

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

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**BIG BRANCH RESOURCES, INC. as insured by  
THE WEST VIRGINIA CWP FUND,**

**Petitioners,**

**v.**

**JOHN A. OGLE;  
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,**

**Respondents.**

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

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**CORRECTED BRIEF FOR THE FEDERAL RESPONDENT**

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

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**No. 13-3251**

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**BIG BRANCH RESOURCES, INC. as insured by  
THE WEST VIRGINIA CWP FUND,**

**Petitioners,**

**v.**

**JOHN A. OGLE;  
DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
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**On Petition for Review of an Order of the Benefits  
Review Board, United States Department of Labor**

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**CORRECTED BRIEF FOR THE FEDERAL RESPONDENT**

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**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Sixth Circuit Rule 34(a), the Director respectfully requests that the Court hear oral argument in this case. The issue on appeal is one of first impression in this Court and the Director believes that oral argument will assist in its resolution.

**STATEMENT OF JURISDICTION**

Big Branch Resources, Inc. and its insurance carrier, the West Virginia CWP

Fund, (collectively, the Fund or Employer) petition this Court for review of a Benefits Review Board decision affirming an administrative law judge's award of John A. Ogle's claim for benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C. §§ 901-944, as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). On December 8, 2011, the ALJ awarded Ogle federal black lung benefits. Appendix (App.) 265-299. The Fund timely appealed to the Benefits Review Board on January 5, 2012. R 177-217;<sup>1</sup> *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 January 9, 2013, the Board issued a final order affirming the ALJ's award of benefits. App. 300-309. On March 4, 2013, the Fund timely petitioned this Court to review the Board's Order. App. 310-314; *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 the Fund's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated

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<sup>1</sup> "R" refers to record materials not in the Petitioner's Appendix, but listed in the Board's consecutively paginated certified case record index. *See* Joint Appendix Index.

by 33 U.S.C. § 921(c)—Ogle’s exposure to coal dust—last occurred in Kentucky, within the jurisdictional boundaries of this Court. *See Danko v. Director, OWCP*, 846 F.2d 366, 368 (6th Cir. 1988).<sup>2</sup>

### STATEMENT OF THE ISSUES

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that coal miners who worked underground for at least 15 years and 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 dispute that this presumption (the 15-year presumption), which was restored by Congress in 2010, applies to this case. Section 921(c)(4) specifies that “the Secretary” may rebut the presumption only by establishing (A) that the miner does not have pneumoconiosis or (B) that the miner’s “impairment did not arise out of, or in connection with,

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<sup>2</sup> Ogle’s last coal mine employment was in Kentucky and he previously worked for the same employer in West Virginia. App. 177, 193, 266. Pursuant to unpublished Sixth Circuit law, when a miner has been exposed to coal mine dust in multiple jurisdictions, jurisdiction is proper in the location of a miner’s last coal mine employment. *Walker v. Bethenergy Mines, Inc.*, 4 Fed. Appx. 218, 220 (6th Cir. 2001) (unpub.); *compare Danko*, 846 F.2d at 368 (holding that “the place where a coal mine worker is exposed to coal dust . . . is the circuit in which the injury occurred and the circuit in which jurisdiction is proper[.]” but declining to address what circuit is the proper forum when a claimant is exposed to coal dust in more than one). Other courts to address the issue have held that jurisdiction is proper in any circuit in which the miner worked and was exposed to coal mine dust. *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 970-71 (7th Cir. 1984) (holding that the proper circuit for appeal is any in which the miner worked and was exposed to coal dust); *Hunter v. Director, OWCP*, 861 F.2d 516, 517 n.1 (8th Cir. 1988) (same). Pursuant to either rule, this Court has jurisdiction here.

employment in a coal mine.” The ALJ, consistent with the regulation implementing Section 921(c)(4), stated (1) that coal mine operators are also limited to the two methods of rebuttal listed in the statute, and (2) that an operator must “rule out” any connection between a miner’s impairment and coal mine employment to establish rebuttal under clause (B). The ALJ, finding that the Fund had failed to rebut the presumption by either method, awarded benefits.

The questions presented are:

1. Did the ALJ commit reversible error by stating that coal mine operators are limited to the two methods of rebuttal listed in Section 921(c)(4).
2. Did the ALJ commit reversible error by stating that an operator must rule out any connection between a miner’s disability and coal mine employment to establish rebuttal under clause (B).
3. In considering whether the Fund had established rebuttal under clause (B), did the ALJ commit reversible error by giving less weight to the Fund’s medical experts because they did not diagnose legal pneumoconiosis.<sup>3</sup>

### **STATEMENT OF THE CASE**

John A. Ogle filed his first claim for federal black lung benefits in 2002 and

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<sup>3</sup> The Fund also argues that the ALJ’s assessments of the conflicting expert testimony and ultimate decision awarding BLBA benefits to Ogle are not supported by substantial evidence. Pet. Brief at 31-59. The Director only addresses the Fund’s legal challenges.

it was denied. DX 1.<sup>4</sup> Ogle filed the claim at issue in this appeal, his second, on November 5, 2007.<sup>5</sup> App. 1-4. After a formal hearing, ALJ William S. Colwell awarded benefits, finding that the Fund had not rebutted the Section 921(c)(4) presumption of entitlement. App. 290-97. The Fund appealed to the Board, which affirmed the award. R 177-217; App. 308. The Fund then petitioned this Court for review. App. 310-14.

### STATEMENT OF THE FACTS

Because this brief addresses only the Fund's legal challenges to the ALJ's decision, 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 and the ALJ's application of them to this claim.

#### 1. Statutory and Regulatory Background.

"The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969 . . . to provide benefits for

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<sup>4</sup> DX refers to the indexed, but separately paginated exhibits that were submitted to the ALJ by the Director. *See* Joint Appendix Index.

<sup>5</sup> Under the BLBA, if a miner's claim for benefits has been denied and over a year has passed, he may file a subsequent claim for benefits. 20 C.F.R. § 725.309(d). Before a subsequent claim may be considered on its merits, however, the claimant must demonstrate that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." *Id*; *see generally* *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756 (6th Cir. 2013).

miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners.” *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). The statute, now known as the Black Lung Benefits Act, *see* 30 U.S.C. § 901(b), has been substantially amended over the years. The history of two provisions—Section 902(b)’s definition of pneumoconiosis and Section 921(c)(4)’s 15-year presumption—are particularly relevant to this case. 30 U.S.C. §§ 902(b), 921(c)(4).

**a. The definition of pneumoconiosis.**

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); *see* Black Lung Benefits Reform Act of 1977, Pub. L. 95-239 § 2(b) (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). The implementing regulation divides pneumoconiosis into two types, “clinical” and “legal.” 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to a particular collection of diseases “recognized by the medical community as pneumoconiosis” and is generally diagnosed by x-ray, biopsy, or autopsy. 20 C.F.R. § 718.201(a)(1). “Legal pneumoconiosis” is a broader category, including “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is “significantly related to, or substantially aggravated

by” exposure to coal mine dust is legal pneumoconiosis. 20 C.F.R. § 718.201(b).

Before March 1, 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. § 410.110(o) (1970); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

**b. The 15-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 15-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 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). Once the presumption is invoked, “the burden of production and persuasion lies on the employer . . . to rebut the presumption of disability due to pneumoconiosis.” *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011).

In 1980, after the BLBA had been amended to include both clinical and legal pneumoconiosis in its definition of pneumoconiosis, DOL promulgated 20 C.F.R. § 718.305 to implement the 15-year presumption. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Section 718.305(a) is substantially identical to the statute except that the last sentence specifying the two methods of rebuttal is not limited to "the Secretary." Also relevant to this case is Section 718.305(d), which 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. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

20 C.F.R. § 718.305(d).

In 1981, the 15-year presumption was eliminated for all claims filed after that year. Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (Dec. 29, 1981). Accordingly, subsection (e) was added to 20 C.F.R. § 718.305 to explain that the 15-year presumption would not be available in such claims.<sup>6</sup> *See* Standards for

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<sup>6</sup> 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). Until a revised regulation is promulgated, the current version of 20 C.F.R. § 718.305 remains the Department's definitive interpretation of Section 921(c)(4).

Determining Coal Miner's Total Disability or Death Due to Pneumoconiosis; Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, As Amended, 48 Fed. Reg. 24272, 24288 (May 31, 1983) (final rule enacting subsection (e)).

In 2010, while Ogle's claim was pending before the ALJ, Congress restored the 15-year presumption in Section 1556 of the Affordable Care Act (ACA). Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). 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 ACA's enactment date. *Id.*; *see Morrison*, 644 F.3d at 479.

## **2. The Decisions Below.**

### **a. ALJ Colwell's December 8, 2011 Decision awarding benefits.**

The ALJ awarded benefits in a decision dated December 8, 2011. App. 265-99. Based on Ogle's testimony and the evidence in the record, the ALJ found that Ogle worked for approximately 21 years in underground coal mine employment. App. 269-70. After summarizing the medical evidence in detail, he concluded that "it is uncontradicted on this record that Claimant suffers from a totally disabling respiratory impairment." App. 289. On the basis of these findings, the ALJ concluded that Ogle had invoked the 15-year presumption of entitlement. App. 289-90 (citing 20 C.F.R. § 718.305). The ALJ then considered whether the Fund

had rebutted the presumption by demonstrating, “by a preponderance of the evidence[,]” either that Ogle “does not, or did not, suffer from pneumoconiosis” or that Ogle’s “disability does not, or did not, arise out of coal mine employment[.]” App. 290.

The ALJ recognized that, to rebut the presumption by showing that Ogle does not suffer from pneumoconiosis, the Fund must demonstrate the absence of both clinical and legal pneumoconiosis. App. 293. The ALJ found that the preponderance of the x-ray evidence “demonstrated the absence of clinical pneumoconiosis[.]” App. 293. But he found that the Fund had failed to prove that Ogle did not have legal pneumoconiosis by a preponderance of the evidence. App. 296.

The ALJ’s analysis of the legal pneumoconiosis issue focused primarily on the medical opinions of five doctors: Dr. Anil Agarwal (who conducted Ogle’s DOL-sponsored evaluation);<sup>7</sup> Drs. Glen Baker and J. Randolph Forehand (Ogle’s medical experts); and Drs. James Castle and Thomas Jarboe (the Fund’s medical experts). App. 293-96. According to the ALJ, all five doctors agreed that Ogle

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<sup>7</sup> Each miner who files a BLBA claim must “be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation,” 30 U.S.C. § 923(b), which the Department provides at no cost to the miner. *See* 20 C.F.R. § 725.406.

suffered from totally disabling chronic obstructive pulmonary disease (COPD).<sup>8</sup> App. 288-89, 293. But they disagreed as to the cause. App. 293-96. Dr. Agarwal, Baker and Forehand attributed Ogle's disease to a combination of smoking and coal dust exposure. App. 293. Drs. Jarboe and Castle, however, opined that because the miner's obstructive lung disease was partially reversible, it was due solely to the miner's smoking history, not to a coal dust lung disease, which would be progressive and irreversible. App. 293.

Although the ALJ agreed with Drs. Jarboe and Castle that pneumoconiosis is a progressive and irreversible disease, he was troubled by the fact that Drs. Castle and Jarboe did not adequately explain those portions of Ogle's lung disease that were irreversible. App. 293-95. Likewise, although Drs. Castle and Jarboe explained that the miner's severely restrictive disease stemmed from paralysis of the hemidiaphragm and/or obesity stemming from coronary artery bypass surgery, the ALJ felt that they failed to explain the obstructive component of Ogle's lung disease. App. 295. The ALJ therefore found that the probative value of the opinions of Drs. Castle and Jarboe was "compromised" by their failure to "adequately explain the cause of the *irreversible* and *totally disabling* component

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<sup>8</sup> COPD is a lung disease characterized by "airway dysfunction" often resulting in "[a]irflow limitation and shortness of breath[.]" Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). It includes the disease processes "chronic bronchitis, emphysema, and asthma." *Id.*

of [Ogle's] lung disease.” App. 295. Likewise, the ALJ found that “to the extent that Drs. Castle and Jarboe rely on negative chest x-ray findings to preclude a finding of legal pneumoconiosis, including coal dust induced obstructive lung disease, their opinions lose probative value.”<sup>9</sup> App. 295.

In contrast, the ALJ was persuaded by the opinions of Drs. Agarwal, Baker, and Forehand, because their conclusions attributing Ogle's COPD, in part, to coal dust “are based on physical examination findings, work and smoking histories, qualifying ventilatory testing, symptoms, and complaints.” App. 296. The ALJ was further persuaded because these “physicians do not premise their opinions on views that are inconsistent with the plain language of the regulations or with the Department's position in the preamble.” App. 296. The ALJ therefore found that the Fund had failed to rebut the presumption of legal pneumoconiosis by a preponderance of the medical evidence. App. 296.

The ALJ then turned to the second method of rebuttal: “disability causation.” App. 296-97. He observed that, in the Fourth Circuit, “rebuttal is established by ‘ruling out’ the causal nexus between the miner's totally disabling

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<sup>9</sup> X-ray evidence is primarily used to diagnose clinical pneumoconiosis. 20 C.F.R. §§ 718.102, 718.201(a)(1). In the preamble to the BLBA's implementing regulations, the Department explained that coal dust exposure can produce a disabling chronic obstructive lung disease, even in the absence of findings of clinical pneumoconiosis and x-ray evidence of the same. 65 Fed. Reg. at 79,940-79,943; *see* App. 295-96.

lung impairment and his coal dust induced lung disease.” App. 296 (citing *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996)).<sup>10</sup>

Regarding total disability causation, Drs. Agarwal, Baker, and Forehand concluded that the miner’s totally disabling respiratory impairment stemmed from smoking and coal dust exposure. App. 297. The ALJ was persuaded by their opinions. He found them to be “sufficiently reasoned and documented on this record as they are based on physical examination findings, symptoms, complaints, and qualifying ventilatory testing.” App. 297. The ALJ again noted that the opinions of these doctors were consistent with the BLBA implementing regulations and the preamble to the regulations. App. 297. In contrast, he found the opinions of Drs. Castle and Jarboe—who attributed the miner’s totally disabling respiratory impairment to smoking, a paralyzed hemidiaphragm, and/or obesity—less probative. App. 297. In doing so, he noted that neither “physician diagnosed the presence of legal pneumoconiosis, contrary to this tribunal’s findings on the record as a whole.” App. 297.

Having found that the Fund had failed to rebut the 15-year presumption through either method, the ALJ awarded Ogle BLBA benefits. App. 297.

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<sup>10</sup> ALJ Colwell assumed that Fourth Circuit law applied to this case. App. 266. The Fund argues that this mistake was significant because it believes that the “rule-out” rebuttal standard applies in the Fourth Circuit, but not the Sixth. Pet. Brief at 25-30. The Director disagrees, and believes that the rule-out standard applies in both jurisdictions. See page 25-28, *infra*.

**b. The Benefits Review Board's January 9, 2013 Decision affirming the award.**

The Fund appealed to the Benefits Review Board, which affirmed. App. 300-09.<sup>11</sup> The Board rejected as contrary to established precedent the Fund's arguments that (1) Section 921(c)(4)'s rebuttal provisions do not apply to claims brought against a responsible operator; (2) the retroactive application of the 2010 amendment is unconstitutional; and (3) applying Section 921(c)(4) is premature because the Department has not yet promulgated regulations implementing it. App. 302-03. The Board then affirmed, as supported by substantial evidence, the ALJ's evaluation of the conflicting medical evidence and conclusion that the Fund had not rebutted the 15-year presumption. App. 303-07. The Board accordingly affirmed the award, and this appeal followed. App. 308, 310-14.

**SUMMARY OF THE ARGUMENT**

There is no dispute that Ogle worked as an underground coal miner for more than 15 years, that he now suffers from a totally disabling respiratory or pulmonary impairment, and that he is accordingly entitled to Section 921(c)(4)'s rebuttable presumption of entitlement. The Fund challenges only the ALJ's finding that it did not rebut the presumption. The operator musters two basic legal arguments support of this position, neither of which is persuasive.

The Fund first argues that the ALJ erred by limiting its available methods of

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<sup>11</sup> The Board noted that Sixth Circuit law applies to this case. App. 301.

rebuttal to the two listed in Section 921(c)(4) (i.e., by proving either that Ogle did not have pneumoconiosis or that his disability was unrelated to his coal mine work). It is true that this sentence does not, by its own terms, apply to private coal mine operators. But simple logic limits operators to those same two methods of rebuttal. Miners are entitled to BLBA benefits if they (a) suffer from pneumoconiosis that (b) causes (c) total disability. To invoke the 15-year presumption, Ogle proved that he was totally disabled. Proving either that Ogle did not suffer from pneumoconiosis or that Ogle's disability was caused by some other condition exhausts the Fund's possibilities for rebuttal—there is no other element to rebut. In any event, the rebuttal limitations played no role in the outcome of this case because the ALJ did not reject any of the Fund's rebuttal evidence on this ground, and the Fund has never advanced a plausible theory of rebuttal other than the two methods listed in Section 921(c)(4).

The Fund's second legal argument attacks the ALJ's statement that an operator seeking to rebut the 15-year presumption on disability causation grounds must "rule out" any connection between the miner's disability and coal mine work. But aside from its desire to substitute a more lenient standard, the Fund offers no compelling argument for setting aside the rule, which has been incorporated into the regulation implementing the 15-year presumption since 1980. In any event, like his statement of the available rebuttal methods, the ALJ's articulation of the

rule-out standard played no role in the outcome of this case. The ALJ did not find that the Fund’s medical evidence was insufficient to rebut the 15-year presumption because it did not “rule out” any connection between Ogle’s disability and his mining work. Instead, the ALJ concluded that the Fund’s experts were not credible. Without credible evidence, the Fund could not establish rebuttal under any standard.

The Fund also argues that, when considering whether it had shown that Ogle’s disability was unrelated to coal dust, the ALJ impermissibly discounted testimony of its medical experts who testified that Ogle did not have legal pneumoconiosis. But this was far from error. As the Fund admits, its experts’ analysis of the disability causation issue completely overlapped with their analysis of the legal pneumoconiosis issue. After finding that analysis unpersuasive in his discussion of legal pneumoconiosis, it would have been irrational for the ALJ to credit that same analysis when he turned to disability causation.

## **ARGUMENT**

### **1. Standard of Review.**

This brief addresses only the Fund’s legal challenges to Ogle’s benefits award. This Court “review[s] the Board’s legal conclusions de novo.” *Morrison*, 644 F.3d at 477. 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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999); *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).

**2. The ALJ did not improperly restrict the Fund’s ability to rebut the 15-year presumption.**

**a. While Section 921(c)(4)’s rebuttal-limiting sentence does not apply to operators, there is no longer any way to rebut the 15-year presumption aside from the two methods listed in the statute.**

The Fund’s primary legal argument is premised on the curious history of 15-year presumption’s rebuttal limitations. Section 921(c)(4), enacted in 1972, provides that “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.” In 1976, the Supreme Court held that Section 921(c)(4)’s rebuttal-limiting sentence “is inapplicable to operators.” *Usery*, 428 U.S. at 35. Nevertheless, when 20 C.F.R. § 718.305 was adopted in 1980, it applied those rebuttal limits to coal mine operators as well as the Secretary. *See* 20 C.F.R. § 718.305(a); 45 Fed. Reg. at 13692. The ALJ applied this regulatory standard. App. 289-90.

The Fund argues that the ALJ (and, by implication, Section 718.305(a))

improperly constrained its ability to rebut the 15-year presumption in defiance of the Supreme Court’s clear command. Pet. Brief 14-22. But this is not so. Section 921(c)(4)’s rebuttal limiting sentence does not apply to operators. But, as a result of BLBA amendments that became effective in 1978, the only way any liable party—whether a mine operator or the government—can rebut the 15-year presumption is to prove either that the miner does not suffer from pneumoconiosis or that the miner’s disability was not caused by coal mine employment. This is clear from the relationship between the elements of entitlement and the 15-year presumption.

In general, a miner seeking BLBA benefits must prove, by direct evidence or via presumption, that “(1) he has pneumoconiosis; (2) his pneumoconiosis arose at least in part out of his coal mine employment; (3) he is totally disabled; and (4) the total disability is due to pneumoconiosis.” *Morrison*, 644 F.3d at 478 (footnote and citations omitted); *see* 20 C.F.R. § 725.202(d)(2). “Pneumoconiosis,” however, includes both clinical and legal pneumoconiosis, and “legal pneumoconiosis” is defined as “any chronic lung disease . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). Thus, where (as here) legal pneumoconiosis is at issue, the first element of entitlement incorporates the

second.<sup>12</sup>

As a result, in any BLBA claim involving legal pneumoconiosis, the elements of entitlement can be reduced to: (1) **disease**: whether the miner suffers from a chronic lung disease arising out of coal mine employment; (2) **disability**: whether the miner has a totally disabling pulmonary or respiratory impairment; and (3) **disability causation**: whether the miner’s pneumoconiosis contributes to that disability. Legal pneumoconiosis will be at issue in any case where the 15-year presumption is invoked because an operator must disprove both legal and clinical pneumoconiosis to establish that a miner does not suffer from the disease. *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); see *Morrison*, 644 F.3d at 478-79 and n.3. To invoke the 15-year presumption, a miner must establish the disability element. As a result, there are only two elements left for an operator to rebut—disease and disability causation. These, of course, are the same methods of rebuttal listed in Section 921(c)(4).

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<sup>12</sup> The second element, disease causation, is independently relevant where the dispute focuses on clinical pneumoconiosis. See 20 C.F.R. §§ 718.201(a)(1), 718.203. For example, an operator could concede that a claimant has silicosis (one of the diseases specifically included in the regulatory definition of “clinical pneumoconiosis”) but argue that the miner contracted the disease while working in a silver mine rather than a coal mine. Although Ogle submitted some evidence suggesting that he has clinical pneumoconiosis, the ALJ determined that the Fund had successfully rebutted the presumption of clinical pneumoconiosis. App. 293. That determination is not at issue in this appeal.

A third logical possibility for rebuttal existed when *Usery* was decided in 1976, but it was extinguished two years later when the Act's definition of pneumoconiosis was amended. Before 1978, only miners totally disabled by *clinical* pneumoconiosis arising out of coal mine employment were generally entitled to BLBA benefits.<sup>13</sup> For example, a miner with totally disabling COPD caused solely by coal dust would not (absent a presumption) have a valid claim. This would be true even if the miner also had a mild case of clinical pneumoconiosis that did not contribute to the disability.

If such a miner invoked the 15-year presumption, however, the liable operator would not be able to rebut it under either method listed in Section 921(c)(4). It could not prove either (A) that the miner did not have clinical

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<sup>13</sup> Compare 20 C.F.R. § 718.201(a)(1) (“*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 arising”) (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) (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. § 718.210 (1981) (“pneumoconiosis” includes “any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure”).

pneumoconiosis, or (B) that the miner’s disability did not arise from the miner’s exposure to coal dust. It 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, if Section 921(c)(4)’s rebuttal-limiting sentence applied, the operator would be obligated to pay benefits to a former miner who was not disabled by clinical pneumoconiosis. This is the scenario animating *Usery*’s discussion of that sentence.

The operator-plaintiffs in *Usery* argued that Section 921(c)(4)’s rebuttal-limiting 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.” *Id.*<sup>14</sup> 428 U.S. at 34-35. The Court recognized this problem, *Usery*, 428 U.S. at 34 (“The effect of this limitation on rebuttal evidence is . . . to grant benefits to any

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<sup>14</sup> 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 listed in Section 921(c)(4).

miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis.” ), but held that Section 921(c)(4)'s rebuttal-limiting sentence “is inapplicable to operators,” *id.* at 35. It therefore had no need to address the constitutional question. *Id.* 35-37.<sup>15</sup> That holding has never been overturned, but it has been rendered irrelevant by subsequent congressional action.

On March 1, 1978, less than two years after *Usery* was decided, Congress expanded the definition of “pneumoconiosis” to include what is now known as legal pneumoconiosis. Black Lung Benefits Reform Act of 1977, Pub. L. 95-239 § 2(b), 92 Stat 95 (March 1, 1978); *see* 20 C.F.R. § 718.201(a)(2) (“legal pneumoconiosis” includes any “chronic lung disease or impairment . . . arising out of coal mine employment”); page 6-7, n.14, *supra*. 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 disabling lung disease caused by coal dust exposure is legal

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<sup>15</sup> While the Court held that “the Act does not itself limit the evidence with which an operator may rebut the [15-year] presumption[,]” it did not specify what methods beyond the two listed in Section 921(c)(4), if any, were available to them. *Usery*, 428 U.S. at 37. Indeed, it explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. *Id.* at 37 and n.40.

pneumoconiosis. 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.

Due to this amendment, the only ways to rebut the 15-year presumption are to prove either (A) that the miner does not suffer from pneumoconiosis (thus rebutting the disease element) or (B) that the miner’s disability does not arise from coal mine employment (thus rebutting the disability-causation element). *See* page 19, *supra*. Hence, when 20 C.F.R. § 718.305 was adopted in 1980, it listed the same two exclusive methods of rebuttal, but did not limit their application to the Secretary. And this Court has observed that employers are limited to the two listed methods of rebuttal. *See, e.g., Morrison*, 644 F.3d at 479. It remains true, as the Supreme Court held, that Section 921(c)(4)’s rebuttal-limiting sentence does not apply to private parties. But, since 1978, this holding has not mattered. No other rational rebuttal method exists.<sup>16</sup>

**b. The ALJ’s application of Section 921(c)(4)’s rebuttal limits had no impact on the Fund’s defense of this claim.**

The Fund’s claim that the ALJ “prejudicially” limited its rebuttal methods to the two listed in Section 921(c)(4), Pet. Brief at 21, is simply false. The ALJ did

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<sup>16</sup> This fact explains the Fund’s inability to cite any authority for the proposition that *Usery* allows operators to rebut the 15-year presumption by any method other than the two listed in the statute and 20 C.F.R. § 718.305(a).

not reject any of the Fund’s proffered evidence as outside the scope of rebuttal. And, even now, the Fund is unable to hypothesize a category of evidence or theory of the case that would permit rebuttal on a ground other than disease or disability causation. Its inability to do is strong evidence that there is, in fact, no other logical way to rebut the presumption. More importantly, it is conclusive proof that the Fund was not prejudiced by the ALJ’s application of the statutory rebuttal limitations. *See 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 [921(c)(4)], the petitioner in this case was not prevented by the hearing officer from submitting whatever rebuttal evidence it wished to submit.”).

The Fund argues that it has identified a third ground for rebuttal: “that [Ogle’s] pneumoconiosis is mild and that the totally disabling respiratory impairment was the product of another disease.” Pet. Brief at 20. But this is a straightforward disability-causation argument, and everyone agrees that an employer can rebut the 15-year presumption on that basis.<sup>17</sup> At another point, the Fund describes its proposed third method as allowing rebuttal where the operator

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<sup>17</sup> If an operator proves that a miner’s disability was caused by a disease other than pneumoconiosis, it will have necessarily shown that the miner’s “respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine”—one of the rebuttal methods listed in Section 921(c)(4).

proves that “pneumoconiosis was not a *significantly* or *materially* contributing cause of the pulmonary disability.” Pet. Brief at 22 (emphasis added). But this does not identify a method of rebuttal in addition to disease and disability causation. It addresses a separate issue—what an operator must show to establish rebuttal on disability-causation grounds—to which we now turn.

**3. The ALJ correctly stated that an operator must rule out any connection between pneumoconiosis and a miner’s disability to establish rebuttal on disability-causation grounds.**

The Fund’s second legal argument is that the ALJ improperly required it to “rule out” any connection between Ogle’s coal mine employment and his disability to establish rebuttal on disability-causation grounds. Pet. Brief 22-30. The Fund argues that operators should be able to rebut the 15-year presumption by proving only that the pneumoconiosis was not a “substantially contributing cause” of the miner’s disability. Pet. Brief at 25. The argument is both incorrect and irrelevant. It is incorrect because the ALJ properly articulated the rule-out rebuttal standard and irrelevant because the rule-out standard played no role in the outcome of this case.

**a. The rule-out standard applies to this case.**

An operator seeking to rebut the 15-year presumption on disability-causation grounds must rule out any connection between the miner’s disability and exposure to coal dust. This is clear from the regulation implementing the presumption,

which 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 . . . the presumption will be considered rebutted.” 20 C.F.R. § 718.305(d) (emphasis added).<sup>18</sup> To rebut the 15-year presumption, an employer must present evidence establishing that the miner’s total disability did not arise, even in part, from pneumoconiosis, as the ALJ put it, by “‘ruling out’ the causal nexus between the miner’s totally disabling lung impairment and his coal dust induced disease.” App. 296. *See Morrison*, 644 F.3d at 480 (“Rebuttal requires an affirmative showing . . . that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work.”) (quoting *Hatfield v. Sec’y of Health & Human Servs.*, 743 F.2d 1150, 57 (6th Cir. 1984), *overruled on other grounds by Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987)); *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939-40 (4th Cir. 1980) (testimony of operator’s doctor was legally insufficient to rebut the 15-year presumption on disability-causation grounds

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<sup>18</sup> The Fund argues that the ALJ violated its due process rights by adjudicating this case in the absence of a regulation or case law interpreting Section 921(c)(4) as revived in 2010. Pet. Brief at 21-24. But it cites no authority for the remarkable proposition that acts of Congress are ineffective until interpreted by administrative agencies or the courts. In any event, substantial guidance was available. Both the Department of Labor and the courts had interpreted Section 921(c)(4) long before 2010, and “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, 580-80 (1978)(citations omitted); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

because “the witness did not rule out the possibility of . . . a connection” between the miner’s cancer and “his previously existing [clinical] pneumoconiosis or from his work in the mines;” reversing Board’s denial and awarding benefits).

While this Court has not been called upon to interpret Section 718.305(d)’s “in whole or in part” language, it has interpreted identical language in a similar presumption: the now-defunct “interim presumption” of entitlement implemented by 20 C.F.R. § 727.203 (2000).<sup>19</sup> The interim presumption could be rebutted by several methods, one of which was “if the evidence established that the total disability or death of the miner did not arise *in whole or in part* out of coal mine employment[.]” 20 C.F.R. § 727.203(b)(3) (2000) (emphasis added).<sup>20</sup> The overwhelming majority of courts to interpret Section 727.203(b)(3)’s “in whole or in part” language concluded that rebuttal was available only to operators that ruled out any connection between disability and coal mine work. *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

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<sup>19</sup> The Part 727 “interim” regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 718.1(b); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 139 (1988).

<sup>20</sup> It could also, like the 15-year presumption, be rebutted by proof that the miner did not suffer from pneumoconiosis. 20 C.F.R. § 727.203(b)(4) (2000).

“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).

Contrary to the Fund’s suggestion, this Court followed the majority rule. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000) (affirming ALJ’s conclusion that doctor “did not *rule out* pneumoconiosis as a contributing cause of the disability” and explaining that 20 C.F.R. § 727.203(b)(3) “requires the employer to prove that coal mining played *no role* in the miner’s disability.”) (emphasis added); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984) (“If an employer is able to prove that pneumoconiosis *played no part* in causing a miner’s disability, then the employer has satisfied the requirements of section 727.203(b)(3). Where, however, pneumoconiosis is a contributing cause to a miner’s total disability, he is conclusively entitled to benefits.”) (emphasis added); *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 361 (6th Cir. 1985) (“the burden is on the employer to establish that pneumoconiosis did not contribute to the disabling disease.”). No amount of linguistic massaging can transform “no role” into “some role” or “no part” into “substantial part.” This Court consistently interpreted Section 727.203(b)(3) as adopting a rule-out standard, and the identical language in Section 718.305(d) should be interpreted

the same way.

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

The second problem with the Fund’s attack on the rule-out standard is that it played no role in the outcome in this case. To be sure, the ALJ mentioned the rule-out standard in his summary of relevant legal standards. App. 296. But the rule-out standard was irrelevant to the key factual dispute in this case: whether Ogle’s COPD was legal pneumoconiosis. And the term “rule-out” is nowhere to be found in the ALJ’s analysis of the disability-causation issue, the only place where it could be relevant.<sup>21</sup> App. 296-297.

The ALJ did find that the opinions submitted by the Fund’s medical experts—Drs. Jarboe and Castle—were inadequate to rebut the presumption. But this was not because the ALJ thought those opinions were insufficient to meet the rule-out standard. To the contrary, it is quite clear that the ALJ understood the Fund’s experts to rule out any connection between Ogle’s disability and his

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<sup>21</sup> The rule-out standard only applies where an operator seeks to rebut the presumption on disability-causation grounds. 20 C.F.R. § 718.305 (a), (d). And that rebuttal method is only relevant where the operator cannot establish rebuttal by the more direct method of proving that the miner does not have pneumoconiosis. *Id.*; *cf. Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore implicated only in cases where the miner worked underground for at least 15 years, suffers from a totally disabling respiratory or pulmonary impairment, and the operator is unable to establish that the miner does not have pneumoconiosis. It is not surprising that Section 718.305(d) imposes a demanding rebuttal standard in that circumstance.

exposure to coal dust. *See* App. 283 (Dr. Jarboe “categorically opined that [Ogle’s] disabling impairment was unrelated to coal mine dust or coal workers’ pneumoconiosis.”), 286 (“Dr. Castle opined that [Ogle] is permanently and totally disabled by cardiac disease, obesity, and possibly back problems,” and “tobacco smoke induced airway obstruction[,]” but “not coal workers’ pneumoconiosis or a coal mine dust induced lung disease.”).

The ALJ rejected those opinions on the more mundane ground that the Fund’s experts were not credible. According to the ALJ, Drs. Jarboe and Castle did “not adequately explain the cause of the *irreversible* and *totally disabling* component of the miner’s lung disease” and their testimony was inconsistent with the Department of Labor’s findings in the BLBA’s regulatory preamble. App. 295-296. The Fund was required to rebut a statutory presumption that Ogle is totally disabled by pneumoconiosis. Without credible medical evidence addressing the issue, the Fund cannot establish rebuttal under Section 718.305(d)’s rule-out standard, the more lenient “substantially contributing cause” standard the Fund champions, or any other standard. The ALJ’s articulation of the rule-out standard therefore played no role in the outcome of this case.

**4. The ALJ permissibly discredited Dr. Jarboe’s and Dr. Castle’s opinions on disability causation because they did not diagnose legal pneumoconiosis.**

This case, like many BLBA cases, ultimately boils down to a battle of the experts. It is therefore unsurprising that much of the Fund’s brief is devoted to attacking the ALJ’s conclusion that Drs. Jarboe and Castle were less credible than other physicians who offered contrary medical opinions. Pet. Brief at 31-58. Most of these attacks raise only substantial evidence issues and are not addressed in this brief.<sup>22</sup> But the Fund also raises a legal challenge that calls for a response.

The ALJ’s analysis of the testimony of Drs. Jarboe and Castle primarily occurred in his discussion of whether the Fund had shown that Ogle did not have legal pneumoconiosis. App. 290-296. The ALJ found their opinions insufficient

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<sup>22</sup> In the course of those arguments, the Fund notes that the ALJ considered the preamble to the BLBA’s implementing regulations in assessing the credibility of various doctors who testified in this case. Pet. Brief at 40-48. This Court has held that ALJs are entitled to do just that. *A&E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (explaining that an ALJ can give more weight to medical opinions that “are consistent with the medical and scientific premises underlying the amended regulations, as expressed in the preamble” and less weight to medical opinions that are not). Like other credibility determinations, the question of whether a particular doctor’s opinion is inconsistent with the Act, its regulations, or their preamble is primarily for the ALJ to decide. *See Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (“[O]n substantial evidence review we would have to find that the [employer’s] interpretation [of its expert’s testimony] was the only permissible one, not that it was one of several[,]” to reverse ALJ’s finding that the opinion was hostile to the BLBA.).

to rebut the presumption of legal pneumoconiosis. App. 296. He then turned to disability-causation rebuttal, and gave less weight to those doctors because they did not diagnose legal pneumoconiosis. App. 296-97. The Fund concedes that an ALJ “may accord less weight to a physician’s opinion based on the physician’s failure to diagnose pneumoconiosis when the ALJ, contrary to the physician, makes a factual finding of pneumoconiosis.” Pet. Brief at 56. But it argues that it was “illogical and inequitable” for the ALJ to apply that rule in this case because the ALJ did not “find” that Ogle had legal pneumoconiosis, but merely found that the Fund had not rebutted the statutory presumption of legal pneumoconiosis. Pet. Brief at 56.

Given the ALJ’s credibility findings, his conclusion is the only rational one he could reach. As the ALJ observed, all the medical experts diagnosed COPD, and there appears to have been no dispute that Ogle’s COPD contributed (along with other conditions) to his total respiratory disability. App. 293. Thus, the only real dispute was whether that COPD was legal pneumoconiosis (*i.e.*, whether it was caused solely by smoking, as Drs. Jarboe and Castle opined, or by a combination of smoking and coal dust). App. 293. Indeed, the Fund itself admits that the opinions of Drs. Jarboe and Dr. Castle “regarding legal pneumoconiosis *are* opinions about the causation of Mr. Ogle’s disability.” Pet. Brief at 57. Given

this admission, the ALJ's finding that the Fund's medical experts were similarly unpersuasive on the disability-causation issue is hardly "illogical."

This does not lead, as the Fund suggests, to a world where any operator failing to show that a miner does not have pneumoconiosis will necessarily fail to establish rebuttal on disability-causation grounds, effectively limiting operators to only one method of rebuttal. Pet. Brief at 57-58.<sup>23</sup> It merely means that, where the only seriously disputed medical issue in a case is whether the claimant's disabling lung disease was caused by coal dust, the employer can only establish rebuttal by proving that it was not. This is hardly a "drastic result" that "overrides the statutory framework[.]" Pet. Brief at 58. It is simple common sense.

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<sup>23</sup> It is not difficult to imagine scenarios where a doctor's discussion of a miner's alleged pneumoconiosis is entirely distinct from his disability-causation analysis. Consider a case where the miner has very mild emphysema and severe lung cancer. The operator's medical expert testifies that both diseases were caused solely by smoking and that the miner's disability is entirely due to the cancer. The ALJ finds that the miner's emphysema was caused, in part, by coal dust exposure, and is therefore legal pneumoconiosis. This finding would not undercut the expert's opinion that the cancer was the sole cause of the miner's disability.

## CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court reject the Fund's legal challenges to the ALJ's award of federal black lung benefits.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 9,309 words, as counted by Microsoft Office Word 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, copies of the Corrected Brief for the Federal Respondent were served electronically using the Court's CM/ECF system on the Court and the following:

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