability. A. 35a. He nevertheless noted in passing that he did not find their opinions to be credible either.

C. The Benefits Review Board's November 23, 2015 Decision and Order affirming the award.

Helen Mining appealed to the Benefits Review Board, which affirmed. A. 6a-15a. The company argued, *inter alia*, that the regulation establishing rebuttal standards for the fifteen-year presumption (20 C.F.R. § 718.305(d)(1)) was contrary to the plain language of 30 U.S.C. § 921(c)(4) as interpreted by the Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). A. 9a-10a. The Board rejected that argument as contrary to its own precedent. A. 10a. The Board also affirmed, as supported by substantial evidence, the ALJ's determination that the opinions of Drs. Fino and Spagnolo were not credible and "did not 'sufficiently disassociate'" Elliott's asthma from his coal mine dust exposure. A. 12a. The Board accordingly affirmed the ALJ's conclusion that Helen Mining had not rebutted the fifteen-year presumption and the resulting award.[9] A. 12a-13a, 14a. This appeal followed. A. 1a - 2a.

[9] The Board acknowledged that the ALJ did not consider whether Helen Mining rebutted the presumption of pneumoconiosis (*see* n.6, *supra*). It did not remand the case, however, because the Board concluded that the ALJ had properly discredited Helen Mining's doctors regarding the cause of Elliott's asthma (thus precluding rebuttal under 20 C.F.R. § 718.305(d)(1)(i)). A. 13a n.8.

STANDARD OF REVIEW

This brief addresses only Helen Mining's argument that the Department of Labor's regulation implementing the fifteen-year presumption is invalid, a legal issue. The Court "exercise[s] plenary review over all questions of law." *B & G Constr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 247 (3d Cir. 2011) (citation omitted); *Lombardy v. Director, OWCP*, 355 F.3d 211, 213 (3d Cir. 2004) (citation omitted). 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. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted); *Elliott Coal Mining Company, Inc. v. Director, OWCP*, 17 F.3d 616, 626 (3d Cir. 1994); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

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 provided in the predecessor regulation was implicitly endorsed when Congress re-enacted the fifteen-year presumption without change in 2010 and is consistent with this Court's interpretation of 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 Mining Co.*, 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 Helen Mining'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. The regulation should be upheld as a permissible exercise of the Secretary of Labor's authority to implement the Black Lung Benefits Act.

ARGUMENT

A. The rule-out standard in context.

30 U.S.C. § 921(c)(4) establishes the fifteen-year presumption, but does not explain what an employer must prove to rebut it. That answer is supplied by the BLBA's implementing regulations, which provide that an employer can establish rebuttal by proving either (i) that the miner does not have pneumoconiosis arising out of coal mine employment or (ii) that pneumoconiosis caused "no part" of the miner's respiratory or pulmonary disability. 20 C.F.R. § 718.305(d)(1). Helen Mining attacks the second rebuttal method, commonly called the rule-out standard, as unduly harsh. It argues that the rule-out standard should be replaced by a more lenient standard under which an employer would only be obligated to prove that pneumoconiosis was not a "substantially contributing factor" in the miner's disability. Pet. Br. 29. Two courts of appeals have considered and rejected substantially identical challenges to the rule-out standard. *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 143 (4th. Cir. 2015) ("To rebut the presumption of disability due to pneumoconiosis, an operator must establish that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis'"); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (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.") (citation omitted). This Court should do the same.

The underlying legal question is simple: in light of the statute's silence on the topic, is the Department's regulation permissible under *Chevron*. That simple question is, however, presented in the context of a complicated regulatory regime. This section therefore begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Helen Mining'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 the survivors of miners killed by the disease. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the medical and scientific difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)'s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: "if a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis [.]" 30 U.S.C. § 921(c)(4)

(1972). In 1981, the fifteen-year presumption was eliminated for all claims filed thereafter.[10] In 2010, however, Congress restored the presumption for all claims that, like Elliott's, were filed after January 1, 2005, and pending on or after March 23, 2010.[11] *See* A. 229a.

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 restored fifteen-year presumption.[12] *See Marmon Coal Co. v. Director, OWCP*, 726 F.3d 387, 390 (3d Cir. 2013). The regulation specifies what an employer (or the 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).[13] While

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

[11] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (Mar. 23, 2010).

[12] 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) (codified at 20 C.F.R. § 718.305).

[13] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). Helen Mining 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 (S. Dakota), N.A.*, 517 U.S. 735, 744 n.3 (1996); *see also Usery*, 428 U.S. at 15-17 (rejecting argument that the BLBA's retrospective imposition of liability on coal-mine operators violated the Due Process Clause).

it uses somewhat different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.[14] *See infra* at 19, 25-26.

2. Elements of entitlement.

Miners seeking BLBA benefits are generally required to establish four elements of entitlement: ***disability*** (that they suffer from a totally disabling respiratory or pulmonary condition); ***disease*** (that they suffer from pneumoconiosis); ***disease causation*** (that their pneumoconiosis was caused by coal mine employment); and ***disability causation*** (that pneumoconiosis contributes to the disability). 20 C.F.R. § 725.202(d)(2) (listing elements).

Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases generally "recognized by the medical community as pneumoconioses." 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).[15] Because legal

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[14] 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 (2012).

[15] 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.

pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.[16]

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 respiratory disability by a preponderance of the evidence. Once invoked, the miner is presumed to satisfy the remaining elements of entitlement. The burden then shifts to the employer to rebut (again by a preponderance of the evidence) any of the presumed elements (disease, disease causation, and disability causation).

While there are three presumed elements available to rebut, there are in practice only two basic methods of rebuttal. This derives from the fact that, in order to rebut the disease element, the employer must prove that the miner does not have either legal pneumoconiosis (which includes the disease-causation element) or clinical pneumoconiosis. 78 Fed. Reg. 59106; *see Big Branch Resources, Inc. v.*

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§ 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 30-31.

[16] 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).

Ogle, 737 F.3d 1063, 1071 n.5 (6th Cir. 2013) ("Due to the definition of legal pneumoconiosis, the [methods of rebutting the three presumed elements] are often expressed as 1) 'establishing that the miner does not have a lung disease related to coal mine employment' and 2) 'that the miner's totally disabling respiratory or pulmonary impairment is unrelated to his pneumoconiosis.'") (quoting 78 Fed. Reg. at 59106)).

The first method is to prove that the miner does not have a lung disease caused by coal mine employment. To do this, the employer must prove (A) that the miner does not have legal pneumoconiosis *and* (B) either that the miner does not have clinical pneumoconiosis, or that the miner's clinical pneumoconiosis was not caused by coal mine employment. These showings would rebut either the disease element (by demonstrating the absence of legal and clinical pneumoconiosis) or the disease-causation element (by demonstrating the absence of legal pneumoconiosis and that the miner's clinical pneumoconiosis was not caused by coal mine employment).

If the employer fails to prove the absence of a lung disease related to coal mine employment, it can only rebut by a second method: attacking the presumed causal relationship between the disease and the miner's disability (thus rebutting the disability-causation element).

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

> (d) *Rebuttal*—(1) *Miner's claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—
>
> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115. 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).[17]

4. The rule-out standard.

The revised regulations also specify what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and

[17] 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.

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).[18] But if the employer cannot rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that the miner's pneumoconiosis contributes to his total 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).

[18] 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).

This "no part" or "in whole or in part" requirement is generally known as the "rule-out" standard. *See Consol Energy, Inc. v. Sweeney*, No. 15-1966, 2016 WL 1730739, at *2 (3d Cir. May 2, 2016) (unpub) ("In order to establish rebuttal under the second prong, the party opposing benefits must 'rule[ ] out any connection between the claimant's disability and coal mine employment.'") (quoting *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1336 (10th Cir. 2014)).

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

Helen Mining argues that the rule-out standard, as expressed in 20 C.F.R. § 718.305(d)(1)(ii), is not a permissible interpretation of the Act. Pet. Br. 21-29. The company claims that it should have instead been allowed to rebut the presumption by proving only that pneumoconiosis "was not a *substantially* contributing factor" in Elliott's total disability." Pet. Br. 28 - 29 (emphasis added).[19] Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Helen Mining's challenge is governed by *Chevron's* familiar two-step analysis. As this Court explained in *United States v. McGee*, 763 F.3d 304, 312 (3d Cir. 2014): "At step one, we ask if 'the [enabling] statute is silent or ambiguous' on 'the precise

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[19] Although the ALJ referenced the rule-out standard in his statement of governing legal standards, A. 27a, it is unlikely that the rule-out standard played a role in the outcome of his decision. As explained *supra* at n.7, the ALJ appears to have (incorrectly) applied the "substantially contributing cause" standard that Helen Mining champions in his analysis of disability-causation rebuttal. A. 29a, 34a. The Director nevertheless requests that the Court address Helen Mining's legal challenge to revised section 718.305(d)(1)(ii).

question at issue.'" (quoting *Chevron*, 467 U.S. at 842-43) (alteration in original). If so, the directive of Congress controls. *Id.* If, however, "the statute is silent or ambiguous with respect to a particular issue, then we must defer to the agency's regulation if it is based on a permissible construction of the statute." *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 619 (3d Cir. 2006). 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." *Chevron*, 467 U.S. at 843-44.[20]

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

Applying *Chevron's* first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer

[20] Of course, *Chevron* deference only applies if Congress has delegated the necessary rule-making authority to the agency. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). Section 718.305(d)(1)(ii) 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 Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 312 (3d Cir. 1995) ("Congress granted the Secretary of Labor broad authority to promulgate regulations under the BLBA.") (citing, *inter alia*, 30 U.S.C. §§ 932(a), 936(a)).

rebuttal.[21] Congress has therefore left a gap for the Department to fill. *See Bender*, 782 F.3d at 138 ("Although operators necessarily must meet some unarticulated standard to rebut the presumption, the statute specifies none. Thus, . . . Congress has left a "gap" for the agency to fill by using its delegated regulatory authority.").

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 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. Thus, the fact that Helen Mining's "substantial contribution" standard may also be a permissible interpretation of the statute is irrelevant.[22] Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S.

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[21] The statute addresses rebuttal only in the context of claims in which the government is the responsible party, explaining that the Secretary can rebut the presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. § 921(c)(4). The second method encompasses disability causation. *See supra* at 16-18. 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 Helen Mining's "substantial contributing cause" standard are just two of many standards that could permissibly fill the statutory gap. For example, requiring employers to prove that pneumoconiosis is not a "significant," "necessary," or "primary" cause of a miner's disability might also be permissible.

at 845; *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 it establishes the medical criteria necessary to rebut the fifteen-year presumption in the context of the BLBA's highly technical regulatory regime. As the Supreme Court has recognized, "[t]he identification and classification of medical eligibility criteria 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. *See generally Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 171-72 (3d Cir. 2008) ("*Chevron* deference is even more appropriate in cases that involve a complex and highly technical regulatory program.[.]") (citations and internal quotation marks omitted). Section 718.305(d)(1)(ii) easily qualifies for deference under *Chevron* Step two because it advances the purpose and intent of the statute it implements, was implicitly endorsed by Congress when it reinstated the fifteen-year presumption, and is consistent with this Court's longstanding treatment of a similar BLBA presumption.

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.[23] Congress amended the BLBA in 1972 because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86. Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" those miners faced. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17); *see also Bender*, 782 F.3d at 141 ("Congress instituted the statutory presumption to make it easier for those miners most likely to be disabled due to coal dust exposure to obtain benefits.").

"The rule-out standard unquestionably advances Congress' purpose in enacting the statutory presumption." *Bender*, 782 F.3d at 141. Revised section 718.305(d)(1)(ii) does this by imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely

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

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); *cf. 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. "This class of cases is indisputably serious and encompasses claimants whose disabilities likely are attributable at least in part to pneumoconiosis." *Bender*, 782 F.3d at 141. 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.[24]

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 . . .

[24] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (rejecting constitutional challenge to BLBA regulation establishing the "interim" presumption of entitlement, *see infra* at n.25, explaining "[u]nless the inference from the predicate facts of coal-mine employment and [medical test results indicating respiratory disability] to the presumed facts of total disability due to employment-related pneumoconiosis is 'so unreasonable as to be a purely arbitrary mandate,' we may not set it aside. . .") (quoting *Usery*, 428 U.S. at 28).

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.*, *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.") (citation omitted).

"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 United States v. Amirnazmi*, 645 F.3d 564, 587 (3d Cir. 2011) ("[W]hen Congress is aware of an agency's interpretation of a statute and takes no action to correct it while amending other portions of the statute, it may be inferred that the agency's interpretation is consistent with congressional intent.") (quoting *Barrera-Echavarria v. Rison,* 44 F.3d 1441, 1444-45 (9th Cir.1995) (en banc)) (alteration in original).

If Congress was dissatisfied with section 718.305(d)'s rule-out rebuttal standard when it re-enacted section 921(c)(4) in 2010, it could have imposed a different standard in the amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This choice can only be interpreted as an endorsement of the Director's longstanding adoption of the rule-out standard. *See Bender*, 782 F.3d at 141 ("Congress necessarily was aware of this

regulation when reenacting the statutory presumption in 2010, Congress did not insert a different rebuttal standard for coal mine operators into the statute, or otherwise amend the statutory language to signal its disagreement with the agency's earlier construction of the statute. 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.").

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

This Court has not previously faced a challenge to revised section 718.305(d)'s "no part" rebuttal standard. It has twice noted, however, that the regulation effectively adopts the rule-out standard. *Consol Energy, Inc. v. Sweeney*, No. 15-1966, 2016 WL 1730739, at *3 (3d Cir. May 2, 2016); *PBS Coals, Inc. v. Director, OWCP*, 607 F. App'x 159, 160 (3d Cir. 2015). In both cases, the Court observed that the regulatory language was similar to the rebuttal provisions that applied to the now-defunct "interim presumption" of entitlement implemented by 20 C.F.R. § 727.203 (1999).[25] *Consol Energy*, 2016 WL 1730739, at *3; *PBS Coals*, 607 F. App'x at 160 n.5.

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[25] 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. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. *See* 20 C.F.R. § 725.4.

This Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the "interim presumption," which is further evidence that it is a permissible rebuttal standard for the fifteen-year presumption. 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).[26] 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 19. As this Court held in *Kline v. Director, OWCP*, that standard required an employer "to 'rule out' a possible causal connection between a miner's disability and his coal mine employment." 877 F.2d 1175, 1179 (3d Cir. 1989).[27] If rule-out was an appropriate rebuttal

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

[27] *See also Plesh v. Director, OWCP*, 71 F.3d 103, 113 (3d Cir. 1995). The overwhelming majority of other courts to consider the issue have agreed. *See Rosebud Coal Sales Co. v. Weigand*, 831 F.2d 926, 928-29 (10th Cir. 1987) (rejecting employer's argument that rebuttal is established "upon a showing that

standard for the easily invoked interim presumption, it is hard to imagine how it could be unduly harsh in the context of the more stringent 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.

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

Helen Mining repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Pet. Br. 21 - 27. From Helen Mining'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

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[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).

presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

As Helen Mining points out, *Usery* held that the final sentence of 30 U.S.C. § 921(c)(4) does not apply to private employers. Pet. Br. 24 (quoting *Usery*, 428 U.S. at 35). 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 16-17, 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 Bender*, 782 F.3d at 139 ("At the time *Usery* was decided, coal miners could be compensated under the Act only if their disability was caused by what became known as 'clinical pneumoconiosis[.]'");

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.[28]

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

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[28] 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) (2016) (***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 in coal mine employment.").

not prove either (A) that the miner did not have clinical pneumoconiosis (because the miner in question did suffer from that condition), or (B) that the miner's disability did not arise from the miner's exposure to coal dust (because the miner's disabling emphysema did arise from coal dust exposure). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, certain miners invoking the presumption against the federal government (who were suffering from what would, in the future, be known as legal pneumoconiosis) 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."[29] 428 U.S. at 34-35. The Court recognized this problem, *Usery*, 428 U.S. at 34 ("The effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis."), but avoided the constitutional controversy by holding that section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators." *Id.* at 35-37.

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).[30] As a result, the scenario motivating *Usery's* discussion of the rebuttal-limiting sentence became moot. Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal

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

[30] *See supra* at n.15.

because every lung disease caused by coal dust exposure is legal pneumoconiosis.[31] 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. *See Bender*, 782 F.3d at 139 (After legal pneumoconiosis became generally compensable, "the concerns animating the Court's discussion in *Usery*, namely, concerns about Section 921(c)(4) preventing an operator from rebutting the presumption by showing that a miner was not disabled due to clinical pneumoconiosis but due to another respiratory disease caused by his coal mine employment, are no longer present, because all totally disabling diseases caused by coal dust exposure now are compensable under the Act.").[32]

In any event, *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

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[31] *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 fifteen-year presumption are the two set forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements.").

[32] 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.

disease other than pneumoconiosis.[33] Both the old and revised versions of 20 C.F.R. § 718.305 allow operators to do just that. But nothing in *Usery* even suggests that an operator must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a "substantial" contributing cause of a miner's disability. "The Court in *Usery* did not address any regulation implementing the statute and, crucially, the Court did not consider the evidentiary standard under which parties other than the Secretary could rebut the statutory presumption." *Bender*, 782 F.3d at 138. Revised section 718.305(d)(1)(ii) simply supplies the missing evidentiary standard.[34]

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[33] To the extent that Helen Mining'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. *See Bender*, 782 F.3d at139 ("[T]he premise of the operator's argument, namely, that the rule-out standard is the substantive equivalent of the statutory rebuttal standard at issue in *Usery,* is mistaken. . . . The statute merely identifies the elements of a claim that can be rebutted. In contrast, the rule-out standard prescribes the evidentiary standard that a party must satisfy to rebut the presumption.").

[34] To the extent that *Usery* has any relevance to the issue, it supports 20 C.F.R. § 718.305(d)(1)(ii)'s rule-out standard. The words the Court used to frame the operators' concern – the rebuttal-limiting sentence might lead to an award "even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability [and] that *the disability was* ***wholly*** *a product of other disease*" – are not only consistent with the rule-out standard, they essentially articulate it. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a "substantial" cause of a miner's disability.[35] It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption by disproving disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard. Helen Mining's argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

[35] As a result, Helen Mining's analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Pet. Br. 26-27 (citing, *inter alia*, *U.S. v. Home Concrete & Supply*, 138 S.Ct. 1836 (2012)). 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.

CONCLUSION

Helen Mining's challenge to the regulatory rebuttal standard 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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I hereby certify that:

1) This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9006 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with 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 Office Word 2010 in 14-point Times New Roman.

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