

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

No. 13-1738

HOBET MINING, LLC,

Petitioner

v.

CARL R. EPLING, JR.

and

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

Respondents

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Hobet Mining, LLC's statement of appellate and subject matter jurisdiction is correct and complete.

STATEMENT OF THE ISSUES

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain claimants who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by

pneumoconiosis and therefore entitled to federal black lung benefits.¹ One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

Hobet argues that the ALJ and Board wrongly discredited Dr. Hippensteel's opinion that the miner's pulmonary problems were due to obesity and sleep apnea, not to intrinsic lung disease, and therefore incorrectly held that Hobet had failed establish rebuttal on disability causation grounds.

The questions presented are:

1. Whether, after finding the presumption of pneumoconiosis unrebutted, an ALJ can give less weight to the opinion of a medical expert who did not diagnose pneumoconiosis when he determined that the miner's pulmonary problems were unrelated to pneumoconiosis.
2. Whether the regulation adopting the rule-out standard is permissible.

¹ Unless otherwise noted, all citations to the Black Lung Benefits Act in this brief are to the 2012 version of Title 30. As discussed throughout this brief, one portion of the BLBA -- 30 U.S.C. § 921(c)(4) -- the primary section in dispute here -- was amended in 2010.

STATEMENT OF THE CASE

A. Course of the proceedings

Epling filed this claim on January 24, 2007. Joint Appendix (App.) 1. ALJ Richard Morgan denied benefits after finding that Epling had not established that he suffered from pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. App. 40. Epling appealed to the Board which vacated the ALJ's denial of benefits and remanded the case for reconsideration under the fifteen-year presumption, as revived by the Affordable Care Act.² App. 67. On remand, the ALJ awarded benefits, finding that Epling was entitled to the fifteen-year presumption and that Hobet had not rebutted the presumption. App. 72. Hobet appealed to the Board which affirmed. App. 94. Hobet then petitioned this Court for review. App. 104.

B. The decisions below

1. Judge Morgan denies benefits.

At the time of Judge Morgan's first decision, the fifteen-year presumption had not been restored by the ACA. Accordingly, Epling was required to prove that he had pneumoconiosis, that the pneumoconiosis was caused by his coal mine

² Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013). As detailed *infra*, the ACA restored 30 U.S.C. 921(c)(4), which affords a rebuttable presumption of total disability due to pneumoconiosis when a miner with 15 or more years of qualifying coal mine employment is totally disabled.

work, that he had a totally disabling pulmonary impairment, and that his disability was due to pneumoconiosis. 20 C.F.R. § 718.202-.204.

Judge Morgan credited Epling with at least 21 years of coal mine employment and recorded that he had never smoked. App. 43, 45. The ALJ found that Epling had not established pneumoconiosis because even though the chest X-rays showed clinical pneumoconiosis, they were outweighed by the CT scans and the medical opinions which did not diagnose clinical or legal pneumoconiosis.³ App. 56. The ALJ then found that although Epling suffered from total respiratory disability, he did not establish that it was caused by pneumoconiosis. App. 62. As with his pneumoconiosis finding, the ALJ gave greatest weight Dr. Hippensteel's opinion "because of the thoroughness of his comprehensive report which best integrated the medical evidence" (JA 61-62), and he credited Dr. Hippensteel's opinion that the miner's respiratory disability was due to hypoxemia from sleep apnea associated with obesity. App. 61. Concluding that Epling failed to establish two requisite elements of entitlement (disease and disability-causation), the ALJ denied the claim.

2. The Board remands.

³ "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).

While Epling’s appeal was pending, the ACA was enacted. The Board accordingly vacated the denial and remanded for consideration of whether Epling was entitled to invocation of the 15-year presumption, and whether Hobet rebutted the presumption by “disprov[ing] the existence of pneumoconiosis, or establish[ing] that claimant’s pulmonary or respiratory impairment ‘did not arise out of, or in connection with,’ coal mine employment.” App. 69.

3. Judge Morgan awards benefits.

On remand, the ALJ reopened the record to allow the parties to submit evidence to address the 15-year presumption. Epling submitted interpretations of four CT scans, medical treatment records, and the deposition of Dr. Ranavaya. Hobet submitted supplemental medical opinions and depositions from its experts, Dr. Crisalli and Dr. Hippensteel, and an interpretation of a CT scan.

The ALJ invoked the fifteen-year presumption because Epling had at least fifteen years of underground coal mine employment and the medical opinion and arterial blood gas study evidence established the existence of a totally disabling respiratory impairment.⁴ App. 83, 85.

⁴ Arterial blood gas studies “are performed to detect an impairment in the process of alveolar gas exchange.” 20 C.F.R. § 718.105(a). The defect primarily manifests “as a fall in arterial oxygen tension either at rest or during exercise.” *Id.* “[A]lveolar gas” refers to “the gas in the alveoli of the lungs, where gaseous exchange with the capillary blood takes place.” *Dorland’s Illustrated Medical Dictionary* at 756 (30th Ed. 2003). Alveoli are the “small saclike structures” in the lungs. *Id.* at 55.

The ALJ then found that the chest X-ray, CT scan evidence, and medical opinions established the presence of clinical pneumoconiosis. This time, the ALJ did not credit Dr. Hippensteel's opinion regarding the existence of clinical pneumoconiosis because he found that it was inconsistent with the chest X-ray and CT scan results. App. 80. The ALJ referred to the doctor's March 25, 2011 deposition, in which the doctor stated that the evidence regarding the existence of pneumoconiosis was equivocal and that the miner had neither clinical nor legal pneumoconiosis. The ALJ noted that Dr. Hippensteel's data was incomplete at that time because he did not review Dr. Miller's positive interpretation of the January 7, 2011 CT scan and Dr. Siegler's positive interpretation of the April 7, 2011 CT scan. App. 80. The ALJ acknowledged, however, that on February 2, 2012, Dr. Hippensteel interpreted a January 7, 2011 CT scan as indicating pneumoconiosis. *Id.*

On the issue of disability causation, the ALJ accorded little weight to employer's experts, Drs. Crisalli and Hippensteel, both of whom stated that the miner's disability was due to hypoxia from obesity and sleep apnea. App. 89. The ALJ rejected Dr. Crisalli's opinion because the doctor did not diagnose clinical pneumoconiosis.⁵ With regard to Dr. Hippensteel, the ALJ focused primarily on the doctor's 2011 deposition. He faulted the doctor for expressing the view that it

⁵ Hobet has not challenged this ALJ finding.

would be unusual for the miner to develop pneumoconiosis ten years after he left coal mine employment, and because the doctor's "ultimate opinion" was that the miner did not have clinical pneumoconiosis. *Id.* Thus, concluding that employer had not disproven the existence of clinical pneumoconiosis, nor that the miner's disability was not due to coal mine dust exposure, the ALJ awarded benefits. App. 90.

4. The Board affirms the award.

Hobet appealed to the Board which affirmed. App. 94. The Board affirmed, as supported by substantial evidence, the ALJ's finding that Hobet had not rebutted the fifteen-year presumption by proving that Epling's disability is unrelated to his coal mine dust exposure.⁶ In particular, the Board rejected Hobet's argument that because Dr. Hippensteel's two most recent opinions reflected a diagnosis of clinical pneumoconiosis, the ALJ erred in discrediting the doctor's opinion on disability causation. The Board reasoned that "Dr. Hippensteel's opinion as to the cause of the claimant's pulmonary impairment is set forth in reports and discussed during depositions that predate the doctor's acceptance of a diagnosis of clinical pneumoconiosis." App. 99. The Board also held that "Dr. Hippensteel's assumption of the existence of clinical pneumoconiosis at his deposition did not

⁶ Hobet did not challenge the ALJ's findings that Epling invoked the fifteen-year presumption, or that he suffered from clinical pneumoconiosis. App. 97, 98.

necessarily render his opinion on the issue of disability causation any more credible.” *Id.*

C. Relevant medical evidence – Dr. Hippensteel’s opinion⁷

At Hobet’s request, Dr. Hippensteel reviewed the miner’s medical records in May 2008. App. 184. He reported an underground mining history of 24.25 years and that the miner never smoked. The doctor considered physical examination reports, work and social histories, pulmonary function and blood gas study results, chest X-ray readings and CT scan interpretations, and treatment records, including the records from Dr. Zaldivar who treated the miner for sleep apnea in 2007. Dr. Hippensteel reported that the “evidence in the case was not clear cut in regard to the presence or absence of coal workers’ type of pneumoconiosis.” App. 191. The CT scans did not show the disease, although some chest X-rays did. The doctor observed that the miner was 60 pounds overweight and “[s]uch obesity makes for an apparent increase in lung markings on chest x-ray.” *Id.* He agreed with Dr. Crisalli that the miner suffered from hypoxemia at rest, and that obesity and sleep apnea were aggravating factors to gas exchange.⁸ He observed that Dr. Crisalli found no ventilatory impairment and a normal diffusion capacity “which is

⁷ There is no dispute that Epling has clinical pneumoconiosis and is totally disabled by a respiratory disease. The only issue on appeal relating to the medical evidence is whether the ALJ reasonably discredited Dr. Hippensteel’s opinion that Epling’s respiratory disability was caused by hypoxemia from sleep apnea and obesity.

⁸ Hypoxemia is "deficient oxygenation of the blood." *Dorland's* at 900.

against impairment in gas exchange based on intrinsic lung disease such as coal workers' pneumoconiosis." *Id.* Therefore, Dr. Hippensteel concluded that the miner's hypoxemia was not related to coal workers' pneumoconiosis, even if he assumed that the miner suffered from the disease. *Id.*

Hobet deposed Dr. Hippensteel on May 30, 2008. App. 193. The doctor reiterated that the miner's totally disabling hypoxemia was due to sleep apnea associated with his obesity because the miner's ventilatory function and diffusion capacity were normal. App. 212. Although the doctor was willing to accept a diagnosis of coal workers' pneumoconiosis, he was able to "rule out" that the miner's impairment was caused by pneumoconiosis. App. 213-214. The doctor explained that the results of the miner's pulmonary function studies over time were normal and thus showed that factors, other than intrinsic lung disease, were affecting his gas exchange. App. 214.

On November 23, 2010, after the Board remanded the case to the ALJ consideration under Section 921(c)(4), Hobet obtained a supplemental opinion from Dr. Hippensteel. App. 248. The doctor reviewed his May 2008 report and deposition. He reiterated that the chest X-rays varied in their interpretations, but the CT scan, "which is a widely used test to obtain more specific information than a regular chest x-ray," did not show pneumoconiosis. *Id.* The doctor also observed that the miner's ventilatory function was normal, but the miner was obese

and had “obstructive sleep apnea requiring treatment to prevent nocturnal hypoxemia and other complications of this upper airway problem.” *Id.* The doctor concluded that the miner’s records showed “some evidence against and some evidence for” the diagnosis of pneumoconiosis. App. 249. But even if the miner had simple pneumoconiosis, “in spite of the contrary evidence against that diagnosis,” the miner did not have any pulmonary impairment due to the disease “as explained and discussed in my report and deposition.” *Id.*

Dr. Hippensteel was deposed for a second time on March 25, 2011. App. 262. He noted that the experts disagreed regarding the presence simple pneumoconiosis and found the evidence equivocal. App. 267, 291-92. But he concluded that it was more likely the miner did not have pneumoconiosis “either in its medical or legal form. App. 281, 283, 286. Even assuming that pneumoconiosis was present, Dr. Hippensteel stated the miner did not have an impairment from the disease. *Id.* Although the miner’s blood gas study results indicated total disability, they were not based on pulmonary dysfunction, but from problems extrinsic to his lungs. App. 295.

On February 4, 2012, Dr. Hippensteel interpreted a January 7, 2011 chest CT scan as indicating simple pneumoconiosis. App. 258.

On February 19, 2012, Dr. Hippensteel reviewed Dr. Miller’s positive interpretation of the January 7, 2011 CT scan and Dr. Siegler’s positive

interpretation of the April 7, 2011 CT scan, Dr. Marzouk's treatment notes, and Dr. Ranavaya's December 21, 2011 deposition. App. 417. He concluded that the miner had "simple coal workers' pneumoconiosis, and medical problems unrelated to it, including granulomatous disease in his chest, obesity and sleep apnea. He does not have any disabling intrinsic lung disease from any cause." App. 420.

SUMMARY OF THE ARGUMENT

Hobet argues that, after finding that it had failed to rebut the presumption that Epling has clinical pneumoconiosis, the ALJ improperly discredited Dr. Hippensteel's opinion on disability causation because that doctor did not diagnose clinical pneumoconiosis. In Hobet's view, this was improper because Dr. Hippensteel did, in fact, diagnose the disease in his final two opinions. But the doctor's disability-causation opinion was explained in his earlier opinions in which the doctor was, at best, equivocal as to whether Epling suffered from clinical pneumoconiosis. The ALJ's decision to give Dr. Hippensteel's opinion less weight for this reason was well within his discretion.

Hobet concedes that the ALJ's award of benefits rests on the discrediting of Dr. Hippensteel's opinion and not on the application of an erroneous section 921(c)(4) rebuttal standard. Hobet Br. at 36. Therefore, if the Court affirms the ALJ's discrediting of Dr. Hippensteel's opinion, the Court need not address Hobet's remaining arguments regarding section 921(c)(4)'s rebuttal standard and

the Department's implementing regulation. If addressed, however, these arguments must be rejected.

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

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*. *Usery* simply held that employers must be allowed to rebut the presumption by proving that a miner's disability was not caused by pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows for rebuttal on that ground. Contrary to Hobet's suggestion, *Usery* does not hold that

employers must be allowed to rebut the fifteen-year presumption merely by proving that pneumoconiosis is not a “substantial” cause of a miner’s disability. Like the statute itself, *Usery* is silent on that point.

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. *Doss v. Director, OWCP*, 53 F.3d 654, 659 (4th Cir. 1995). Substantial evidence means evidence “of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review.” *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999).

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

B. The ALJ permissibly discredited Dr. Hippensteel’s opinion on disability causation

Hobet argues that the ALJ erred in giving little weight to Dr. Hippensteel’s opinion regarding the cause of Epling’s respiratory disability. We disagree. The ALJ’s discrediting of Dr. Hippensteel’s opinion regarding the cause of the miner’s disability is supported by substantial evidence.

Hobet argues that the ALJ incorrectly concluded that Dr. Hippensteel did not diagnose pneumoconiosis. It is true, as Hobet points out, that in 2012 – *four years after he began reviewing the evidence*—that Dr. Hippensteel finally diagnosed pneumoconiosis based on more recent positive CT scans. App. 258, 420. However, in his 2008 and 2010 opinions, the doctor stated that there was evidence for and against a diagnosis of pneumoconiosis (App. 191, 213, 249); and in his 2011 deposition, he stated that it was more likely that Epling did not suffer from the disease (App. 282-283). It is these earlier opinions which contain the doctor’s explanation of why Epling’s respiratory disability was not related to coal dust exposure, as the Board recognized. App. 99. When Dr. Hippensteel eventually diagnosed pneumoconiosis in 2012, he did not revisit the disability-causation analysis provided in his earlier opinions -- he simply categorically pronounced that the miner “does not have any disabling intrinsic lung disease from any cause.” App. 420. It was as though nothing had changed, and the doctor gave no

explanation why this was so. Thus, the doctor's 2012 disability-causation opinion -- by failing to take into account his conversion to the clinical pneumoconiosis camp-- is entirely unexplained, and the ALJ permissibly disregarded it. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9 (4th Cir. 1998) (ALJ has the discretion to disregard an opinion unsupported by a sufficient rationale); *Risher v. OWCP*, 940 F.2d 327, 331 (8th Cir. 1991) ("An ALJ may disregard a medical opinion that does not adequately explain the basis for its conclusion.").

Further, the doctor's failure to diagnose pneumoconiosis in his earlier opinions leaves these opinions less credible on the cause of a miner's disability. *Scott v. Mason Coal Co.*, 289 F.3d 263, 268-69 (4th Cir. 2002); *Grigg v. Director, OWCP*, 28 F.3d 416, 419-20 (4th Cir. 1994) (doctor's misdiagnosis of pneumoconiosis renders opinion on disability causation "not worthy of much, if any, weight" and legally insufficient to meet "rule out" rebuttal standard). In sum, the ALJ could disregard Dr. Hippensteel's succinct conclusion in his 2012 opinion that Epling does not have any disabling intrinsic lung disease because the doctor did not explain this opinion, and the ALJ properly questioned Dr. Hippensteel's earlier opinions that Epling's respiratory disability was not related to

pneumoconiosis given that, at the time he rendered these opinions, he had not definitively diagnosed pneumoconiosis.⁹

C. The rule-out standard in context

Hobet's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Epling's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Hobet Br. at 35-46. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is simple: in light of the statute's silence on the topic, is the Department's regulation permissible under *Chevron*. Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather than discussing that regulatory

⁹ Hobet (Br. 32-33) argues that the Board "stretched" to affirm the ALJ's finding on this basis in violation of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). But *Chenery* limits *judicial* review of *administrative* decisions and does not apply to the Board, itself an administrative agency. Here, the Board correctly affirmed the ALJ's weighing of the evidence as within his discretion and supported by substantial evidence. App. 99; *see* 33 U.S.C. 921(b)(3) incorporated by 30 U.S.C. § 932(a) (Board standard of review of ALJ decisions). App. 99. The ALJ addressed Dr. Hippensteel's February 4 and February 19, 2012 opinions, which primarily review CT scan interpretations and diagnose clinical pneumoconiosis, in considering the existence of pneumoconiosis. App. 80. *See generally Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 891 (7th Cir. 2002) (observing that CT scans are just one method for diagnosing the existence of pneumoconiosis). And then when the ALJ addressed disability causation, he properly focused on (and rejected) Dr. Hippensteel's earlier opinions because it was in those earlier opinions that Dr. Hippensteel detailed his views on the cause of the miner's disability. App. 89.

scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing regulations before addressing Hobet’s challenge to the regulatory rule-out standard.

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

The BLBA, originally enacted in 1969, is designed to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)’s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: “If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis[.]” 30 U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.¹⁰ In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and

¹⁰ Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (Dec. 29, 1981).

pending on or after March 23, 2010.¹¹ It therefore applies to Epling’s claim, which was filed in 2007 and remains pending. App. 1.

On September 25, 2013, the Department of Labor promulgated a regulation (“revised section 718.305” or “revised 20 C.F.R. § 718.305”) implementing the fifteen-year presumption.¹² The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.¹³ *See infra* at 20-21; Hobet Br. at 42 n.9 (admitting no change). Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses Hobet’s petition

¹¹ Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013).

¹² Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners’ and Survivors’ Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

¹³ 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners’ Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress’s removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 revision. *See* 20 C.F.R. § 718.305 (2012).

through the lens of revised section 718.305.¹⁴

2. Elements of entitlement

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

Pneumoconiosis comes in two forms, clinical and legal. “Clinical pneumoconiosis” refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). “Legal pneumoconiosis” is a broader category, including “any chronic lung disease . . . arising out of coal mine employment.” 20 C.F.R.

¹⁴ The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). Hobet does not argue that the revised regulation should not be applied. Nor could it. The revised regulation does not change the law, but merely reaffirms the Department’s longstanding interpretation of 30 U.S.C. § 921(c)(4). Regulations that do not “replace[] a prior agency interpretation” can be applied to “antecedent transactions” without violating the general against retrospective rulemaking. *Smiley v. Citibank*, 517 U.S. 735, 744 n.3 (1996); *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir. 1999).

§ 718.201(a)(2).¹⁵ Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.¹⁶

3. The fifteen-year presumption and methods of rebuttal

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

While there are three presumed elements available to rebut, there are in

¹⁵ This has been true since 1978, when the current statutory definition of pneumoconiosis – “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment” – was enacted. 30 U.S.C. § 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. 95-239 § 2(b) (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as “a chronic dust disease of the lung arising out of employment in a coal mine.” 30 U.S.C. § 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 35-37.

¹⁶ Miners with clinical pneumoconiosis and at least ten years of coal mine employment are rebuttably presumed to satisfy the disease-causation element by operation of 30 U.S.C. § 921(c)(1). *See* 20 C.F.R. § 718.203(b).

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

The first method is to prove that the miner does not have a lung disease caused by coal mine employment. To do this, the employer must prove (A) that the miner does not have legal pneumoconiosis *and* (B) either that the miner does not have clinical pneumoconiosis, or that the miner’s clinical pneumoconiosis was not caused by coal mine employment. These showings would rebut either the disease element (by demonstrating the absence of legal and clinical pneumoconiosis) or the disease-causation element (by demonstrating the absence of legal pneumoconiosis and that the miner’s clinical pneumoconiosis was not caused by coal mine employment). If the employer fails to prove the absence of a

lung disease related to coal mine employment, it can only rebut by the second method: attacking the presumed causal relationship between that disease and the miner's disability (thus rebutting the disability-causation element).

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

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

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

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

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

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

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115. While it was phrased less clearly, the previous regulation similarly allowed employers to rebut the presumption by attacking any of the three presumed elements (disease, disease causation, and disability causation).¹⁷

¹⁷ From 1980 until 2013, 20 C.F.R. § 718.305(a) provided that the presumption could be rebutted “only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” The revised regulation's language was designed “to more clearly reflect that all three of the presumed elements may be rebutted.” 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107; *see* Hobet Br. at 42 n.9.

4. The rule-out standard

The revised regulations also explain what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. § 718.305(d)(1)(i).¹⁸ But if the employer fails to rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a “*substantially contributing cause*” of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner’s pneumoconiosis and disability, however, the employer must “establish that *no part* of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis[.]” Revised section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R § 718.305(d) (1981) (The presumption “will be

¹⁸ For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b).

considered rebutted” if the liable party establishes that “the cause of death or total disability did not arise *in whole or in part* out of dust exposure in the miner’s coal mine employment.”) (emphasis added). This “no part” or “in whole or in part” standard is often referred to as the “rule-out” standard.¹⁹ The primary legal dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii), is a permissible interpretation of the Act.

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

Hobet argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that “pneumoconiosis was mild and did not *substantially* contribute to total disability.” Hobet Br. at 40 (emphasis added).²⁰ Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, Hobet’s challenge is governed by *Chevron*’s familiar two-step analysis. As this Court explained in upholding another BLBA regulation, “In applying *Chevron*, we first ask ‘whether Congress has directly spoken to the

¹⁹ The Sixth Circuit sometimes describes it as a “contributing cause” standard. *See Ogle*, 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding “substantially contributing cause” standard Hobet advocates. ALJ Morgan, relying on Fourth Circuit caselaw, stated that an employer must “rule out” any causal relationship between a miner’s disability and his coal mine employment. App. 82.

²⁰ At times, Hobet describes this as a “third method” of rebuttal. Hobet Br. at 40. But the substantial contribution standard is “not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain—that pneumoconiosis caused total disability.” *Ogle*, 737 F.3d at 1070.

precise question at issue.’ Our *Chevron* analysis would end at that point if the intent of Congress is clear, ‘for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Elm Grove Coal*, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If, however, “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.’ In that regard, the courts have ‘long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.’” *Id.* (quoting *Chevron*, 467 U.S. at 843-44).²¹

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

Applying *Chevron*'s first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.²² Congress has therefore left a gap for the Department to fill.

²¹ Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove*, 480 F.3d at 292. The regulation falls within the Secretary of Labor's statutory authority to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]” 30 U.S.C. § 936(a). *See also Bethlehem Mines Corp. v. Massey* (“*Massey*”), 736 F.2d 120, 124 (4th Cir. 1984) (“The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.”).

²² The statute addresses rebuttal only in the context of claims in which the

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

The only remaining question is whether the regulatory rule-out standard is a permissible way to fill this statutory gap. The fact that Hobet’s “substantial contribution” standard may also be a permissible interpretation is irrelevant.²³ “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.²⁴

government is the responsible party, explaining that the Secretary can rebut the presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner’s “respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” 30 U.S.C. § 921(c)(4). The second method encompasses disability causation. *See supra* at 22. But it does not specify what showing the government must make to establish rebuttal on that ground.

²³ The Director’s rule-out standard and Hobet’s “substantial contributing cause” standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that pneumoconiosis is not a “significant,” “necessary,” or “primary” cause of a miner’s disability might also be permissible. So long as the rule-out standard the Director actually adopted falls within the range of permissible alternatives, it must be upheld.

²⁴ *Cf. Pauley*, 501 U.S. at 702 (“[I]t is axiomatic that the Secretary’s interpretation

Deference to this regulation is particularly appropriate because “[t]he identification and classification of medical eligibility criteria [under the BLBA] necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.” *Pauley*, 501 U.S. at 697. The fact that the rule-out standard establishes criteria for rebutting, rather than establishing, a claimant’s entitlement does not change the fact that it establishes medical eligibility criteria. *Massey*, 736 F.3d at 124 (“The wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress.”).

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

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59016.²⁵ Congress amended the BLBA in 1972

need not be the best or most natural one by grammatical or other standards. Rather, the Secretary’s view need be only reasonable to warrant deference.”) (citations omitted).

²⁵ Notably, this explanation directly responded to comments suggesting that the Department eschew the rule-out standard in favor of the “substantially contributing cause” standard Hobet advocates here. *Id.*

because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86. Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, “Congress enacted the presumption to ‘[r]elax the often insurmountable burden of proving eligibility’” those miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17).

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

attempt to prove that such a miner's disability is unrelated to pneumoconiosis.²⁶

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

The Department adopted the rule-out standard by regulation over 30 years ago. *See* 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if “the cause of . . . total disability did not arise *in whole or in part* out of dust exposure in the miner's coal mine employment.”) (emphasis added). This fact alone supports the Department's claim for deference. *See, e.g., Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). If Congress was dissatisfied with the section 718.305(d)'s rule-out rebuttal standard when it re-enacted section 921(c)(4)

²⁶ *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (Rejecting constitutional challenge to BLBA regulation; explaining “Unless the inference from the predicate facts of coal-mine employment and pulmonary function values to the presumed facts of total disability due to employment-related pneumoconiosis is “so unreasonable as to be a purely arbitrary mandate,” we may not set it aside[.]”) (quoting *Usery*, 428 U.S. at 28).

in 2010, it could have imposed a different standard in the amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This choice can only be interpreted as an endorsement of the Director's longstanding adoption of the rule-out standard.

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

The only court of appeals to address the rule-out standard since section 921(c)(4) was revived in 2010 affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (Agreeing with the Director that an employer “must show that the coal mine employment *played no part* in causing the total disability.”). The issue was presented to this Court in *Owens*, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.²⁷

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F.

²⁷ Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery*. 724 F.3d at 559. Hobet advances the same argument, which is addressed *infra* at 34-41. Notably, the revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

App'x. 563 (4th Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.²⁸ The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant had not demonstrated a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that: "it is the [employer's] failure to effectively *rule out* such a relationship that is crucial." *Id.* (emphasis added). After concluding that the employer's evidence was "clearly insufficient to meet the statutory burden" because its key witness "did not rule out the possibility of such a connection [between the miner's disabling cancer and pneumoconiosis or his mining work,]" this Court reversed the Board and awarded benefits. *Id.* at 939. *Accord Colley & Colley Coal Co.*, 59 F. App'x. at 567 ("[T]he rebuttal standard requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.") (citation and quotation omitted). Hobet has given no reason for this Court to depart from *Rose*.

²⁸ *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. § 921(c)(4) ("there shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis").

The fact that this Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the now-defunct “interim presumption” established by 20 C.F.R. § 727.203 (1999) is yet further evidence that it is a permissible rebuttal standard.²⁹ The interim presumption was substantially easier to invoke than the fifteen-year presumption, being available to any miner who could establish ten years of employment (or, in some circumstances, even less) and either total disability or clinical pneumoconiosis. *See* 20 C.F.R. § 727.203(a) (1999); *Pittston Coal v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the now-defunct interim presumption could be rebutted if the operator proved that the miner’s death or disability did not arise *in whole or in part* out of coal mine employment[.]” 20 C.F.R. 727.203(b)(3) (emphasis added).³⁰ This, of course, is the same language that the initial version of 20 C.F.R. § 718.305(d) used to articulate the rule-out

²⁹ The Part 727 “interim” regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 725.4(d); *Mullins Coal Co.*, 484 U.S. at 139. As this Court has recognized, the interim presumption is “similar” to the fifteen year presumption, *Colley & Colley Coal Co.*, 59 F. App’x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. 20 C.F.R. § 725.4.

³⁰ Rebuttal could also be established by proving that the miner did not have pneumoconiosis, 20 C.F.R. § 727.203(b)(4), or was not totally disabled, 20 C.F.R. 727.203(b)(1)-(2).

standard. *See supra* at 22 n.17. As this Court held in *Massey*, “[t]he underscored language makes it plain that the employer must *rule out* the causal relationship between the miner’s total disability and his coal mine employment in order to rebut the interim presumption.” 736 F.2d at 123.³¹ In *Massey*, this Court rejected an employer’s argument that the rule-out standard was impermissibly restrictive, explaining that “[t]he wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate” because there is “nothing in the Black Lung Act to indicate that the Secretary’s rebuttal evidence rule exceeds its congressional mandate.” 736 F.2d at 124.³² If rule-out is an appropriate rebuttal standard for the

³¹ *See also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339 (4th Cir. 1996) (“This rebuttal provision requires the employer to *rule out* any causal relationship between the miner’s disability and his coal mine employment by a preponderance of the evidence, a standard we call the *Massey* rebuttal standard.”). The overwhelming majority of other courts to consider the issue have agreed. *See Rosebud Coal Sales Co. v. Wiegand*, 831 F.2d 926, 928-29 (10th Cir. 1987) (rejecting employer’s argument that rebuttal is established “upon a showing that [claimant’s] disability did not arise in whole or in *significant* part out of his coal mine employment” as “wholly at odds with the decisions rendered by six courts of appeals” which “apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal mine employment be ruled out”) (citing cases in the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits).

³² Hobet cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the section 921(c)(4) presumption are not similarly situated to claimants who have (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim

easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

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

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

Hobet repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. Hobet Br. at 43-46. From Hobet's brief, one might expect to find, in *Usery*, a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving

presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely based on negative x-ray readings. *See* 20 C.F.R. § 718.202(a)(1),(b).

that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." This is the same language that the prior version of section 718.305 used to describe rebuttal options for employers as well as the government. As explained *supra* at 20-23, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

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

6-7.³³

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits. This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner's disability did not arise from the miner's exposure to coal dust (it

³³ This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. Compare 20 C.F.R. § 718.201(a)(1) (2013) ("**clinical pneumoconiosis** . . . includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis") (emphasis added) with 20 C.F.R. § 410.110(o) (1970) ("**pneumoconiosis** . . . includes anthracosis, silicosis, or anthracosilicosis") (emphasis added) and 20 C.F.R. § 410.110(o)(1) (1976) ("**pneumoconiosis** . . . includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis") (emphasis added). After several presumptions (including the 15-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. See 20 C.F.R. § 410.110(o)(2)-(3) (1976). But the general regulatory definition of pneumoconiosis did not include what is now called "legal" pneumoconiosis until after statutory definition was broadened in 1978. See 20 C.F.R. § 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

did, via the disabling emphysema). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, certain miners were entitled to benefits even though they were not disabled by clinical pneumoconiosis.

This is the precise scenario animating *Usery's* discussion of the fifteen-year presumption. The operator-plaintiffs in *Usery*, concerned that section 921(c)(4)'s rebuttal-limiting sentence would be applied to private employers as well as the government, argued that the sentence effectively created an unconstitutional irrebuttable presumption "because it establishes liability even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability" and "that the disability was wholly a product of other disease" caused by coal dust exposure, that "is not otherwise compensable under the Act."³⁴ 428 U.S. at 34-35. The Court recognized this problem, *Usery*,

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

428 U.S. at 34 (“The effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years’ employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis.”), but 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.

It is true that *Usery* “confirmed the existence of a *limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in § 921(c)(4) are not logically equivalent to the methods that would otherwise be available.”. *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring) (*quoted* in *Hobet. Br.* at 41-42). Due to section 921(c)(4)’s rebuttal-limiting sentence, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any “chronic lung disease or impairment . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2).³⁵ As a result, the scenario

³⁵ *See supra* at 35-36.

motivating *Usery's* discussion of the rebuttal-limiting sentence became moot. Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every lung disease caused by coal dust exposure is legal pneumoconiosis.³⁶ 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.³⁷

Most importantly for present purposes, *Usery* has nothing at all to do with the rule-out standard. At most, *Usery* stands for the proposition that operators must be allowed to rebut the fifteen-year presumption by proving that a miner's disability is caused by a disease other than pneumoconiosis. Both the old and

³⁶ Similarly, the court's observation that the rebuttal limiting sentence effectively "grants benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis[.]" 428 U.S. at 34, is now irrelevant, because every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis.

³⁷ The many authorities applying the rebuttal-limiting sentence's language to operators — including 20 C.F.R. § 718.305 (1981) and this Court's decisions in *Rose*, 614 F.2d at 939 — simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Once the definition of pneumoconiosis was expanded to include legal pneumoconiosis, "[t]he only ways that any liable party—whether a mine operator or the government—can rebut the 15-year presumption are the two set forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements.").

revised version of 20 C.F.R. § 718.305 allow operators to rebut the presumption on disability-causation grounds and are therefore consistent with *Usery*. But nothing in *Usery* even suggests that an operator must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a “substantial” contributing cause of a miner’s disability. To the contrary, the words the Court used to frame the operators’ argument—the rebuttal-limiting sentence can prevent rebuttal “even though it might be medically demonstrable in an individual case that the miner’s pneumoconiosis was mild and did not cause the disability [and] that *the disability was wholly a product of other disease*”—are not only consistent with the rule-out standard, they essentially articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a “substantial” cause of a miner’s disability.³⁸ It is also consistent with the plain text of section 921(c)(4), which is entirely silent on the subject of whether attempts to rebut the presumption by

³⁸ As a result, Hobet’s extensive analysis of Supreme Court decisions addressing regulations that interpret statutes in ways that conflict with earlier judicial interpretations is irrelevant. Hobet Br. at 42-46. In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might be permissible. 428 U.S. at 37 and n.40.

disproving disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.³⁹ Hobet’s argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

³⁹ To the extent that Hobet’s brief could be read to suggest that the rule-out standard itself is an interpretation of the text of section 921(c)(4)’s rebuttal-limiting sentence, it cites nothing in *Usery* or any other case supporting that claim. Such an interpretation would also be inconsistent with the Director’s explanation for adopting the rule-out standard in the revised regulation and the fact that the rule-out standard also applied to 20 C.F.R. § 727.203’s “interim” presumption, which did not derive from section 921(c)(4)’s text.

CONCLUSION

Hobet's challenge to the ALJ's decision to give little weight to Dr. Hippensteel's opinion on disability causation, and its legal challenges to the regulatory rebuttal standard should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

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

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 9,904 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, an electronic copy of this brief was served through the CM/ECF system on all parties.

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