

No. 12-9590

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

**ANTELOPE COAL COMPANY/
TINTO ENERGY AMERICA,
Petitioners**

v.

ROLAND E. GOODIN

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 PRIOR OR RELATED CASES

The Director is not aware of any prior or related cases.

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BRIEF FOR THE FEDERAL RESPONDENT

**STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION**

This case involves a claim for disability benefits filed by Rolland E. Goodin (Goodin or the miner) pursuant to the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). On

August 12, 2011, Administrative Law Judge Richard Malamphy (the ALJ) issued a decision awarding Goodin benefits and ordering his former employer, Antelope Coal Company/Tinto Energy America (Antelope), to pay them. Appendix, p. (A.) 254. Antelope appealed this decision to the United States Department of Labor Benefits Review Board (the Board) on September 7, 2011, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). A.297. 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 September 27, 2012, the Board affirmed the award. A.285. Antelope petitioned this Court for review on November 21, 2012. The Court has jurisdiction over this petition because section 21(c) of the Longshore Act, 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury, within the meaning of section 21(c), arose in Wyoming, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUES

Former miners who (1) have a totally disabling respiratory or pulmonary condition and (2) worked for at least fifteen years in either underground coal mines or surface mines with conditions “substantially similar to conditions in an underground coal mine” are rebuttably presumed to be entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4). The ALJ found that Gooden, a totally disabled former miner who worked for more than fifteen years in various surface mines, had successfully invoked section 921(c)(4)’s fifteen-year presumption and that Antelope’s medical evidence failed to rebut it. He consequently awarded benefits.

The issues presented are:

1. Whether the ALJ permissibly found that Antelope had failed to rebut the fifteen-year presumption by proving that Goodin’s disabling lung disease was unrelated to his coal mine employment.
2. Whether the ALJ permissibly found that Goodin worked for more than fifteen years in surface mines with conditions “substantially similar” to those in underground mines.
3. Whether Goodin’s award should be vacated because Antelope believes that the miner’s right “to substantiate his . . . claim by means of a complete pulmonary evaluation” provided by the Department of Labor was violated, where the miner makes no such argument.
4. Whether the ALJ’s failure to consider certain medical evidence submitted by Antelope requires that the case be remanded, where rebuttal would not be possible even if that evidence had been considered and credited.

STATEMENT OF THE CASE

Goodin filed a claim for black lung benefits in 2007. A.1.¹ Following an administrative hearing, ALJ Richard K. Malamphy awarded benefits, finding that the miner was entitled to the fifteen-year presumption and that Antelope had failed to rebut it. A.254; R.160. The coal company appealed to the Board, arguing, *inter alia*, that the ALJ improperly limited the methods by which Antelope could prove rebuttal. In the alternative, the coal company asserted that the ALJ should not have invoked the presumption in the first place because Goodin – who worked at a surface coal mine – did not have at least fifteen years of coal mine employment with conditions substantially similar to those in underground employment. Finally, Antelope argued that the Director did not provide Goodin with a complete pulmonary examination, as required by statute and regulation, and that the ALJ failed to consider all of the relevant evidence. The Board rejected these arguments, A.285, R.1, and Antelope thereafter petitioned this Court for review.

¹ The Index of Documents in the Certified Case Record (R.), submitted October 5, 2012, by Board Clerk Thomas O. Shepherd, does not contain separate entries for the hearing exhibits, hearing transcript, or administrative proceedings occurring before the ALJ's August 2011 award of benefits. The Director is therefore unable to provide separate references to the Certified Case Record for these documents.

STATEMENT OF THE FACTS

Goodin was sixty-seven years old at the time of the administrative hearing in 2010. A.1. He was employed as a miner in aboveground strip mines for at least twenty-five years, ending in 2006. A.5, 268. He smoked one-half to one and one-half packs of cigarettes a day for over thirty years, ending in 2006. A.258, 281.

A. Statutory and Regulatory Background.

1. The Definition of Pneumoconiosis.

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as “black lung disease.” 30 U.S.C. § 901(a); 20 C.F.R. § 718.1(a). Since March 1, 1978, the Act has defined “pneumoconiosis” as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 30 U.S.C. § 902(b). Compensable pneumoconiosis takes two distinct forms, “clinical” and “legal.” 20 C.F.R. § 718.201(a).

“Clinical pneumoconiosis” refers to a cluster of diseases recognized by the medical community as fibrotic reactions of lung tissue to the “permanent deposition of substantial amounts of particulate matter in the lungs,” 20 C.F.R. § 718.201(a)(1), and is generally diagnosed by chest X-ray, biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). Clinical pneumoconiosis is

often referred to as “coal workers’ pneumoconiosis” or “CWP.” *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995) (explaining there is a difference between “the particular medical affliction ‘coal workers’ pneumoconiosis’ [and] the broader legal definition of pneumoconiosis”).

“Legal pneumoconiosis” is a broader category referring to “any chronic lung disease or impairment . . . arising out of coal mine employment,” 20 C.F.R. § 718.201(a)(2), and may be diagnosed by a physician “notwithstanding a negative X-ray,” 20 C.F.R. § 718.202(a)(4). “Legal pneumoconiosis” . . . includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2); *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (explaining clinical and legal pneumoconiosis); *see generally Energy West Mining Co. v. Hunsinger*, 389 Fed.Appx. 891 (10th Cir. 2010) (discussing “legal pneumoconiosis”).

Before 1978 the BLBA 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) (1976). This term generally encompassed only what is now known as clinical pneumoconiosis. *See* 20 C.F.R. § 410.101(o) (1970); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

2. The Fifteen-Year Presumption.

From its inception, the BLBA has included various presumptions to assist miners in proving that they are totally disabled by pneumoconiosis. Relevant to this case is 30 U.S.C. § 921(c)(4)'s fifteen-year presumption, which was enacted in 1972 and provides, in relevant part:

If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis The Secretary shall not apply all or a portion of the requirement . . . 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.

30 U.S.C. § 921(c)(4) (1972). *See also* 20 C.F.R. § 718.305 (implementing the fifteen-year presumption).

In short, section 921(c)(4) provides a rebuttable presumption of entitlement to miners who (1) suffer from a totally disabling respiratory or pulmonary condition and (2) worked for at least fifteen years in underground coal mines or surface mines with substantially similar conditions. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479 (10th Cir. 1989) (explaining that, if the fifteen-year presumption is invoked, the employer may rebut the presumption "by establishing

that the miner does not have pneumoconiosis or that his disability did not arise out of mine employment”).

In 1981, the fifteen-year presumption was eliminated for all claims filed after that year. Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (1981). Accordingly, subsection (e) was added to 20 C.F.R. § 718.305 to explain that the fifteen-year presumption would not be available in such claims. The regulation has not been amended since.² In 2010, Congress restored the fifteen-year presumption in section 1556 of the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010).³ This restoration applies to claims, such as this one, that were filed after January 1, 2005, and pending on or after March 23, 2010, the amendment’s enactment date. *Id.*; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011).

B. Relevant Facts.

There are two key disputes in this case. The first is medical. Antelope does not challenge the ALJ’s finding that Goodin is totally disabled by chronic

² While the current version of 20 C.F.R. § 718.305 does not, by its own terms, apply to claims filed after 1981, it remains the Department’s definitive interpretation of section 921(c)(4).

³ The Department has issued proposed regulations implementing section 921(c)(4) as revived in 2010. *See Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners’ and Survivors’ Entitlement to Benefits*, 77 Fed. Reg. 19456 (Mar. 30, 2012).

obstructive pulmonary disease (COPD).⁴ *See* Pet. Br. 8 (“Mr. Gooden has disabling pulmonary disease.”). If Goodin’s COPD is “significantly related to, or substantially aggravated by” his occupational exposure to coal mine dust, his COPD is compensable legal pneumoconiosis. *See* 20 C.F.R. § 718.201(b).

The second disputed issue is whether the conditions of Goodin’s work as a surface miner were substantially similar to conditions in underground mines. If so, he is entitled to the fifteen-year presumption, and Antelope bears the burden of proving that Goodin’s COPD is not legal pneumoconiosis. The evidence relevant to these two issues is set forth below.

1. Medical Opinion Evidence.

Dr. Andras Bodoni, a Board-certified internist, examined Goodin on July 23, 2007, at the Director’s request.⁵ A.14. Relying on physical examination results, work and social histories, study results, and a positive X-ray reading, the doctor diagnosed pneumoconiosis due to the miner’s twenty-five years of coal mine work, and reactive airway dysfunction syndrome (RADS) due to chemical

⁴ COPD “includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma.” 65 Fed. Reg. 79939 (Dec. 20, 2000). The doctors in this case describe Gooden’s respiratory condition as being chronic bronchitis or emphysema when not using the umbrella category of COPD.

⁵ The Act requires DOL to provide each claimant-miner with “an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. § 923(b); *see also* 20 C.F.R. §§ 725.405(b), 725.406(a).

exposure at work. Dr. Bodoni reported that Goodin's respiratory condition was totally disabling and that it was due to both pneumoconiosis and RADS. A.17.

Antelope deposed the doctor in October 2007. A.23. He explained that, while the miner's work in an open pit (as a surface miner) was "less exposure," all of the miner's work was "very decent exposure." A.31. When asked concerning the effect of Goodin's smoking, Dr. Bodoni replied that it was impossible to distinguish the effects of smoking from those of coal mine dust exposure. A.32.

Dr. Lawrence Repsher, a Board-certified internist and pulmonologist, examined Goodin on November 15, 2007, at Antelope's request. A.45, 155-56. Relying on physical examination results, work and social histories, study results, a negative X-ray and CT-scan, and review of Dr. Donald Smith's treatment records, Dr. Repsher reported that Goodin's respiratory condition was unrelated to coal mine employment because (1) there was no X-ray or CT-scan evidence of pneumoconiosis; (2) there were no lung biopsy slides for review; (3) the pulmonary function study results showed COPD (chronic obstructive pulmonary disease) but no CWP; and (4) the blood gas analyses showed no evidence of CWP but were "probably" related to the miner's COPD, which is not related to the miner's coal mine work. A.47-50.

Concerning factor number three – the miner's pulmonary function study results – Dr. Repsher explained that coal mine work caused a "statistically

significant presence of COPD, but not a clinically significant presence of COPD,” A.48; and that, while “[t]his does not mean that exposure to coal mine dust cannot cause clinically significant airway obstruction (COPD), but [sic] does indicate that it would be very unlikely in this specific individual miner.” A.48.

Antelope deposed Dr. Repsher in January 2011. A.152. The doctor stated that he had reviewed the medical opinions of Drs. Cecile Rose (*see infra* at 13-14), Robert Farney (*see infra* at 11-12), as well as additional evidence submitted at the October 2010 administrative hearing, none of which led him to change his opinion. A.159-60, 172. Dr. Repsher explained that Goodin’s centrilobular emphysema was not due to coal mine employment because such employment did not cause centrilobular emphysema. A.178. The doctor also explained that his opinion excluding coal mine work as a cause of the miner’s lung impairment was based upon the fact that pulmonary function testing showed “a disproportional decrease in his FEV1, not a proportional decrease in FEV1.” A.179. Finally, Dr. Repsher stated that all the evidence pointed to the fact that Goodin had very severe centrilobular emphysema, A.169, but that this condition did not prevent the miner from performing “continued heavy labor,” A.177.

Dr. Robert Farney, who is Board-certified internal medicine, pulmonary disease, and sleep medicine, examined the miner on July 7, 2008, at Antelope’s request. A.57. Relying on physical examination results, work and social histories,

study results, a negative X-ray and CT-scan, review of the treatment records of Dr. Donald Smith, the X-ray readings of record, and the medical opinions of Drs. Bodoni and Repsher, he diagnosed COPD in the form of emphysema. He explained that Goodin's COPD was due to smoking, not CWP, and that it rendered the miner totally disabled. A.64. Dr. Farney also observed that, [a]lthough [Goodin] was no doubt exposed to dusty conditions at various times, the risk for developing coal worker's [sic] [pneumoconiosis] is less in surface mining." *Id.* In response to Antelope's written questions, Dr. Farney explained that Goodin did not suffer from legal pneumoconiosis because smoking was the more likely cause of the miner's COPD, as a surface miner Goodin was less at risk, and there was no X-ray evidence showing CWP. A.65.

Antelope and Goodin deposed Dr. Farney in January 2011. A.180. The doctor stated at that time that "[m]iners who work in surface mining may have some cough and sputum production that we would diagnose as chronic bronchitis, but those who have any substantial pulmonary impairment, it's really only the cigarette smokers who showed that." A.219. Dr. Farney also observed that while Goodin's lungs showed "some evidence of some interstitial abnormality," that condition "arise[s] as a result of cigarette smoking but is generally not regarded as a finding in coal workers['] pneumoconiosis." A.208.

Dr. Cecile Rose, who is Board-certified in internal medicine, pulmonary medicine and general preventive and occupational medicine, and who is also a B-reader, examined Goodin on September 7, 2010, at the miner's request.

Claimant's Exhibit No. (CX) 8. She considered the miner's physical examination results, work and social histories, study results, a positive X-ray and CT-scan, treatment records, X-ray and CT-scan readings of record, and the medical opinions of Drs. Bodini, Repsher, and Farney. She concluded that "[Goodin's] lung disease [was] complex and multifactorial," that his respiratory condition was totally disabling, and that his coal mine work was "a substantial contributing cause." *Id.*

In May 2011, Goodin requested that Dr. Rose review the depositions of Drs. Repsher and Farney. A.250. Upon doing so, she disagreed with Dr. Repsher's statement that centrilobular emphysema is never due to coal mine employment; she explained that such emphysema is "the most common type of emphysema associated with both coal mine dust exposure and cigarette smoking":

Smoking and coal mine dust are both causes of emphysema, and the mechanisms of their effects are similar. Emphysema is characterized by the loss of the normal architecture of the lung due to an enlargement of the air sacs where gas exchange occurs. Centrilobular emphysema is the most common type of emphysema associated with both coal mine dust exposure and cigarette smoking. There is ample evidence in the published medical literature showing that the various histologic types of emphysema – centriacinar, centrilobular, focal, pancinar, and bullous – can occur from exposure to coal mine dust exposure and cigarette smoking.

A.251. Dr. Rose also disagreed with Dr. Repsher's conclusion that the miner's lung disease was not disabling, and observed that Dr. Repsher's statement concerning disproportional/proportional decrease in the FEV1 value was both "poorly explained" and not supported by the facts. A.252.

Concerning Dr. Farney's deposition statements, Dr. Rose disagreed with the doctor that Goodin's surface coal mine was not dusty. She explained that a miner's risk of having CWP was related to the amount of exposure, and that "a higher prevalence of CWP is associated with tenure in surface coal mining jobs." A.252. She also disagreed with Dr. Farney's statement that interstitial abnormality is never due to coal mine employment. A.252-53.

Finally, **Dr. Donald Smith** was Goodin's treating physician. CX 9. His records date from June 2006 to November 2009. The most noted diagnoses are COPD, pulmonary fibrosis, obstructive sleep apnea, and emphysema. A June 2006 report notes that an X-ray was not typical for CWP and suggests the miner's problem is fibrosis and emphysema.

2. Employment Evidence.

Goodin testified at the administrative hearing that he worked as a surface coal miner for approximately twenty-five years:

<u>Employer and period of employment</u>	<u>Position</u>
Kerr-McGee Coal Corp. (1981 -1998)	warehouse worker (4-5 years) equipment operator (3 years) equipment oiler (9 years)
Rio Tinto Energy (1998-2006) ⁶	equipment operator (8-9 years)

A.5, 122, 127.⁷

Goodin did not explain his job duties as a warehouse worker but did report that it was dusty. A.128. As an equipment operator, he had three separate job duties: driving a truck with an attached shovel; driving a water truck; and operating a machine called a scraper. As a shovel-truck driver, he went into the pit and hauled away dirt overburden; he also hauled coal to a hopper where the coal was processed. A.126. He explained that “truck drivers had to get down and go out and . . . help the shovel move down the wall” of the pit. A.120. And when transporting coal, he had to get out of the cab because there was always spillage: “Well, the coal keeps spilling out and after a while – [the trucks lining up] get out further and further away from the hopper. And you have to go in there and clean where there – the tires are, you know, so they can get up there and dump, make

⁶ Goodin indicated that Kerr McGee, Rio Tinto, and Antelope were inter-related. A.114-17, 122.

⁷ This chart reflects the miner’s testimony at the administrative hearing, A.122, 127, and the ALJ’s findings of fact, A.270, which Antelope accepts as true in its brief, Pet. Br. 5-6. The record evidence is not entirely consistent on the years Goodin worked in various positions. It is clear, however, that Goodin’s combined work as an equipment oiler and an equipment operator exceeds fifteen years.

their dump.” A.131. He explained that the dust was pulverized and that: “[I]t’s always kicking up a puff of dust as you’re going down the road,” A.127, with dirt on one side and coal on the other, with a gap of 120 to 130 feet, and that “you’re always having that dust kick up and just hang in the air on that,” A.148.

According to the miner, it was worse when the seasonal wind was blowing: it was “like a sand blaster sometimes.” A.132.

When Goodin drove a water truck, he was required to go into the pit to hook up water pumps, load his truck with water, and then spray the water in areas to keep down the coal dust in the air. A.123-25. He said he sometimes had to “dig a little sump” and install a pump in the pit if his truck got stuck, A.125-26, and that sometimes coal runs were closed if the water was not able to keep the coal dust down. A.129.

When Goodin operated a “scraper,” he “clean[ed] the top coal.” A.123. He reported that dust entered the cabs of the scraper machines because they were old: “There was no way [to keep the dust out], even when you closed the doors, it was just like a cloud of dust inside the cabs on them.” A.148. He added that scraping was dusty because the water truck to dampen the dust could not fit where the scraper was. A.124.

Goodin used a truck called the “240” for about ten percent of his time and that truck had a cab with a filtration system, but he explained that dust still entered

the cab. A.147, 149. As to the rest of the truck cabs, he stated dust always entered those cabs because they were old. A.140.

Goodin explained that as an equipment oiler, his responsibility was to go into the mine pit to repair the equipment, and that he would be “in the pit while all the equipment is running . . . trying to get them serviced, so it would get pretty dusty out there on the oiling end of it.” A.130.

Finally, the miner explained that, in general, he was always dusty at the end of a work day because the dust “just [hung] in the air” from his mine and other mines in the area. A.128.

C. The Decisions Below.

1. The ALJ’s Award.

The ALJ first considered whether the fifteen-year presumption at 30 U.S.C. § 921(c)(4) was invoked. He concluded it was because Goodin had fifteen-years of “substantially similar” coal mine employment and the medical evidence established that the miner had a totally disabling respiratory condition. A.270-71.

On the issue of substantial similarity, the ALJ first set out in detail Goodin’s testimony concerning the extent of his exposure to dusty conditions as a surface miner. A.270-71. The ALJ noted, *inter alia*:

The configuration of the South Antelope Mine required driving a truck through a reasonably narrow area walled in on both sides, leading to dust hanging in the air. Some days the runs had to be shut down because the visibility was so poor from the dust that the trucks

couldn't drive safety. That was particularly an issue on hot days when Claimant said the water he sprayed to keep the dust down would evaporate quickly. Other days a hard wind would blow the dust like a sandblaster, he testified.

Although as an equipment operator, Claimant testified he generally drove vehicles with enclosed cabs and air filtration systems, Claimant also said that dust still got into the cabs. Further, he explained he was in and out of the vehicles multiple times per day, 10 times in the case of the water truck, 5-6 times in the blader [the shovel-truck], and 3-4 times in the scraper. Inside the cabs, a fine black powder would coat the cab surfaces. He also sometimes operated a bobcat or tractor with a front end loader to clean coal that had spilled out of the hopper.

A.270-71.

Observing that Goodin's testimony was both credible and uncontested, the ALJ concluded that the miner worked in dusty conditions during his work as an equipment operator and equipment oiler; he further concluded that, "[b]ased on [his own] experience with the testimony of underground miners," the miner's conditions while working as equipment operator and equipment oiler in surface mines was substantially similar to those found in underground coal mining:

Claimant's work as an equipment operator and oiler involved work where active mining was occurring. The conditions, particularly given the mining set up, caused dust to hang in the air. As an oiler, Claimant spent nine years outside exposed to that dust. As an equipment operator he had some protection within the vehicles he drove, but frequently exited those vehicles to fill his water truck and perform other duties, and even when inside the truck was regularly exposed to dust.

A.271.⁸ The ALJ then considered whether the medical evidence proved that Goodin had a totally disabling respiratory condition. Finding in the affirmative, A.271-76, the ALJ concluded that Goodin was entitled to the fifteen-year presumption, A.275-76, and turned to the question of whether Antelope's medical evidence rebutted the miner's claim by establishing that the miner did not have clinical or legal pneumoconiosis that contributed to his respiratory disability.

To determine whether the evidence rebutted the presumption of clinical pneumoconiosis, the ALJ weighed the X-rays (three positive, one negative, one in equipoise, and one positive entitled to little weight). A.276-78. Based upon these readings, the ALJ concluded that the X-ray evidence did not rebut the presumption of clinical pneumoconiosis. A.278.

The ALJ then considered the CT-scan evidence. A.279. He described Dr. Lynch's interpretation of the September 2010 CT-scan (features not characteristic of coal workers' pneumoconiosis but "could certainly be related to coal dust exposure; moderate emphysema "may be related to coal dust exposure and/or smoking"); and Dr. Wiot's interpretation of the July 2008 CT-scan (negative for coal workers' pneumoconiosis; miner has mild emphysema and interstitial fibrosis unrelated to coal dust exposure).

⁸ The ALJ declined to consider Goodin's four or five years of work in a surface mine warehouse in the "substantially similar" analysis because Goodin established the required fifteen years without reference to that work. A.271.

The ALJ then turned to the medical opinion evidence.⁹ A.279, 283. In this regard, the ALJ first observed that Drs. Repsher and Farney both reported that Goodin suffered from neither clinical nor legal pneumoconiosis, and both attributed the miner's COPD solely to smoking, in contrast to Dr. Rose, who attributed the condition to a combination of smoking and dust exposure. A.280-81. The ALJ found Dr. Repsher's testimony to be unpersuasive for at least four reasons.

First, the ALJ noted that Dr. Repsher may have discounted the possibility of legal pneumoconiosis because Goodin's impairment was purely obstructive, an inference contrary to 20 C.F.R. § 718.201(a)(2). A. 282. Second, Dr. Repsher's diagnosis was based, in part, on the fact that only a statistical minority of miners have COPD arising out of coal mine employment, an explanation the ALJ found unconvincing because the doctor "did not address why it would be unlikely in this specific miner, namely what medical evidence would suggest Claimant is not

⁹ It is not clear why the ALJ turned to the medical opinion evidence before determining whether the CT-scan and X-ray evidence, when weighed together, rebutted the presumption of clinical pneumoconiosis. The ALJ likely wanted to discuss all of the evidence, including the medical opinion evidence, before considering that question. Ultimately, the ALJ did not need to resolve the clinical pneumoconiosis issue. To rebut the fifteen-year presumption, an operator must either prove that the miner has neither legal nor clinical pneumoconiosis, or that the miner's disability is unrelated to coal mine employment. *See infra* at 47. Here, the ALJ found that Antelope had failed to prove that Goodin's COPD was not legal pneumoconiosis, and there is no dispute that Goodin's COPD contributes to his respiratory disability. Resolving the clinical pneumoconiosis issue was therefore unnecessary.

among the supposed minority whose COPD is caused by coal dust rather than cigarette smoke.” A.282. The ALJ added: “A reasoned opinion must be based on the Claimant’s actual condition, as evidenced by the medical evidence, not a statistical probability applied generically.” *Id.* Third, the ALJ then determined that Dr. Repsher’s reliance on negative X-ray results was questionable because the regulations allow a miner to establish legal pneumoconiosis even if the X-ray evidence is not positive for clinical pneumoconiosis. Finally, the ALJ faulted the doctor’s opinion because it failed to address whether coal mine work could have contributed to Goodin’s lung problems even if smoking was the main cause of his COPD. A.282-83 (citing 20 C.F.R. § 718.201).

The ALJ next turned to Dr. Farney’s opinion. A.280. The doctor gave three main reasons for his conclusion that the miner’s COPD was not due to coal mine employment: because Goodin, as a surface miner, was exposed to less dust than an underground coal miner; because Goodin’s smoking was a more likely cause; and because a miner’s COPD was unlikely to be related to coal mine employment if the miner’s X-ray was not positive for pneumoconiosis. A.280-81.

The ALJ was not convinced by the first explanation because he had already determined that the miner’s dust exposure was comparable to conditions in underground coal mines. The ALJ observed: “Dr. Farney appears to simply assume that a surface mine would result in less dust exposure, without looking at

the particulars of Claimant’s work environment.” A.282. As to smoking being the more likely cause, the ALJ observed that Dr. Farney’s “stating that cigarette smoking may pose a greater risk than coal dust exposure is not sufficient to eliminate a finding that coal dust exposure is what caused this particular claimant’s lung disease.” *Id.* The ALJ rejected Dr. Farney’s reliance on X-ray results as inconsistent with the fact that COPD can be legal pneumoconiosis even in the absence of X-ray evidence showing clinical pneumoconiosis. The ALJ also observed that Dr. Farney, like Dr. Repsher, failed to consider that coal mine employment may have aggravated or contributed to Goodin’s COPD even if was primarily caused by smoking. A.282-93.

The ALJ therefore concluded that Antelope had failed to rebut the presumption of entitlement because the evidence failed to disprove that the miner suffered from pneumoconiosis. A.283.

2. The Board’s Affirmance.

Antelope argued to the Board, as it does to this Court, that the ALJ: (1) used an improper rebuttal standard in weighing the evidence; (2) used an improper standard to determine whether the conditions of Goodin’s surface coal mine work were “substantially similar” to conditions in underground mining; and (3) failed to consider Dr. Meyer’s CT-scan interpretation; and that the award should be vacated because (4) DOL had failed to provide Goodin with a complete pulmonary

examination since the DOL-obtained X-ray was alleged to be unreadable. A.286-92.¹⁰ All of these arguments were rejected by the Board.

The Board affirmed, as supported by substantial evidence, the ALJ's finding that Antelope had not rebutted the fifteen-year presumption by proving that Goodin's COPD was not legal pneumoconiosis. A.290, 292. On the "substantially similar conditions" issue, the Board held that, "in order to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is only required to proffer sufficient evidence of dust exposure in his or her work environment." A.288 (citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001), and *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988)). The Board concluded that the criterion was met because the ALJ found that Goodin's credible and uncontradicted testimony established that he worked in dusty conditions in surface mining. A.288-89. In particular, the Board affirmed the ALJ's finding that Goodin was regularly exposed to coal dust even when he operated trucks with enclosed cabs. A.289.

While acknowledging that the ALJ mistakenly failed to consider Dr. Meyer's CT-scan interpretation of no CWP in his analysis of the clinical-

¹⁰ Antelope also argued that the Affordable Care Act's revival of the fifteen-year presumption was unconstitutional. The Board rejected the argument, and Antelope does not raise it on appeal. A. 287.

pneumoconiosis issue, the Board explained that the error was harmless because Antelope failed to rebut the presumption that the miner suffered from legal pneumoconiosis. A.292; *see supra* at . Finally, the Board determined that DOL had satisfied its obligation to provide Goodin with a complete pulmonary examination since DOL provided him with all the required testing and obtained an opinion on all the elements of entitlement. The Board added that “the Director is required to provide each miner with a complete evaluation, not a dispositive one.” A.291 n.9. Accordingly, the Board affirmed the ALJ’s award of benefits. A.293.

SUMMARY OF THE ARGUMENT

The ALJ’s findings that Goodin successfully invoked section 921(c)(4)’s fifteen-year presumption and that Antelope failed to rebut it, are correct and supported by substantial evidence, as is the award of BLBA benefits flowing from those findings. Antelope’s primary argument is that the ALJ improperly restricted the coal company’s attempts to rebut the presumption by (1) stating that coal mine operators are limited to the two rebuttal options listed in section 921(c)(4); and (2) allegedly requiring it to rule out any connection (rather than merely any substantial connection) between Goodin’s disability and exposure to coal mine dust in order to establish rebuttal. These points are both irrelevant and incorrect as a matter of law. The ALJ did not restrict Antelope’s ability to develop and submit rebuttal evidence, and did not apply or even mention the “rule-out” standard. The ALJ’s

finding that Antelope had failed to rebut the fifteen-year presumption did not turn on any of these issues. It turned instead on the ALJ's finding that Antelope's experts had not given credible testimony on the crucial medical issue in this case: whether Goodin's disabling COPD was caused, in part, by his exposure to coal dust. Without credible medical evidence, Antelope cannot rebut the statutory presumption of entitlement under any standard, no matter how lenient.

Antelope also challenges the ALJ's finding that Goodin worked for at least fifteen years in conditions "substantially similar to conditions in an underground mine," as required by section 921(c)(4). This requirement, however, only obligates surface miners to prove that they worked in conditions that exposed them to coal mine dust for the requisite period. Antelope's proposed alternate standards are both impractical and inconsistent with the Act's structure and history.

Antelope has no standing to argue, as it does, that Goodin's award should be vacated because the Department of Labor did not provide Goodin with an adequate pulmonary examination. The purpose of the DOL-provided pulmonary examination, required by 30 U.S.C. § 923(b), is to benefit miners by giving them the opportunity to substantiate their BLBA claims. It defies reason to suggest that an operator can defeat an award on the theory that its opponent was not given adequate assistance in the development of his or her claim.

Finally, even if the ALJ did not adequately consider a particular CT-scan reading or other evidence suggesting that Goodin did not suffer from clinical pneumoconiosis, this error was harmless. To rebut the fifteen-year presumption by proving that a miner does not have pneumoconiosis, an operator must disprove both clinical and legal pneumoconiosis, and the ALJ found that Antelope had not disproved legal pneumoconiosis. The ALJ's failure to fully consider all the evidence on clinical pneumoconiosis is therefore, as the Board held, harmless error. Antelope's petition for review should be denied.

ARGUMENT

A. Standard of Review.

This case involves questions of both fact and law. With respect to questions of fact, the Court reviews the ALJ's findings under a substantial-evidence standard. *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009). The Court "will not reweigh the evidence considered by the agency, but only inquire into the existence of evidence in the record that a reasonable mind might accept as adequate to support its conclusion." *Id.* at 1217 (quotation and emphasis omitted). "Additionally, the task of weighing conflicting medical evidence is within the sole province of the ALJ." *Hansen v. Director, OWCP*, 984 F.2d 364, 368 (10th Cir. 1993).

This Court exercises *de novo* review over the Board’s legal conclusions. *Anderson v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006). As the administrator of the BLBA, the Director’s interpretation of the Act is entitled to deference. *See Lukman v. Director, OWCP*, 896 F.2d 1248, 1250-51 (10th Cir. 1990). The Director’s interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as is his interpretation of the BLBA’s implementing regulations in a legal brief. *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). His reasonable interpretation of the Act’s ambiguous provisions in other contexts is also entitled to deference. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

B. The ALJ correctly ruled that Antelope did not rebut the fifteen-year presumption.

Antelope’s primary argument is that its ability to rebut the fifteen-year presumption was improperly restricted by the ALJ and the Board. Pet. Br. 21-30. In particular, the coal company argues that employers are not limited to the two methods of rebuttal listed in section 921(c)(4), and that the so-called “rule-out standard” is unduly restrictive. The resolution of these interesting issues must await another day, however, because neither played any role in the outcome of this

case. The ALJ's finding that Antelope had not rebutted the presumption ultimately turned on his determination that the coal company's medical experts were not credible.

1. Section 921(c)(4)'s rebuttal limits played no role in the outcome of this case.

Section 921(c)(4) provides that “[t]he *Secretary may rebut* [the fifteen-year] 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.” 30 U.S.C. § 921(c)(4) (emphasis added). In his summary of the legal standards generally applicable to rebuttal, the ALJ quoted the implementing regulation, 20 C.F.R. § 718.305(a), which applies those limitations to operators as well as to the Secretary. A.276. According to the Antelope, this “improperly and prejudicially restricted Antelope’s ability to defend against Mr. Goodin’s claim.” Pet. Br. 21-22.

This is not so. The ALJ did not reject any of the employer’s proffered evidence on this ground. And, even now, Antelope is unable to hypothesize a category of evidence or theory of the case that would permit rebuttal on another ground.¹¹ See Pet. Br. 23-24. The ALJ’s quotation of 20 C.F.R. § 718.305(a)

¹¹ Antelope claims that “[o]perators must be allowed to rebut the presumption with proof that a miner’s pneumoconiosis was mild and that the disability was a product of another disease.” Pet. Br. 21. This is true. But an operator making this showing will have established that the miner’s “respiratory or pulmonary

played no role in the outcome of this case. As the Fifth Circuit explained in refusing to consider a similar argument, the question of whether section 921(c)(4)'s rebuttal limitations apply to operators should be addressed only in a case where the answer matters. *U.S. Steel Corp. v. Gray*, 588 F.2d 1022, 1026 (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 411(c)(4), the petitioner in this case was not prevented by the hearing officer from submitting whatever rebuttal evidence it wished to submit.”). Antelope’s request for an advisory opinion on the subject should be rejected.

In any event, operators are as a practical matter limited to the two methods of rebuttal listed in 20 C.F.R. § 718.305(a), despite the fact that the Supreme Court held, in 1976, that “the §411(c)(4) limitation on rebuttal evidence is inapplicable to operators.” *Usery*, 428 U.S. at 35-36. Antelope’s inability to identify a theory of rebuttal that is not encompassed by the two methods listed in 20 C.F.R. § 718.305(a) is easy to explain. Miners seeking BLBA benefits are generally required to establish, with direct evidence or via presumption: (1) that they have a totally disabling respiratory or pulmonary impairment, and (2) that they have pneumoconiosis (clinical or legal) arising out of coal mine employment that (3)

impairment did not arise out of, or in connection with, employment in a coal mine” – one of the two rebuttal methods acknowledged by Section 921(c)(4) and 20 C.F.R. § 718.305(a). The example fails to prove the existence of rebuttal methods beyond the two in listed in section 921(c)(4) and 20 C.F.R. § 718.305(a).

contributes to the total disability. 20 C.F.R. § 725.202(d)(2); *see Bosco*, 892 F.2d at 1478-79. To invoke the fifteen-year presumption, the miner must prove the total-disability element by a preponderance of the evidence. Consequently, the only possible grounds for rebuttal are to prove that the miner does not have pneumoconiosis, or that pneumoconiosis does not contribute to the miner's disability. The two rebuttal options listed in 20 C.F.R. § 718.305(a) and section 921(c)(4) exhaust those possibilities.

This was not true when *Usery* was decided in 1976. Before 1978, only miners totally disabled by *clinical* pneumoconiosis arising out of coal mine employment were generally entitled to BLBA benefits. *See supra* at 6. At that time, a miner with totally disabling COPD caused by coal dust exposure was not entitled to benefits, even if he also had a mild case of clinical pneumoconiosis that did not contribute to the disability. But a problem arises if such a miner invokes the fifteen-year presumption. The liable operator could not rebut it under either of the methods listed in section 921(c)(4): it could not prove (A) that the miner did not have clinical pneumoconiosis – because the miner did; or (B) that the miner's impairment did not arise out of employment in a coal mine – because it did. As a result, the operator would seemingly be required to pay BLBA benefits to a miner who was not totally disabled by “pneumoconiosis,” as defined at the time.

This scenario animated the Supreme Court’s discussion of section 921(c)(4)’s rebuttal-limiting sentence in *Usery*, where various coal mine operators argued that the rebuttal limitations were unconstitutional for that reason. 428 U.S. at 34-35. The constitutional question was rendered moot by the Court’s holding that those limitations did not apply to private employers. *Id.* at 35-36. The practical result was that, in addition to the two rebuttal methods listed in section 921(c)(4)(A) and (B), operators could rebut the fifteen-year presumption by proving (C), that the miner’s disability resulted from a disabling lung disease that was caused by coal dust exposure but was not pneumoconiosis, as then defined.

The situation changed two years later, when Congress expanded the definition of “pneumoconiosis” to include what is now known as “legal pneumoconiosis. *See supra* at 6. Because any “chronic lung disease or impairment . . . arising out of coal mine employment” is legal pneumoconiosis, “(C)” rebuttal is no longer viable. 20 C.F.R. § 718.201(a)(2). The authorities post-dating the amendment limiting operators, as well as the Secretary, to the (A) and (B) rebuttal methods listed in section 921(c)(4) – including 20 C.F.R. § 718.305(d) and this Court’s decision in *Bosco* – merely reflect this fact.

It remains true, as the Supreme Court held in *Usery*, that section 921(c)(4)’s rebuttal-limiting sentence does not apply to private parties. But that holding has

had no real-world application since 1978. Simple logic now limits operators to the rebuttal methods listed in the statute.

2. The rule-out standard played no role in the outcome of this case.

Antelope also objects to the “rule-out” standard, which requires an employer trying to establish rebuttal on disability-causation grounds to rule out any connection between the disability and dust exposure. Pet. Br. 22-30. According to the coal company, it should be allowed to establish rebuttal by proving that pneumoconiosis was not a “substantially contributing cause” of Goodin’s disability. Pet. Br. 24; *see* 20 C.F.R. § 718.204(c)(1).

The rule-out standard played no role in this case. The words “rule out” are absent from the ALJ’s decision. Nor did the ALJ cite any of the many decisions applying the rule-out standard or the regulation adopting it, 20 C.F.R. § 718.305(d).¹² Indeed, it is difficult to imagine how the rule-out standard could be

¹² 20 C.F.R. § 718.305(d) provides: “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.” 20 C.F.R. § 718.305(d) (emphasis added). This Court has not addressed section 725.305(d) or the rule-out standard’s application to fifteen-year presumption cases. It did, however, interpret identical language in 20 C.F.R. § 727.203(b)(3)’s now-defunct “interim presumption” as establishing a rule-out standard. *See Rosebud Coal Sales 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

relevant. The key dispute in this case is whether Goodin's COPD was legal pneumoconiosis (*i.e.*, whether it was "significantly related to, or substantially aggravated by, dust exposure"). 20 C.F.R. § 718.201(b). The rule-out standard simply does not apply where an operator attempts to rebut the fifteen-year presumption by proving that the miner does not have pneumoconiosis. 20 C.F.R. § 718.305(a), (d); *see Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The standard therefore could not have played a role in the ALJ's finding that Antelope did not bear its burden on that question.

The rule-out standard applies where an operator cannot prove that the miner does not have pneumoconiosis and instead attempts to rebut the presumption by proving that pneumoconiosis did not contribute to the miner's respiratory or pulmonary disability. 20 C.F.R. § 718.305(d). But that option is unavailable to Antelope in this case. Its own experts attribute Goodin's disability to COPD.¹³ This concession, combined with Antelope's failure to rebut the statutory

coal mine employment be *ruled out*.”) (citing cases in the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits) (emphasis added); *see also Mangus v. Director, OWCP*, 882 F.2d 1527, 1529 (10th Cir. 1989) (“The employer must rule out *any* relationship between the disability and the coal mine employment” to rebut the interim presumption).

¹³ *See* A.64 (Dr. Farney), 169, 177 (Dr. Repsher). Note that while Dr. Repsher testified that Goodin's COPD (emphysema) was not *totally* disabling, he nevertheless described it as “very severe.” *See also* Pet. Br. 8 (conceding that Goodin has a disabling pulmonary disease).

presumption that Goodin's COPD is legal pneumoconiosis, fatally undermines any attempt to prove that Goodin's disability was not caused by pneumoconiosis. There is no way to rebut this claim on disability-causation grounds, even under the "substantially contributing cause" standard Antelope champions.

3. The ALJ permissibly found that the medical opinions submitted by Antelope's experts were not credible, and therefore inadequate to establish rebuttal under any standard.

The ALJ's finding that Antelope failed to rebut the fifteen-year presumption was not based on section 921(c)(4)'s rebuttal limitations or the rule-out standard. It was based on the ALJ's finding that Antelope had failed to prove that Goodin's disabling COPD was not legal pneumoconiosis. This ruling, in turn, rested on the ALJ's determination that the opinions of Antelope's medical experts – Drs. Farney and Repsher – were not credible on that key issue. A.281-83.

This is a garden-variety credibility determination that easily passes substantial-evidence review. As the ALJ observed, neither Dr. Farney nor Dr. Repsher "explain[ed] why coal dust could not have aggravated" the smoking-induced COPD both doctors diagnosed, which would constitute legal pneumoconiosis. A.283-84; *see* 20 C.F.R. § 718.201(b). This failure alone could support the ALJ's determination that their opinions were insufficient to carry Antelope's burden. The ALJ also reasonably discredited Dr. Farney's opinion

because he assumed that Gooden experienced no significant exposure to coal dust, contrary to the ALJ's findings on that score. A.282. The ALJ permissibly discredited Dr. Repsher's testimony because he talked in generalities rather than specifics concerning the miner. *Id.* Antelope objects, pointing out that Dr. Repsher testified that his opinion was influenced by the results of one of Goodin's pulmonary function tests. Pet. Br. 29. But this effort is undermined, as the ALJ observed, by Dr. Repsher's own statement that the pulmonary function test in question was not valid. *See* A.263.

Antelope was required to rebut a statutory presumption that Goodin is totally disabled by pneumoconiosis. Without credible medical evidence addressing the issue, Antelope cannot establish rebuttal under any standard, whether demanding or lenient. This Court should reject Antelope's attempt to convert a substantial evidence issue into an issue of law and affirm the ALJ's ruling that the coal company did not rebut the fifteen-year presumption.

C. The ALJ properly found that Goodin successfully invoked Section 921(c)(4)'s fifteen-year presumption.

Antelope also argues that Goodin was not entitled to the fifteen-year presumption in the first place because he did not labor in conditions "substantially similar to conditions in an underground mine" for at least fifteen years, as required

by 30 U.S.C. § 921(c)(4). Pet. Br. 30-39.¹⁴ Antelope is wrong on the law and on the facts. To invoke the fifteen-year presumption, disabled surface miners need only show that they were generally exposed to coal mine dust in the course of their employment for at least fifteen years. Goodin easily satisfied that standard.

1. Surface miners who are exposed to coal mine dust work under “conditions substantially similar to conditions in an underground mine” for purposes of section 921(c)(4).

Section 921(c)(4) does not state how the required similarity between underground coal mine conditions and surface coal mine conditions may be demonstrated. The Director, however, has long taken the position that the requirement is satisfied if the miner’s surface work exposed him or her to coal mine dust. *See, e.g., Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 511 (7th Cir. 1988) (“[T]he Director . . . make[s] the argument that the ‘substantially similar’ language of the Act requires only a showing that the conditions under which the miner worked exposed him to coal dust.”).¹⁵

¹⁴ There is no dispute that Goodin did not work in an underground coal mine for the required fifteen years. He did work for at least five years in an underground uranium mine, A.256, but that time is irrelevant for purposes of invoking the fifteen-year presumption.

¹⁵ The Director does not argue that his interpretation of section 921(c)(4)’s “substantially similar” standard, as expressed in this brief and past briefs to the Board and the courts of appeals, is entitled to *Chevron* deference. Any such standard promulgated in his upcoming regulations implementing the BLBA’s 2010 amendments will, however, be entitled to such deference. *See* n.3, *supra*.

The Seventh Circuit – the only court of appeals to directly address the issue – has agreed. In *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 511 (7th Cir. 1988) that court rejected an employer’s argument that surface miners must present evidence addressing the conditions in underground mines to prove “substantial similarity.” 855 F.2d at 512. Instead, a surface miner “is required only to produce sufficient evidence of the surface mining conditions under which he worked.” *Id.* It is then the ALJ’s job, as fact-finder, “to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.” *Id. Accord, Blakely v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995) (holding that an ALJ, “relying on the testimony of two witnesses, who both testified that Blakely was exposed to coal dust while a surface miner,” permissibly concluded that the miner was “exposed to dust conditions substantially similar to those underground”; explaining that the claimant “‘bears the burden of establishing comparability’ but ‘must only establish that he was exposed to sufficient coal dust in his surface mine employment’”) (quoting *Midland Coal*, 855 F.2d at 512-13); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001) (holding that miner’s “unrebutted testimony” that “clearly delineated, in objective terms, the awful conditions on the surface of the mine[]” was “sufficient” to support a finding of substantial similarity). This Court should adopt the Director’s standard as well.

“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, 581 (1978); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *U.S. v. O’Flanagan*, 339 F.3d 1229, 1235 (10th Cir. 2003). When it re-enacted section 921(c)(4) in 2010, Congress was aware that the administrator of the BLBA and the only court of appeals to consider the issue had both concluded that miners can prove that they labored in “substantially similar conditions” by establishing that they were exposed to coal mine dust in the course of their surface-mining employment. If Congress was dissatisfied with that administrative and judicial interpretation of section 921(c)(4), 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 decision can only be interpreted as an endorsement of the Director’s and the Seventh Circuit’s longstanding interpretation of the “substantial similarity” requirement.

Antelope objects to the Seventh Circuit’s rule that a claimant “must only establish that he was exposed to sufficient coal dust in his surface mine employment,” a standard it describes as “[in]consistent with the statute’s command.” Pet. Br. 31. But that standard is entirely consistent with the BLBA. The Act is predicated on the fact that dusty conditions exist in underground mines

and that these conditions are the cause of black lung disease.¹⁶ *See Midland Coal*, 855 F.2d at 512 (“Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis.”). The crucial condition that exists in underground mines, for purposes of the BLBA, is dustiness. Surface miners who are also exposed to coal dust are therefore experiencing conditions similar – in the respect relevant to the BLBA – to those in underground mines.

Antelope’s suggestion that a claimant (or the Director) must quantify the amount of dust a particular surface miner experiences and compare that amount to some objective standard representing conditions existing in underground coal mines is both impractical and inconsistent with the BLBA. Pet. Br. 31-32, 37-39. First, establishing either end of the proposed comparison would be impossibly burdensome. It is difficult to quantify the amount of dust any particular surface miner was exposed to. *See Usery*, 428 U.S. at 29 (describing “the degree of dust concentration to which a miner was exposed” as “a historical fact difficult for the miner to prove”). And the dust conditions in underground coal mines (and even

¹⁶ When the BLBA was originally enacted as Title IV of the Federal Coal Mine Safety and Health Act of 1968, benefits were limited to miners who worked in underground coal mines. *See* 30 U.S.C. § 902(d) (1970) (defining “miner” as “any individual who is or was employed in an underground coal mine”); *see also* 30 U.S.C. §§ 901, 902(b), (d), 932(h) (1970). Coverage was generally expanded to surface miners in 1972. *See* 30 U.S.C. § 902(d) (1972).

different sections of the same underground mine) vary wildly.¹⁷ See *Midland Coal*, 855 F.2d at 511 (“[W]e can discern no plain meaning of the requirement of ‘substantial similarity.’ Instead, immediately apparent is that fact that the Act does not specify whether a claimant must establish similarity to a particular underground mine, a hypothetical underground mine, the best, worst, or an average underground mine.”). The only relevant common factor among underground coal mines is that they are generally dusty.¹⁸

Perhaps because of these practical difficulties, Congress has never required miners to quantify their dust exposure to establish their entitlement to BLBA benefits or to trigger any statutory presumption. This is well-illustrated by *Usery*, which upheld section 921(c)’s two ten-year presumptions (as well as section

¹⁷ Notably, an “underground coal mine” includes not only the underground coal deposit but “all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.” 20 C.F.R. § 725.101(a)(3). This was even true before 1972, when the Act covered only miners working at underground mines. See 20 C.F.R. § 410.110 (i) (1971) (defining “underground coal mine” to include “all land, buildings, and equipment appurtenant thereto”). It is therefore possible that section 921(c)(4) contemplates comparing conditions at a surface mine to conditions in the above-ground portions of an underground mine.

¹⁸ If conditions in aboveground mines are, on the whole, substantially less dusty than conditions in underground mines, surface miners will be able to invoke the presumption less frequently (because fewer will suffer from totally disabling respiratory impairments) and their employers will be able to rebut the presumption more frequently (by showing that the miner does not have pneumoconiosis) than in cases involving underground coal miners.

921(c)(4)'s fifteen-year presumption) against constitutional attack.¹⁹ 428 U.S. at 28-31. The operators argued that the ten-year presumptions were “arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others.” *Id.* at 29. The Court rejected that argument, explaining that “Congress was surely entitled to select duration of employment, to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of the miner’s pneumoconiosis or death[.]” *Id.* at 29-30. And Congress has indeed followed this pattern after *Usery*, establishing presumptions triggered by the duration of a miner’s exposure to dust without requiring any showing of the *degree* of dust exposure. *See, e.g.*, 30 U.S.C. § 921(c)(5) (1977 & Supp. III 1979) (rebuttable presumption of entitlement for survivors of certain miners employed for at least twenty-five years). It would be anomalous to require any such qualitative showing to invoke the fifteen-year presumption.

The quoted section of *Usery* also emphasizes the limited effect of the statutory presumptions, observing that “[i]t is worth repeating that mine

¹⁹ *See* 30 U.S.C. § 921(c)(1) (“If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.”); 30 U.S.C. § 921(c)(2) (1976) (“If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis.”).

employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves . . . to presumptively establish the cause of pneumoconiosis[.]” 428 U.S. at 29. Similarly, fifteen years of employment in generally dusty conditions in surface coal mines does not, standing alone, trigger anything. It serves, along with proof of a totally disabling respiratory impairment, to trigger a rebuttable presumption of entitlement. An employer can rebut that presumption by showing either that the miner does not have pneumoconiosis or that pneumoconiosis does not contribute to the miner’s disability. *See supra* at 28-30. Given the limited impact of the presumption, it is unnecessary to impose onerous invocation requirements.²⁰

The Director’s and the Seventh Circuit’s interpretation of section 921(c)(4) is also supported by Congress’s decision, in 1978, to extend the Act’s coverage to coal mine construction workers. *See* Pub. L. 95-239 § 2(b) (March 1, 1978) (expanding definition of “miner” to include “an individual who works or has

²⁰ While the showing required to invoke the fifteen-year presumption is not onerous, surface miners do bear the burden of proving that they were exposed to coal dust for the requisite fifteen years. *Midland Coal*, 855 F.2d at 512. An employer is also free to develop evidence establishing, for example, that the miner was not exposed to coal dust (or was only exposed to a de minimus amount) for a substantial period of surface employment. If so, that period cannot be used to establish the required fifteen years. While Antelope complains that the standard “presumes that surface and underground miners are exposed to the same amount of dust,” Pet. Br. 37, this is not so. Miners who worked above ground for more than fifteen years can and do fail to invoke the presumption. *See, e.g., Hansbury v. Reading Anthracite Co.*, BRB No. 11-0236 BLA, 2011 WL 6140714 (DOL Ben. Rev. Bd., Nov. 29, 2011).

worked in coal mine construction or transportation in or around a coal mine, *to the extent such individual was exposed to coal dust* as a result of such employment”) (emphasis added). The legislative history of that amendment indicates that Congress intended to cover coal mine construction workers “when they work in conditions *substantially similar* to conditions in underground coal mines.” S.Rep. No. 95-209, 95th Cong., 1st Sess. (1977) (emphasis added), quoted in *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 870 (3d Cir. 1979). The employer in *Williamson Shaft* argued, based on this expression of legislative intent, that construction workers were covered by the Act only if they actually worked in underground mines. The Third Circuit disagreed, observing that those workers “labor in conditions *substantially similar* to those of miners when they spend extended periods of time *exposed to dusts* in the coal mine environment.” *Williamson Shaft*, 794 F.2d at 870 (emphasis added). The Third Circuit’s interpretation of “conditions substantially similar to conditions in underground coal mines,” as used in the 1977 amendment’s legislative history, is on all fours with the Director’s and Seventh Circuit’s interpretation of the same phrase in section 921(c)(4).

2. Goodin established that he worked for more than fifteen years in dusty conditions.

In the alternative, Antelope argues that, even if surface miners are only required to prove that they worked in dusty conditions to establish comparability

with underground work, Goodin only satisfied this condition during the nine years he worked as an equipment oiler. Pet. Br. 33-34, 38-39. Antelope stresses the fact that when Goodin worked as an equipment operator, much of his time was spent in trucks, and that the cabs were not as dusty as work in underground mines because they “had a filtration system.” Pet. Br. 38. The ALJ, however, rejected this argument because coal still managed to get in the cabs and because the miner frequently had to leave the cab to perform other tasks.²¹ A.271.

Antelope’s final argument on the issue of comparable conditions involves the ALJ’s statement that, “[b]ased on [his own] experience with the testimony of underground miners, Mr. Goodin’s work was substantially similar.” A.271, quoted in Pet. Br. 36. The coal company asserts that the ALJ erred in relying on his personal experience with the testimony of underground miners in other cases. Pet. Br. 36-37. The Director agrees. The ALJ likely misread the caselaw as requiring him to compare Goodin’s testimony with his personal knowledge of conditions in underground mines. Some statements in *Midland Coal*, considered in isolation, support this view. For example, the decision states that “[i]t is . . . the function of the ALJ, based on his expertise and, we would expect, certain appropriate objective factors . . . to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.” 855 F.2d at 512. But the

²¹ In addition, Antelope fails to acknowledge that the miner worked in cabs whose doors closed tightly only a small percentage of the time. *See supra* at 16-17, 18.

relevant condition known to prevail in underground mines is dustiness. A claimant is therefore required only to demonstrate that he or she is exposed to coal dust in order to establish substantial similarity to conditions underground. *See supra* at 36-38.

If the decision turned on this error, Antelope would admittedly be entitled to a remand. But because the ALJ credited Goodin's uncontradicted testimony that he was exposed to coal dust in his above-ground work as an oiler and equipment operator (which lasted more than fifteen years), the only conclusion supported by the record is that Goodin successfully invoked the fifteen-year presumption. Antelope introduced no contrary evidence. The error was therefore harmless.

D. This award should not be vacated to give Goodin another medical examination.

Section 413(b) of the Act provides, in relevant part: "Each miner who files a claim for benefits under this title shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b); *see also* 20 C.F.R. §§ 725.405(b), 725.406(a). By regulation, "a complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram [*i.e.*, X-ray] and, unless medically contraindicated, a blood gas study." 20 C.F.R. § 725.406(a); *see also* 20 C.F.R. § 718.101(a). The regulations further provide that the evaluation (commonly referred to as a "413(b) exam") must "comply with the applicable

quality standards,” and must “address the relevant conditions of entitlement.” 20 C.F.R. § 725.456(e).

Antelope argues that the Director did not meet this obligation because several reviewing doctors determined that the chest X-ray taken during Goodin’s 413(b) exam was unreadable. Pet. Br. 41; *see* A. 277. Because of this, Antelope states that liability for this case should revert to the Black Lung Benefits Disability Trust Fund. *Id.* This argument is without merit.

Antelope posits that, if the X-ray had been of higher quality, its doctors might have been able to interpret it as negative for clinical pneumoconiosis. Pet. Br. 41. This argument is not only speculative, but based on a fundamental misunderstanding of section 413(b). The purpose of the examination is to give the miner the “opportunity to substantiate his or her claim”; it is not for the benefit of the coal company. Antelope’s suggestion that Goodin’s award should be vacated because Goodin was not given the full advantage of section 413(b) turns that purpose on its head. Goodin, who would have standing to complain about an inadequate exam, has not raised the issue; and the Board held that the examination was adequate. *See* A.291.

In any event, an additional negative X-ray would have done nothing to change the outcome of this case. X-ray readings are evidence of the presence or absence of clinical pneumoconiosis, an issue the ALJ did not squarely address. *See*

supra at 20 n.19. But proving that Goodin did not have clinical pneumoconiosis would do nothing to advance Antelope's cause, because the coal company failed to establish that Goodin's COPD was not *legal* pneumoconiosis. *See Barber*, 43 F.3d at 901 (4th Cir. 1995) (holding that an operator must prove that the claimant has neither clinical nor legal pneumoconiosis to rebut the fifteen-year presumption); *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011) (same). An additional negative X-ray reading would do nothing to undermine the ALJ's finding on that issue.

E. Antelope has failed to show that any evidence not directly considered by the ALJ would have changed the outcome of this case.

Finally, Antelope asserts that the ALJ, when weighing the CT-scan evidence, failed to note that Dr. Myers found the absence of clinical pneumoconiosis. Pet. Br. 43-44. The coal company also asserts that the ALJ failed to discuss the fact that Goodin's treatment records suggest the absence of clinical pneumoconiosis. *Id.* at 44-45. This again, however, is harmless error. As explained in the previous paragraph, evidence that Goodin does not suffer from clinical pneumoconiosis cannot rebut the fifteen-year presumption in light of Antelope's failure to rebut the presumption of legal pneumoconiosis.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court affirm the ALJ's award of benefits.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument may be helpful to the Court because this is the first time the Court will address the BLBA's fifteen-year presumption since that presumption was reinstated by the Patent Protection and Affordable Care Act in 2010.

CERTIFICATE OF COMPLIANCE CONCERNING
PRIVACY REDACTIONS

Pursuant to 10th Cir. R. 25.5, I certify that all required privacy redactions
have been made.

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CERTIFICATE OF COMPLIANCE CONCERNING HARD COPIES

Pursuant to the ECF User Manual, I certify that the hard copies to be submitted to the court and parties to the case are exact copies of the version submitted electronically today.

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CERTIFICATE OF COMPLIANCE CONCERNING VIRUSES

Pursuant to the ECF User Manual, I certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE CONCERNING PAGE LIMITS

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 11,731 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, 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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