No. 17-3625

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ZURICH AMERICAN INSURANCE GROUP,
INSURER OF STRAIGHT CREEK COAL RESOURCES

Petitioner

v.

JOANNA DUNCAN 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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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is unnecessary in this case. The legal issues raised by the Petitioner have previously been addressed by the Court in two separate published decisions, and the briefs adequately set forth the position of the parties. Further, Claimant Joanna Duncan is unrepresented by counsel, and the Director has taken no position on the ultimate question of whether she was properly awarded benefits under the Black Lung Benefits Act. Accordingly, it is the Director's position that oral argument is unwarranted.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a consolidated claim by Joanna Duncan for miner's disability benefits on behalf of the estate of her husband, Raymond Duncan (the miner), and survivor's benefits pursuant to the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944. On March 30, 2016, Administrative Law Judge Scott R. Morris (the ALJ) issued a Decision and Order awarding benefits on both claims. Appendix (A) 38-73. Straight Creek Coal Resources (Straight Creek or

employer) timely appealed this decision to the Benefits Review Board (the Board) on April 8, 2016, 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). A 36-37. The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On April 24, 2017, the Board affirmed the award. A 19-35. Straight Creek timely petitioned this Court for review of the Board's decision on June 13, 2017. A 1. The Court has jurisdiction over the 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 the appeals in which the injury occurred. The injury—the miner's occupational exposure to coal-mine dust—occurred in Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

A totally disabled miner invokes the section 921(c)(4) presumption that his disability is due to pneumoconiosis if he worked for at least fifteen years in either i) underground mines, or ii) at aboveground mines in conditions "substantially similar" to underground mines. Here, Straight Creek conceded total disability, and the ALJ found that all of the miner's employment occurred at aboveground mines in substantially similar conditions to those found in underground mining.

1. On appeal, Straight Creek concedes that this Court in *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483 (6th Cir. 2014) accepted the regulatory definition of "substantial similarity" set forth in 20 C.F.R. § 718.305(b)(2), but nonetheless argues the regulation is invalid. The first issue is:

Does this Court's holding in *Sterling* foreclose Straight Creek's argument that section 718.305(b)(2) is invalid, and if not, is it a valid regulation?

2. An employer can rebut the section 921(c)(4) presumption, *inter alia*, by disproving the existence of clinical and legal pneumoconiosis. 20 C.F.R. § 718.201(c) provides that pneumoconiosis is a latent and progressive disease that may first become detectable after the cessation of coal mine dust exposure. Straight Creek argues that section 718.201(c) does not apply to legal pneumoconiosis. This Court held in *Sunny Ridge Mining Co. Inc. v. Keathley*, 773 F.3d 734 (6th Cir. 2014) that section 718.201(c) applies to legal pneumoconiosis. The second issue is:

Does this Court's holding in *Sunny Ridge* foreclose Straight Creek's argument that section 718.201(c) does not apply to legal pneumoconiosis?[1]

[1] This response brief focuses on Straight Creek's legal challenges to the black lung regulations, and, except for footnote 15, *infra* at 28, does not address the ALJ's factual findings or Straight Creek's numerous substantial evidence arguments. Accordingly, the Director takes no position on the ultimate disposition of this appeal.

STATEMENT OF FACTS

A. Statutory and regulatory background

1. The Black Lung Benefits Act

The BLBA provides for the award of disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); 20 C.F.R. § 718.201(a).

There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201. "Clinical pneumoconiosis" refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Both categories are "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

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

The Act contains several presumptions designed to aid claimants in establishing that they are totally disabled by pneumoconiosis arising out of coal-mine employment. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act … prescribes several 'presumptions' for use in determining compensable disability."). One such presumption, 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in aboveground mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from "a totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4).[2] If so, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis" and therefore entitled to benefits. *Id.*

Congress enacted the fifteen-year presumption in 1972, revoked it in 1981, and restored it in 2010. Black Lung Benefits Act of 1972, Pub. L. 92-303 § 4(c), 86 Stat. 154 (1972); Black Lung Benefits Amendments of 1981, Pub. L. 97-119

[2] 30 U.S.C. § 921(c)(4) also requires that at least one "chest roentgenogram" [*i.e.*, x-ray] submitted in connection with the claim" must be interpreted as negative for complicated pneumoconiosis—a particularly advanced form of clinical pneumoconiosis—for the claimant to invoke the presumption. If the x-ray evidence uniformly demonstrates complicated pneumoconiosis, the claimant is entitled to a separate, irrebuttable presumption of entitlement under 30 U.S.C. § 921(c)(3) and 20 C.F.R. § 718.304, and "there would have been no need to invoke the [rebuttable fifteen-year] presumption." *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), *quoted in Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011).

§ 202(b)(1), 95 Stat. 1635 (1981); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a), 124 Stat. 119, 260 (2010). This restoration applies to claims, such as this one, that were filed after January 1, 2005, and were pending on or after March 23, 2010, the amendment's enactment date. Pub. L. No. 111-148, § 1556(c); *see generally Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013) (discussing history of the presumption and retroactive effect of the 2010 amendment).

On September 25, 2013, the Department of Labor (DOL) promulgated a regulation, 20 C.F.R. § 718.305, implementing the fifteen-year presumption as restored in 2010.[3] The revised regulation applies to all claims affected by the statutory amendment, s*ee* 20 C.F.R. § 718.305(a); *Sterling*, 762 F.3d at 489-90, and provides standards governing how the presumption can be invoked and rebutted.

3. 20 C.F.R. § 718.305(b): invoking the presumption as a surface miner

The statute does not elaborate on how surface miners can prove that they worked in conditions "substantially similar" to those in underground coal mines. That gap is filled by the regulation implementing the presumption, which provides that conditions in a surface mine "will be considered 'substantially similar' to

[3] 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).

those in an underground mine if the claimant demonstrates that the miner was *regularly exposed to coal-mine dust* while working there." 20 C.F.R. § 718.305(b)(2) (emphasis added).

The previous version of section 718.305 did not specifically address this issue.[4] It was, however, interpreted consistently with the current version. *See Sterling*, 762 F.3d at 489-90 ("The 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption. . . . It also reflects an interpretation of the regulation that has been accepted by both of the courts of appeals that have considered the issue.") (citations omitted).

B. Summary of relevant evidence[5]

The miner was employed for over 22 years in coal mining, all of which occurred aboveground. A 105, 120-128. From 1974 to 1990, he worked as an electrician at a strip mine; from 1993 to 1995, as a utility man and electrician at a coal preparation plant; between 1995 and 1997, as a pinsetter and maintenance

[4] 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 version was promulgated. *See* 20 C.F.R. § 718.305 (2012).

[5] Because this response brief focuses on Straight Creek's challenges to the black lung regulations, the medical evidence is not summarized.

man at a strip mine; and finally for Straight Creek from 1998 through 1999, as a heavy equipment operator and electrician at a coal preparation plant. A 105.

In his work history, the miner stated that he was exposed to dust, gas, or fumes throughout his coal-mine employment. A 105. In an October 1, 2009 letter to DOL, the miner similarly stated that "I've had to breath[e] coal dust in all my work in the mines," and "I had to work under some of the worst conditions ever." A 209. In addition, he elaborated on his work conditions at Straight Creek: "I ran a dozer on a coal pile ten to twelve hours a day full of coal dust, shoveled split coal in tunnels three to four times a night [and] helped clean tipples full of coal dust." *Id*.

Medical reports support the miner's description of his coal dust exposure. A progress note from Dr. Charles Moore, the miner's treating physician, indicates that he

> had a long talk with [patient] about pneumoconiosis. This [patient] has a 22 year [history] of mining work. He was an electricition [sic] and worked on equipment at the mining face as well as away from the mining face. He was exposed to extremely high levels of dust his whole 22 years of work.

A 1468. Dr. Westerfield, who examined the miner for Straight Creek, likewise agreed that the miner "has adequate history of exposure to coal and rock dust through his work in surface mining and at the coal preparation plant to develop pneumoconiosis." A 409.

Mrs. Duncan testified regarding her husband's coal dust exposure during the last four years of his employment.[6] A 85, 88-89. She stated that when he came home from work he was covered with dust and you could only see the color of his eyes. A 85. She further testified that she had to wash his clothes several times to get out all of the dust, and that sometimes "they still wouldn't come clean." A 85.

C. Procedural history

The miner filed a claim for benefits on May 28, 2009, and passed away on August 29, 2011. A 100-103, 315, 365. Mrs. Duncan continued to pursue her husband's claim on his estate's behalf and filed her own claim for survivor's benefits on October 24, 2011. A 313-314. The district director issued proposed decisions awarding benefits on both claims, and Straight Creek requested a hearing before an administrative law judge on the consolidated claims. A 343.

1. The ALJ awards benefits.

The ALJ first determined that the miner's claim was timely.[7] A 6-7. He then found that the miner was employed in aboveground mining for over fifteen

[6] Mrs. Duncan did not live with the miner during his earlier coal mine employment. A 88-89.

[7] A miner's claim must be filed within three years of a medical determination of total disability due pneumoconiosis which has been communicated to the miner. 30 U.S.C. 932(f). The BLBA contains no statute of limitations for survivor's claims.

years in dust conditions that were substantially similar to those in underground mines. A 44-46.

In finding substantially similar conditions, the ALJ relied on the miner's statements, detailed above, that he was exposed to significant levels of coal dust throughout his career. A. 46. In addition, the ALJ observed that the miner's accounts of his coal dust exposure to Drs. Moore and Westerfield further indicated regular coal dust exposure, as did Mrs. Duncan's hearing testimony. *Id*. With no evidence to the contrary, the ALJ concluded that "a preponderance of the evidence" showed "the Miner's coal mine dust exposure was more than sporadic or incidental," *i.e.*, it was regular, and thus sufficient to establish that the miner's aboveground employment occurred in conditions substantially similar to those in underground mines. A 46.

In light of Straight Creek's concession of total respiratory disability, the ALJ invoked the fifteen-year presumption of entitlement. A 48. He then ruled that Straight Creek had failed to rebut the presumption and awarded benefits on the miner's claim. A 66-69. Based on the miner's award, the ALJ awarded Mrs. Duncan survivor's benefits under the automatic entitlement provision of 30 U.S.C. 932(l). A 71. *See generally Consol. Coal Co. v. Maynes*, 739 F.3d 323, 324 (6th 2014).

2. The Board affirms the award of benefits.

The Board affirmed the ALJ's decision in all respects. A 19-35. As relevant here, the Board rejected "on its face" employer's argument that the "regularly exposed to coal dust standard" in section 718.305(b)(2) is meaningless because all miners are presumed to be exposed to coal dust under 20 C.F.R. § 725.202(b)(1). It explained that section 725.202(b)(1) refers only to coal mine construction and transportation workers A 25. The Board further disagreed with employer's contention that section 718.305(b)(2) is inconsistent with the Seventh Circuit's "substantial similarity" standard. It observed that the regulation was based on *Director, OWCP v. Midland Coal Co.,* 855 F.2d 509 (7th Cir. 1988) and that both the Tenth and the Sixth Circuits had found that the regulation codified that standard. A 25-26. For similar reasons, the Board discounted employer's argument that the regulation is contrary to Congress's intent to compensate only those surface miners who were exposed to the same intense dust levels found in underground mines. A 26.

Citing the miner's statements, the description of his coal dust exposure in the doctor's reports, and Mrs. Duncan testimony, the Board determined that substantial evidence supported the ALJ's finding that the miner's aboveground employment was under conditions substantially similar to underground mining. A 27.

Finding the miner's total disability unchallenged on appeal, A 21 n.5, the Board thus affirmed the ALJ's invocation of the fifteen-year presumption. A 27. It then upheld as supported by substantial evidence the ALJ's determination that employer had failed to rebut the fifteen-year presumption. A 28-32. Accordingly, it concluded by affirming the award of benefits in both the miner's and survivor's claims. A 33-34.

SUMMARY OF THE ARGUMENT

A miner with a totally disabling respiratory impairment may invoke the section 921(c)(4) presumption based on either employment in an underground mine or work at an aboveground mine in conditions substantially similar to underground mining. 30 U.S.C. § 921(c)(4). Section 921(c)(4) does not define substantial similarity, but 20 C.F.R. § 718.305(b)((2) does. It allows aboveground miners who are regularly exposed to coal-mine dust to invoke the fifteen-year presumption. Straight Creek challenges the validity of the regular exposure to coal-mine dust standard.

The Court should reject this argument. First, as Straight Creek concedes, this Court accepted the regular exposure to coal-mine dust standard in *Sterling*, 762 F.3d at 489-90, and there is no basis for a panel of this Court to overrule controlling authority. Second, the regular coal mine dust exposure standard reasonably fills a gap left in section 921(c)(4) and is valid under *Chevron*.

Straight Creek also argues that 20 C.F.R. § 718.201(c), which provides that pneumoconiosis is a latent and progressive disease that may first become detectable after the cessation of coal mine dust exposure, does not include legal pneumoconiosis. This Court, however, held in *Sunny Ridge Mining Co. Inc., v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) that section 718.201(c) covers both clinical and legal pneumoconiosis. Because *Sunny Ridge* is controlling authority, the Court should reject this argument as well.

ARGUMENT

A. Standard of review

This Court reviews the ALJ's decision, despite the fact that the appeal comes from the Benefits Review Board. *Cornett v. Benham Coal, Inc.* 227 F.3d 569, 575 (6th Cir. 2000); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989). The ALJ's decision will be affirmed so long as it is "supported by substantial evidence and is consistent with applicable law." *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995). If the ALJ's decision is supported by substantial evidence, the Court will not reverse, "even if the facts permit an alternative conclusion." *Youghiogheny & Ohio Coal*, 49 F.3d at 246; *see also Morrison v. Tennessee Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011). "Substantial evidence is defined as relevant evidence that a reasonable mind might

accept as adequate to support a conclusion." *Cumberland River Coal Co. v Banks*, 690 F.3d 477, 483 (6th Cir. 2012) (internal quotation marks and citations omitted).

The Court reviews legal issues *de novo*, *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 301 (6th Cir. 2010), but the Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Caney Creek Coal v. Satterfield*, 150 F.3d 568, 572 (6th Cir. 1998). The Director's interpretation of those implementing regulations will be upheld "unless it is plainly erroneous or inconsistent with the regulation [,]" *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted), even if that interpretation is expressed in a brief, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. 20 C.F.R. § 718.305(b)(2) is a valid regulation.

The Court should uphold the validity of section 718.305(b)(2). The fifteen-year presumption is available to miners who worked in aboveground mines if "the conditions of [the] miner's employment" were "substantially similar to conditions in an underground mine." 30 U.S.C. § 921(c)(4). The implementing regulation explains that conditions in aboveground mines "will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the

miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. § 718.305(b)(2).

Straight Creek concedes (Pet. Br. 13) that this Court "accepted the regulatory definition [of regular exposure to coal-mine dust]" in *Sterling*, 762 F.3d at 489-90. There, the liable employer argued that the ALJ had erroneously invoked the fifteen-year presumption without comparing the miner's surface coal mine work with underground coal mine work. 762 F.3d at 489-90. In rejecting this argument, the Court held that the miner "needed only to establish that he 'was regularly exposed to coal-mine dust while working[.]'" 762 F.3d at 490. The Court then applied the revised regulation (which had not been promulgated at the time of the ALJ's decision) because it was consistent with DOL's "longstanding interpretation of the statutory presumption." *Id.* The Court concluded that substantial evidence supported the ALJ's finding that the miner had met the regular exposure to coal-mine dust standard based on (1) his testimony that conditions at the mine were "very dusty;" (2) corroborating testimony regarding the heavy truck traffic at the mine; and (3) the amount of dust covering the miner after work.[8] *Id.*

[8] *Accord Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 13343-44 (10th Cir. 2014) (section 718.305(b)(2) "instructs ALJs to find substantial similarity if the miner was regularly exposed to coal dust. The clarified standard—regular dust exposure—provides sufficient guidance to measure similarity.").

Having upheld the regular exposure to coal-mine dust standard in a published opinion, the Court must reject Straight Creek's request that it reconsider *Sterling* and find the regulation facially invalid. "A published prior panel decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (internal quotations omitted). Because neither has occurred, Straight Creek's concession that this Court adopted the regular exposure to coal mine dust standard in *Sterling* is fatal to its legal challenge to the regulation.

In an abundance of caution, however, we will address, and refute, Straight Creek's three arguments against section 718.305(b)(2).[9] First, it argues (Pet. Br.13-15) that the regular exposure to coal-mine dust standard is actually "no standard at all" because, according to the company, the black lung regulations presume that all miners have been regularly exposed to coal dust. Second, Straight Creek contends (Pet. Br. 17-18) that the standard impermissibly departs from the Seventh Circuit's substantial similarity standard. And third, Straight Creek argues (Pet. Br. 18-19) that the regulation contravenes the purpose of the fifteen-year

[9] *Sterling* notes that at oral argument the coal company "waived any challenge to the validity (though not the applicability) of the DOL regulation." 762 F.3d 489 n.2.

presumption, which it claims was to "address the excessive dust exposures found in the underground mines prior to the enactment of the dust controls."

Because the regular exposure to coal-mine dust requirement is set forth in a regulation promulgated after notice-and-comment procedures, Straight Creek's challenge is governed by the familiar two-step *Chevron* analysis. Under that analysis, DOL regulations implementing section 921(c)(4) will be upheld if a) Congress has not spoken directly on the issue and b) DOL's regulation is a permissible interpretation of the statute. *Island Creek Ky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (*citing Chevron*, 467 U.S. at 843). Straight Creek has fallen far short of the showing necessary to invalidate the regulation.

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

The first step of the *Chevron* analysis is straightforward. Section 921(c)(4) provides no guidance about what factors to consider in determining whether an aboveground miner worked under conditions "substantially similar" to conditions in underground mines. When called upon to interpret this provision, the Seventh Circuit confessed that "[it could] discern no plain meaning of the requirement of 'substantial similarity,'" noting that "immediately apparent [was] the fact that the [BLBA] does not specify whether a claimant must establish similarity to a particular underground mine, a hypothetical underground mine, the best, worst, or an average underground mine." *Midland Coal*, 855 F.2d at 511. Nor does the

statute explain *how similar* an aboveground miner's working conditions must be to conditions underground to qualify as "substantial[ly]" similar, another source of ambiguity. Congress therefore left a gap for DOL to fill.

Straight Creek contends (Pet. Br. 15-17) that the regulation is invalid under *Chevron I*, but it points to no statutory text or legislative history that answers the difficulties above. It is readily apparent that Straight Creek's real complaint—that the regulation is an unreasonable construction of the section 921(c)(4)—falls under *Chevron II*.

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

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

The DOL responded to section 921(c)(4)'s ambiguity by promulgating a standard that is both reasonable and workable: it mandates that the miner be regularly exposed to coal-mine dust. The preamble to the regulation details how the Department came to this conclusion.

First, the preamble observes that "a fundamental premise underlying the BLBA, as demonstrated by the legislative history [is] . . . that "underground mines are dusty." 78 Fed. Reg. 59104 (*citing Midland Coal*, 855 F.2d at 512). That legislative fact, the preamble continues, makes unnecessary proof of conditions at an underground mine, and thereby allows the parties to focus on the dust conditions at the aboveground mine where the miner worked. 78 Fed. Reg.

59104-05. This evidence must show that "the miner's duties regularly exposed him to coal-mine dust, and thus that the miner's work conditions approximated those at an underground mine." 78 Fed. Reg. 59105. Consequently, the preamble warns that proof of "'sporadic or incidental exposure' will not satisfy claimant's burden." *Id*. The preamble then explains that the fact-finder must evaluate all the evidence and determine whether it credibly establishes the miner's regular exposure to coal-mine dust; if so, the miner has met his burden of showing substantial similarity. *Id*.

The advantages of the straight-forward regular exposure standard become evident when compared to proposed competing interpretations of section 921(c)(4)'s "substantial similarity" language.[10] For example, the agency rejected suggestions to "adopt technical comparability criteria, such as requiring a claimant to produce scientific evidence specifically quantifying the miner's exposure to coal dust in non-underground mining," as impractical because many miners do not have access to such information. 78 Fed. Reg. 59105; *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976) (recognizing that "a showing of the degree of dust concentration to which a miner was exposed [is] a historical fact difficult for the miner to prove").

[10] Although Straight Creek complains about the regular dust exposure standard, it offers no workable alternative.

The other side of the proposed comparison—establishing what conditions prevail in underground mines—presents similar impracticalities for claimants. The dust conditions in different underground coal mines, and in different sections of the same underground mine (which includes areas aboveground as well as underground), vary significantly. In any event, aboveground miners are unlikely to have access to detailed information about dust conditions in underground mines. Nor could DOL avoid this problem by developing an objective, universal standard representing conditions in underground mines, effectively setting a target that aboveground miners must hit to establish substantial similarity. Because there is no practical way for most aboveground miners to objectively quantify their dust exposure, their "dust exposure evidence will be inherently anecdotal[.]" 78 Fed. Reg. 59105. As a result, "it would serve no purpose for the DOL to "develop an objective, and therefore dissimilar, benchmark of underground mine conditions for comparison purposes." *Id.*

In sum, while the "regularly exposed to dust" standard is not onerous, aboveground miners (unlike their underground peers) do bear the burden of proving that they were exposed to coal-mine dust for the requisite fifteen years. 20 C.F.R. § 718.305(b); *Midland Coal*, 855 F.2d at 512. Sporadic or incidental exposure will also not suffice. Moreover, employers are free to develop evidence establishing, for example, that the miner was not exposed to coal dust (or was only

exposed to a de minimis amount) for a substantial period of aboveground employment. If so, that period cannot be used to establish the required fifteen years. The standard, especially in light of the impracticability of the alternatives, is a reasonable construction of section 921(c)(4) and should be upheld.

b. Straight Creek's criticisms of the regular exposure standard are meritless.

(i) Section 725.202(b)(1)'s dust exposure presumption is irrelevant, and Straight Creek misconstrues it regardless.

Straight Creek claims that the regular exposure standard is "no standard at all" because under 20 C.F.R. 725.202(b)(1) "every 'miner' is presumed to have 'regular exposure' to coal dust." Pet. Br. 13 (The brief incorrectly cites the relevant provision as section 725.203(b).)[11] This contention is meritless.

As an initial matter, section 725.202(b) by its terms applies only to construction and transportation workers, as its title plainly states: "*Coal mine construction and transportation workers; special provisions.*" (italics in original). Thus, it has no effect in the typical case of a miner who works in the "extraction or preparation of coal." 30 U.S.C. § 902(d) (definition of miner). And it has no specific application here: Mr. Duncan never worked as a coal mine construction worker or transportation worker, and the ALJ did not utilize the presumption.

[11] Section 725.202(b)(1) provides a rebuttable presumption that transportation and construction workers were "exposed to coal-mine dust during all periods of employment occurring in or around a coal mine or coal preparation facility…." 20 C.F.R. § 725.202(b)(1).

Thus, Straight Creek's concerns about the effect of section 725.202(b) have no bearing on the outcome of this case and are completely irrelevant.

Even if Mr. Duncan were a transportation or construction worker, the section 725.202(b) dust exposure presumption merely helps him establish that he was a miner; it does not relieve surface transportation and construction workers from the more substantial burden of proving work in conditions substantially similar to those in an underground coal mine. Section 725.202(b) specifies that coal mine construction and transportation workers "*shall be considered a miner* to the extent such worker is or was exposed to coal-mine dust as a result of employment in or around a coal mine or coal preparation facility." 20 C.F.R. 725.202(b) (emphasis added); *accord* 30 U.S.C. 902(d) (definition of "miner" includes a coal mine construction or transportation worker "to the extent such individual was exposed to coal dust as a result of such employment.") (emphasis added). Thus, to prove miner status, a transportation or construction worker need only show dust exposure.[12] And the rebuttable dust exposure presumption in section 725.202(b)(1) assists in doing that.

[12] DOL previously rejected, as lacking a statutory foundation, a suggestion that to be considered miners, construction and transportation workers prove that they worked in conditions "substantially similar" to those in underground mines. 43 Fed. Reg. 36778 (Aug. 18, 1978); *see also Ritchey v. Blair Electric Serv. Co.*, 6 BLR 1-966, 1-969 n.3 (Ben. Rev. Bd. 1984) (coal mine construction and transportation workers need not establish that their work was performed under conditions which were substantially similar to those in an underground mine in

But the dust exposure presumption says nothing about the quantum of dust exposure presumed or substantial similarity to conditions in an underground coal mine as required under 30 U.S.C. § 921(c)(4). This is a more substantial burden for aboveground coal mine workers to bear. *See Freeman United Coal Min. v. Summers*, 272 F.3d 473, 479-480 (7th Cir. 2001) (a miner cannot prove substantial similarity simply by showing that he was in or around a coal mine for at least fifteen years for "[s]uch a scintilla of evidence would not discharge the claimant's burden of proof"). Rather, an aboveground miner must demonstrate that his work regularly exposed him to coal-mine dust, and proof of "sporadic or incidental exposure will not suffice. 20 C.F.R. § 718.305(b)(2); 78 Fed. Reg. 59105.

Moreover, section 718.305 does not suggest that surface transportation and construction workers are exempt from the substantial similarity burden. It states that "[t]he claimant may invoke the [fifteen-year] presumption by establishing" both the required coal mine employment, which includes the substantial similarity requirement for surface workers, and total disability. 20 C.F.R. § 718.305(b); *see also* 78 Fed. Reg. 59105 (explaining that claimant must develop evidence addressing the dust conditions prevailing at the aboveground mine where the miner

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order to be considered a miner); *Conley v. Roberts & Schaefer Co.*, 7 BLR 1-309, 1-312 n.3 (Ben. Rev. Bd. 1984) (same), *George v. Williamson Shaft Construction Co.*, 8 BLR 1-91, 1-93 (Ben. Rev. Bd. 1985) (same).

worked). Thus, the provision clearly places the burden of producing evidence and proving substantial similarity on the claimant.[13]

Finally, the BLBA betrays no indication that Congress intended to favor construction and transportation workers over surface coal miners in invoking the Section 411(c)(4) presumption. If anything, the opposite is true. After all, section 902(d) requires construction and transportation workers to establish dust exposure in the first instance to qualify as a miner—an evidentiary hurdle that is not shared by surface extraction and preparation workers. Interpreting the regulatory dust exposure presumption to favor workers upon whom Congress imposed an additional burden over those who did not share that burden would be irrational.[14]

(ii) The regular dust exposure standard is consistent with the Director's longstanding interpretation and Seventh Circuit law.

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[13] Section 725.202(b)(1)(ii) provides that the dust exposure presumption may be used to establish the BLBA section 921(c) presumptions. Four of the five presumptions in section 921(c) (including (c)(4)) require proof of a specified number of years of coal mine employment. The most reasonable interpretation of subsection (ii)'s directive is that the dust exposure presumption aids construction or transportation workers in establishing the requisite number of years of mining.

[14] Admittedly, one of the criteria for *rebutting* the dust exposure presumption (by showing the employee "was not regularly exposed to coal-mine dust") and the regulatory standard for *establishing* substantial similarity (by showing regular exposure to coal-mine dust) use similar language. *Compare* 20 C.F.R. §§ 725.202(a)(2)(i) *with* 718.305(b)(2). But this superficial resemblance does not expressly link the two standards. And, as noted above, interpreting the coal dust exposure presumption to establish substantial similarity is inconsistent with section 718.305(b) and would create an absurd result not intended by Congress or DOL.

Straight Creek complains that section 718.305(b) departs from prior interpretations of the statute by the Director and courts of appeal. Pet. Br. 17-18. This Court, however, reached the opposite conclusion in *Sterling*: "The 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption.. . . It also reflects an interpretation of the regulation that been accepted by both courts of appeals that have considered the issue." 762 F.3d at 489 (citations omitted); *accord Antelope Coal*, 743 F.3d at 1342 (the revised regulation codifies DOL's longstanding interpretation and court of appeals decisions).

Nonetheless, Straight Creek faults the regulation for supposedly eliminating any ALJ comparison between the miner's working conditions with known underground mining conditions. Pet. Br. 17-18. Straight Creek misconstrues the regulation. It employs the legislative fact that underground coal mines are dusty as the baseline for the ALJ comparison, but the factfinder must still compare the miner's aboveground working conditions with that established fact. 78 Fed. Reg. 59104-05; *see also Antelope Coal*, 743 F.3d at 1342 (observing that "consistently dusty working conditions are sufficiently similar to underground mining conditions."). That comparison comports with Seventh Circuit law. *E.g.*, *Midland Coal*, 855 F.3d at 512 (stating that ALJ compares miner's aboveground conditions to "known mining conditions").

Straight Creek also contends (Pet. 18) that the regular exposure requirement itself is a departure from prior interpreations. The preamble, however, explains that the regular exposure requirement was included "to clarify that a demonstration of sporadic or incidental exposure [to coal dust] is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105. This is entirely consistent with the Director's and the Seventh Circuit's interpretation of section 921(c)(4)'s "substantial similarity" inquiry before the new regulation was promulgated. *See supra* at 20 (explaining that periods of surface-mine employment during which a miner is only exposed to de minimus amounts of coal dust cannot be used to establish the required fifteen years); *Freeman United*, 272 F.3d at 480 (rejecting claimant's argument that "a miner can prove substantial similarity simply by showing that he was in or around a coal mine for at least 15 years."). Thus, the crucial elements of the Director's interpretation remain unchanged: disabled surface miners can establish "substantial similarity" without proving what conditions prevail in underground mines or precisely quantifying their exposure to dust on the surface.

Of course, even if the duly-promulgated, revised regulation has departed in some small way from prior interpretations (which is has not), Straight Creek has not shown that this change, standing alone, is impermissible. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("[T]he mere fact that an agency

interpretation contradicts a prior agency position is not fatal. . . change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."). Thus, this Straight Creek criticism of the regulation is of no legal significance.

(iii) The regular dust exposure standard is consistent with the legislative history of section 921(c)(4).

Straight Creek cites a snippet of legislative history from the 1977 amendments to BLBA to support its contention that the regular dust exposure standard is too lax. Pet. Br. 18-19 (arguing that the fifteen-year presumption was intended to address pre-dust control exposures). But the statements relied on by Straight Creek were not made in connection with Congress's consideration of the fifteen-year presumption. Rather, Congress relied on the cited statements to pass a 25-year presumption favoring eligible survivors (codified at 30 U.S.C. § 921(c)(5)). *See* H. Rep. 95-151 (1977) (*reprinted in* Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 (Committee Print, 1979) 508, 515). Congress did not make any changes to section 921(c)(4)'s substantial-similarity provision in 1977.

More relevant than this forty-year old, misapplied history is the fact that Congress endorsed the Department's longstanding statutory interpretation when it reinstated the presumption without alteration in 2010. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("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."); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 140 (4th Cir. 2015) ("We therefore may assume, in the absence of a contrary showing, that Congress intended to retain the agency's interpretation of the prior version of the statute.") (citing *Lorillard*). If the Department's interpretation were contrary to congressional intent, Congress would have revised the statute in 2010, but it did not.

In truth, there is limited legislative history for section 921(c)(4)'s "substantial similarity" requirement as originally enacted in 1972, and the most that can be said is that Congress did not make its intent clear. On the other hand, the legislative history of section 921(c)(4) as a whole is clear and consistent with the Director's interpretation of the "substantial similarity" requirement. "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17). Imposing a demanding standard on aboveground miners attempting to invoke the presumption would hardly be consistent with that intent. The Director's "regularly exposed to dust" standard is.[15]

[15] The Court should affirm as supported by substantial evidence the ALJ's finding that the miner satisfied the substantial similarity requirement. The evidence here—the miner's letter to DOL (that he breathed coal dust throughout his coal mine

C. This Court held in *Sunny Ridge Mining Co. Inc. v. Keathley* that 20 C.F.R. § 718.201(c), which provides that pneumoconiosis can be a latent and progressive disease, applies to legal pneumoconiosis.

20 C.F.R. § 718.201(c) provides in relevant part that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Straight Creek argues (Pet. Br. 26-30) that this section applies only to clinical pneumoconiosis, and therefore, the ALJ erred in discrediting Dr. Westerfield's diagnosis of no legal pneumoconiosis as being inconsistent with it. In *Sunny Ridge Min. Co. Inc., v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014), this Court held that section 718.201(c) covers both clinical and legal pneumoconiosis. Straight Creek's contention is meritless.

Sunny Ridge explains that "

> [s]ubsection (a) of 20 C.F.R. § 718.201 defines 'pneumoconiosis' as 'includ[ing] both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.' The word 'pneumoconiosis' in subsection (c) of

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employment and worked under terrible conditions); Mrs. Duncan's testimony (that coal dust covered his clothing and appearance); and the medical report accounts (that he was exposed to extremely high levels of dust throughout his career, and had an adequate history of exposure to coal and rock dust)—is qualitatively no different from evidence that this Court previously found sufficient to establish substantial similarity. *See Brandywine Explosives & Supply v. Director, OWCP,* 790 F.3d 657, 664 (6th Cir. 2015) (miner's testimony describing dusty conditions at surface mine "easily" established substantially similar requirement); *Consol. Coal Co.,* 732 F.3d at 732 (miner's credited testimony that he was exposed to rock and coal dust all of the time sufficient).

> that same section is not specifically limited to either type of pneumoconiosis. It therefore applies to both.

773 F.3d at 739 (citation omitted). The Court further observes that "[t]his conclusion is compelled by previous decisions of this circuit," which are "consistent with the plain reading of the regulation."[16] *Id*. *Sunny Ridge* thus concludes on the basis of the regulation and its own precedent that legal pneumoconiosis may be latent and progressive. *Id*. Because *Sunny Ridge* is controlling authority, *Rutherford*, 575 F.3d at 619, Straight Creek's contention that legal pneumoconiosis is not latent or progressive must be rejected.

In any event, Straight Creek's arguments that section 718.201(c) does not include legal pneumoconiosis are unpersuasive. It cites a string of cases (Pet. 28-29) acknowledging that clinical pneumoconiosis is latent, but that proposition hardly proves that legal pneumoconiosis is not. Tellingly, Straight Creek cites no cases on the latter point. Moreover, its contention that "[c]linical pneumoconiosis is the only condition with evidence supporting a finding of a 'latent and progressive' disease" (Pet. 30) is incorrect. *See* 65 Fed. Reg. 79971 (Dec. 20,

[16] The *Sunny Ridge* court gives as one example *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). 773 F.3d at 739. (Straight Creek apparently reads the case differently, claiming the ALJ erred in relying on it. Pet. Br. at 27.) Another example is *Greene v. King James Coal Min., Inc.*, 575 F.3d 628 (6th Cir. 2009), where the Court approved of an ALJ's rejection of Dr. Westerfield's opinion (like the one here) that coal dust exposure could not have contributed to claimant's pulmonary condition because his symptoms arose only after he stopped working in the coal mines. 575 F.3d at 638.

2000) (citing medical study demonstrating that post-retirement deterioration in miners' pulmonary function regardless of x-ray evidence of pneumoconiosis).

CONCLUSION

For reasons discussed above, the Court should reject Straight Creek's legal challenges to 20 C.F.R. §§ 718.305(b) and 718.201(c).

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 proportionately spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 7,190 words as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2017 the Director's brief was served electronically using the Court's CM/ECF system on

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