

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**WEST VIRGINIA CWP FUND, as carrier for  
RAGLAND COAL COMPANY, INC.,**

**Petitioners**

**v.**

**ROGER D. ADKINS**

**and**

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

**Respondents**

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

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**BRIEF FOR THE FEDERAL RESPONDENT**

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## **STATEMENT OF RELATED CASES**

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

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

- West Virginia CWP Fund v. Reed, No. 12-1104
- Hobet Mining, LLC v. Epling, No. 13-1738
- Laurel Run Mining Co. v. Maynard, No. 12-2581
- Consol of Kentucky, Inc. v. Atwell, No. 13-1220
- West Virginia CWP Fund v. Cline, No. 13-1914
- Island Creek Coal Co. v. Hargett, No. 13-1193
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- Elk Run Coal Co., Inc. v. Harvey, No. 12-1398
- Logan Coals, Inc. v. Bender, No. 12-2034
- West Virginia CWP Fund v. Gump, No. 11-2416

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 12-1655**

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**Respondents**

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

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**JURISDICTIONAL STATEMENT**

This case involves a 2008 claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), filed by

Roger D. Adkins, who worked in underground coal mine employment for twenty years.<sup>1</sup> On February 28, 2011, Administrative Law Judge Ralph A. Romano (the ALJ) issued a decision awarding the miner benefits and ordering his former employer, Ragland Coal Company, Inc., and its carrier, West Virginia CWP Fund (collectively, Ragland or the coal company), to pay them. Appendix, page (A.) 71. Ragland appealed this decision to the United States Department of Labor Benefits Review Board on March 23, 2011, 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.105. 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 March 23, 2012, the Board affirmed the award. A.89. Ragland petitioned this Court for review on May 18, 2012. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Adkins' exposure to coal dust – the injury contemplated by 33 U.S.C. 921(c) – occurred in West Virginia, A.90, within this Court's territorial jurisdiction.

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<sup>1</sup> Unless otherwise noted, all citations to the BLBA in this brief are to the 2012 version of Title 30. Two portions of the BLBA – including 30 U.S.C. § 921(c)(4), the primary object of this dispute – were amended in 2010. *See infra* p. 13.

## **STATEMENT OF THE ISSUES**

The BLBA at 30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain claimants who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute, however, 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. Ragland argues that the ALJ erred both in applying the rule-out standard and in weighing the medical evidence relevant to rebuttal.

The questions presented are:

1. Whether the regulation adopting the rule-out standard is permissible.
2. Whether the ALJ committed legal errors in weighing the medical evidence relevant to rebuttal.<sup>2</sup>

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<sup>2</sup> Ragland also asserts that the ALJ's ultimate decision awarding benefits is not supported by substantial evidence. Opening brief at (Br.) 26-37. The Director addresses only the coal company's legal challenges.

## **STATEMENT OF THE CASE**

Because the Director limits his response to Ragland's legal challenges to the ALJ's award, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (which is summarized *infra* pp. 12-19) and the decisions below applying them.

### **A. The ALJ's February 2011 Award of Benefits (A.71)**

At the outset, the ALJ determined that Adkins had twenty years of underground coal mine employment and a thirty-five-year smoking history, A. 73 n.7, 75, and that he was totally disabled by his respiratory condition. A.75, 78. The judge therefore concluded that the evidence invoked the fifteen-year presumption of entitlement. A.78.<sup>3</sup>

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<sup>3</sup> Ragland does not dispute that the ALJ properly invoked the fifteen-year presumption; the dispute involves rebuttal of that presumption.

To rebut this presumption, the ALJ explained that the coal company had to (1) prove the absence of both clinical and legal pneumoconiosis,<sup>4</sup> or (2) “rule out” any connection between the miner’s impairment and his coal mine employment.”

A.78. The ALJ concluded that Ragland failed to rebut the presumption that Adkins suffered from *clinical* pneumoconiosis because the chest x-ray readings were in equipoise. A.80-81. The ALJ then considered whether Ragland rebutted the presumption of *legal* pneumoconiosis, i.e., whether the coal company proved that Adkins respiratory condition (which all doctors agreed took the form of emphysema) was *not* significantly related to or substantially aggravated by his coal mine employment. A.81. In this regard, the ALJ observed that the regulation at section § 718.202(a)(4) provided that “[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical

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<sup>4</sup> Compensable pneumoconiosis takes two distinct forms, “clinical” and “legal.” 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to a cluster 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), and is generally diagnosed by chest x-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). In contrast, “legal pneumoconiosis” is a broader category referring to “any chronic lung disease or impairment . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). Legal pneumoconiosis includes COPD (chronic obstructive pulmonary disease) due to coal mine employment. 20 C.F.R. § 718.201(a)(2). *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996). (“[C]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act.”).

judgment, *notwithstanding a negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis. . . .” 20 C.F.R. § 718.202(a)(4) (emphasis added).

In weighing the medical opinion evidence on the issue of legal pneumoconiosis, the ALJ had before him the opinion of Dr. Rasmussen, who examined Adkins pursuant to the Department’s statutory obligation to provide each miner-claimant with a complete pulmonary examination, 30 U.S.C. § 923(b) (A.106, 239); and those of Drs. Zaldivar and Fino, who examined the miner at Ragland’s request (A.122, 139, 160, 196, 291). The ALJ considered the doctors similarly qualified: Dr. Rasmussen was a Board-certified internist with significant background in pulmonary diseases, and Drs. Zaldivar and Fino were Board-certified internists and pulmonologists. A.85.

Dr. Rasmussen reported that the miner’s emphysema was due to both coal mine employment and cigarette smoking; that both factors “caused the same type of lung impairments,” which therefore made it impossible to distinguish the effects of one over the other; that it was not “medically reasonable or realistic” to conclude that the miner’s emphysema was due to just one factor; and that the two factors had an “additive effect.” A.113, 249-52, 257. Alternately, Drs. Zaldivar and Fino reported that the miner’s emphysema was not due to coal mine employment because, *inter alia*, the x-ray evidence was negative for pneumoconiosis. A.151, 204, 222, 225, 232-33. Contrary to Dr. Rasmussen’s opinion, the two Ragland



doctors also reported that it was possible to distinguish the effect of coal mine employment from that of smoking. A.147-48,, 183, 234-35.

The ALJ gave more weight to Dr. Rasmussen's opinion because it was "consistent with the regulations and well-reasoned." A.85. In contrast, the ALJ found the opinions of Drs. Zaldivar and Fino inconsistent with the regulations: while both doctors admitted pneumoconiosis could be diagnosed even if the x-ray readings were negative, the ALJ concluded that "the totality of [the doctors'] opinions demonstrates that they are merely paying lip service to that concept," and that their opinions "hinge[] on the negative x-ray readings." A.86 ("[W]hile both Drs. Zaldivar and Fino state that one can have pneumoconiosis absent radiographic evidence, their opinions and reasoning suggest otherwise."). Concluding that the evidence proved that Adkins suffered from legal pneumoconiosis, the ALJ found that Ragland therefore failed to rebut the presumption of pneumoconiosis. *Id.*

The ALJ turned next to the second method of rebuttal: proving that the coal mine employment played no part in Adkins' emphysema. A.86. He concluded that Ragland failed in this burden for the same reasons the coal company failed to disprove legal pneumoconiosis. *Id.* Additionally, the ALJ observed that, while "Dr. Fino testified that his opinion that Claimant's smoking was causing his emphysema would not change even if he assumed legal pneumoconiosis," such a "statement [was] not well-reasoned because the definition of legal pneumoconiosis

in Section 718.201(b) describes a respiratory impairment significantly related to [or] aggravated by dust exposure in coal mine employment.” A.86-87. The ALJ concluded that “Dr. Fino’s assumption would undermine his very opinion.” A.87. Based upon this weighing of the evidence, the ALJ awarded benefits. *Id.*

#### **B. The Board’s March 2012 Affirmance (A.89)**

Ragland appealed to the Benefits Review Board, arguing that the ALJ improperly limited its ability to rebut the fifteen-year presumption, and that the application of revived section 921(c)(4) was unconstitutional. A.91. The coal company also asserted that the ALJ had impermissibly selectively analyzed the opinions of Drs. Zaldivar and Fino in concluding that their finding of no legal pneumoconiosis and no disability causation was based upon the absence of an x-ray positive for pneumoconiosis. Finally, Ragland alleged that the ALJ had erred in crediting Dr. Rasmussen’s opinion. A.91-94.

The Board rejected the constitutional arguments based upon precedent, A.91; and rejected the selective-analysis argument as inconsistent with the ALJ’s decision: In “consider[ing] the physicians’ opinions in their entirety,” the ALJ “permissibly considered the rationale underlying the physicians’ opinions, and substantial evidence supports his credibility determination.” A.93. The Board also concluded that the ALJ’s discrediting of Drs. Fino and Zaldivar’s opinions as inconsistent with the regulations was proper because, citing 20 C.F.R. §§

718.202(a)(4), (b) and 718.201(a)(1), (2), “the regulations. . . permit a finding of legal pneumoconiosis notwithstanding the absence of radiographic evidence of clinical pneumoconiosis.” *Id.* Finally, because the ALJ properly discredited the opinions of Ragland’s doctors, the Board found it unnecessary to consider the coal company’s arguments concerning the ALJ’s crediting of Dr. Rasmussen’s opinion. A.94 n.6. The Board, therefore, affirmed the ALJ’s award of benefits based upon Ragland’s failure to rebut the fifteen-year presumption of entitlement. A.94.

### **SUMMARY OF THE ARGUMENT**

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

therefore a reasonable interpretation of the Act entitled to this Court's deference under *Chevron*.

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976). *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner's disability is unrelated to pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows for rebuttal on that ground. Contrary to Ragland'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. Consequently, the ALJ did not err in requiring the coal company to "rule out" pneumoconiosis as a cause of Adkins's disability.

The ALJ also made no legal errors in weighing the medical evidence relevant to rebuttal. He properly discredited the opinions of Drs. Zaldivar and Fino (that the miner's totally disabling emphysema was unrelated to coal mine employment) because, contrary to regulation, the doctors' opinions were driven by the fact that the miner's x-rays did not show clinical pneumoconiosis. The ALJ also properly credited the opinion of Dr. Rasmussen (that coal mine employment contributed to the miner's disabling emphysema).

## **ARGUMENT**

### **A. Standard of Review**

This brief addresses only Ragland's legal challenges to the decisions below. This Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (citation and quotation omitted); *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

### **B. The rule-out standard in context**

Ragland's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Adkins's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Br.20-29. 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 Ragland’s challenge to the regulatory rule-out standard.

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

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

*Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the medical and scientific difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years to ease their evidentiary burdens. One of these is 30 U.S.C. § 921(c)(4)’s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part:

“If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. . . .” 30

U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed thereafter.<sup>5</sup> In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after

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<sup>5</sup> Pub. L. No. 97-119 § 202(b)(1), 95 Stat. 1635 (Dec. 29, 1981).

March 23, 2010.<sup>6</sup> The presumption therefore applies to Adkins’s claim, which was filed in 2008 and remains pending. A.75.

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.<sup>7</sup> The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.<sup>8</sup> *See infra* pp. 17-18. Because the new regulation applies to this claim and is clearer than its predecessor, this brief

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<sup>6</sup> Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (Mar. 23, 2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013).

<sup>7</sup> 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).

<sup>8</sup> The regulation at 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners’ Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress’s removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. *See* 20 C.F.R. § 718.305 (2011).

primarily discusses Ragland’s petition through the lens of revised section 718.305.<sup>9</sup>

## ***2. Elements of entitlement***

Miners seeking BLBA benefits are generally required to establish four elements of entitlement: ***disability*** (that they suffer from a totally disabling respiratory or pulmonary condition); ***disease*** (that they suffer from pneumoconiosis); ***disease causation*** (that their pneumoconiosis was caused by coal mine employment); and ***disability causation*** (that pneumoconiosis contributes to the disability). 20 C.F.R. § 725.202(d)(2) (listing elements); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

As discussed *supra* at 5 n.4, 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

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<sup>9</sup> The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). While Ragland asserts that the regulation is inconsistent with the Supreme Court’s decision in *Usery* (a fact in dispute, *infra* at 30-37, the coal company does not argue that the revised regulation is impermissibly retroactive. Br. 19-21. 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).



C.F.R. § 718.201(a)(2).<sup>10</sup> Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.<sup>11</sup>

### ***3. The fifteen-year presumption and methods of rebuttal***

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

While there are three presumed elements available to rebut, there are in practice only two basic methods of rebuttal. This derives from the fact that, in

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<sup>10</sup> This has been true since 1978, when the current statutory definition of pneumoconiosis – “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment” – was enacted. 30 U.S.C. § 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239 § 2(b), 92 Stat. 95 (Mar. 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* pp. 32-33.

<sup>11</sup> Miners with clinical pneumoconiosis and at least ten years of coal mine employment are rebuttably presumed to satisfy the disease-causation element by operation of 30 U.S.C. § 921(c)(1). *See* 20 C.F.R. § 718.203(b).

order to rebut the disease element, the employer must prove that the miner does not have legal pneumoconiosis (which includes the disease-causation element, *see supra* p. 15) and 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 a second

method: attacking the presumed causal relationship between the disease and the miner's disability (thus rebutting the disability-causation element).

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

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

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

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

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

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

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115.<sup>12</sup>

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<sup>12</sup> Although 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). It 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.” 20 C.F.R. § 718.305(a) (2011). The revised regulation's language was designed “to more clearly reflect that all three of the presumed elements may be rebutted.” 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107.

#### ***4. The rule-out standard***

The revised regulations also specify what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and 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).<sup>13</sup> But if the employer cannot rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that the miner's pneumoconiosis contributes to his disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a “*substantially* contributing cause” of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner's pneumoconiosis and disability, however, the employer must “establish that *no part* of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]” Revised section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R. § 718.305(d)(2011) (The presumption “will be considered rebutted” if the liable party establishes that “the cause of death or total

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<sup>13</sup> For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b).

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.<sup>14</sup> The primary dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii), is a permissible interpretation of the Act.

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

Ragland argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that “pneumoconiosis did not *substantially* contribute to his total disability.” Br.17 (emphasis added).<sup>15</sup> Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Ragland’s challenge is governed by *Chevron’s* familiar two-step

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<sup>14</sup> The Sixth Circuit sometimes describes it as a “contributing cause” standard. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1061, 1071 (6th Cir. 2013). This brief avoids that formulation, as it invites confusion with the less demanding “substantially contributing cause” standard the coal company advocates.

<sup>15</sup> While Ragland’s preferred standard has been called a “third method” of rebuttal, Br.15, 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; *see* 20 C.F.R. § 718.204(c) (including substantially contributing cause standard in definition of disability causation).

analysis.<sup>16</sup> As this Court explained in upholding another BLBA regulation:

In applying *Chevron*, we first ask “whether Congress has directly spoken to the precise question at issue.” Our *Chevron* analysis would end at that point if the intent of Congress is clear, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

*Elm Grove Coal*, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If,

however,

“the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” In that regard, the courts have “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”

*Id.* (quoting *Chevron*, 467 U.S. at 843-44).<sup>17</sup>

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<sup>16</sup> While the ALJ articulated the rule-out standard in his statement of governing legal standards, it is unlikely that the rule-out standard played a role in the outcome of his decision. The ALJ did not reject the opinions proffered by Ragland’s medical experts because they did not meet or satisfy the rule out standard. Rather, the ALJ rejected these opinions because he concluded that they were generally not credible. *See supra* p.7-8. Even though the ALJ’s decision may be affirmed on this basis, the Director nevertheless requests that the Court address Ragland’s legal challenge to revised section 718.305(d)(1)(ii), which has been challenged in many other cases pending before this Court. *See Statement of Related Cases, supra* p. ix.

<sup>17</sup> Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove Coal*, 480 F.3d at 292. That is the case here. 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.”).

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

Applying *Chevron*'s first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.<sup>18</sup> Congress has therefore left a gap for the Department to fill.<sup>19</sup>

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

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

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<sup>18</sup> 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* pp. 15-16. But it does not specify what showing the government must make to establish rebuttal on that ground.

<sup>19</sup> Ragland disputes that there is any "gap" to fill because the Supreme Court in *Usery* held that section 921(c)(4) unambiguously states that employers are not limited to the provision's two stated methods. Br.21. This argument, however, misses the point: while section 921(c)(4) does not limit employers to the stated rebuttal methods, the question still exists as to how the employer (or the Director, for that matter) can, in fact, disprove the causation between the miner's impairment and his coal mine employment.

contribution” standard may also be a permissible interpretation is irrelevant.<sup>20</sup>

“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.<sup>21</sup>

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

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<sup>20</sup> The Director’s rule-out standard and the coal company’s “substantial contributing cause” standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a “significant,” “necessary,” or “primary” cause of a miner’s disability might also be permissible. So long as the rule-out standard, the standard the Director actually adopted, falls within the range of permissible alternatives, it must be upheld.

<sup>21</sup> *Cf. Pauley*, 501 U.S. at 702 (“[I]t is axiomatic that the Secretary’s interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary’s view need be only reasonable to warrant deference.”) (citations omitted).



fact that it establishes medical eligibility criteria. *Massey*, 736 F.2d at 124 (“The wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress.”).

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

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106.<sup>22</sup> 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 imposing a rebuttal standard that is demanding but also narrowly tailored to benefit

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<sup>22</sup> Notably, this explanation directly responded to comments suggesting that the Department eschew the rule-out standard in favor of the “substantially contributing cause” standard Ragland advocates here. *Id.*

a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis. The rule-out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. § 718.305(d)(1)(i); cf. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore relevant only if claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. 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.<sup>23</sup>

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

The Department adopted the rule-out standard by regulation over thirty years ago. See 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if “the cause of . . . total disability did not arise *in whole or in part* out of dust exposure in the miner's coal mine employment.”) (emphasis added). This fact alone supports the

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<sup>23</sup> 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).

Department's claim of deference. *See, e.g., Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

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

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

Only one court of appeals has addressed the rule-out standard since section 921(c)(4) was revived in 2010, and it affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1061, 1063 (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 recently 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.<sup>24</sup>

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.<sup>25</sup> The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant failed to demonstrate a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that "it is the [employer's] failure effectively to *rule out* such a relationship that is crucial here." *Id.* (emphasis added). After concluding that the

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<sup>24</sup> Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery*. 724 F.3d at 559. Ragland advances the same argument, which is addressed *infra* pp. 30-37. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

<sup>25</sup> *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. § 921(c)(4) ("[T]here shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis.").

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). Ragland 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 "interim presumption," established by 20 C.F.R. § 727.203 (1999), is yet further evidence that it is a permissible rebuttal standard.<sup>26</sup> 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.

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<sup>26</sup> The Part 727 "interim" regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 725.4(d); *Mullins Coal Co.*, 484 U.S. at 139. As this Court has recognized, the interim presumption is "similar" to the fifteen-year presumption, *Colley & Colley Coal Co.*, 59 F. App'x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. 20 C.F.R. § 725.4(d).

See 20 C.F.R. § 727.203(a) (1999); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the interim presumption could be rebutted if the operator proved that the miner’s death or disability did not arise “*in whole or in part* out of coal mine employment[.]” 20 C.F.R. § 727.203(b)(3) (1999) (emphasis added).<sup>27</sup> This, of course, is the same language that the initial version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard. See *supra* p. 17.

And as this Court held in *Massey*, “[t]he underscored [in whole or in part] language makes it plain that the employer must *rule out* the causal relationship between the miner’s total disability and his coal mine employment in order to rebut the interim presumption.” 736 F.2d at 123.<sup>28</sup> In *Massey*, this Court rejected an

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<sup>27</sup> Rebuttal could also be established by proving that the miner did not have pneumoconiosis, 20 C.F.R. § 727.203(b)(4) (1999), or was not totally disabled, 20 C.F.R. § 727.203(b)(1)-(2) (1999).

<sup>28</sup> 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).

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.<sup>29</sup> 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 fill a statutory gap in a way that advances section 921(c)(4)'s purpose, were implicitly endorsed when Congress re-enacted that provision without change in 2010, and are consistent with this Court's interpretations of both the fifteen-year presumption and the similar interim presumption. The rule-out

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<sup>29</sup> Ragland cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the section 921(c)(4) presumption are not similarly situated to claimants who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. § 718.202(a)(1), (b). Indeed, the main point underlying congressional enactment (and restoration) of these presumptions was to make it easier for claimants to prove entitlement. The company then can hardly complain about its heavier burden; that is what Congress intended.

standard is therefore a reasonable interpretation of the Act entitled to this Court's deference.

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

Ragland repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. See Br.17, 23-27. From its brief, one might expect to find in *Usery* a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

*Usery* held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same



language that the prior version of section 718.305 used to describe rebuttal options for employers as well as the government. As explained *supra* at pp. 15-16, 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.<sup>30</sup>

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<sup>30</sup> This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. § 718.201(a)(1) (2013) (“***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis”) (emphasis added) *with* 20 C.F.R. § 410.110(o) (1970) (“***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis”) (emphasis added) *and* 20 C.F.R. § 410.110(o)(1) (1976) (“***pneumoconiosis*** . . . includes coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis”) (emphasis added). After several presumptions (including the fifteen-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. *See* 20 C.F.R. § 410.110(o)(2)-(3) (1976). But the general regulatory definition of pneumoconiosis did not include

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits.<sup>31</sup> This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis (because the miner in question did suffer from that condition) or (B) that the miner's disability did not arise from the miner's exposure to coal dust (because the miner's disabling emphysema did arise from coal dust exposure). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, miners invoking against the federal government were effectively entitled to benefits even though they were not disabled by clinical pneumoconiosis.

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what is now called "legal" pneumoconiosis until after the statutory definition was broadened in 1978. *See* 20 C.F.R. § 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

<sup>31</sup> Given the long-established judicial acceptance of the concept of "legal pneumoconiosis, *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995), it may be difficult to imagine a time when legal pneumoconiosis was not compensable. But before 1978, that was the case.

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."<sup>32</sup> 428 U.S. at 34-35. The Court recognized this problem, *Usery*, 428 U.S. at 34 ("The effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis."), but avoided the

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<sup>32</sup> Although the quoted sentences of *Usery* do not specify that the disabling disease was caused by coal dust, it is clear from the topic sentence of that paragraph that the Court is discussing a miner who is "totally disabled by some respiratory or pulmonary impairment arising in connection with his employment[.]" 428 U.S. at 34. It is equally true from context. If the disabling disease was not caused by exposure to coal dust, the employer could establish rebuttal by proving that the miner's disability was unrelated to coal mine employment and there would have been no need whatsoever to address the application or constitutionality of the second rebuttal method allowed under section 921(c)(4)'s rebuttal-limiting sentence.

constitutional controversy by holding that section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators." *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). But that observation only underscores the fact that miners disabled by legal pneumoconiosis, who invoked against the Secretary, were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act.

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).<sup>33</sup> As a result, the scenario motivating *Usery's* discussion of the rebuttal-limiting sentence became moot. Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal

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<sup>33</sup> *See supra* n.10.

because every lung disease caused by coal dust exposure is legal pneumoconiosis.<sup>34</sup> 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.<sup>35</sup>

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 allow operators to do just that. But nothing in *Usery* even suggests that an operator must be allowed to establish disability-

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

<sup>35</sup> As our understanding of the effects of coal dust exposure has grown, so has the law evolved. *See, e.g., Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 314 (4th Cir. 2012) (observing that regulatory amendments were based on medical and scientific premises found in the preamble). The many authorities applying the rebuttal-limiting sentence's language to operators – including 20 C.F.R. § 718.305 (1981) and this Court's decision in *Rose*, 614 F.2d at 939 – simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Since the definition of pneumoconiosis has been 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.").

causation rebuttal by proving that pneumoconiosis is not a “substantial” contributing cause of a miner’s disability. To the contrary, the words the Court used to frame the operators’ argument – the rebuttal-limiting sentence can prevent rebuttal “even though it might be medically demonstrable in an individual case that the miner’s pneumoconiosis was mild and did not cause the disability [and] that *the disability was wholly a product of other disease*” – are not only consistent with the rule-out standard, they essentially articulate it. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a “substantial” cause of a miner’s disability.<sup>36</sup> It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption by disproving disability causation should be governed by a rule-out standard, a

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<sup>36</sup> As a result, Ragland’s extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Br.19-21. In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. 428 U.S. at 37 and n.40 (observing that “the role of regulations is not merely interpretive; they may instead be designedly creative in a substantive sense, if so authorized”).

substantially-contributing-cause standard, or any other standard.<sup>37</sup> Ragland's argument that the ALJ's use of the rule-out standard was in error should be rejected.

**E. The ALJ committed no legal errors when weighing the medical evidence.**

Ragland asserts that substantial evidence does not support the ALJ's conclusion that the no-causation opinions of Drs. Zaldivar and Fino were driven by the lack of x-ray evidence positive for pneumoconiosis. Br.23-24. The Director disagrees. But in limiting his response to legal issues, the Director addresses the legal issue the coal company avoids: whether an ALJ can discredit a doctor's opinion of no legal pneumoconiosis (or no disability-causation) when the doctor bases his/her opinion on the lack of positive x-ray evidence. This Court has resolved this legal issue in the affirmative. In *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 313 (4th Cir. 2012), this Court affirmed the ALJ's discrediting of a doctor's opinion that COPD must be considered unrelated to coal mine employment without a positive x-ray. The *Harman* court explained that such an opinion "finds no support in the Department's regulations, which separate

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<sup>37</sup> To the extent that Ragland'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.

clinical and legal pneumoconiosis into two different diagnoses, *see* 20 C.F.R. § 718.201(a)(1)-(2), and provide that “[n]o claim for benefits be denied solely on the basis of a negative chest X-ray, *id.* § 718.202(b).” *Id.* The court added that the doctor’s opinion also “conflicts with the recognition in the preamble to the 2000 regulations that coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis. *Id.*; *see also* *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175 n.\* (4th Cir. 1995) (holding that a doctor’s opinion that a diagnosis of pneumoconiosis cannot be made without a positive x-ray “is in direct conflict with” the regulations); *Helen Min. Co. v. Director, OWCP*, 650 F.3d 248, 256-57 (3d Cir. 2011) (holding that ALJ properly discredited a doctor’s diagnosis of no legal pneumoconiosis where the doctor “stat[ed] that a finding of radiographic pneumoconiosis is a prerequisite to a determination of legal pneumoconiosis”).

A second legal issue in this case involves the ALJ’s dismissal of Dr. Fino’s assertion that his opinion would not change even if he assumed that Adkins suffered from legal pneumoconiosis. A.86-86. Ragland suggests, contrary to the ALJ’s understanding, that the doctor’s observation rings true. Br.18. Not so. Since Adkins’ respiratory condition takes the form of emphysema, assuming legal pneumoconiosis would mean that his emphysema “was significantly related to, or substantially aggravated by, dust exposure in coal mine employment” because that



is how legal pneumoconiosis is defined under 20 C.F.R. § 718.201(a)(2) and (b). Such a finding hardly supports Dr. Fino's unexplained conclusion that coal mine employment did not contribute to the miner's emphysema. He just can't have it both ways.

A final legal issue involves the ALJ's crediting of Dr. Rasmussen's opinion that Adkins' emphysema was due both to coal mine employment and smoking. Ragland asserts that the opinion is mere speculation because the doctor admitted he could not tell which part of the miner's impairment was due to coal mine employment and which part was due to smoking. Br.32-35. The coal company acknowledges this Court's decision in *Westmoreland Coal Co, Inc. v. Cochran*, 718 F.3d 319 (4th Cir. 2013), rejecting such an attack against Dr. Rasmussen's opinion as speculative, but attempts to distinguish it. In *Cochran*, the coal company asserts, Dr. Rasmussen reported that both factors contributed and merely overlapped, whereas in the instant case, the doctor admitted that the miner's impairment could be due to either factor. Br.34. This is an illusionary distinction. In both cases Dr. Rasmussen unequivocally concluded that coal mine employment contributed to the miners' respiratory impairments. In both situations, this medical judgment was based upon the facts before the doctor and the doctor's understanding of what he and the medical community hold to be causative

elements.<sup>38</sup>

## CONCLUSION

Ragland's legal challenges to the "rule-out" rebuttal standard and the ALJ's discrediting of the opinions of Drs. Zaldivar and Fino should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration.

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<sup>38</sup> In any event, even if the ALJ erred in crediting Dr. Rasmussen's opinion, his reasons for discrediting the contrary opinions of Drs. Zaldivar and Fino are correct and affirmable. Consequently, the award should be affirmed because there is no credible evidence to rebut the 15-year presumption.

**REQUEST FOR ORAL ARGUMENT**

The Director does not oppose Ragland's request for oral argument.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 9537 words as counted by Microsoft Office Word 2010.

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**CERTIFICATE OF SERVICE**

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

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## **ADDENDUM OF STATUTES AND REGULATIONS**

### **The fifteen-year presumption**

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

\* \* \*

#### (c) Presumptions

\* \* \*

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

## Revised section 718.305

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

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

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

\* \* \*

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

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

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

(d) Rebuttal—

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

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

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

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

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

\* \* \*

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

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

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

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

(e) This section is not applicable to any claim filed on or after January 1, 1982.<sup>39</sup>

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<sup>39</sup> Subsection (e) was added on May 31, 1983, by 48 Fed. Reg. 24271, 24288.