

No. 13-2508

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

CONSOLIDATION COAL COMPANY,

Petitioner

v.

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF RELATED CASES

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

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

- Consol of Kentucky v. Atwell, No. 13-1220
- Laurel Run Mining Co. v. Maynard, No. 12-2581
- Island Creek Coal Co. v. Hargett, No. 13-1193
- West Virginia CWP Fund v. Cline, No. 13-1914
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- West Virginia CWP Fund v. Reed, No. 12-1104

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BRIEF FOR THE FEDERAL RESPONDENT

JURISDICTIONAL STATEMENT

This case arises from Respondent Herbert Williams's claim for benefits under the Black Lung Benefits Act (the "BLBA" or the "Act"), 30 U.S.C. §§ 901-944 (2006 & Supp. VI 2012).¹ On October 10, 2012, Administrative Law Judge

¹ Unless otherwise noted, all citations in this brief to the BLBA are to the 2012 version of Title 30. Two portions of the BLBA -- including 30 U.S.C. § 921(c)(4), the primary object of this dispute -- were amended in 2010. *See infra* at 11-14.

Adele H. Odegard (“the ALJ”) awarded BLBA benefits to Williams. Joint Appendix (“J.A.”) 88-103. Petitioner Consolidation Coal Company (“Consolidation”) timely appealed the award to the Benefits Review Board on October 22, 2012. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ’s decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On October 30, 2013, the Board issued a final order affirming the award of benefits. J.A. 104-14. Consolidation timely petitioned this Court to review the Board’s order on December 13, 2013. J.A. 115-19; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions). This Court has jurisdiction over Consolidation’s petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) -- Williams’s exposure to coal dust -- occurred in West Virginia, within the jurisdictional boundaries of this Court. *See Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989).

STATEMENT OF THE ISSUE

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain claimants who worked as coal miners for at least fifteen years and who suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. There is no question that Williams is entitled to invoke this presumption.

One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

The question presented is whether the regulation adopting the rule-out standard is permissible.²

² Consolidation also challenges the ALJ's calculation of Williams's smoking history and the role it played in the ALJ's discrediting of Consolidation's expert opinions on disability-causation. Consolidation Br. at 2, 20-45. The Director addresses only Consolidation's legal challenges to the rebuttal standard in this brief, not whether the ALJ's calculation of Williams's smoking history, and her corresponding credibility findings, are supported by substantial evidence.

STATEMENT OF THE CASE

Because the Director addresses only Consolidation's legal challenges to the ALJ's award, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (which is detailed *infra* at 11-18) and their application in the decisions below.

A. The ALJ's December 2010 award of benefits

Williams filed this claim on September 4, 2007. J.A. 57. The district director issued a proposed decision and order awarding benefits in April 2008. Consolidation requested an ALJ hearing, which was held on December 15, 2009.

Id.

Following the hearing, but before the case was decided, Congress restored 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement for all claims filed after January 1, 2005, and pending on or after March 23, 2010. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013). The ALJ accordingly allowed the parties to submit additional evidence and argument regarding the revived presumption. J.A. 49-52. After receiving the parties' submissions, the ALJ found, among other things, that Williams had more than 30 years of qualifying coal mine employment

and was totally disabled by a respiratory impairment. J.A. 72. Because Williams met the other filing requirements, the ALJ invoked the fifteen-year presumption.

Id.

Turning to rebuttal, the ALJ found that Consolidation could rebut only on disability-causation grounds,³ and had to “rule out any causal relationship between the miner’s disability and his coal mine employment by a preponderance of the evidence.” J.A. 73 (citations omitted).

Reviewing the evidence, the ALJ observed that Consolidation’s experts, Drs. Spagnolo and Ghio, both attributed Williams’s respiratory impairment to smoking-induced COPD. She gave their opinions no weight, however. J.A. 73-75. First, she found that Dr. Spagnolo relied on an inaccurate smoking history (wrongly believing that the miner continued to smoke until 2008 whereas the ALJ determined he quit in 1981), and additionally, that Dr. Ghio did not fully explain his conclusions. J.A. 75. In particular, she faulted Dr. Ghio for not explaining why Williams’s most recent pulmonary function test showed a smoking-related impairment when it was taken 25 years after he had stopped smoking and produced

³ Prior to invoking the fifteen-year presumption, the ALJ found that Williams had affirmatively established clinical pneumoconiosis by x-ray and doctor opinion. J.A. 62-69. Consequently, Consolidation could not rebut the presumption by proving that the miner did not have the disease.

far worse results than tests taken closer in time to when he smoked. *Id.* Without a credible medical opinion on the cause of Williams's disability, the ALJ ruled that Consolidation could not establish rebuttal, and she awarded benefits. *Id.*

B. The Board's December 2011 remand

The Board affirmed as unchallenged on appeal the ALJ's findings on the length of employment and total respiratory disability. The Board also affirmed the existence of clinical pneumoconiosis. It therefore found the presumption properly invoked. J.A. 84.

The Board agreed with Consolidation, however, that the ALJ's findings regarding Williams's smoking history could not be affirmed. J.A. 85. According to the Board, the ALJ failed to provide "valid reasons for her credibility determinations" supporting her conclusion that Williams last smoked in 1981. And because the ALJ "discredited the opinions of Drs. Spagnolo and Ghio in whole or in part on the ground that they relied on an inaccurate smoking history," the Board vacated the ALJ's finding that Consolidation failed to rebut the Section 411(c)(4) presumption. J.A. 86.

On remand, the Board instructed the ALJ to "reassess the evidence of record relevant to the issues of the length and extent of claimant's smoking history and rebuttal of the amended Section 411(c)(4) presumption, and to fully explain the

basis for her findings of fact, and conclusions of law[.]” J.A. 86 (citations omitted).

C. The ALJ’s October 2012 award of benefits on remand

On remand, the ALJ went into great detail assessing the evidence of Williams’s smoking history, spending seven single-spaced pages to do so. J.A. 90-97. After this thorough review, she reiterated her previous conclusion that Williams had a 26 pack-year history of smoking, ending in 1981. J.A. 97.

Citing this Court’s decision in *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980), the ALJ required Consolidation to prove on rebuttal that Williams “does or did not have pneumoconiosis, or that his respiratory impairment did not arise out of, or in connection with, his coal mine employment.” J.A. 97. Because the Board had affirmed her previous finding that Williams suffered from simple clinical pneumoconiosis, the ALJ observed that the first method was foreclosed. *Id.*

The ALJ then found that Consolidation failed to establish rebuttal on disability-causation grounds. J.A. 98. Relying on her reconsidered smoking-history findings, the ALJ once again discredited Dr. Spagnolo’s opinion as premised on an inaccurate smoking history. J.A. 99. Moreover, she discredited Dr. Ghio’s opinion, finding numerous inconsistencies and omissions in his

interpretation of the pulmonary function testing and other medical evidence. J.A. 100. The ALJ thus concluded: “I find that no opinion articulates a rationale whereby the contributory nature of the Claimant’s stipulated coal mine dust exposure can be ruled out as a cause of his disability.” *Id.* She once again awarded benefits pursuant to the presumption.

D. The Board’s October 2013 affirmance

Consolidation appealed to the Benefits Review Board, which affirmed. J.A. 104-13. The Board first rejected, as contrary to established Board precedent and newly-promulgated Department regulations, Consolidation’s argument that the Section 921(c)(4) rebuttal provisions apply only to the Secretary of Labor and that therefore the ALJ had improperly limited the scope of rebuttal. J.A. 107 n.4. The Board then affirmed, as supported by substantial evidence, the ALJ’s conclusions regarding Williams’s smoking history. J.A. 109. It accordingly upheld the ALJ’s discrediting of Dr. Spagnolo’s opinion as based on an inaccurate smoking history and Dr. Ghio’s opinion as inadequately explained and reasoned. J.A. 111-12. The Board therefore affirmed the ALJ’s finding that Consolidation had not rebutted the presumption on disability-causation grounds because its expert opinions on causation were not credible. J.A. 112. This appeal followed.

SUMMARY OF THE ARGUMENT

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

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

The regulation is also perfectly consistent with the Supreme Court’s decision in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976). *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner’s disability is unrelated to pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows

for rebuttal on that ground. Contrary to Consolidation's suggestion, *Usery* does not hold that employers must be allowed to rebut the presumption merely by proving that pneumoconiosis is not a "substantial" cause of a miner's disability. Like the statute itself, *Usery* is silent on that point. Consolidation's challenge to the regulation should therefore be rejected.

ARGUMENT

A. Standard of Review

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

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

1. The rule-out standard in context

Consolidation's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Williams's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Consolidation Br. at 10-20. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is

simple: in light of the statute’s silence on the topic, is the Department’s regulation permissible under *Chevron*? Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather than discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Consolidation’s challenge to the regulatory rule-out standard.⁴

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

The BLBA, originally enacted in 1969, is designed to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the medical and scientific difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)’s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: “If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally

⁴ At the outset (and as we discuss below), it is important to note that the Sixth Circuit -- the only court to directly address the issue -- has held that the rule-out standard applies to responsible operators. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013). No court has held otherwise.

disabled due to pneumoconiosis[.]” 30 U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.⁵ In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.⁶ It therefore applies to Williams’s claim, which was filed in 2007 and remains pending. J.A. at 57.

On September 25, 2013, the Department of Labor promulgated a regulation (“revised section 718.305” or “revised 20 C.F.R. § 718.305”) implementing the fifteen-year presumption.⁷ The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.⁸ *See infra* at 11-19; Consolidation

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

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

⁷ Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners’ and Survivors’ Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 718.305).

⁸ 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners’ Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e)

Br. at 16, n.3. Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses Consolidation’s petition through the lens of revised section 718.305.⁹

b. Elements of entitlement

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

to account for Congress’s removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. See 20 C.F.R. § 718.305 (2012).

⁹ The revised regulation applies to all claims affected by the statutory amendment. See Revised 20 C.F.R. § 718.305(a). Consolidation does not argue that the revised regulation should not be applied. The Tenth Circuit, the only court to consider the issue, recently held that the amended rules in section 718.305 apply retroactively “because they do not change existing law and are substantially consistent with prior regulations and agency practices.” *Antelope Coal*, 2014 WL 804008 at *7 (citations omitted). See also *Smiley v. Citibank*, 517 U.S. 735, 744 n.3 (1996) (Regulations that do not “replace[] a prior agency interpretation” can be applied to “antecedent transactions” without violating the general rule against retrospective rulemaking.).

Pneumoconiosis comes in two forms, clinical and legal. “Clinical pneumoconiosis” refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). “Legal pneumoconiosis” is a broader category, including “any chronic lung disease . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2).¹⁰ Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.¹¹

c. The fifteen-year presumption and methods of rebuttal

The same four basic elements of entitlement apply in claims governed by section 921(c)(4)’s fifteen-year presumption. To invoke the presumption, a miner must establish (in addition to fifteen years of qualifying mine employment) total disability by a preponderance of the evidence. Once invoked, the miner is

¹⁰ This has been true since 1978, when the current statutory definition of pneumoconiosis -- “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment” -- was enacted. 30 U.S.C. § 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. 95-239 § 2(b), 92 Stat. 95 (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as “a chronic dust disease of the lung arising out of employment in a coal mine.” 30 U.S.C. § 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 32-35.

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

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

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

The first method is to prove that the miner does not have a lung disease caused by coal mine employment. To do this, the employer must prove (A) that the miner does not have legal pneumoconiosis *and* (B) either that the miner does not have clinical pneumoconiosis, or that the miner’s clinical pneumoconiosis was

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

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

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

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

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

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

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

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

The former version of the regulation also provided for those same methods of rebuttal, albeit in language that was less clear.¹² From 1980 until 2013, 20 C.F.R. § 718.305(a) provided that the presumption could be rebutted “only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” Clause (A) allowed employers to rebut the presumption by proving that a miner did not have legal or clinical pneumoconiosis. Clause (B) permitted rebuttal by proving that a miner’s disability was unrelated to pneumoconiosis or that a miner’s clinical pneumoconiosis was not caused by coal mine employment.¹³

d. The rule-out standard

The revised regulations also explain what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what

¹² The revised regulation’s language was designed “to more clearly reflect that all three of the presumed elements may be rebutted.” 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107.

¹³ Former section 718.305(d)’s rebuttal provision uses the same language that 30 U.S.C. § 921(c)(4) uses to describe the rebuttal options available to “the Secretary.” Since the definition of pneumoconiosis was expanded in 1978 to include legal pneumoconiosis, however, it has logically exhausted all possible methods of rebuttal for employers as well as the government. *See infra* at 34-37.

claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. § 718.305(d)(1)(i). For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b). But if the employer fails to rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a “*substantially contributing cause*” of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner’s pneumoconiosis and disability, however, the employer must “establish that *no part* of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis[.]”

Revised section 718.305(d)(1)(ii) (emphasis added).¹⁴ The same was true under

¹⁴ The ALJ applied the rule-out standard in this case. *See, e.g.*, J.A. 100 (“the burden is on the Employer to affirmatively rebut the presumption of disability due to pneumoconiosis by ruling out an occupational connection to the Claimant’s impairment. . . . I find that no opinion articulates a rationale whereby the contributory nature of Claimant’s stipulated coal mine dust exposure can be ruled out as a cause of his disability.”).

the prior regulation. *See* 20 C.F.R § 718.305(d)(2011) (the presumption “will be considered rebutted” if the liable party establishes that “the cause of death or total disability did not arise *in whole or in part* out of dust exposure in the miner’s coal mine employment”) (emphasis added). This “no part” or “in whole or in part” standard is often referred to as the “rule-out” standard.¹⁵ The primary legal dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii), is a permissible interpretation of the Act.¹⁶

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

Consolidation argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that pneumoconiosis did not “substantially” contribute to Williams’s disability.

¹⁵ The Sixth Circuit sometimes describes it as a “contributing cause” standard. *See Big Branch Resources*, 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding “substantially contributing” cause standard the coal company advocates.

¹⁶ As explained in the preamble to the revised regulation, the rule out standard does *not* (1) require employers to disprove disability causation by more than a preponderance of the evidence; or (2) govern the degree of medical certainty with which a doctor’s opinion must be expressed. 78 Fed. Reg. 59107. It merely establishes the fact that must be proved -- *i.e.*, that pneumoconiosis played no role in the miner’s disability. “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.” *Id.*

Consolidation Br. at 16, 20.¹⁷ At times, Consolidation describes its proposed “substantial contribution” standard as a third method of rebuttal and frames its argument as whether the ALJ improperly limited it to the two statutory methods of rebuttal contained in 30 U.S.C. § 921(c)(4): proving that the miner does not have pneumoconiosis or proving that pneumoconiosis does not cause the miner’s disability. *See, e.g.*, Consolidation Br. at 10-12. Consolidation’s “substantial contribution” standard is, however, “not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain – that pneumoconiosis caused total disability.” *Big Branch Resources*, 737 F.3d at 1070 (6th Cir. 2013); *see* 20 C.F.R. § 718.204(c) (including substantially contributing cause standard in the definition of disability causation). Consolidation identifies no limitation

¹⁷ While the ALJ articulated the rule-out standard in her statement of governing legal standards (*see* J.A. 97), it is unlikely that the rule-out standard played a role in the outcome of her decision. The ALJ did not reject the opinions proffered by Consolidation’s medical experts because they were insufficient to meet the rule out standard; she concluded that those opinions were generally not credible due to flaws in the doctors’ reasoning. *See* JA 98-100. To the contrary, the ALJ clearly understood that Consolidation’s experts ruled out any relationship between coal dust exposure and Williams’s disability. *See, e.g.*, J.A. 99 (Dr. Spagnolo’s opinion “was that Claimant’s disabling impairment was due to his smoking history and not at all to his coal mine employment”; “Dr. Ghio determined the Claimant’s disabling impairment to be due to the smoking history, and not pneumoconiosis.”). The Director nevertheless requests that the Court address Consolidation’s legal challenge to revised section 718.305(d)(1)(ii), which has been challenged in a number of other cases pending before this Court. *See* Statement of Related Cases, *supra* at x.

imposed on its ability to rebut other than the rule-out standard.¹⁸ The Director's response therefore focuses on that issue.

Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Consolidation's challenge is governed by *Chevron's* familiar two-step analysis. As this Court explained in upholding another BLBA regulation:

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

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

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

Id. (quoting *Chevron*, 467 U.S. at 843-44).¹⁹

¹⁸ Nor could it, because the ALJ did not reject any of Consolidation's medical evidence as outside the scope of permissible rebuttal. *See U.S. Steel Corp. v. Gray*, 588 F.2d 1022, 1225-26 (5th Cir. 1979) (even assuming that a coal mine operator might wish to adduce a type of rebuttal evidence that is not encompassed by the rebuttal clause of section [921(c)(4)], the petitioner in this case was not prevented by the hearing officer from submitting whatever rebuttal evidence it wished to submit."); *Antelope Coal Co.*, 2014 WL 804008 at *11.

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

Applying *Chevron*'s first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.²⁰ Congress has therefore left a gap for the Department to fill.

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

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

¹⁹ Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove Coal*, 480 F.3d at 292. That is the case here. The regulation falls within the Secretary of Labor's statutory authority "to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]" 30 U.S.C. § 936(a). *See also Bethlehem Mines Corp. v. Massey* ("*Massey*"), 736 F.2d 120, 124 (4th Cir. 1984) ("The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.").

²⁰ The statute addresses rebuttal only in the context of claims in which the government is the responsible party, explaining that the Secretary can rebut the presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. § 921(c)(4). The second method encompasses disability causation. *See supra* at 19. But it does not specify what showing the government must make to establish rebuttal on that ground.

“substantial contribution” standard may also be a permissible interpretation is irrelevant.²¹ “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845. *Cf. Pauley*, 501 U.S. at 702 (“[I]t is axiomatic that the Secretary’s interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary’s view need be only reasonable to warrant deference.”) (citations omitted).

Deference to this regulation is particularly appropriate because “[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*,

²¹ The Director’s rule-out standard and Consolidation’s “substantial contributing cause” standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a “significant,” “necessary,” or “primary” cause of a miner’s disability might also be permissible. So long as the rule-out standard the Director actually adopted falls within the range of permissible alternatives, it must be upheld.

501 U.S. at 697. The fact that the rule-out standard establishes criteria for rebutting, rather than establishing, a claimant's entitlement does not change the fact that it establishes medical eligibility criteria. *Massey*, 736 F.2d at 124 ("The wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress").

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

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106 (Responding to comments suggesting that the Department eschew the rule-out standard in favor of the "substantially contributing cause" standard Consolidation advocates here.) Congress amended the BLBA in 1972 because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86. Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" those miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17).

Revised section 718.305(d)(1)(ii) appropriately furthers that goal by imposing a rebuttal standard that is demanding, but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis. The rule-out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. § 718.305(d)(1)(i); cf. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore relevant only if claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.²²

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

²² 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).

The Department adopted the rule-out standard by regulation over 30 years ago. *See* 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if “the cause of . . . total disability did not arise *in whole or in part* out of dust exposure in the miner’s coal mine employment.”) (emphasis added). This fact alone supports the 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) (Deferring to agency interpretation that was “longstanding, has been consistently applied in the same manner, and comports with the congressional intent of the governing statute.”). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

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

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

Only one court of appeals has addressed the rule-out standard since section 921(c)(4) was revived in 2010, and it affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (agreeing with the Director that an employer “must show that the coal mine employment *played no part* in causing the total disability.”). The issue was presented to this Court in *Owens*, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.²³

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App’x. 563, 567 (4th Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.²⁴

²³ Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery*. 724 F.3d at 559. Consolidation advances the same argument, which is addressed *infra* at 33-40. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

²⁴ *Rose* was a claim for survivors’ benefits by the miner’s widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. §

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

911(c)(4) ("there shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis").

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.²⁵ The interim presumption was substantially easier to invoke than the fifteen-year presumption, being available to any miner who could establish ten years of employment (or, in some circumstances, even less) and either total disability or clinical pneumoconiosis. *See* 20 C.F.R. § 727.203(a) (1999); *Pittston Coal v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the interim presumption could be rebutted if the operator proved that the miner’s death or disability did not arise “*in whole or in part* out of coal mine employment[.]” 20 C.F.R. § 727.203(b)(3) (1999) (emphasis added).²⁶ As this Court held in *Massey*, “[t]he underscored language makes it plain that the employer must *rule out* the causal relationship

²⁵ The Part 727 “interim” regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 725.4(d); *Mullins Coal Co.*, 484 U.S. at 139. As this Court has recognized, the interim presumption is “similar” to the fifteen-year presumption, *Colley & Colley Coal Co.*, 59 F. App’x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. 20 C.F.R. § 725.4(d).

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

between the miner’s total disability and his coal mine employment in order to rebut the interim presumption.” 736 F.2d at 123.²⁷ This, of course, is the same language that 20 C.F.R. § 718.305(d) used to articulate the rule-out standard from 1980 until 2013. See *supra* at 19-20. As the Tenth Circuit recently explained, there is “no reason to interpret § 718.305(d)(2010) or the revised § 718.305(d)(1)(ii) (2013) any differently” than section 727.203(b)(3). *Antelope Coal*, 2014 WL 804008, at *2.

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

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

evidence rule exceeds its congressional mandate.” 736 F.2d at 124.²⁸ If rule-out is an appropriate rebuttal standard for the easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

In sum, the rule-out standard adopted in revised section 718.305(d)(1)(ii) and its predecessor fill a statutory gap in a way that advances section 921(c)(4)’s purpose, were implicitly endorsed when Congress re-enacted that provision without change in 2010, and are consistent with this Court’s interpretations of both the fifteen-year presumption and the similar interim presumption. The rule-out standard is therefore a reasonable interpretation of the Act entitled to this Court’s deference.

²⁸ Consolidation cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the section 921(c)(4) presumption are not similarly situated to claimants who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. § 718.202(a)(1), (b). Indeed, the main point underlying congressional enactment (and restoration) of these presumptions was to make it easier for claimants to prove entitlement. Consolidation can hardly complain about its heavier burden – that’s what Congress intended.

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

Consolidation repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. See Consolidation Br. at 12-15, 18-20. From Consolidation's brief, one might expect to find in *Usery* a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same language that the prior version of section 718.305 used to describe rebuttal options

for employers as well as the government. As explained above, *supra* at 15-18, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

But this was not true when section 921(c)(4) was enacted in 1972 or when *Usery* was decided in 1976. Before the statutory definition of pneumoconiosis was expanded in 1978, only miners disabled by *clinical* pneumoconiosis were generally entitled to BLBA benefits. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) (“When the BLBA was originally enacted,” the definition of pneumoconiosis encompassed “only those diseases the medical community considered pneumoconiosis[,]” *i.e.* clinical pneumoconiosis.); *Usery*, 428 U.S. at 6-7.²⁹

²⁹ This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. § 718.201(a)(1) (2013) (“***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis”) (emphasis added) *with* 20 C.F.R. § 410.110(o) (1970) (“***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis”) (emphasis added) *and* 20 C.F.R. § 410.110(o)(1) (1976) (“***pneumoconiosis*** . . . includes coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis”) (emphasis added). After several presumptions (including the 15-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. *See* 20 C.F.R. § 410.110(o)(2)-(3)

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits.³⁰ This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis (because the miner in question did suffer from that condition), or (B) that the miner's disability did not arise from the miner's exposure to coal dust (because the miner's disabling emphysema did arise from coal dust exposure). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in Section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting

(1976). But the general regulatory definition of pneumoconiosis did not include what is now called "legal" pneumoconiosis until after statutory definition was broadened in 1978. *See* 20 C.F.R. § 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

³⁰ Given the long-established judicial acceptance of the concept of "legal pneumoconiosis," *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995), it may be difficult to imagine a time when legal pneumoconiosis was not compensable. But before 1978, that was the case.

sentence, miners invoking against the federal government were effectively entitled to benefits even though they were not disabled by clinical pneumoconiosis.

This is the precise scenario animating *Usery's* discussion of the fifteen-year presumption. The operator-plaintiffs in *Usery*, concerned that section 921(c)(4)'s rebuttal-limiting sentence would be applied to private employers as well as the government, argued that the sentence effectively created an unconstitutional irrebuttable presumption “because it establishes liability even though it might be medically demonstrable in an individual case that the miner’s pneumoconiosis was mild and did not cause the disability” and “that the disability was wholly a product of other disease” caused by coal dust exposure, that “is not otherwise compensable under the Act.”³¹ 428 U.S. at 34-35. The Court recognized that “[t]he effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years’ employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case

³¹ Although the quoted sentences of *Usery* do not specify that the disabling disease was caused by coal dust, it is clear from the first sentence of that paragraph that the Court is discussing a miner who is “totally disabled by some respiratory or pulmonary impairment arising in connection with his employment[.]” 428 U.S. at 34. It is equally true from context. If the disabling disease was not caused by exposure to coal dust, the employer could rebut the presumption by proving that the miner’s disability was unrelated to coal mine employment – one of the two rebuttal methods allowed under section 921(c)(4)'s rebuttal-limiting sentence.

of pneumoconiosis[,]” but avoided the constitutional question by holding that section 921(c)(4)’s rebuttal-limiting sentence “is inapplicable to operators.” *Id.* at 34, 35-37.

It is true that *Usery* “confirmed the existence of a *limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in § 921(c)(4) are not logically equivalent to the methods that would otherwise be available.” *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring) (quoted in Consolidation. Br. at 22). Section 921(c)(4)’s rebuttal-limiting sentence barred the Secretary from defeating the presumption by proving that a miner was disabled by a disease caused by coal dust other than pneumoconiosis, a rebuttal method that “would otherwise be available” in 1976. As a result, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any “chronic lung disease or impairment . . . arising out of

coal mine employment.” 20 C.F.R. § 718.201(a)(2).³² As a result, the scenario motivating *Usery*’s discussion of the rebuttal-limiting sentence became moot.

Proving that a miner’s disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every lung disease caused by coal dust exposure is legal

pneumoconiosis.³³ To the contrary, because an employer must rebut legal as well as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.³⁴

³² *See supra* at 33.

³³ The irrelevance of the rebuttal-limiting sentence in the post-1978 regime is similarly illustrated by the Court’s description of its effect, which was to “grant benefits to any miner with 15 years’ employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis[.]” 428 U.S. at 34. Today, of course, every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis. It is only fitting that black lung law has evolved as our understanding of the effects of coal dust exposure has grown. *See, e.g., Harman Min. Co. v. Director, OWCP*, 678 F.3d 305, 314 (4th Cir. 2012) (observing that regulatory amendments were based on advances in medical and scientific knowledge set forth in the regulatory preamble).

³⁴ The many authorities applying the rebuttal-limiting sentence’s language to operators -- including 20 C.F.R. § 718.305 (1981) and this Court’s decision in *Rose*, 614 F.2d at 939 -- simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Once the definition of pneumoconiosis was expanded to include legal pneumoconiosis, “[t]he only ways that any liable party -- whether a mine operator or the government -- can rebut the 15-year presumption are the two set

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

forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements." While Section 921(c)(4)'s rebuttal-limiting sentence never directly applied to operators, it encompassed all logically available rebuttal methods for employers as well as the Secretary after 1978. The prior regulation's wording has produced understandable confusion on that point, which is one reason the revised regulation no longer uses the same text.

Consolidation claims (Consolidation Br. 13 n.2) that this explanation, which is also found in the preamble to the revised regulation, 78 Fed. Reg. 59106, is inconsistent with the position the Director took in *Owens*. Not so. The Director made this same argument to this Court in *Owens*. See *Owens*, 724 F.3d at 555.

rule-out standard, they essentially articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a “substantial” cause of a miner’s disability.³⁵ It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption by disproving disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.³⁶ Consolidation’s argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

³⁵ As a result, Consolidation’s extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Consolidation Br. at 17-20. In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. 428 U.S. at 37 and n.40 (observing that “the role of regulations is not merely interpretive; they may instead be designedly creative in a substantive sense, if so authorized”).

³⁶ To the extent that Consolidation’s brief could be read to suggest that the rule-out standard itself is an interpretation of the text of section 921(c)(4)’s rebuttal-limiting sentence, it cites nothing in *Usery* or any other case supporting that claim. Such an interpretation would also be inconsistent with the Director’s explanation for adopting the rule-out standard in the revised regulation and the fact that the rule-out standard also applied to 20 C.F.R. § 727.203’s interim presumption, which did not derive from section 921(c)(4)’s text.

CONCLUSION

Consolidation's legal challenges to the regulatory rebuttal standard should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration with an instruction to apply revised section 718.305, including the rule-out rebuttal standard.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B). This brief contains 9,235 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

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ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption

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

* * *

(c) Presumptions

* * *

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

Revised section 718.305

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

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

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

* * *

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

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

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

(d) Rebuttal—

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

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

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

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

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

* * *

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

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

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

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

(e) This section is not applicable to any claim filed on or after January 1, 1982.³⁷

³⁷ Subsection (e) was added on May 31, 1983, by 48 Fed. Reg. 24271, 24288.