

**No. 14-1923**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**EASTERN ASSOCIATED COAL CORPORATION**

**Petitioner**

**v.**

**ARVIS R. TOLER**

**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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**BRIEF FOR THE FEDERAL RESPONDENT**

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**STATEMENT OF JURISDICTION**

The Director adopts Eastern Associated Coal Corporation's statement of jurisdiction. Petitioner's Opening Brief (Pet. Br.) at 1-2.

**STATEMENT OF THE ISSUES**

1. This Court, sitting en banc, upheld the right of miners to file subsequent claims, even absent statutory authorization, stating, "It is almost too obvious for

comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases." *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996). In 2000, the Department engaged in notice and comment rulemaking, *inter alia*, to codify *Lisa Lee Mines*. This resulted in the promulgation of 20 C.F.R. 725.309 ("the subsequent claim regulation"), which has been upheld by every court of appeals to consider it.<sup>1</sup> The first question presented is whether *Lisa Lee Mines* remains good law in this Circuit in light of the Department's regulatory codification of it.

2. *Lisa Lee Mines* further ruled that subsequent claims constitute a new cause of action and do not reopen the denial of the prior claim. 86 F.3d at 1361-62. The second question presented is whether miners' subsequent claims violate the separation of powers doctrine, which prohibits Congress from enacting legislation that directs the federal judiciary to reopen final judgments.

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<sup>1</sup> Section 725.309 was amended in September 2013. *See* 78 Fed. Reg. 59102, 59118. These amendments made no substantive change to the regulatory provisions governing miners' subsequent claims, although changes were made regarding survivors' subsequent claims. The result of these changes is that the language pertaining to this case is now located in different subsections of the regulation. *Compare* 20 C.F.R. § 725.309(b), (c)(2-6) (2014) *with* 20 C.F.R. § 725.309(c), (d)(1-5) (2012). Full versions of both the 2014 and 2012 versions of 20 C.F.R. § 725.309 are provided in the appendix to this brief.

3. Toler filed an unsuccessful claim for federal black lung benefits in 1993. To succeed on his current 2008 claim he must demonstrate that his condition has changed by proving, with evidence addressing his current condition, that he now satisfies one of the elements of entitlement previously decided against him. The third issue presented is whether the administrative law judge (ALJ) could utilize the fifteen-year presumption, which Congress reinstated while Toler's current claim was pending before him, to prove a change in condition.

4. The regulation implementing the fifteen-year presumption provides that it can be rebutted if an employer proves that the miner does not have pneumoconiosis arising out of coal mine employment or that "no part" of the miner's disability is due to pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(ii). The third issue presented is whether 20 C.F.R. § 718.305(d)(1)(ii)'s "no part" rebuttal standard (also known as the "rule-out" standard) is a permissible interpretation of the statute.

### **STATEMENT OF THE CASE**

Toler filed his first claim in 1993. This Court finally denied it in August 1998 by an unpublished, per curiam decision. *Toler v. Eastern Associated Coal Corp.*, 162 F.3d 1156 (Table), 1998 WL 537925 (4th Cir. 1998); Joint Appendix (JA) JA 54-56.

Toler's current claim was filed in February 2008, fifteen years after his first claim. A Department of Labor district director issued a proposed decision and

order awarding benefits, DX 24, and Eastern requested a hearing before an ALJ. ALJ Daniel Solomon awarded benefits. JA 47. Eastern appealed, and the Benefits Review Board remanded for further ALJ consideration. JA 39. The ALJ again awarded benefits, and the Board affirmed. JA 9, 21, 37. Eastern then petitioned this Court for review.

## STATEMENT OF THE FACTS

### A. Statutory and regulatory background

#### 1. Conditions of entitlement

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, a respiratory or pulmonary disease arising out of coal mine employment. 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. There are two types of pneumoconiosis, “clinical” and “legal.” 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to a particular 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); *accord e.g., Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 791 n.1 (4th Cir. 1990).

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); *accord e.g. Gulf & Western Industries v. Ling*, 176 F.3d

226, 231 (4th Cir.1999) and *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996). Any chronic lung disease that is “significantly related to, or substantially aggravated by” exposure to coal mine dust is legal pneumoconiosis. 20 C.F.R. § 718.201(b).

A former coal miner seeking federal black lung benefits must prove (1) that he suffers from pneumoconiosis; (2) that his pneumoconiosis was caused by coal mine employment; (3) that he is totally disabled by a pulmonary or respiratory impairment; and (4) that his impairment is caused, in part, by pneumoconiosis. 20 C.F.R. § 725.202(d). These four elements can be established in two basic ways. The first is through direct medical evidence. Pneumoconiosis, for example, can be proved by x-rays, autopsies, biopsies, medical opinion reports, and other medical evidence such as CT scans and digital x-rays. 20 C.F.R. §§ 718.107, 718.202.

The conditions of entitlement can also be established with the assistance of presumptions. *See 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 is 30 U.S.C. § 921(c)(4)’s “fifteen-year presumption.” The presumption is invoked if the miner (1) “was employed for fifteen or more years in one or more underground coal mines” or in surface mines with conditions “substantially similar to conditions in an underground mine” and (2) suffers from “a totally disabling respiratory or

pulmonary impairment[.]” 30 U.S.C. § 921(c)(4). If those criteria are met, there is a rebuttable presumption that the miner “is totally disabled due to pneumoconiosis[.]” *Id*; see also 20 C.F.R. § 718.305(c).<sup>2</sup> The party opposing entitlement can then rebut the presumption by proving that the miner did or does not have clinical and legal pneumoconiosis, or that the miner’s pneumoconiosis played no part in his pulmonary disability. 20 C.F.R. § 718.305(d).

## **2. Miners’ subsequent claims**

A miner’s medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a potentially latent and progressive disease that may first become detectable – or disabling – after a claimant stops mining. 20 C.F.R. § 718.201(c). For this reason, miners who unsuccessfully sought benefits in the past are permitted to file “subsequent

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<sup>2</sup> Congress restored the fifteen-year presumption in section 1556 of the Affordable Care Act, and made it applicable to claims filed after January 1, 2005, and pending on or after March 23, 2010, the ACA’s enactment date. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). The Department amended section 718.305 and other regulatory provisions to account for this restoration. 78 Fed. Reg. 59102 (Sep. 25, 2013). Although promulgated one month after the ALJ’s decision, Eastern does not argue that the revised regulation should not be applied to this claim. Nor can 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). See *Central Ohio Coal Co. v. Director, Office of Workers' Compensation Programs*, 762 F.3d 483, 489 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014).

claims,” arguing that they now satisfy the conditions of entitlement. 20 C.F.R. § 725.309.

A miner’s subsequent claim is not, however, an opportunity to relitigate the original claim. To ensure that the previous denial’s finality is respected, a miner must prove that his condition has changed. *See, e.g., Lisa Lee Mines*, 86 F.3d at 1362 (“A new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same. The health of a human being is not susceptible to once-in-a-lifetime adjudication.”). The method of proving such a change is prescribed by regulation: the miner must establish, with “new evidence” – *i.e.*, evidence post-dating the denial of his previous claim – that he now satisfies one of the conditions of entitlement decided against him in the earlier claim. 20 C.F.R. § 725.309(c)(4) (“the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.”).<sup>3</sup> If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(c).

If the new evidence establishes a condition of entitlement previously decided

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<sup>3</sup> This test is commonly called the “one-element” test, which this Court adopted in *Lisa Lee Mines*, 86 F.3d at 1362-63. The Department promulgated section 725.309(d) (2001) to effectuate *Lisa Lee* and codify the one-element test. 65 Fed. Reg. 79,968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

against the miner, the subsequent claim is allowed and the ALJ goes on to consider all the evidence, old and new, to determine whether the miner satisfies all four conditions of entitlement. 20 C.F.R. § 725.309(c)(5) (“If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim [other than those established by waiver or stipulation] shall be binding on any party in the adjudication of the subsequent claim.”). Even if the claimant ultimately prevails in the subsequent claim, the prior denial remains effective in that he cannot be awarded benefits for any period prior to that denial. 20 C.F.R. § 725.309(c)(6).

## **B. Relevant medical evidence**

The parties agree that Toler worked as a miner for at least 27 years, including 16 years underground, and that he has a totally disabling respiratory impairment. Moreover, Eastern has not challenged the ALJ’s weighing of the medical opinion evidence.<sup>4</sup> Nevertheless, because an understanding of the relevant

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<sup>4</sup> Eastern complains that the ALJ’s rejection of its medical experts’ opinions “violates the Administrative Procedure Act (“APA”) as well as the statute [the BLBA] itself.” Pet. Br. 31. In doing so, however, Eastern broadly mischaracterizes the ALJ’s opinion, and fails to specify the error in his reasoning or the statutory provisions violated. As such, Eastern has waived its potential challenge to the ALJ’s fact-finding on the merits. *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 n. 7 (4th Cir. 2006) (noting conclusory remark regarding error “is insufficient to raise on appeal any merits-based challenge to the district court’s ruling”); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir. 2000) (continued...)

medical evidence may be helpful to the Court, the Director briefly summarizes it here.

The current claim includes two analog (film) x-rays, a digital x-ray reading, and CT scan readings, which were interpreted by equally qualified doctors.<sup>5</sup> Dr. Ahmed read the April 2, 2008, film as positive for pneumoconiosis; Dr. Scott read the film as negative for pneumoconiosis. JA 26, 247-48. Drs. Miller and

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(...continued)

Cir.1999) (holding that failure to raise specific issues in opening brief constitutes abandonment of the issue); *see generally* Fed. R. App. P. 28(a)(8)(A) (petitioner's opening brief must contain "[petitioner's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies").

In any event, the ALJ's fact-finding on the merits is supported by substantial evidence and therefore should be affirmed. He permissibly relied on the Department's preamble in evaluating the conflicting medical opinions. *Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 315-16 (4th Cir. 2012) ("[a]lthough the ALJ did not need to look to the preamble in assessing the credibility of Dr. Fino's views, we conclude that the ALJ was entitled to do so); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2014) ("an ALJ may consider the . . . Preamble in assessing medical expert opinions"); *Central Ohio Coal Co. v. Director, Office of Workers' Compensation Programs*, 762 F.3d 483, 471 (6th Cir. 2014) (upholding ALJ's discrediting of identical Dr. Rosenberg opinion, the same medical expert here, as inconsistent with preamble).

<sup>5</sup> When the claim was adjudicated by the ALJ, digital x-ray readings and CT scans could be admitted as "other medical evidence. 20 C.F.R. § 718.107 (2013). Once admitted, this evidence may then be weighed with the other evidence of pneumoconiosis, as the ALJ did here. JA 30; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11 (4th Cir. 2000). Because digital radiography systems are rapidly replacing traditional analog film-based systems, the Department recently updated its existing film-radiograph standards and provided parallel standards for digital radiographs. 79 Fed. Reg. 21606 (Apr. 17, 2014).

Alexander read the July 14, 2008, film as positive for pneumoconiosis; Drs. Scott and Wheeler read the film as negative for pneumoconiosis, although Dr. Wheeler noted two masses for which he recommended follow-up CT scans. JA 26, 260, 262. Dr. Wheeler also interpreted a digital x-ray as negative for pneumoconiosis, and both he and Dr. Scott read the CT scans as negative for the disease. JA 26.

Dr. Burrell examined Toler on April 2, 2008. JA 240. He diagnosed simple coal workers' pneumoconiosis based on the x-ray reading, severe chronic obstructive pulmonary disease, and arteriosclerotic heart disease.<sup>6</sup> He attributed Toler's respiratory impairment to "28 years exposure to environmental hazardous dust in coal mining employment and 30 years history of tobacco abuse," thereby diagnosing legal pneumoconiosis. JA 243.

Dr. DiMeo submitted a letter dated June 19, 2009. JA 103. He stated that

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<sup>6</sup> COPD is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011); see *Andersen v. Director, OWCP*, 455 F.3d 1102, 1104 n.3 (10th Cir. 2006). "Obstructive disorders are characterized by a reduction in airflow." *The Merck Manual* 1853. In contrast, "[r]estrictive disorders are characterized by a reduction in lung volume." *Id.* at 1855. In lay terms, restrictive disease makes it more difficult to inhale, while obstructive disease makes it more difficult to exhale. See *Gulf & Western Indus.*, 176 F.3d at 229 n.6.

COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000). Both cigarette smoking and dust exposure during coal-mine employment can cause COPD. See 65 Fed. Reg. 79939-43 (summarizing medical and scientific evidence linking COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as cause of COPD).

Toler has “severe obstructive lung disease with pulmonary nodule and intermittent infiltrates. It is quite probable given the severity of Mr. Toler’s disease that coal dust played an integral role in it’s [*sic*] development.” JA 103.

Dr. Rosenberg examined Toler on December 11, 2009. JA 104. He opined that Toler suffers from disabling COPD due to smoking and that he does not have either clinical or legal pneumoconiosis. JA 108, 110.

Dr. Renn reviewed the medical record and likewise concluded that Toler’s disability was due entirely to smoking, and that he did not have either clinical or legal pneumoconiosis. JA 161.

## **C. Decisions below**

### **1. Prior claim**

Toler’s first claim was denied because he failed to establish the presence of either clinical or legal pneumoconiosis. The ALJ determined that the x-ray evidence was negative for pneumoconiosis, and that Toler’s totally disabling emphysema was due solely to smoking. JA 62-69. Affirming the denial, the Board and then this Court ruled that substantial evidence supported the ALJ’s no pneumoconiosis finding. JA 54-56, 57-61, 71-72.

## **2. Current claim**

### **a. First ALJ decision awarding benefits**

While Toler's claim was pending before the ALJ, Congress reinstated the fifteen-year presumption and made it applicable to claims like Toler's that were filed after January 1, 2005, and pending as of March 23, 2010. *See supra* n. 2. The ALJ found that Toler had invoked the fifteen-year presumption based on Eastern's stipulation of 27 years of coal employment, including at least 16 underground, and a totally disabling pulmonary impairment. JA 48. He thus turned to rebuttal.

The ALJ ruled that Eastern had not rebutted the presumption, finding that Eastern had failed to establish that Toler did not have pneumoconiosis or that his severe respiratory impairment did not arise out of, or in connection with, coal mine employment. JA 53. The ALJ gave several reasons for discounting the medical opinions of Eastern's experts, Drs. Rosenberg and Renn. First, the ALJ found the reasoning in both opinions contrary to the regulatory preamble. JA 51-52. Second, the ALJ found that Dr. Renn had failed to adequately explain the cause of Toler's residual impairment following the administration of bronchodilators.<sup>7</sup> JA

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<sup>7</sup> A bronchodilator is a drug used to treat COPD. *The Merck Manual* 1894 (19th ed. 2011). It aids breathing by expanding the "air passages of the lung." *Dorland's Illustrated Medical Dictionary* 253 (32nd ed. 2012).

52. And third, the ALJ determined that neither doctor had fully considered Toler's lengthy twenty-seven year history of coal mine dust exposure. JA 53. He thus awarded benefits.

**b. Benefits Review Board remand**

The Board vacated the award and remanded for further consideration. It affirmed the ALJ's decision to apply the fifteen-year presumption, but remanded to give Eastern an opportunity to develop evidence responding to the change in law, *i.e.*, the reinstatement of the fifteen-year presumption. JA 42.

**c. Second ALJ decision awarding benefits**

The ALJ rejected Eastern's argument that principles of finality and the separation of powers doctrine precluded Toler's subsequent claim. JA 23. Citing *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789 (7th Cir. 2013), and the Board's prior holding, the ALJ found that "the 15-year presumption can be used to show a change in condition." JA 23-24.

The ALJ invoked the presumption and again concluded that Eastern had failed to rebut it. Regarding the first rebuttal prong – the existence of pneumoconiosis, the ALJ found the x-ray evidence positive for clinical pneumoconiosis (because one of Dr. Wheeler's negative readings was equivocal); and the "other evidence" – the CT scans and digital x-ray reading – negative. He then found "this evidence [ ] inconclusive as to clinical pneumoconiosis" and

therefore insufficient to rebut the presumption of pneumoconiosis. JA 26, 30. Regarding legal pneumoconiosis, the ALJ reiterated his prior critiques of Drs. Rosenberg and Renn's opinions, JA 27, and detailed several additional ways in which Dr. Rosenberg's new opinion, submitted on remand, was contrary to the preamble. JA 29-30. The ALJ further discounted Dr. Rosenberg's opinion for failing "to adequately explain why Claimant's impairment could not have been aggravated by his coal dust exposure[.]" *Id.* He thus concluded that Eastern had not provided a reasoned opinion disproving legal pneumoconiosis. JA 31.

Last, the ALJ found that Eastern had failed to establish the second rebuttal prong by proving that Toler's pneumoconiosis played no role in his disability. JA 31. The ALJ rejected Dr. Rosenberg's opinion on the same grounds that he found it insufficient to establish the first rebuttal prong. JA 31. The ALJ concluded, "I accord little weight to the opinions of Drs. Rosenberg and Renn on this issue as they both failed to diagnose Claimant with Pneumoconiosis contrary to my findings." JA 31. The ALJ thus awarded benefits.

#### **d. Benefits Review Board affirmance**

The Board affirmed as unchallenged on appeal the ALJ's findings of twenty-seven years of coal mine employment, and a totally disabling pulmonary impairment. JA 13 n.6. Like the ALJ, the Board rejected Eastern's finality and separation of powers contentions. Relying on *Lisa Lee Mines*, the Board explained

that “the health of human being is not subject to once-in-a-lifetime adjudication,” and therefore Toler was not relitigating his prior claim (or violating *res judicata*). Instead, he was attempting to prove that he had become disabled due to pneumoconiosis after the prior denial. JA 14-15. For this same reason, the Board found no separation of powers violation, holding that Toler’s subsequent claim is a separate cause of action that does not reopen the finally-denied prior claim. JA 15-16 (citing *Lisa Lee Mines*). Furthermore, citing *Bailey*, 721 F.3d at 794, the Board found unobjectionable the ALJ’s use of the fifteen-year presumption to establish a previously-denied condition of entitlement (pneumoconiosis), as required by 20 C.F.R. § 725.309. JA 16.

Turning to the ALJ’s rebuttal findings, the Board upheld his discrediting of Drs. Rosenberg and Renn’s opinions. Specifically, it ruled that the ALJ had “permissibly found that the reasoning Drs. Renn and Rosenberg used to eliminate coal dust exposure as a source of [Toler’s] COPD was inconsistent with the medical science accepted by DOL [in the regulatory preamble.] JA 18. Moreover, it affirmed that the ALJ acted within his discretion in rejecting Dr. Rosenberg’s opinion because the doctor failed to adequately explain his belief that coal mine dust did not contribute to or aggravate Toler’s pulmonary condition. JA 18.

Having upheld the ALJ’s finding that Eastern did not establish the absence of clinical and legal pneumoconiosis (the first rebuttal prong), the Board then

addressed whether it had ruled out the relationship between Toler's disability and his coal mine employment, the second rebuttal prong. JA 19 (citing *Rose v. Clinchfield Coal Co.*, 614 F.2d 936 (4th Cir. 1980)). The Board determined that the ALJ had permissibly discounted Drs. Renn and Rosenberg's disability causation opinions due to their failure to diagnose legal pneumoconiosis in the first instance. JA 19. The Board thus affirmed the award of benefits.

### **SUMMARY OF THE ARGUMENT**

This Court held in *Lisa Lee Mines* that miners may file subsequent claims because a coal miner's health can deteriorate over time. Relying on the Department's one-element test, it further held that miners' subsequent claims represent an entirely new cause of action, do not relitigate the prior denial, and thus do not subject the previous denial to reopening. In 2000, the Department promulgated 20 C.F.R. § 725.309 codifying *Lisa Lee Mines* and the one-element test. The Department also codified the underlying rationale for the subsequent claim rule, namely that pneumoconiosis can be a latent and progressive disease. 20 C.F.R. § 718.201(c). Since the rulemaking, this Court has reaffirmed the teachings of *Lisa Lee Mines*, and the courts of appeals have repeatedly sustained the subsequent claim and latency provisions against coal industry attacks. Eastern's challenge should likewise be rejected.

*Lisa Lee Mines* and Section 725.309 plainly dispose of Eastern's contention

that miners' subsequent claims violate the separation of powers doctrine, which prohibits Congress from enacting legislation that directs the federal courts to reopen final judgments. Because a subsequent claim addresses the miner's condition at a later point in time with new evidence, it does not reopen the prior denied claim or otherwise interfere with the prior judicial judgment. *Lisa Lee Mines*, in addition, ruled that miners' subsequent claims do not require explicit statutory authorization to proceed (because a miner's physical condition is not susceptible to a once-in-a-lifetime adjudication) and thus directly rejected Eastern's argument to that effect.

With respect to the Toler's subsequent claim, the fifteen-year presumption may be applied to prove a change in condition of entitlement as a matter of law, pursuant to the plain language of the BLBA's implementing regulations. Thus, the ALJ properly utilized the presumption in finding a change in condition regarding an element of entitlement that was not established in the miner's first claim.

Last, the Department, after notice-and-comment rulemaking, revised 20 C.F.R. § 718.305, 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 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, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Contrary to Eastern's contentions, the rule-out standard does not alter the burden of proof required of employers or change the level of medical certainty required of their doctors. The rule out standard simply identifies the facts necessary to establish one method of rebuttal.

## **ARGUMENT**

### **I. Standard of Review**

Eastern argues that subsequent claims are impermissible generally because the BLBA does not provide statutory authorization for them; that where the denial of the previous claim has been affirmed by an Article III Court, subsequent claims violate the separation of powers doctrine; that claimants cannot rely on the fifteen-year presumption to establish a change in condition in a subsequent claim; and that the rule-out rebuttal standard is contrary to law. 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*, as is his interpretation of the BLBA’s implementing regulations in a legal brief. *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

## **II. Toler’s subsequent claim does not violate principles of finality or the separation of powers doctrine.**

Because this is a subsequent claim, the ALJ had to determine whether Toler’s condition changed since the denial of his previous claim. The method of proving such a change is prescribed by regulation. The ALJ was bound to determine whether the “new evidence” – *i.e.*, evidence post-dating the denial of his previous claim – established at least one of the conditions of entitlement previously decided against him. 20 C.F.R. § 725.309(c)(4); *Lisa Lee Mines*, 86 F.3d at 1363.

The ALJ did just that. He properly applied the law in effect at the time of his decision, including the fifteen-year presumption. He invoked the presumption based on the miner’s twenty-seven years of coal mine employment and total respiratory disability. He then turned to rebuttal, addressing whether the evidence submitted with the new claim disproved the presumed facts, *i.e.*, the presence of pneumoconiosis and disability due to coal mine employment. Finding no rebuttal, the presumed facts were no longer merely presumed, but established. Because

pneumoconiosis and disability causation were elements of entitlement previously decided against Toler, the requisite change of condition was also proved.

Eastern offers two arguments why subsequent claims generally, and Toler's specifically, are precluded; neither have merit, and we address each in turn.

**A. This Court's en banc decision in *Lisa Lee Mines* upheld the right of miners to file subsequent claims. Contrary to Eastern's suggestion, *Lisa Lee Mines* remains good law; and Section 725.309 is valid.**

Eastern argues that subsequent claims are prohibited because the BLBA does not expressly authorize them and the underlying reason for them – the latency and progressivity of pneumoconiosis – is largely, if not entirely, a myth. Pet. Br. at 17-21. Recognizing that the en banc Court approved of subsequent claims in *Lisa Lee Mines*, Eastern attempts to undermine that decision by suggesting that it was reached without the benefit of the Department's rulemaking record in 2000. That rulemaking, which codified *Lisa Lee Mines*, amply supports Section 725.309, as the courts of appeals have uniformly found in upholding the regulation. *Lisa Lee Mines* remains good law; Section 725.309 is valid, and Eastern's contentions are meritless.

This Court in *Lisa Lee Mines* considered and rejected Eastern's argument that subsequent claims require express statutory authorization. Pet Br. at 21. It explained that "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication. 'It is almost too obvious for comment that res judicata does

not apply if the issue is claimant’s physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases.” *Lisa Lee Mines*, 86 F.3d at 1362, quoting A. Larson, *The Law of Workmen’s Compensation*, § 79.72(f) (1989). *Id.* The Court continued in this vein, observing that “[t]he issue in 1986 was [the miner’s] condition in 1986, and his future condition was not and could not have been litigated then.” The Court thus broadly stated that “nothing bars or should bar claimants from filing claims *seriatim*,” *id.*, and then held:

Lisa Lee correctly notes that there is no express statutory basis for the duplicate claims regulation, and asserts that it is invalid. The premise of this argument is that, absent the regulation, miners could not file new claims. But of course they could; as the excerpt from Larson’s treatise quoted above makes clear, common-law *res judicata* has no applicability where the issue is a person’s health at two different times.

*Lisa Lee Mines*, 86 F.3d at 1363 n. 9.<sup>8</sup> *Lisa Lee Mines* thus makes crystal clear that miners’ subsequent claims do not offend principles of finality, and express statutory (or regulatory) authorization is unnecessary for their consideration.

*Lisa Lee Mines* went on to endorse the Department’s one-element test,

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<sup>8</sup> Eastern categorically rejects these fundamental and widely-accepted premises. *See* Pet. Br. at 16 (“Mr. Toler’s earlier claim is precisely the same as his new claim, asserts the same cause of action, and relies on the same evidence considered and rejected by this Court.”).

which requires a threshold determination, based on new evidence, establishing one of the elements of entitlement previously resolved against the miner. The Court explained that the one-element test “is easily the most reasonable and workable” procedure for adjudicating subsequent claims and best comports with principles of finality. 86 F.3d at 1362-64. The Department thereafter codified *Lisa Lee Mines* and the one-element test. 65 Fed. Reg. 79,968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (October 8, 1999).

Eastern has not directly challenged *Lisa Lee Mines*. Instead, it intimates the Court may disregard *Lisa Lee Mines* and Section 725.309 because the Department’s rulemaking in 2000 demonstrates that most forms of pneumoconiosis are neither progressive nor latent, thereby calling into the question the underlying premise for subsequent claims and Section 718.201(c) (stating that pneumoconiosis can be a latent and progressive disease). Pet. Br. at 17-21. This Court, however, has, since the rulemaking, reaffirmed the teachings of *Lisa Lee Mines*, and acknowledged that pneumoconiosis can be both latent and progressive. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616-17 (4th Cir. 2006). Moreover, every court to consider the subsequent claim regulation post-rulemaking has upheld it. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 483-485 (6th Cir. 2012) (relying on Section 718.201(c) in upholding subsequent claim regulation); *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1223 (10th Cir. 2009)

(same); *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 489-490 (7th Cir. 2004) (same); *National Mining Ass'n v. Dep't of Labor (NMA)*, 292 F.3d 849, 863-864 (D.C. Cir. 2002) (same). And the Supreme Court recently declined to take up the issue. *Buck Creek Coal v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013), *reh'g denied* (Mar. 19, 2013), *cert. denied* 134 S.Ct. 898 (U.S. Jan 13, 2014) (No. 12A1171, 13-93).

Furthermore, to the extent that the coal industry has attempted to directly challenge the science underlying Section 718.201(c), the courts have roundly rejected those challenges as well. *See NMA*, 292 F.3d at 863, 869 (finding sufficient evidence in the rulemaking record to justify the Secretary's view that pneumoconiosis can be a latent and progressive disease, but is not always so; citing opposing medical studies showing pneumoconiosis may be progressive in as many as either 8% or 24% of cases); *Midland Coal*, 358 F.3d at 490 (finding no reason to substitute the court's scientific judgment for that of the agency and noting that “*Chevron* imposes on the mine operators the heavy burden of showing that the agency was not entitled to use its delegated authority to resolve the scientific question in this manner”); *see also, Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 253 (3d Cir. 2011) (rejecting coal company's argument that *NMA* supports “the proposition that pneumoconiosis cannot be properly characterized as latent and progressive”).

In any event, the subsequent claim regulation and Section 781.201(c) are the product of notice-and-comment rulemaking and therefore entitled to *Chevron* deference. *Elm Grove Coal Co.*, 480 F.3d at 288. Eastern has not made the kind of showing that would be necessary to strike down these provisions under the *Chevron* standard.<sup>9</sup> *Midland Coal*, 358 F.3d at 490. Nor has Eastern shown that *Lisa Lee Mines* is no longer good law. The Court is therefore bound by *Lisa Lee Mines*, *U.S. v. Cobler*, 748 F.3d 570, 577 (4th Cir. 2014); and it should accordingly defer to the Department’s reasonable subsequent claim regulation, Section 725.309. The Court should (again) reject Eastern’s challenge to the subsequent claim regulation as without merit.

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<sup>9</sup> In making its case against these regulations, Eastern cites an unidentified Surgeon General report and a statement from the American College of Occupational and Environmental Medicine (ACOEM) to demonstrate that pneumoconiosis is not latent or progressive. Pet. Br. 18. This “evidence,” however, does not withstand scrutiny. The Department specifically rejected the progressivity findings in a 1985 Surgeon General report as inconsistent with later medical studies, and a 2004 Surgeon General report did not contain those superseded findings. 65 Fed. Reg. at 79,971; *RAG Am. Coal Co. v. OWCP*, 576 F.3d 418, 426-427 (7th Cir. 2009). ACOEM’s assertion in the Secretary’s rulemaking that the medical literature generally shows that pneumoconiosis does not progress lacked any citation to medical literature, and it was ultimately proven incorrect. *See, e.g.*, 65 Fed. Reg. at 79,971 (concluding that the rulemaking record contains “abundant evidence demonstrating that pneumoconiosis is a latent, progressive disease”). Indeed, NIOSH took the opposite view, concluding that the “scientific evidence [reflects] that pneumoconiosis is an irreversible, progressive condition that may become detectable only after cessation of coal mine employment.” 64 Fed. Reg. 54,978-54,979 (Oct. 8, 1999).

**B. Toler’s subsequent claim does not violate the separation of powers doctrine.**

Eastern argues that because this Court affirmed the denial of Toler’s prior claim, his subsequent claim is precluded by the constitutional separation of powers doctrine. Pet. Br. at 13-17. The Court should reject this argument. As demonstrated above, Toler’s subsequent claim is based on a change in his physical condition, not on any legislative or executive branch intervention. Moreover, because a subsequent claim does not reopen a prior denial, but rather adjudicates the miner’s health at a later time (fifteen years later in Toler’s case), the separation of powers doctrine is simply not implicated.

Preliminarily, the scope of Eastern’s separation of powers argument is quite narrow. The argument only applies where a prior claim’s denial was affirmed by an Article III court. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 232 (1995) (distinguishing and not calling into question precedent “upholding the legislation that altered rights fixed by final judgments of non-Article III courts . . . or administrative agencies). For example, in *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940), Congress enacted legislation specifically directing the reopening of a compensation claim under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-50, that had been finally denied by an administrative agency. 309 U.S. at 375-76. The Supreme Court rejected a constitutional challenge to this legislation, as it did not infringe on the domain of the judiciary,

309 U.S. at 378-81, and *Plaut* reaffirmed the validity of that decision. 514 U.S. at 232. Thus, although Eastern’s separation of powers argument facially applies here, because the Court affirmed the denial of Toler’s first claim, it has no relevance to the great majority of subsequent claims.<sup>10</sup>

In any event, Eastern’s reliance on *Plaut* is misplaced. In *Plaut*, Congress had enacted legislation that effectively “require[d] federal courts to reopen final judgments in suits dismissed with prejudice.”<sup>11</sup> 514 U.S. at 217. The Supreme Court struck down the legislation as a violation of the constitutional separation of powers principle. 514 U.S. at 217-30. The Court explained that Article III of the

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<sup>10</sup> The courts of appeals decide only a small percentage of all black lung claims filed. For example, in Fiscal Year 2009 (the most recent year for which published statistics are available), the Office of Workers’ Compensation Programs issued initial decisions on 3,109 claims. OWCP Annual Report to Congress FY 2009 (published in 2011) at 66. In contrast, only thirty-eight appeals were filed with the circuit courts involving black lung claims. *Id.* at 25. Later editions of the Annual Report provide the number of published black lung circuit court decisions, but not the number of appeals filed.

<sup>11</sup> The *Plaut* plaintiffs had filed suit in federal district court alleging securities fraud under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. § 78j(b). 514 U.S. at 213. The suit was dismissed as time-barred as a result of the Supreme Court’s decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). 514 U.S. at 214. In response, Congress enacted section 27A of the 1934 Act, codified at 15 U.S.C. § 78aa-1, to clarify the statute of limitations applicable to suits under section 10(b). 514 U.S. at 214-15. Section 27A(b), 15 U.S.C. § 78aa-1(b), specifically made the new statute of limitations provision applicable to certain suits that had already been finally dismissed as time-barred (including that of the *Plaut* plaintiffs) and, as a result, allowed the *Plaut* plaintiffs to reinstate their dismissed claims. 514 U.S. at 214-17.

Constitution established a “judicial department,” with the power to decide cases and “render dispositive judgments.” 514 U.S. at 218-19 (internal quotation omitted). “By retroactively commanding the federal courts to reopen final judgments,” the Supreme Court held, the new legislation abridged this principle. 514 U.S. at 219.

*Plaut* and the separation of powers principle have no relevance with respect to miners’ subsequent claims for the same reason that subsequent claims do not violate *res judicata* – they are adjudicating the miner’s physical condition and degree of disability at two entirely different times. *Lisa Lee Mines*, 86 F.3d at 1362; *accord e.g., Buck Creek Coal*, 706 F.3d at 759. Necessarily then, miners’ subsequent claims do not reopen the prior denials. *Lisa Lee Mines*, 86 F.3d at 1361 (“the correctness of [the prior decision’s] legal conclusion” must be accepted in adjudicating the subsequent claim); *LaBelle Processing Co. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995) (subsequent claimant cannot “collaterally attack [] the prior denial of benefits”); *Buck Creek Coal Co.*, 706 F.3d at 759-60 (subsequent claim adjudication gives “full credit” to the finality of the prior denied claim). And in point of fact, benefits awarded on miners’ subsequent claims must be based on evidence addressing the miners’ condition after the prior denial, 20 C.F.R. § 725.309(c)(4), and benefits may not predate the prior denial, but rather commence after the date of the prior denial. 20 C.F.R. § 725.309(c)(6).

Eastern's focus on congressional reinstatement of the fifteen-year presumption as authorizing Toler's subsequent claim is entirely off-point. Pet. Br. at 15-17. Toler's subsequent claim was filed two years before the ACA, and miners who cannot take advantage of the presumption (*e.g.*, they lack 15 years of qualifying coal mine employment) may nevertheless pursue subsequent claims. To be sure, the fifteen-year presumption may be utilized in adjudicating a miner's subsequent claim, *see infra* Argument III, but it merely assists the miner in proving his subsequent claim assertion that he is now totally disabled by pneumoconiosis (although before he was not). In short, it is the miner's changed physical condition, not the fifteen-year presumption or any other any legislative or execution branch action, that underlies his subsequent claim. *Lisa Lee Mines*, 86 F.3d at 1363 n. 9 (recognizing that miners could file subsequent claims without statutory or regulatory authorization); *see also id.* at 1364 ("no rational system of law or of medicine could stand on the proposition that [pneumoconiosis] can or must be measured only once."). Absent interference by the other branches of government, the prerogatives of the judicial branch remain untouched, and there can be no separation of powers violation.

Miners' subsequent claims, because they derive from the miners' changed physical condition, are readily distinguishable from the narrow class of permissible *survivors'* subsequent claims based on the ACA's reinstatement of automatic

survivors' benefits under 30 U.S.C. § 932(l).<sup>12</sup> See 20 C.F.R. § 725.309(c)(1) (allowing such survivor refilings). In survivor automatic entitlement cases, the miner's condition has not changed – the survivors' prior claim finally determined that the miner's death was not due to pneumoconiosis. Nevertheless, the refiling offends neither res judicata nor the separation of powers principles because the congressional reinstatement of automatic entitlement dramatically changed the elements of entitlement – from medical proof that the miner's death was due to pneumoconiosis to proof that his lifetime claim had been awarded. A claim for automatic entitlement thus represents an entirely new and previously unavailable cause of action involving proof of new facts. *Union Carbide Corp. v. Richards*, 721 F.3d 307 (4th Cir. 2013); *Consolidation Coal Co. v. Maynes*, 739 F.3d 323

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<sup>12</sup> 30 U.S.C. § 932(l) provides: “In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his or her death be required to file a new claim for benefits, or otherwise revalidate the claim of such miner.” The ACA's restoration of automatic entitlement is found at Pub. L. No. 111-148, § 1556(b), 124 Stat. 119, 260 (2010). Like the fifteen-year presumption, reinstated section 932(l) applies only to claims filed after January 1, 2005, and pending as of March 23, 2010.

Because of the ACA's time limits, and because section 932(l) applies only when the miner's lifetime claim has been awarded, the great majority of survivor subsequent claims are precluded. See *Union Carbide Corp. v. Richards*, 721 F.3d 307, 317 (4th Cir. 2013) (noting the small number of survivor refilings based on automatic entitlement). For survivors of deceased miners, there can be no change in the miner's physical condition between the original and subsequent filing, and survivor refilings based solely on the miner's physical condition must be denied. See 20 C.F.R. § 725.309(c)(4).

(6th Cir. 2014); *Marmon Coal Co. v. Dir., OWCP*, 726 F.3d 387 (3d Cir.2013); 78 Fed. Reg. 59109-11 (Sep. 25, 2013). Although these cases are certainly correct, they are inapposite because, as shown above, miners' subsequent claims rest on their changed physical condition, not on a new (and previously unavailable) theory of relief resulting from congressional action.<sup>13</sup> Eastern's extended attack on the reasoning of these survivors' subsequent claim cases is therefore misguided and of no import.

**III. The ALJ correctly recognized that the fifteen-year presumption can be used to establish a change in condition.**

While Eastern spends most of its energy attacking the subsequent claim regulation on finality principles, it briefly argues that the fifteen-year presumption cannot be relied on to establish a change in condition. Pet. Br. 22. But this argument fares no better than its others. The BLBA's various presumptions play an integral role in establishing the various elements of a claim. It is unsurprising, then, that the only court of appeals to consider the question had little difficulty concluding that the fifteen-year presumption can be used to establish elements of

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<sup>13</sup> The subsequent claim regulation further illustrates this distinction: new evidence is required when the previously-denied condition of entitlement relates to a miner's physical condition, 20 C.F.R. § 725.309(c)(4); whereas proof of a change in condition of entitlement is entirely unnecessary in survivor subsequent claims based on automatic entitlement. 20 C.F.R. § 725.309(c)(1).

entitlement for the purpose of proving a change in condition. *See Bailey*, 721 F.3d 789, 794 (7th Cir. 2013).<sup>14</sup>

As the Seventh Circuit recognized, the answer is clear from the BLBA's implementing regulations, which incorporate the BLBA's various presumptions into the very definition of the elements of entitlement. A subsequent claimant must show that "one of the applicable conditions of entitlement (see § 725.202(d) (miner) . . . ) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(c). Section 725.202(d) lists the familiar elements of a miner's claim, including that the claimant "[h]as pneumoconiosis (*see 718.202*)" and that "[t]he pneumoconiosis contributes to the [miner's] total disability (*see § 718.204(c)*)[.]" 20 C.F.R. § 725.202(d)(2)(i), (iv) (emphasis added).

The referenced subsections, in turn, state that the elements of pneumoconiosis and disability causation, respectively, can be established by the fifteen-year presumption, implemented at 20 C.F.R. § 718.305. *See* 20 C.F.R. §§ 718.202(a)(3) ("If the presumption[] described in § . . . 718.305. . . [is]

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<sup>14</sup> Eastern argues that the Seventh Circuit "failed to consider the temporal differences involved in invoking the fifteen-year presumption and applying the fifteen-year presumption to additionally find a change in a claimant's condition." Pet. Br. at 23. But it is clear from the decision (and the briefs) that the *Bailey* court considered the res judicata issue explicitly. 721 F.3d at 794-95.

applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.”); 718.204(c)(2) (“Except as provided in § 718.305 . . . proof that the miner suffers . . . from a totally disabling respiratory pulmonary impairment . . . shall not, by itself, be sufficient to establish that the miner’s impairment is or was due to pneumoconiosis.”).

Under the plain language of these regulations, subsequent claimants may invoke the fifteen-year presumption to prove a change in condition. *Bailey*, 721 F.3d at 794 (“As the 15-year presumption is now built into the definitions of elements, the 15-year presumption can be used to show a change in condition.”). As the product of notice-and-comment rulemaking, the regulations are entitled to *Chevron* deference. *Bailey*, 721 F.3d at 794 (“Even if the language regarding the use of the fifteen-year presumption were susceptible to other readings, we would defer to the Director’s reasonable interpretation of the statute.”). Likewise, the Director’s interpretation of the BLBA’s implementing regulations is entitled to deference, even if their text is susceptible to other readings. *Lisa Lee Mines*, 86 F.3d at 1363 (Director’s reasonable interpretation of § 725.309 is entitled to deference); *see generally Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary of Labor’s construction of his own regulations is “controlling unless plainly erroneous or inconsistent with the regulation.”) (internal quotation marks and citations omitted). Eastern has not even attempted to make the kind of showing

that would be necessary to strike down these regulations under either the *Chevron* or *Auer* standards. Indeed, it does not even acknowledge their relevance despite the fact that these regulations were central to the *Bailey* court's analysis of this issue.

Eastern, understandably, is unhappy that Congress revived the presumption in a way that, in the company's view, caused it to lose this case. The presumption's revival created an "anomalous situation" because Toler "enjoys a 15-year presumption in the evaluation of the present claim but not in previous claims." *Bailey*, 721 F.3d at 795. But, "of course, [Toler's] adjudicators must apply the law in effect at the time of a decision. Congress has reintroduced the presumption and [Toler] can utilize that presumption, regardless of the law in effect at previous evaluations." *Id.*

It is important to note that this pendulum swings both ways. As the Sixth Circuit has aptly observed, "All that the [2010] legislation does is alter the methods of proof for miner and survivor claims, something Congress has done periodically for the last forty-four years, and something that has favored companies on some occasions and miners on others." *Vision Processing, LLC v. Groves*, 705 F.3d 551, 558 (6th Cir. 2013). While the particular change here benefitted miners, the next may aid employers. For example, in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997), the claimant's initial, unsuccessful claim was governed by the

“claimant favorable” interim regulations, 20 C.F.R. Part 727. 117 F.3d at 1003. When he filed a subsequent claim in 1981, the Part 727 regulations had been restricted to claims filed before March 31, 1980. *Id.* As a result, the Seventh Circuit ruled that Spese’s subsequent claim was governed by the stricter, then-new 20 C.F.R. Part 718 regulations, including the original subsequent claim provision, 20 C.F.R. § 725.309 (1981). *Id.* at 1004. The lesson – that subsequent claims are governed by current law, not the law in effect during the original claim – applies equally here. There was therefore no legal error in the determination below that Toler’s condition had changed.

Eastern simply misconstrues the interplay between Section 725.309 and Section 718.305 in contending that it has been denied due process. Pet. Br. at 23 (“The fact established to invoke the presumption (Toler’s total disability for work) and the fact presumed (a change in his condition) are unconnected.”). The relevant fact established by Section 718.305 is that Toler has pneumoconiosis, not that his condition has changed. And because Toler failed to establish pneumoconiosis in his prior claim, he has now established a change in a condition of entitlement, as required by Section 725.309(c).<sup>15</sup>

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<sup>15</sup> Eastern also argues “the ALJ permitted Toler to adjudicate his second claim without proof that anything actually changed.” Pet. Br. at 22. Eastern’s certainty that nothing about Toler’s physical condition changed and that the different result  
(continued...)

Finally, Eastern complains that there is no “contemporary legislative record” or “new science” to support revival of the fifteen-year presumption. Pet. Br. at 24-25. Congress, however, is not required to explain its actions to Eastern’s satisfaction. “Legislation ‘adjusting the burdens of and benefits of economic life’ is presumed to be constitutional; the party alleging a due process violation must establish that the legislature ‘has acted in an arbitrary and irrational way.’” *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849 (7th Cir. 2011), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, “Congress is not

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is due only to a change in law is unwarranted. First, the district director found a change of condition and proposed an award of benefits in 2008, *before* the fifteen-year presumption was reinstated. DX 24. Second, Dr. Burrell diagnosed clinical and legal pneumoconiosis and attributed Toler’s total respiratory disability to both smoking and coal mine employment. JA 243. (Dr. Burrell’s opinion was uncontradicted – and bolstered the presumed facts – following the ALJ’s discrediting of Eastern’s experts.) Third, the ALJ found the weight of the new x-ray evidence positive for clinical pneumoconiosis (although he also found the CT scans negative). Moreover, Eastern overstates our ability to discern Toler’s past condition. There is a practical reason why the subsequent-change inquiry forbids a direct comparison between the current evidence and the evidence underlying the previous denial. As this Court explained in *Lisa Lee Mines*:

Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical-perhaps the only practical-way to discern a concrete form in the mists of the past. The ease we might feel at second-guessing *this* final judgment ought not tempt us to overestimate our retrospective perspicacity; most black lung claims involve a mixed bag of test results and wildly divergent medical opinions. The final decision of the ALJ (or BRB or claims examiner) on the spot is the best evidence of the truth at the time.

*Lisa Lee Mines*, 86 F.3d at 1360.

required to discuss an act's purpose to satisfy due process. It is enough that a rational basis exists. . . . With § 1556, Congress decided to ease the path to recovery for claimants who could prove at least 15 years of coal mine employment and a totally disabling pulmonary impairment” and to “provide people who recently filed a claim with a ‘fair shake[.]’” *Keene*, 645 F.3d at 849. Thus, a connection exists between the fact established (at least 15 years of underground coal mine employment and Toler's total respiratory disability) and the facts presumed (Toler's pneumoconiosis and disability causation).

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

Eastern last argues that even if the fifteen-year presumption was properly invoked, the rebuttal requirement that it rule out any connection between the miner's total respiratory disability and pneumoconiosis is contrary to law.<sup>16</sup> Pet.

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<sup>16</sup> Eastern does not challenge the first rebuttal method requiring proof that the miner does not have clinical and legal pneumoconiosis. 20 C.F.R. § 718.305(d)(i). The second rebuttal method, section 718.305(d)(1)(ii), addresses the relationship between the miner's disease (pneumoconiosis) and his disability, which is commonly referred to as “disability causation.” *E.g. Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995). The regulation employs the phrase “in no part,” rather than “rule out” simply for clarity, not as a substantive change. 78 Fed. Reg. 59107. We continue to use “rule out” for consistency with prior law.

On January 29, 2015, this Court heard oral argument in two cases addressing the validity of the rule-out standard. *West Virginia CWP Fund v. Page Bender, Jr.*, No. 12-2034; *Hobet Mining, LLC v. Carl Epling, Jr.*, No. 13-1738.

Br. at 25-32. 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*. The answer to that question is undoubtedly yes.<sup>17</sup>

**A. The rule-out standard passes muster under *Chevron*.**

**1. *Chevron* step one: the fifteen-year presumption 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.

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<sup>17</sup> 20 C.F.R. § 718.305(d)(1)(ii) falls within the Secretary of Labor’s statutory authority “to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]” 30 U.S.C. § 936(a). *See 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.”).

<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* n. 17. But it does not specify what showing the government must make to establish rebuttal on that ground.

(continued...)

**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. Section 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.

Deference to this regulation is particularly appropriate because “[t]he identification and classification of medical eligibility criteria [under the BLBA] necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.” *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). The fact that the rule-out standard establishes criteria for rebutting, rather than establishing, a claimant’s entitlement does not change the fact that it establishes medical eligibility criteria. *Massey*, 736 F.2d at 124 (“The wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress”).

**a. The rule-out standard advances the purpose and intent of the fifteen-year presumption**

As explained in the preamble to amended Section 718.305, the rule-out

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standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106. 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).

Section 718.305(d)(1)(ii) appropriately furthers that goal by imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis and the rule-out standard plays absolutely no role in that method of rebuttal. 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 relevant only if the claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a

demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.<sup>19</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 first adopted the rule-out standard by regulation over 30 years ago. *See* 20 C.F.R. § 718.305(d) (1981). This fact alone supports the Department's claim for 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. *Lorillard v. Pons*, 434 U.S. 575, 580 (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 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

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<sup>19</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).

different standard in the amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This choice can only be interpreted as an endorsement of the Department’s longstanding position.

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

The only court of appeals to address the rule-out standard since Section 921(c)(4) was revived in 2010 affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (agreeing with the Director that an employer “must show that the coal mine employment *played no part* in causing the total disability.”). The issue was presented to this Court in *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir.2013), 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>20</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); *Barber v. Director, OWCP*, 43 F.3d 899, 900 (4th Cir. 1995); *Colley & Colley Coal Co. v. Breeding*, 59 F. App’x. 563, 567 (4th

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<sup>20</sup> Notably, current Section 718.305(d)(1)(ii) had not been promulgated when *Owens* was decided.

Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.<sup>21</sup> The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant had not demonstrated a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that: "it is the [employer's] failure effectively to *rule out* such a relationship that is crucial." *Id.* (emphasis added). After concluding that the employer's evidence was "clearly insufficient to meet the statutory burden" because its key witness "did not rule out the possibility of such a connection [between the miner's disabling cancer and pneumoconiosis or his mining work,]" this Court reversed the Board and awarded benefits. *Id.* at 939.

Eastern blithely asserts that *Rose* did not intend to establish a legal standard. Pet. Br. 26. But this is belied by latter Court decisions applying the rule-out rebuttal standard in fifteen-year presumption cases. *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

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<sup>21</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) ("there shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis").

by a preponderance of the evidence.”) (citation and quotation omitted ); *Barber*, 43 F.3d at 900 (“The respondent may rebut the presumption by showing . . . that pneumoconiosis does not contribute to the miner’s disability”). Eastern 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>22</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. *See* 20 C.F.R. § 727.203(a) (1999); *Pittston Coal v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the now-defunct interim presumption could be rebutted if the operator proved that the miner’s death or disability did not arise “*in whole or in part* out of coal mine employment[.]” 20

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<sup>22</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).

C.F.R. § 727.203(b)(3) (1999) (emphasis added).<sup>23</sup> This, of course, is the same language that the 1981 version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard. As this Court held in *Massey*, “[t]he underscored language makes it plain that the employer must *rule out* the causal relationship between the miner’s total disability and his coal mine employment in order to rebut the interim presumption.” 736 F.2d at 123.<sup>24</sup> In *Massey*, this Court rejected an employer’s argument that the rule-out standard was impermissibly restrictive, explaining that “[t]he wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate” because there is “nothing in the Black Lung Act to indicate that the Secretary’s rebuttal evidence rule exceeds its congressional mandate.” 736 F.2d at 124. If rule-out is an appropriate rebuttal standard for the easily-invoked interim

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<sup>23</sup> Rebuttal could also be established by proving that the miner was not totally disabled by or did not have pneumoconiosis, 20 C.F.R. § 727.203(b)(1)-(2), (4) (1999).

<sup>24</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).

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 Section 718.305(d)(1)(ii) fills a statutory gap in a way that advances Section 921(c)(4)'s purpose, was implicitly endorsed when Congress re-enacted that provision without change in 2010, and is consistent with this Court's interpretations of both the fifteen-year presumption and the similar interim presumption. It is therefore a reasonable interpretation of the Act entitled to this Court's deference and should be upheld.

**B. Contrary to Eastern's contentions, the rule-out standard does not alter the burden of proof required of employers or change the level of medical certainty required of their experts in formulating their opinions. The rule-out standard simply identifies the facts necessary to establish one method of rebuttal.**

Notwithstanding the fact that ALJs, the Board, and the courts have utilized the rule-out standard (under the fifteen-year presumption and interim regulations) in hundreds, if not thousands, of black lung claims, Eastern asserts the standard establishes a burden of proof that violates the Administrative Procedure Act (APA) and is impossible for doctors to meet. Pet. Br. at 26-28. Eastern thus claims the rule-out standard is arbitrary, capricious, and contrary to law. Eastern simply misunderstands (or mischaracterizes) the operation of the rule-out standard, and its contentions are therefore meritless.

Contrary to Eastern's argument, the "in no part" or rule-out standard does

not violate the burden of proof imposed by the APA. As interpreted by the Supreme Court, the APA requires the proponent of a rule or order to bear the burden of persuasion by a preponderance of the evidence to prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267,277-78 (1994).<sup>25</sup> The preponderance of the evidence standard, the High Court clarified, “goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found, but does not determine what facts must be proven as a substantive part of a claim or defense.” *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 129 (1997) (citing *Greenwich Collieries*). The “in no part” or “rule-out” standard does not run afoul of the APA because it is the fact that must be established and not the “degree of certainty needed to find a fact or element under the preponderance standard.” See 78 Fed. Reg. 59107. Indeed, this Court has confirmed that the rule-out standard need only be established by a preponderance of the evidence, and not a higher standard. *Colley & Colley Coal Co.*, 59 F. App’x. at 567.

Anticipating this rejoinder, Eastern asserts that the distinction between the

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<sup>25</sup> In *Greenwich Collieries*, the Supreme Court invalidated the true doubt rule under which black lung benefits were awarded if the evidence for and against entitlement was evenly balanced, reasoning that the rule effectively shifted the burden of persuasion from the claimant to the party opposing the claim. 512 U.S. at 281.

burden of proof and the elements of entitlement is not “so clear cut as the Director paints it.” Pet. Br. at 26. Suffice to say that Eastern’s disagreement is with the Supreme Court, which has clearly distinguished between the required level of proof (which implicates the APA) and the specific facts to be proved (which does not).

Moreover, Eastern’s reliance on snippets from the rulemaking record and court cases using the phrase “burden of proof” is unavailing. Pet. Br. 27. In both the rulemaking record and in *Massey*, “burden of proof” was used to describe the facts that the employer must prove on rebuttal, not the level or certainty of that proof. See 77 Fed. Reg. 19462 (Mar. 30, 2012) (“the proposed rule allows the party opposing entitlement to rebut the presumption by showing that the miner does not, or did not, have pneumoconiosis. The proposed rule further clarifies what *that proof burden* entails by cross-referencing the regulatory definition of pneumoconiosis.”) (emphasis added); *Massey*, 736 F.2d at 123 (the rule-out standard “places the burden on the employer to disprove the causal relationship between coal mine employment and total disability” and “the employer obviously cannot meet its burden of proof by focusing solely on the disabling potential of the miner's pneumoconiosis”). Eastern’s third authority, *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1514-15 (11th Cir. 1984), adopted the unexceptional proposition that the burden of persuasion (as opposed to the burden

of production) rests with employers on rebuttal, and is wholly unresponsive of Eastern's contention.

In sum, Eastern's claim that the rule-out standard establishes an impermissibly high level of proof is incorrect. Rather, Eastern was only required to prove by a preponderance of the evidence that Toler's pneumoconiosis played no role in his respiratory disability.

Eastern is likewise incorrect in asserting that the "rule-out" standard establishes the level of certainty with which a medical opinion must be expressed to be considered probative evidence. Pet. Br. at 27-30. Again, the standard provides only what facts must be established to rebut the presumption. A medical opinion need not be expressed with "reasonable medical certainty" to be probative of a medical fact under the BLBA. Instead, it is sufficient if the opinion is documented and constitutes a reasoned medical judgment. *See, e.g., Mancina v. Director, OWCP*, 130 F.3d 579, 588 (3d Cir. 1997); *accord Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); 78 Fed. Reg. 59107. Thus, a party opposing entitlement may rebut the presumption when the preponderance of the evidence, including medical opinions that are documented and reasoned exercises of physicians' medical judgment, demonstrates that pneumoconiosis played no role in the miner's respiratory disability. *See* 78 Fed. Reg. 59107.

Eastern dramatically overstates the significance of the rule-out standard in

claiming that it requires a physician’s “absolute certainty,” “metaphysical certainty,” “100% certainty,” and the like. Pet. Br. at 28-30. It does no such thing, as the opinions from Eastern’s own experts demonstrate. Both physicians agreed that Toler does not have pneumoconiosis, and attributed his totally disabling respiratory impairment solely to smoking; they also stated that their views were held to a “reasonable degree of medical certainty.”<sup>26</sup> JA 111, 151, 152. These doctors’ opinions clearly meet the rule-out standard. (The problem, however, was that the ALJ did not find them not credible, a finding that Eastern has not challenged. *See Mingo Coal Co*, 724 F.3d at 556 (declining to address validity of rule-out standard where ALJ’s discrediting of company’s experts was supported by substantial evidence)).<sup>27</sup>

Finally, there are numerous cases in which employers have met the rule out

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<sup>26</sup> Surprisingly, Eastern argues that the term “reasonable medical certainty” is problematic, “almost an oxymoron.” Pet. Br. at 29.

<sup>27</sup> Eastern is also concerned that the rule-out standard, combined with the ALJ’s reference to the preamble, created an irrebuttable presumption. Pet. Br. at 31. Eastern, however, is conflating the issues. The ALJ permissibly referred to the preamble in evaluating the credibility of the medical opinions, *see supra* n.6; this consultation had no effect on the appropriate legal standard on rebuttal. Regardless, the ALJ also offered non-preamble grounds for discrediting the opinions from Drs. Rosenberg and Renn. He found that Dr. Rosenberg failed to adequately explain his conclusion, and that both doctors erroneously stated that Toler does not have pneumoconiosis. JA 29-31. Since Eastern does not challenge these findings, Eastern’s argument is moot.

standard and thereby defeated the miner's claim for benefits. *See, e.g., Stanford v. Jewell Smokeless Coal Corp.*, BRB No. 01-0244 BLA, 2001 WL 36392219, slip op. at 2 (Nov. 2, 2001) (affirming ALJ's finding that employer rebutted presumption by ruling out pneumoconiosis as cause of disability); *Artis v. Director, OWCP*, BRB No. 00-0652 BLA, 2001 WL 36391784, slip op. at 2 (Mar. 29, 2001) (affirming ALJ's finding that doctor's opinion "established that claimant's totally disabling respiratory impairment, if any, did not arise out of coal mine employment" under Section 718.305(d)); *Rose v. Elkins Energy Corp.*, BRB No. 99-0623 BLA, 2000 WL 35927715, slip op. at 2-3 (Mar. 17, 2000) (affirming ALJ's finding that doctor's opinion that "miner's pneumoconiosis had not resulted in respiratory symptoms or disability" rebutted fifteen-year presumption). Thus, Eastern is plainly wrong in claiming the rule-out standard is unachievable.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 12,294 words, as counted by Microsoft Office Word 2010.

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I hereby certify that on January 28, 2014, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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# ADDENDUM OF STATUTES AND REGULATIONS

## The fifteen-year presumption

### 30 U.S.C. § 921 (2014)

#### 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.

**Current regulation implementing the fifteen-year presumption**  
**20 C.F.R. § 718.305 (2014)**

**Presumption of pneumoconiosis.**

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

(b) *Invocation.*

(1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) The miner or survivor cannot establish entitlement under § 718.304 by means of chest x-ray evidence; and

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) does not apply.

(2) The conditions in a mine other than an underground mine will be considered “substantially similar” to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner’s affidavit or testimony, or a spouse’s affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.

(4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner’s physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner’s pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits

(including augmented benefits) if the claim were approved.

(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.

(2) *Survivor’s claim.* In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner 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 death 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.

## Previous regulation implementing the fifteen-year presumption

### 20 C.F.R. § 718.305 (1980-2013)

#### **Presumption of pneumoconiosis.**

(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.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 718.204.

(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 disease of unknown origin.

(e) [added on May 31, 1983, by 48 Fed. Reg. 24271, 24288] This section is not applicable to any claim filed on or after January 1, 1982.

## Current regulation governing subsequent claims

### 20 C.F.R. § 725.309 (2014)

#### **Additional claims; effect of prior denial of benefits.**

(a) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim must be merged with the earlier claim for all purposes. For purposes of this section, a claim must be considered pending if it has not yet been finally denied.

(b) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a request for modification of the prior denial and will be processed and adjudicated under § 725.310.

(c) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a subsequent claim for benefits. A subsequent claim will be processed and adjudicated in accordance with the provisions of subparts E and F of this part. Except as provided in paragraph (1) below, a subsequent claim must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules apply to the adjudication of a subsequent claim:

(1) The requirement to establish a change in an applicable condition of entitlement does not apply to a survivor's claim if the requirements of §§ 725.212(a)(3)(ii), 725.218(a)(2), or 725.222(a)(5)(ii) are met, and the survivor's prior claim was filed— (i) On or before January 1, 2005, or (ii) After January 1, 2005 and was finally denied prior to March 23, 2010.

(2) Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(3) For purposes of this section, the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(4) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(5) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

(6) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(d) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid will be subject to collection or offset under subpart H of this part.

**Former regulation governing subsequent claims**  
**20 C.F.R. § 725.309 (2001-2013)**

**Additional claims; effect of a prior denial of benefits.**

- (a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.702.
- (b) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes. For purposes of this section, a claim shall be considered pending if it has not yet been finally denied.
- (c) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a request for modification of the prior denial and shall be processed and adjudicated under § 725.3 10.
- (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.2 18 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
- (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
- (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied

solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725 .463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter (see § 725.4(d)), a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine

**20 C.F.R. § 725.309 (2001-2013) continued:**

operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart H of this part.