No. 13-1042

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONSOLIDATION COAL COMPANY
Petitioner

v.

JACK C. LAKE

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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

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

- Consol of Kentucky v. Atwell, No. 13-1220
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- West Virginia CWP Fund v. Gump, No. 11-2416

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Consolidation Coal Company's (Consol) statement of jurisdiction, although correct, is incomplete by omitting the jurisdictional basis for the Benefits Review Board to decide the appeal from Administrative Law Judge Daniel Leland's (the ALJ) March 16, 2011, decision awarding benefits, payable by Consolidation. Consolidation appealed the ALJ's decision to the Board on March 30, 2011. The

Board had jurisdiction because Section 21(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(a), as incorporated into the Black Lung Benefits Act (BLBA) by 30 U.S.C. § 932(a), allows an aggrieved party thirty days to appeal an ALJ's decision to the Board.

STATEMENT OF THE ISSUE

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain BLBA claimants who worked as coal miners for at least 15 years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

The question presented is whether the regulation adopting the rule-out standard is permissible.[1]

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[1] Consol also raises several challenges to the ALJ's evaluation of the conflicting medical evidence and resulting award, which are not addressed in this brief.

STATEMENT OF THE CASE

A. Course of the proceedings below

Lake filed his current claim for federal black lung benefits in 2009. The ALJ awarded benefits; the Benefits Review Board affirmed the award, then denied Consol's motion for reconsideration. JA 34, 45. Consol then petitioned this Court for review. JA 53.

B. Statement of the facts

Because the Director addresses only Consol's legal challenges to Lake's award, a detailed recounting of the medical evidence underlying the ALJ's decision is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (*see infra* at 10-12, 15) and their application in the decisions below.

1. The ALJ's Decision and Order Awarding Benefits

The ALJ found that Lake had worked as an underground coal miner from 1971-1998 and suffered from a totally disabling pulmonary impairment.[2] JA 35, 41, 44. Consequently, the ALJ determined that Lake had invoked the 30 U.S.C. § 921(c)(4) presumption, and turned to the question of whether Consol had rebutted

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[2] The ALJ also noted that Lake had "smoked up to one pack of cigarettes a day from 1957 to 1972." JA 36.

it by proving either that Lake did not have pneumoconiosis or that pneumoconiosis did not cause Lake's disability. JA 41-42 (citing 20 C.F.R. § 718.305 (2011)).[3] The ALJ concluded that Consol had failed to prove that Lake did not have legal pneumoconiosis or that pneumoconiosis did not cause Lake's disability. JA 42-44.[4] Finding the presumption invoked and unrebutted, the ALJ awarded BLBA benefits to Lake. JA 44.

These findings were based on the ALJ's evaluation of the medical evidence, in particular the testimony of five doctors addressing the cause of Lake's lung disease. Three of them – Drs. Jaworski, Saludes, and Schaaf – testified that Lake was disabled by a lung disease caused, at least in part, by exposure to coal dust (i.e., legal pneumoconiosis). JA 120, 132, 189. In contrast, Consol's experts –

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[3] 20 C.F.R. § 718.305, the regulation implementing the fifteen-year presumption, was substantially revised on September 25, 2013. See *infra* at 11, 15. While the revised regulation is phrased differently, it does not change the Department's interpretation of the fifteen-year presumption in any way relevant to this case. *Id.* The previous version of the regulation had remained essentially unchanged from 1980-2013. *Id.* at 11. The 2011 version of the rule is cited to avoid any confusion between the prior and revised versions, and because the ALJ's decision was issued in 2011.

[4] Pneumoconiosis comes in two forms, "clinical" and "legal." *See infra* at 12-13 (explaining the distinction between the two forms of compensable pneumoconiosis). The ALJ ruled that Consol had successfully proved the absence of clinical pneumoconiosis, a determination that has not been challenged in this appeal. JA 43.

Drs. Renn and Fino – testified that that Lake's coal dust exposure did not contribute to his pulmonary disability. Because the presumption switched the burden of proof to Consol, the ALJ's treatment of the latter doctors is of primary importance.

According to the ALJ, Dr. Renn diagnosed various conditions including "[c]hronic bronchitis of unknown etiology", asthma, and "probable asbestosis," none of which "resulted from coal mine dust exposure." JA 38 (*see also* JA 139, 143, 326, 340, 343 (Dr. Renn's medical report and deposition testimony addressing these issues)). On the critical issue of the cause of Lake's pulmonary diseases, Dr. Renn "averred that the waxing and waning of pulmonary function is indicative of an asthmatic-type condition but that it is not the pattern with a coal-mine dust induced disease, and therefore that the miner does not have a coal mine dust-induced disease." JA 40 (citing JA 320-21). The ALJ found Dr. Renn's opinion unsupported by the objective pulmonary function test results,[5] and flawed by Dr.

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[5] Pulmonary function tests, also called spirometry, are tests that show how well miners move air in and out of their lungs. These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two data points. *See* Occupational Safety and Health Administration, U.S. Dept. of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), available at (continued…)

Renn's failure to explain why a coal dust-related impairment would not wax and wane over time or why Lake could not suffer from "both asthma and legal pneumoconiosis." JA 44.

The ALJ explained that Dr. Fino, like Dr. Renn, "concluded that asthma is the major reason for [Lake's] reduction in lung function." JA 39. This was based on the "great variability" in pulmonary function studies, "which [Dr. Fino] stated was consistent with asthma." JA 38-39. But, observing that Lake also had a fixed airway obstruction, Dr. Fino opined that Lake might also suffer from emphysema "and stated that he could not rule out some contribution of lung disease caused by the inhalation of coal dust." JA 39.[6] The ALJ gave the opinion little weight because Dr. Fino (1) "failed to explain why variability in lung function could not also be consistent with a coal mine-induced lung disease," (2) claimed that Lake's airway obstruction was "fixed" (which the ALJ understood to mean "irreversible") while the most recent pulmonary test results showed reversibility, and (3) "was

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(…continued)
https://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=277. Pulmonary function tests resulting in certain values established in the regulations are evidence of total disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i).

[6] *See also* JA 265 (Dr. Fino's medical report) ("I certainly cannot rule out some emphysema. As such, I cannot rule out some contribution of lung disease related to the inhalation of coal mine dust. However, the major disease responsible for the reduction in his lung function . . . is asthma[.]").

also unable to rule out some contribution of coal mine dust inhalation to the miner's lung disease which means that he did not conclude that the miner does not have legal pneumoconiosis." JA 43.

2. ***Benefits Review Board's Decision and Order affirming the award***

The Board affirmed the ALJ's decision. JA 45-52. The Board, citing its own precedent, held that the Section 921(c)(4) rebuttal provisions applied to Consol. JA 49. It also held that the ALJ had acted within his discretion in finding that Lake was totally disabled and that the opinions from Drs. Renn and Fino were insufficient to rebut the fifteen-year presumption. JA 48, 50. Consol filed a motion for reconsideration, which the Board denied without comment on November 9, 2012. This appeal followed. JA 53.

SUMMARY OF THE ARGUMENT

The Department of Labor, after notice-and-comment rulemaking, promulgated revised 20 C.F.R. § 718.305(d), which implements the fifteen-year presumption and provides standards governing how it is invoked and rebutted. Like its predecessor, the revised regulation provides that any party attempting to rebut the fifteen-year presumption on disability-causation grounds must rule out any connection – not merely a "substantial" connection – between pneumoconiosis and disability. The statute is silent on this issue, and the regulation fills that gap in

a way that faithfully promotes the purpose of Section 921(c)(4). Moreover, the regulatory rule-out standard was implicitly endorsed when Congress re-enacted the fifteen-year presumption without change in 2010 and is consistent with this Court's interpretations of that provision and the similar interim presumption. It is therefore a reasonable interpretation of the Act entitled to this Court's deference under *Chevron.*

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*. *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner's disability is unrelated to pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows for rebuttal on that ground. Contrary to Consol's suggestion, *Usery* does not hold that employers must be allowed to rebut the presumption merely by proving that pneumoconiosis is not a "substantial" cause of a miner's disability. Like the statute itself, *Usery* is silent on that point. The Department's regulation adopting the rule-out standard should be affirmed.

The ALJ apparently misapplied the standard by discrediting Dr. Fino's opinion because he did not "rule out" coal dust as a cause of Lake's lung disease in determining that Lake did not have legal pneumoconiosis. The rule-out standard applies only to attempts to disprove the presumed connection between

pneumoconiosis and disability. An employer can disprove the presumed connection between dust exposure and lung disease by showing that the disease is not "significantly related to, or substantially aggravated by" exposure to coal mine dust. This was only the third of three reasons the ALJ gave for giving little weight to Dr. Fino's testimony. As a result, if this Court concludes that the other two reasons are supported by substantial evidence, this error was harmless. If the case is remanded, the ALJ should be instructed to apply the rule-out standard only to the issue of disability causation.

ARGUMENT

A. Standard of review

This brief addresses only Consol's legal challenges to the miner's award. This Court exercises *de novo* review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see*

also Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

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

1. The rule-out standard in context

Consol's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" or "material" connection) between the miner's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Pet. Br. at 10-29. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is simple: in light of the statute's silence on the topic, is the Department's regulation permissible under *Chevron*. Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather than discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Consolidation's challenge to the regulatory rule-out standard.

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

The BLBA was originally enacted in 1969 to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the difficulties miners face in affirmatively proving their entitlement to benefits, Congress has

enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)'s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis[.]" 30 U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.[7] In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[8] It therefore applies to Lake's claim, which was filed in 2009 and remains pending. JA 1. 5.

On September 25, 2013, the Department of Labor promulgated a regulation ("revised Section 718.305" or "revised 20 C.F.R. § 718.305") implementing the fifteen-year presumption.[9] The regulation specifies what an employer (or the

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

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

[9] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 718.305).

Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.[10] *See infra* at 15; Pet. Br. at 16. Because the new regulation applies to both claims here and is clearer than its predecessor, this brief primarily discusses Consol's petition through the lens of revised Section 718.305.[11]

b. Elements of entitlement

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

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[10] 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).

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

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

Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[12] Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.

c. Methods of rebutting the fifteen-year presumption

The same four basic elements of entitlement apply in claims governed by

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[12] 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) (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as "a chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. § 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 29.

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

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

The first method is to prove that the miner does not have a lung disease

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

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

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

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115. While it was phrased less clearly, the previous regulation similarly allowed employers to rebut the presumption by attacking any of the three presumed elements (disease, disease causation, and disability causation).[13]

d. The rule-out standard

The revised regulations also explain what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. § 718.305(d)(1)(i). 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,

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[13] 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." Showing that the miner does not have legal or clinical pneumoconiosis falls under clause (A), while showing that the disability was not caused by pneumoconiosis, or that the miner's clinical pneumoconiosis was not caused by coal-mine employment, falls under clause (B). The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted," not to reflect any substantive change. 78 Fed. Reg. 59106; *see* Pet. Br. at 16.

dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

If the employer fails to rebut the presumption that a totally disabled miner has pneumoconiosis, however, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability. Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a "*substantially* contributing cause" of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner's pneumoconiosis and disability, however, the employer must "establish that ***no part*** of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" Revised Section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R. § 718.305(d)(2000) (the presumption "will be considered rebutted" if the liable party establishes that "the cause of death or total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment") (emphasis added). This "no part" or "in whole or in part" standard is often referred to as the "rule-out" standard.[14] The primary legal dispute in this case is whether the

[14] The Sixth Circuit sometimes describes it as a "contributing cause" standard. *See Ogle*, 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding "substantially contributing cause" standard the coal company advocates.

regulations adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii) and former 20 C.F.R. § 718.305(d), are permissible interpretations of the Act.[15]

[15] As explained in the preamble to the revised regulation, the rule-out standard does *not* (1) require employers to disprove disability causation by more than a preponderance of the evidence; or (2) govern the degree of medical certainty with which a doctor's opinion must be expressed. 78 Fed. Reg. 59107. It merely establishes the fact that must be proved – *i.e.*, that pneumoconiosis played no role in a miner's disability. The first point undermines Consol's suggestion that the rule-out standard is inconsistent with *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280-81 (1994), which held that the APA's general preponderance of the evidence standard applies to BLBA claims. Pet. Br. 28-29; *See* 78 Fed. Reg. 59107 (addressing and rejecting commenter's argument that the revised regulation runs afoul of *Greenwich Collieries*).

2. The regulatory rule-out standard is entitled to Chevron deference

Consol argues that the rule-out standard should be abandoned in favor of a less-demanding rebuttal rule that would allow employers to rebut the fifteen-year presumption by proving that pneumoconiosis did not "substantially" or "materially" contribute to a miner's disability. Pet. Br. at 8, 11, 13, 15, 24, 28-29.[16] Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Consol's challenge is governed by *Chevron's* familiar two-step analysis. As this Court explained in *Elm Grove Coal*, "[i]n applying *Chevron*, we first ask 'whether Congress has directly spoken to the precise question at issue.' Our *Chevron* analysis would end at that point if the intent of Congress is clear, 'for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' In that regard, the courts have 'long recognized that considerable weight should be accorded to an executive department's construction of a statutory

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[16] While Consol sometimes describes it as a "third method" of rebuttal, Pet. Br. at 8, 11-12, the substantial contribution standard is "not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain – that pneumoconiosis caused total disability." *Ogle*, 737 F.3d at 1070.

scheme it is entrusted to administer.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44).[17]

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

Applying *Chevron's* first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.[18] Congress has therefore left a gap for the Department to fill.

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

The only remaining question is whether the regulatory rule-out standard is a permissible way to fill this statutory gap. The fact that Consol's "substantial

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[17] The regulation falls within the Secretary of Labor's statutory authority "to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]" 30 U.S.C. § 936(a). *See also Bethlehem Mines Corp. v. Massey ("Massey")*, 736 F.2d 120, 124 (4th Cir. 1984) ("The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.").

[18] 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 15 and n.3. But it does not specify what showing the government must make to establish rebuttal on that ground.

contribution" standard may also be a permissible interpretation is irrelevant.[19] "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.

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

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[19] The Director's rule-out standard and Consol's "substantial contributing cause" standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a "significant," "necessary," or "primary" cause of a miner's disability might also be permissible.

evaluate, for that judgment properly resides with Congress").

i. 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.[20] 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 in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17).

Revised Section 718.305(d)(1)(ii) appropriately furthers that goal by

[20] Notably, this explanation directly responded to comments suggesting that the Department eschew the rule-out standard in favor of the "substantially contributing cause" standard Consolidation advocates here. *Id.* Consol's contention that a contributing-cause standard would be a "much lower burden" than the rule-out standard, Pet. Br. at 29, is incorrect. While the burden would be somewhat lower, the more significant aspect is that it would result in excluding from benefits those miners whose pneumoconiosis made an insufficient contribution to their pulmonary disability.

imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis and the rule-out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. § 718.305(d)(1)(i); c*f. Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is relevant only if the claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.[21]

ii. 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 30 years ago. *See* 20 C.F.R. § 718.305(d) (1981) ("Where the cause of . . . total disability

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[21] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (Rejecting constitutional challenge to BLBA regulation; explaining "[u]nless the inference from the predicate facts of coal-mine employment and pulmonary function values to the presumed facts of total disability due to employment-related pneumoconiosis is 'so unreasonable as to be a purely arbitrary mandate,' we may not set it aside[.]") (quoting *Usery*, 428 U.S. at 28).

did not arise in whole or in part out of dust exposure . . . the presumption will be considered rebutted."). This fact alone supports the Department's deference claim. *See, e.g., Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009) (Deferring to agency interpretation that was "longstanding, has been consistently applied in the same manner, and comports with the congressional intent of the governing statute.").[22] More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted Section 921(c)(4) in 2010.

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

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[22] The fact that the revised regulation does not change the law also disposes of Consol's contention that it was denied due process because "it did not have an opportunity to develop evidence pursuant to this new law." Pet. Br. at 25. Moreover, Consol developed Dr. Fino's opinion after Congress revived the Section 921(c)(4) presumption in March 2010. *See* JA 252.

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

The only court of appeals to address the rule-out standard since Section 921(c)(4) was revived in 2010 affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (Agreeing with the Director that an employer "must show that the coal mine employment *played no part* in causing the total disability."). The issue was presented to this Court in *Owens*, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.[23]

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App'x. 563, 567 (4th Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.[24]

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[23] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), 724 F.3d at 559. Consolidation advances the same argument, which is addressed *infra* at 32-34. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

[24] *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. § 921(c)(4) ("there shall be a rebuttable presumption . . . that such miner's death was (continued…)

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

The fact that this Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the now-defunct

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(…continued)
due to pneumoconiosis").

"interim presumption" established by 20 C.F.R. § 727.203 (1999) is yet further evidence that it is a permissible rebuttal standard.[25] 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 v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the now-defunct 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] As this Court held in *Massey*, "[t]he underscored language makes it plain that the employer must *rule out* the causal relationship between the miner's total disability and his coal mine

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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. As this Court has recognized, the interim presumption is "similar" to the fifteen-year presumption, *Colley & Colley Coal Co.*, 59 F. App'x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. *See* 20 C.F.R. § 725.4(d).

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

employment in order to rebut the interim presumption." 736 F.2d at 123.[27] This, of course, is the same language that the version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard from 1980-2013. *See supra* at 15 n.13.

In *Massey*, this Court rejected an employer's argument that the rule-out standard was impermissibly restrictive, explaining that "[t]he wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate" because there is "nothing in the Black Lung Act to indicate that the Secretary's rebuttal evidence rule exceeds its congressional mandate." 736 F.2d at 124.[28] Consol's

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

[28] Consol also asserts that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Pet. Br. at 28. Aside from *Greenwich Collieries* and *Usery*, both of which are plainly irrelevant (see *supra* at 17 n.15, *infra* at 28-34), Consol cites no authority in support this suggestion. Nor is it compelled by logic, because claimants who cannot invoke the presumption are not similarly situated to those who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black (continued…)

challenge to revised Section 718.305(d) should meet the same fate. If rule-out is an appropriate rebuttal standard for the easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

In sum, the rule-out standard adopted in revised Section 718.305(d)(1)(ii) and its predecessor fills a statutory gap in a way that (1) advances Section 921(c)(4)'s purpose, (2) was implicitly endorsed when Congress re-enacted that provision without change in 2010, and (3) 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.

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

Consol repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Pet. Br. at 17-22, 26-29. From Consol's brief, one might expect to find, in *Usery*, a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not

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(…continued)
lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. § 718.202(a)(1), (b).

substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same language that the prior version of Section 718.305 (adopted in 1980) used to describe rebuttal options for employers as well as the government. As explained *supra* at 15, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

But this was not true when Section 921(c)(4) was enacted in 1972 or when *Usery* was decided in 1976. Before the statutory definition of pneumoconiosis was

expanded in 1978, only miners disabled by *clinical* pneumoconiosis were generally entitled to BLBA benefits. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) ("When the BLBA was originally enacted," the definition of pneumoconiosis encompassed "only those diseases the medical community considered pneumoconiosis[,]" *i.e.* clinical pneumoconiosis.); *Usery*, 428 U.S. at 6-7.[29]

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

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[29] This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. § 718.201(a)(1) (2013) ("***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis") (emphasis added) *with* 20 C.F.R. § 410.110(o) (1970) ("***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis") (emphasis added) *and* 20 C.F.R. § 410.110(o)(1) (1976) ("***pneumoconiosis*** . . . includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis") (emphasis added). After several presumptions (including the 15-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 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").

that did not contribute to their disability. If such a miner invoked the fifteen-year presumption, however, Section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner's disability did not arise from the miner's exposure to coal dust (it did, via the disabling emphysema). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in Section 921(c)(4). Thus, under Section 921(c)(4)'s rebuttal-limiting sentence, certain miners were 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." 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 held that Section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators," *id*. at 35. It therefore had no need to address the constitutional question. *Id.* at 35-37.

It is true that *Usery* "confirmed the existence of *a limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in 921(c)(4) are not logically equivalent to the methods that would otherwise be available." *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring). Section 921(c)(4)'s rebuttal-limiting sentence barred the Secretary from defeating the presumption by proving that a miner was disabled by a disease caused by coal dust other than pneumoconiosis, which was a logically available method of rebuttal in 1976. As a result, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the

definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any "chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[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 because every lung disease caused by coal dust exposure is legal pneumoconiosis. 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.[31]

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[30] Consol claims that the Director's explanation, in the preamble to the revised regulation, that the methods of rebuttal listed in Section 921(c)(4)'s rebuttal-limiting sentence have exhausted all the methods of rebuttal logically available to employers since 1978 is inconsistent with the position he took in *Owens.* Pet. Br. at 11 n.4. Not so. The Director made exactly the same argument to this Court in *Owens. See Owens*, 724 F.3d at 555.

[31] The many authorities applying the rebuttal-limiting sentence's language to operators – including 20 C.F.R. § 718.305 (1981) and *Rose*, 614 F.2d at 939 – simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Once the definition of pneumoconiosis was expanded to include legal pneumoconiosis, "[t]he only ways that any liable party – whether a mine operator or the government – can rebut the 15-year presumption are the two set forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements."). While Section 921(c)(4)'s rebuttal-limiting sentence has never applied to operators itself, it encompassed all logically available rebuttal methods for employers as well as the Secretary after 1978. The prior regulation's wording has produced understandable confusion on that point, which is one reason the (continued…)

Most importantly for present purposes, *Usery* has nothing at all to do with the rule-out standard. At most, *Usery* stands for the proposition that operators must be allowed to rebut the fifteen-year presumption by proving that a miner's disability is caused by a disease other than pneumoconiosis. Both the old and revised version of 20 C.F.R. § 718.305 allows operators to rebut the presumption on disability-causation grounds. But nothing in *Usery* even implies that operators must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a "substantial" or "material" contributing cause of a miner's disability. To the contrary, the words the Court used to frame the operators' argument – the rebuttal-limiting sentence can prevent rebuttal "even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability [and] that *the disability was* ***wholly*** *a product of other disease*" – are not only consistent with the rule-out standard, they articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a "substantial" cause of a miner's

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(…continued)
revised regulation no longer uses the same text.

disability.[32] 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 of disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.[33] Consol's argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

C. The ALJ's misapplication of the rule-out standard in evaluating Dr. Fino's opinion was harmless error.

While the rule-out standard is the central issue in this appeal, it played little or no role in the outcome of Lake's claim. The ALJ did not cite or quote the rule-out standard as articulated in 20 C.F.R. § 718.305(d) (2011), *Rose*, or the many cases applying that standard to the interim presumption. With one minor exception, the ALJ's conclusion that Consol had failed to rebut the fifteen-year

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[32] As a result, Consol's extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Pet. Br. at 21-23. 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 have been permissible even before the definition of pneumoconiosis was expanded. 428 U.S. at 37 and n.40.

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

presumption was based on his determination that Consol's rebuttal evidence – testimony by Drs. Renn and Fino – was simply not credible. JA 43-44. Such credibility determinations are the ALJ's to make, so long as they are supported by substantial evidence.

The ALJ mentioned the term "rule out" only in his discussion of Dr. Fino. JA 39, 43.[34] In the last sentence of a paragraph explaining why he gave Dr. Fino's testimony little weight, the ALJ stated "Dr. Fino was also unable to rule out some contribution of coal mine dust inhalation to the miner's lung disease which means that he did not conclude that the miner does not have legal pneumoconiosis." JA 43. To the extent this statement suggests that Consol was required to rule out any connection between Lake's lung disease and exposure to coal dust to rebut the presumption that Lake has legal pneumoconiosis, it is incorrect. The rule-out standard applies only to attempts to disprove the presumed connection between pneumoconiosis and disability. An employer can disprove the presumed

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[34] The rule-out standard played no role in the ALJ's evaluation of Dr. Renn, who testified that Lake did not have clinical or legal pneumoconiosis (and thus, by necessary implication, that pneumoconiosis did not contribute to Lake's disability in any way). JA 38, 40, 139. The ALJ discredited Dr. Renn's opinion because it was inconsistent with the objective pulmonary function test evidence and insufficiently explained, not because it did not satisfy the rule-out standard. *See* JA 44. If the ALJ had credited Dr. Renn's testimony, it would have been sufficient to rebut the presumption under any standard.

connection between dust exposure and lung disease by showing that the disease is not "significantly related to, or substantially aggravated by" exposure to coal mine dust. *See supra* at 14, 22.

This error does not merit reversal. First, Consol does not challenge the award on this ground in its brief. Second, the error was harmless. Dr. Fino's failure to rule out the presence of legal pneumoconiosis was only the third (and least-explained) of the three reasons the ALJ gave for concluding that Dr. Fino's testimony was not credible. The first two were (1) Dr. Fino's failure to explain why variability in lung function was inconsistent with pneumoconiosis; and (2) the conflict between the pulmonary function test results and Dr. Fino's statement that Lake's airway obstruction was "fixed." JA 43. If the Court finds that the first two reasons given by the ALJ are supported by substantial evidence, no remand is necessary.[35] *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 821 (4th Cir. 1998) (holding ALJ's failure to consider relevant evidence to be harmless error where ALJ provided alternative rationale for crediting and discounting evidence). If the Court finds the ALJ's explanation insufficient, the ALJ should be instructed to apply the rule-out standard only to the issue of disability-causation on remand.

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[35] The Director takes no position on the issue, which is hotly disputed by the private parties. *See* Pet. Br. at 48-53; Lake Br. at 9.

CONCLUSION

The Court should rule that revised 20 C.F.R. § 718.305 is a permissible construction of the BLBA. 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 consistent with the revised regulation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 6,466 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption

30 U.S.C. § 921 (2006 & Supp. VI 2012) – Regulations and presumptions

* * *

(c) Presumptions

* * *

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

Revised section 718.305

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

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

(a) Applicability. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.
* * *
(c) Facts presumed. Once invoked, there will be rebuttable presumption—

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

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

(d) Rebuttal—

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

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

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

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

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201
* * *
(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

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

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

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

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

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