

No. 11-3964

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

HARLAN-CUMBERLAND COAL COMPANY

Petitioner

v.

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The petitioner “waiv[ed] oral argument” in its opening brief. Pet. br. at 16. The federal respondent agrees that this appeal can be resolved without argument, but would be happy to participate if this Court believes that argument would aid its deliberations.

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Harlan-Cumberland Coal Company (Harlan-Cumberland or employer) petitions this Court for review of a Benefits Review Board decision affirming the award of Franklin Farmer's claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), as amended by Section 1556 of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA), Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). This Court has both appellate and subject matter jurisdiction over Harlan-Cumberland's

petition for review pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Act, 30 U.S.C. § 932(a).

On September 12, 2011, Harlan-Cumberland petitioned this Court for review of the Board's July 12, 2011, Decision and Order, within the sixty-day time limit set forth in section 21(c). 33 U.S.C. § 921(c); Fed. R. App. P. 26(a)(1)(C) (if a filing deadline falls on a Saturday, "the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."). The injury contemplated by 33 U.S.C. § 921(c)—Franklin Farmer's exposure to coal mine dust—occurred in Kentucky, within the jurisdictional boundaries of this Court.

The Board had jurisdiction to review the administrative law judge's decision pursuant to section 21(b)(3) of the Longshore Act. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). Harlan-Cumberland appealed the administrative law judge's June 8, 2010, decision to the Board on June 29, 2010, within the thirty-day period prescribed by section 21(a) of the Longshore Act. 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUES

Under 30 U.S.C. § 921(c)(4), as amended by Section 1556 of the Affordable Care Act, coal miners who worked underground for at least 15 years and suffer from a totally disabling respiratory or pulmonary impairment are rebuttably

presumed to be totally disabled by pneumoconiosis, and therefore entitled to federal black lung benefits. The administrative law judge, finding that Farmer was entitled to the presumption and that Harlan-Cumberland had failed to rebut it, awarded benefits. The questions presented are:

1. Whether the ALJ's determination that Harlan-Cumberland failed to rebut the 15-year presumption is supported by substantial evidence.
2. Whether Section 1556 of the Affordable Care Act must be struck down as inseverable if other, unrelated provisions of that statute are found to be unconstitutional.

STATEMENT OF THE CASE

Private respondent Franklin Farmer filed his first claim for federal black lung benefits in 2001, which was finally denied in 2005. Director's Exhibit (DX) 1 at 354, 2.¹ He filed this claim, his second, in 2007. DX 3. While it was pending before the administrative law judge, Congress revived 30 U.S.C. § 921(c)(4)'s 15-year presumption in pending claims filed after January 1, 2005. Pub. L. No. 111-

¹ The Director's Exhibits are included in the Board's November 9, 2011, Index of Documents but are not paginated. The DX citation is employed for the reader's convenience. Also included in the Index of Documents but not paginated is the May 12, 2009, Hearing Transcript, which will be cited to as "HT." The most significant parts of the record have been included in an Appendix ("App") that the Director has prepared and filed at the same time as this brief.

148, § 1556 (2010). The ALJ, applying the presumption, awarded benefits in a decision dated June 8, 2010. App. 12-25. Harlan-Cumberland appealed to the Board, which affirmed on July 12, 2011. App. 5-11. This appeal followed. On January 13, 2012, after the petitioner's brief was filed, this case was held in abeyance pending the Supreme Court's resolution of various challenges to unrelated provisions of the Affordable Care Act. On September 21, 2012, after the Supreme Court resolved those challenges in *National Federation of Independent Business v. Sebelius*, --- U.S. ---, 132 S. Ct. 2566 (2012), the briefing schedule was reset.

STATEMENT OF THE FACTS

A. Statutory and regulatory background.

1. Elements of entitlement and the 15-year presumption.

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as “black lung disease.” 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Coal miners seeking federal black lung benefits must prove (1) that they suffer from pneumoconiosis; (2) that their pneumoconiosis arose out of coal mine employment; (3) that they are totally disabled by a respiratory or pulmonary impairment; and (4) that their pneumoconiosis contributed to their total disability. 20 C.F.R. § 725.202(d); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477,

482 (6th Cir. 2012). These four elements can be established either directly or by the Act's various presumptions. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416 (6th Cir. 1997) (A claimant "bears the burden of proving each element of his claim by a preponderance of the evidence, except insofar as he is aided by a presumption."); *see generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act...prescribes several 'presumptions' for use in determining compensable disability.").

One such presumption, the "15-year presumption," is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from "a totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4).² If so, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis" and

² 30 U.S.C. § 921(c)(4) also requires that at least one "chest roentgenogram" [*i.e.* x-ray] submitted in connection with the claim" must be interpreted as negative for complicated pneumoconiosis, a particularly advanced form of the disease, for the claimant to invoke the presumption. If the x-ray evidence uniformly demonstrates complicated pneumoconiosis, the claimant is entitled to an irrebuttable presumption of entitlement, 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304, and "there would have been no need to invoke the [rebuttable 15-year] presumption." *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), *quoted in Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011). In any event, the ALJ found that the x-ray evidence submitted in this claim "does not show complicated pneumoconiosis." App. 21.

therefore entitled to benefits. *Id.* An employer may rebut the 15-year presumption by demonstrating that the miner “does not, or did not, have pneumoconiosis” or that “his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” *Id.* See also 20 C.F.R. § 718.305 (implementing 30 U.S.C. § 921(c)(4)); *Morrison*, 644 F.3d at 479-80.³

The 15-year presumption was added to the BLBA in 1972. Pub. L. 92-303 § 4(c), 86 Stat. 154 (1972). In 1981, the presumption was eliminated for all claims filed after that year. Pub. L. 97-119 § 202(b)(1), 95 Stat. 1643 (1981). In 2010, while Farmer’s current claim was being considered by the ALJ, Congress restored the 15-year presumption in Section 1556 of the Affordable Care Act. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). This restoration applies to all claims

³ There are two types of pneumoconiosis, “clinical” and “legal.” 20 C.F.R. § 718.201; *Banks*, 690 F.3d at 482 (6th Cir. 2012). “Clinical pneumoconiosis” refers to a particular collection of diseases “recognized by the medical community as pneumoconiosis[.]” 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; dust need not be the disease’s sole or even primary cause. 20 C.F.R. § 718.201(b). To rebut the 15-year presumption, an employer must prove that the claimant has neither clinical nor legal pneumoconiosis. *Morrison*, 644 F.3d at 479-80; *Ansel*, 529 F.2d at 310; cf. *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (“The legal definition of ‘pneumoconiosis’ is incorporated into every instance the word is used in the statute and regulations.”).

filed after January 1, 2005, that are pending on or after March 23, 2010, the ACA's enactment date. *Id.*; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011).

There is no dispute that this claim, which was filed in September 2007 and remains pending, satisfies these effective date requirements. DX 3; Pet. br. at 3, 15. Nor does Harlan-Cumberland challenge the ALJ's finding that Farmer is entitled to the presumption because he worked as an underground miner for more than 15 years and suffers from a totally disabling respiratory impairment. App. 6 n.3; *see* Pet. br. 3. Instead, the employer argues that the ALJ erred by not ruling that it had successfully rebutted the presumption. Pet. br. at 8, 10-14.

2. Subsequent claims.

A miner's medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a latent and progressive disease that may first become detectable—or disabling—after a claimant stops mining. 20 C.F.R. § 718.201(c); *Banks*, 690 F.3d at 482. For this reason, previously unsuccessful claimants are permitted to file “subsequent claims,” arguing that they now satisfy the elements of entitlement. 20 C.F.R. § 725.309. To ensure that the previous denial's finality is respected, a subsequent claimant must prove that his or her condition has changed by establishing with “new evidence” (*i.e.*, evidence addressing the miner's condition after the previous claim was denied) at least one

of the elements of entitlement decided against the miner in the earlier claim. 20 C.F.R. § 725.309(d)(3); *Banks*, 690 F.3d at 486. If the miner demonstrates the required change in condition, the subsequent claim is allowed and the ALJ goes on to consider all the evidence, old and new, to determine whether the miner satisfies all four elements of entitlement. 20 C.F.R. § 725.309(d)(4); *Banks*, 690 F.3d at 486.

While this is a subsequent claim, Harlan-Cumberland does not challenge the ALJ's finding that Farmer has established an element of entitlement (total respiratory disability) decided against the miner in his previous claim. App 19, 2 n.3; Pet br. at 3 and 7 n.4.

B. Factual background and Farmer's initial claim.

Farmer worked as a coal miner in Kentucky for twenty-seven years, including roughly 25 years of underground work. DX 4, 5; Hearing Transcript (HT) 9, 15. He was employed by Harlan-Cumberland from 1996 until he stopped working in March 2001. DX 7.⁴ He is a non-smoker. App. 16, 37, 43.

Farmer filed his initial claim for federal black lung benefits in April 2001.

⁴ The last coal mine operator to employ a claimant as a miner for at least one year is generally liable for the miner's BLBA benefits. *See* 20 C.F.R. § 725.495(a)(1). Harlan-Cumberland has not contested its status as the responsible operator in this case. HT 9-10.

DX 1. An administrative law judge found that Farmer suffered from pneumoconiosis caused by coal mine employment. DX 1 at 41-42.⁵ He denied the claim, however, because Farmer had failed to prove that he was totally disabled. *Id.* at 44. The judge based this conclusion primarily on Dr. Dahhan’s testimony that, “from a respiratory standpoint, [Farmer] retains the respiratory capacity to continue his previous coal mining work or job of comparable physical demand.” App. 58, DX 1 at 44.⁶ Farmer appealed, but the Benefits Review Board affirmed the denial in a decision dated April 29, 2005. DX 1 at 2-8.⁷ Farmer took no further action on that claim, and the denial accordingly became final.

C. The claim on appeal.

Farmer filed this claim on September 7, 2007. DX 3. Harlan-Cumberland contested the claim and requested an administrative hearing, which was conducted before ALJ Merck on May 19, 2009. DX 25. After the hearing, Congress revived the 15-year presumption. 30 U.S.C. § 921(c)(4), as amended by Pub. L. No. 111-

⁵ The administrative law judge’s opinion in the previous claim is also available at [http://www.oalj.dol.gov/Decisions/ALJ/BLA/2003/Farmer_Franklin_v_Harlan_Cumberland_Co_2003BLA05481_\(Jun_18_2004\)_081239_cadec_sd_files/css/Farmer_Franklin_v_Harlan_Cumberland_Co_2003BLA05481_\(Jun_18_2004\)_081239_cadec_sd.htm](http://www.oalj.dol.gov/Decisions/ALJ/BLA/2003/Farmer_Franklin_v_Harlan_Cumberland_Co_2003BLA05481_(Jun_18_2004)_081239_cadec_sd_files/css/Farmer_Franklin_v_Harlan_Cumberland_Co_2003BLA05481_(Jun_18_2004)_081239_cadec_sd.htm).

⁶ See 20 C.F.R. § 718.204(b)(1).

⁷ The Board’s decision in Farmer’s previous claim is also available at <http://www.dol.gov/brb/decisions/blklung/unpublished/Apr05/04-0837.htm>.

148, § 1556(a), (c), 124 Stat. 119, 260 (2010). ALJ Merck provided the parties an opportunity to submit additional medical evidence in light of this change as well as position statements addressing the 15-year presumption’s applicability to this case. App. 14. No party submitted additional evidence and only Farmer submitted a position statement, which argued that the miner was entitled to the presumption. *Id.*

1. The relevant medical evidence.

The parties do not challenge the ALJ’s findings that Farmer has a totally disabling respiratory impairment but does not suffer from clinical pneumoconiosis. As a result, “[t]he only question of fact at issue in this matter is whether the claimant, Franklin Farmer, has ‘legal pneumoconiosis.’” Pet. br. at 8. The ALJ’s resolution of that disputed issue—and hence the employer’s challenge to the ALJ’s award—centered on the conflicting opinions offered by two medical experts: Dr. Rasmussen, who testified that Farmer’s disabling respiratory impairment arose, in part, out of his coal mine employment, and Dr. Dahhan, who testified that coal dust exposure played no role in Farmer’s chronic lung impairment. Pet. br. at 10-14.⁸

⁸ Medical evidence in the record that is not relevant to this question is not separately summarized. For example, the x-ray readings (which are primarily used to diagnose clinical pneumoconiosis) and the various pulmonary function tests and arterial blood gas study results (which are primarily used to determine whether a miner’s respiratory impairment is totally disabling) are not summarized except to
(continued...)

Dr. Rasmussen's November 14, 2007, report

Dr. Rasmussen examined Farmer on November 5, 2007, and drafted a report nine days later.⁹ App. 42. He recorded a 30-year work history of mainly underground coal mining that included considerable heavy manual labor. *Id.* He reported that Farmer was a non-smoker, having never smoked. *Id.* at 43. Dr. Rasmussen reported that the miner underwent surgery in 1998 to address paralysis of the left hemidiaphragm (*i.e.* the left half of his diaphragm). *Id.* at 44; *accord id.* at 57 (Dr. Dahhan's 2001 opinion). Dr. Rasmussen also noted that the miner had been diagnosed with sleep apnea in 2004 and had a history of "COPD, EM" (chronic obstructive pulmonary disease, emphysema). *Id.* at 43.¹⁰ He reported that while the ventilatory studies revealed only a minimal impairment in oxygen transfer at rest, during "light exercise" they showed a "marked" oxygen-transfer impairment and hypoxia. *Id.* at 48. Based on these results, Dr. Rasmussen

(...continued)

the extent that they are referenced by Drs. Dahhan and Rasmussen. *See* 20 C.F.R. §§ 718.202(a)(1), 718.204(b)(2)(i), (ii). Nor are the medical opinions addressing Farmer's condition at the time of his 2001 claim, which the ALJ did not credit due to their age and the employer does not discuss in its brief. App. 20, 25.

⁹ This examination was provided by the Department to fulfill its statutory duty to provide a claimant-miner with "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b).

¹⁰ The regulatory definition of legal pneumoconiosis includes COPD and emphysema that is caused, in part, by exposure to coal mine dust. 20 C.F.R. § 718.201(a)(2), (b).

concluded that Farmer does not retain the pulmonary capacity to perform his former coal mine job. *Id.* at 48.

Dr. Rasmussen stated there were two factors—occupational exposure to coal dust and the miner’s “history of having had a paralyzed left hemidiaphragm in the past”—to be considered in assessing the cause of Farmer’s “severe disabling lung disease.” App. 48. While the doctor noted that Farmer “exhibits some features consistent with paralyzed hemidiaphragm,” he explained that Farmer’s test results produced outcomes that would not be expected from this abnormality alone. *Id.* at 48-49 (Farmer “does not exhibit increase in VE/VO₂, which would clearly be expected, and he exhibits much greater hypoxia than would be expected during exercise.”). Dr. Rasmussen also noted that the diaphragm abnormality had been addressed surgically in a procedure “which basically stretches the diaphragm and usually corrects much of the abnormality” and that his current x-ray of Farmer revealed only a “mild elevation” of the miner’s left diaphragm. *Id.* at 49. He therefore concluded that it “seems unlikely [that Farmer’s] diaphragmatic abnormality would be a major contributing cause of his lung disease.” *Id.*

As for Farmer’s exposure to coal dust, Dr. Rasmussen observed that “[c]oal mine dust is a known potent cause of lung tissue destruction” which can cause “both COPD/emphysema as well as interstitial fibrosis and can frequently have a pattern of significant impairment in oxygen transfer in excess of or in the absence

of ventilatory impairment that we see in Mr. Farmer's case." *Id.* He therefore concluded that Farmer's exposure to coal mine dust "is clearly a major contributing factor to his disabling lung disease." *Id.*¹¹

Dr. Dahhan's March 17, 2008, report¹²

Dr. A. Dahhan examined Farmer on March 17, 2008, at Harlan-Cumberland's request. App. 37. He recorded a 30-year underground coal-mine-work history. *Id.* Dr. Dahhan noted that Farmer was a non-smoker, a fact confirmed by the miner's low carboxyhemoglobin level. *Id.* He reported a medical history including the "surgical repair of paralyzed right hemi diaphragm in 2000." *Id.*¹³ Based on his examination and test results, Dr. Dahhan concluded that Farmer "does not retain the respiratory capacity to return to his previous coal

¹¹ Dr. Rasmussen also diagnosed clinical pneumoconiosis based on a November 2011 x-ray, which he also identified as a "material contributing cause" to the miner's lung disease. App. 44, 49.

¹² As noted above, Dr. Dahhan also submitted a report on the employer's behalf in Farmer's initial claim. App. 57-59. In that report, dated December 17, 2001, Dr. Dahhan testified that Farmer retained the respiratory capacity to perform his previous coal mine work. App. 58. The doctor diagnosed neither legal nor clinical pneumoconiosis. *Id.* He reported that Farmer had "sleep apnea and history of paralysis of the left hemi-diaphragm post repair with resulting mild restrictive ventilatory defect" but noted that neither condition was caused by coal dust exposure. *Id.* at 58.

¹³ There is no documentation of a second surgery on Farmer's right hemidiaphragm in 2000, therefore, it seems most likely that Dr. Dahhan meant the 1998 surgery to the left hemidiaphragm which he mentioned in his 2001 report, but not in his 2008 report. *Compare* App. 57, 62 *with* App. 37.

mining work or job of comparable demand.” App. 38. Dr. Dahhan attributed Farmer’s ventilatory impairment to “obesity, sleep apnea and normal [sic] left hemi diaphragm[.]” Dr. Dahhan opined “within a reasonable degree of medical certainty” that he found “no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust, hence, no evidence of legal pneumoconiosis.” *Id.*¹⁴ He also concluded, based on a negative x-ray reading, that Farmer did not suffer from clinical pneumoconiosis.

2. Summary of the decisions below.

ALJ Merck’s June 8, 2010, Decision and Order awarding benefits

The ALJ awarded benefits in a decision dated June 8, 2010. App. 12-36. Based on his review of Farmer’s employment records and the parties’ stipulation, the ALJ found that Farmer had worked in coal mining for 27 years and that 25 of those years were underground. App. 16. The ALJ credited Farmer’s testimony, and Drs. Rasmussen’s and Dahhan’s medical reports, to find that the miner had never been a smoker. *Id.* The ALJ determined that Farmer had established a change in his condition because the recent pulmonary function studies and both

¹⁴ In addition to his 2001 and 2008 reports in connection with Farmer’s BLBA claims, the record also includes notes from Dr. Dahhan’s treatment of Farmer in 1998-1999 as well as his 1991 pre-employment examination of the miner. App. 60-63; *see also* DX 1 at 248-293.

new medical reports (Dr. Rasmussen's 2007 report and Dr. Dahhan's 2008 report) established that the miner has a totally disabling respiratory impairment, an element of entitlement decided against him in the prior claim. *Id* at 18-19.

After concluding that Farmer's condition had changed, the ALJ reviewed all the additional evidence in the record to assess the claim on the merits. Finding that the test results and medical opinions submitted in Farmer's prior claim, which dated from 1997 to 2001, were less probative than the more recent evidence, the ALJ concluded that a preponderance of all the evidence established total disability. App. 19-20. On the basis of this finding, and Farmer's more than 15 years of underground coal mine employment, the ALJ concluded that Farmer had invoked the 15-year presumption of entitlement. App. 21 citing 20 C.F.R. § 718.305(a).

The ALJ then considered whether Harlan-Cumberland had rebutted the presumption by proving that Farmer does not have pneumoconiosis, or by showing that his respiratory disability did not arise in whole or in part out of dust exposure during coal mine employment. App. 21; *see* 20 C.F.R. § 718.305(a), (d). He concluded that the employer failed to demonstrate that Farmer did not suffer from legal pneumoconiosis or that his disabling impairment was not due, in part, to coal dust exposure. *Id.* at 34, 35.

The ALJ's analysis of the legal pneumoconiosis issue focused on the Rasmussen and Dahhan reports. The ALJ summarized each report in considerable

detail. App. 26-19 (Rasmussen), 29-31 (Dahhan). He determined that Dr. Rasmussen had provided a well-reasoned opinion, based on objective medical evidence, which fully explained his diagnosis that Farmer's chronic pulmonary impairment was caused by a combination of his years of coal dust exposure and his history of diaphragmatic abnormality. App. 29. The ALJ acknowledged that Dr. Rasmussen did not specify exactly how much of Farmer's disability was due to each factor, but noted that such specifics were not required because the regulatory definition of pneumoconiosis is not limited to impairments caused solely by coal dust. App. 28-29 (citing *Cornett v. Benham Coal Co.*, 227 F.3d 569, 576 (6th Cir. 2000) and *Crockett Collieries v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007)).

Turning to Dr. Dahhan's opinion, the ALJ acknowledged the doctor's observation that obesity, sleep apnea, and diaphragm paralysis "can cause an impairment such as Claimant's[.]" App. 30. In the ALJ's view, however, Dr. Dahhan's conclusion—that Farmer's impairment "was not caused by, related to, contributed to or aggravated by the inhalation of coal dust"—was unpersuasive because "the doctor provided no explanation for his conclusion that 30 years of underground coal dust exposure did not contribute to Claimant's restrictive ventilatory impairment." *Id.* at 30-31. Based on this lack of explanation or supporting documentation, the ALJ found Dr. Dahhan's opinion that Farmer does not suffer from legal pneumoconiosis to be "inadequately reasoned" and therefore

entitled to little probative weight. *Id.* at 30, 33.

Crediting Dr. Rasmussen's opinion as more persuasive than Dr. Dahhan's, the ALJ found that a preponderance of the evidence supported a finding of legal pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(4). App. 33-34. He similarly credited Dr. Rasmussen's opinion that Farmer's total disability was causally related to the miner's coal dust exposure. *Id.* at 34-35.¹⁵ Consequently, the ALJ found that Harlan-Cumberland had failed to rebut the 15-year presumption and awarded the claim. *Id.*

The Benefits Review Board's July 12, 2011, Decision and Order affirming the award.

Harlan-Cumberland appealed to the Benefits Review Board, which affirmed. App. 5-11. The Board rejected the employer's constitutional challenge to the ALJ's application of the ACA amendments as inconsistent with Board precedent, and affirmed the ALJ's finding that the claim satisfied ACA Section 1556's effective date requirements. App. 7-8. It also affirmed the ALJ's determination that Farmer had properly invoked the 15-year presumption, based on the ALJ's "unchallenged findings that claimant established more than fifteen years of

¹⁵ The ALJ noted that the medical opinions addressing legal pneumoconiosis and disability causation submitted in Farmer's previous claims were entitled to little probative weight because they were based on significantly older medical tests. *Id.* at 25, 35.

qualifying coal mine employment and the existence of a totally disabling respiratory impairment.” App. 8.

The Board then rejected Harlan-Cumberland’s various challenges to the ALJ’s weighing of the conflicting medical opinions. App. 8-11. The Board affirmed the ALJ’s reliance on Dr. Rasmussen’s diagnosis of legal pneumoconiosis, “because the [ALJ] specifically found that Dr. Rasmussen set forth the rationale for his findings” and “and explained why he concluded that claimant’s lung disease was due to both coal mine dust exposure and the effects of a paralyzed left hemidiaphragm.” *Id.* at 9. The Board then considered and rejected Harlan-Cumberland’s argument that Dr. Rasmussen’s diagnosis was “not definitive enough to support a finding of legal pneumoconiosis” because the doctor “ultimately concluded, without equivocation, that claimant’s ‘coal mine dust [exposure] is clearly a major contributing factor to his disabling lung disease.’” *Id.* at 9.

The Board then turned to Harlan-Cumberland’s objections to the ALJ’s evaluation of Dr. Dahhan’s opinion. It affirmed the ALJ’s finding that Dr. Dahhan’s opinion was inadequately explained as “permissible.” App. 10. It also rejected the employer’s contention that Dr. Dahhan was entitled to greater deference as Farmer’s former treating physician. The Board found this argument to be inconsistent with 20 C.F.R. § 718.104(d), which “provides that the weight

given to the opinion of a treating physician shall be ‘based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole.’” App. 10 (quoting *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (holding that the “case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts.”)).

The Board thus affirmed the ALJ’s conclusions Harlan-Cumberland had failed to rebut the 15-year presumption by proving that Farmer did not suffer from legal pneumoconiosis or that the miner’s disabling impairment was unrelated to his exposure to coal mine dust as supported by substantial evidence. App. 10-11. The Board accordingly affirmed the award, and this this appeal followed. App. 11, 4.

SUMMARY OF THE ARGUMENT

The ALJ correctly invoked Section 921(c)(4)’s presumption of entitlement based on his unchallenged findings that Farmer worked as an underground coal miner for more than 15 years and suffers from a totally disabling respiratory impairment. The ALJ then properly imposed the burden of rebutting that presumption on Harlan-Cumberland. The ALJ permissibly determined that the weight of the medical evidence was insufficient to rebut the presumption and, therefore, that Farmer was entitled to benefits.

Harlan-Cumberland challenges the ALJ’s rebuttal findings by contesting his

decision to credit Dr. Rasmussen's opinion that Farmer's 27 years of occupational coal dust exposure contributed to his totally disabling respiratory condition rather than Dr. Dahhan's contrary opinion. But such credibility determinations are the ALJ's to make. The ALJ adequately explained his reasons for determining that Dr. Dahhan's opinion—the employer's only affirmative evidence addressing the cause of the miner's current condition—as not sufficiently well-reasoned to rebut the statutory presumption that Farmer is totally disabled due to pneumoconiosis. The ALJ's analysis of this conflicting expert testimony is supported by substantial evidence and should be affirmed.

Harlan-Cumberland also argues that Section 1556 of the Affordable Care Act, which revived the 15-year presumption, should be struck down as inseverable from other, purportedly unconstitutional provisions of the ACA. This argument is moot in light of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). The award should be affirmed.

ARGUMENT

A. Standard of Review.

Harlan-Cumberland's primary argument challenges the ALJ's credibility determinations and weighing of the medical opinion evidence, which must be affirmed if they are supported by substantial evidence, *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997), "even if the facts permit an alternative conclusion," *Youghiogeny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995). The employer's severability challenge, in contrast, presents a pure question of law subject to plenary review by this Court. *See Morrison*, 644 F.3d at 477.

B. The ALJ's conclusion that Harlan-Cumberland did not rebut the 15-year presumption is supported by substantial evidence.

On appeal, Harlan-Cumberland does not challenge the ALJ's determinations that Farmer (1) is totally disabled by a respiratory impairment, (2) worked as an underground miner for over 15 years, and (3) is therefore entitled to 33 U.S.C. § 921(c)(4)'s 15-year presumption of entitlement. *See App. 6 n.3*. It challenges only the ALJ's finding that it did not rebut the presumption. In particular, the employer challenges the ALJ's evaluation of the conflicting medical opinions offered by Drs. Dahhan and Rasmussen. Pet at br. 10-14.

Where, as here, "the question . . . is whether the ALJ reached the correct result after weighing conflicting medical evidence," this Court's "scope of review is exceedingly narrow[.]" *Crockett Collieries*, 478 F.3d at 355 (citations, internal

quotation, and alterations omitted). This is particularly so when resolving challenges to an ALJ's evaluation of conflicting testimony by medical experts. *Id.* (“[W]hen medical testimony conflicts, the question of whether of physician’s report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.”) (quotation omitted); *accord A&E Coal Co. v. Adams*, 694 F.3d 798, 803 (6th Cir. 2012) (“The ALJ’s conclusion that Dr. Rasmussen’s opinion was sufficiently reasoned but that Dr. Jarboe’s was not is a matter of credibility, which we cannot revisit.”) (citing *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002)). Harlan-Cumberland identifies no defect in ALJ Merck’s opinion warranting reversal under this demanding standard.

1. The ALJ permissibly discounted Dr. Dahhan’s opinion as inadequately explained.

An employer attempting to rebut the 15-year presumption bears a significant burden. “Rebuttal requires an affirmative showing that the claimant does *not* suffer from pneumoconiosis, or that his disease is not related to coal mine work.” *Morrison*, 644 F.3d at 480 (quoting *Hatfield v. Sec’y of HHS*, 743 F.2d 1150 (6th Cir. 1984) (overruled on other grounds by *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987))). As the ALJ correctly recognized, an employer must prove that the miner has neither legal nor clinical pneumoconiosis. App. 21; *see Morrison*, 644 F.3d at 480 n.5 (employer must affirmatively prove the absence of

pneumoconiosis to rebut the presumption); *Barber*, 43 F.3d at 901. Legal pneumoconiosis includes “any . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 718.201(b). To defeat Farmer’s claim, Harlan-Cumberland was therefore obligated to affirmatively establish that the miner’s disabling respiratory impairment is not significantly related to his 27 years of coal mine work. The ALJ’s conclusion that Dahhan’s opinion was insufficient to meet this burden is adequately explained and falls comfortably within his broad fact-finding discretion.

The ALJ acknowledged that Dr. Dahhan had identified Farmer’s obesity, sleep apnea, and history of diaphragm abnormalities as possible contributors to the miner’s disability. App. 31. But he discounted Dr. Dahhan’s opinion because the doctor “provided no explanation for his conclusion that coal dust exposure did not also contribute to that impairment.” *Id.* This is a reasonable construction of Dr. Dahhan’s testimony on the subject, which simply states without discussion that there was “no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust.” App. 38. The ALJ permissibly found that this unexplained conclusion did not constitute a sufficiently reasoned and documented medical opinion to satisfy Harlan-Cumberland’s rebuttal burden. The employer has cited no evidence or authority

suggesting that the ALJ's reasoning was anything other than a credibility determination entitled to this Court's deference. *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1120 (6th Cir.1987) ("the court may not abrogate the ALJ's function to evaluate and resolve conflicting medical evidence.").

Harlan-Cumberland also argues that the ALJ improperly failed to take Dr. Dahhan's "special status" as Farmer's "treating physician" into account. Pet br. 12-13. Contrary to the employer's suggestion, treating physicians are not automatically entitled to any heightened deference in BLBA claims. "[I]n black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003). Instead, "ALJs must evaluate treating physicians just as they consider other experts." *Id.*, at 513. While Dr. Dahhan may have treated Farmer before 2001, nothing in the doctor's 2008 opinion indicated that he had any current treatment relationship with Farmer or suggested that he had any particular insights into the miner's current condition based on their past relationship. *See* 20 C.F.R. § 718.104(d) (listing factors to consider in determining whether a treating physician relationship has led to "a superior understanding" of the miner's condition). Dr. Dahhan's opinion was therefore not entitled to any particular

deference.¹⁶

2. The ALJ permissibly credited Dr. Rasmussen’s opinion that Farmer’s disability was caused, in part, by exposure to coal mine dust.

Harlan-Cumberland also challenges the ALJ’s decision to credit Dr. Rasmussen’s opinion, which attributed Farmer’s disabling respiratory impairment to both coal dust exposure and the miner’s abnormal diaphragm. Pet. br. 14. As an initial matter, the fact that the ALJ credited Dr. Rasmussen’s affirmative diagnosis of legal pneumoconiosis is irrelevant unless the Court overturns the ALJ’s determination that Dr. Dahhan’s opinion is not sufficiently credible to meet the employer’s rebuttal burden. But, should the Court reach the issue, it should defer to the ALJ’s evaluation of Dr. Rasmussen’s diagnosis.¹⁷

¹⁶ Harlan-Cumberland briefly suggests that it was error for the ALJ to discount Dr. Dahhan’s 2008 opinion in this proceeding because another ALJ found Dr. Dahhan’s 2001 opinion to be persuasive in Farmer’s prior claim. Pet. br. at 11. In *Crockett Collieries*, this Court held that an ALJ’s “apparent reversal in course” in rejecting a medical opinion he had credited at an earlier stage of the same case “does not provide any basis for overturning the ALJ’s award of benefits.” 478 F.3d at 355-56. That logic applies with greater force in this case. Moreover, the employer’s argument fails to appreciate the current posture of Farmer’s claim, where the burden of proof has shifted to Harlan-Cumberland, and the issue is Farmer’s medical condition in 2008 rather than 2001. Indeed, even Dr. Dahhan conceded that Farmer’s condition had deteriorated in the interim from a “mild” disability to a totally disabling one. *Compare* App. 58 *with id.* at 38.

¹⁷ The ALJ found, and the Board affirmed, that Dr. Rasmussen’s credible opinion outweighs Dr. Dahhan’s opinion and affirmatively establishes that Farmer suffers from legal pneumoconiosis, 20 C.F.R. § 718.202(a)(4), and that his disabling
(continued...)

Dr. Rasmussen explained his conclusions and documented his opinion with the results of a physical examination as well as a pulmonary function test, arterial blood gas study, and citations to relevant medical treatises and journal articles. App. 33-47. Nor is Dr. Rasmussen's opinion equivocal. As the Board explained, while Dr. Rasmussen opined that there "appear to be two factors which could be considered in assessing the cause of Mr. Farmer's severe disabling lung disease," he definitively and without equivocation concluded that Farmer's exposure to coal mine dust "*is clearly* a major contributing factor to his disabling lung disease." App. 9, 49 (emphasis added). Furthermore, Dr. Rasmussen cited to test results, backed by a medical journal article on the subject, to explain his conclusion that it was "unlikely" that Farmer's diaphragmatic abnormality was a major contributing cause of his lung disease. App. 48-49. And, in any event, it is entirely permissible for an ALJ to credit a doctor who attributes a miner's respiratory impairment to both coal dust exposure and a second, unrelated cause. *See, e.g., A&E Coal Co.*, 694 F.3d at 800 (affirming ALJ's reliance on Dr. Rasmussen opinion that "it was difficult to differentiate between the effects caused by smoking and the effects

(...continued)

respiratory impairment is due, in part, due to pneumoconiosis, 20 C.F.R. § 718.204(c)(1). Based on these findings (and the unchallenged finding that he is totally disabled), Farmer could apparently defend his award without the 15-year presumption's aid.

caused by coal mine dust”); *Banks*, 690 F.3d 477 (affirming ALJ’s reliance on opinions attributing disability to both coal mine dust and smoking).

Harlan-Cumberland argues that Dr. Rasmussen’s report is insufficient as a matter of law because its conclusions are not stated in terms of “reasonable medical certainty” which, the employer theorizes, is required by this Court’s decision in *Eastover Mining*. Pet. br. at 14. But this Court has long held that “a court should not disregard the substance of a doctor’s testimony merely because he fails to use the magic words ‘reasonable medical certainty.’” *Thompson v. Underwood*, 407 F.2d 994, 997 (6th Cir. 1969).

Eastover Mining does not create a different rule in BLBA cases. In that case, this Court overturned a benefits award that was based on a doctor’s testimony that he “could only conclude with ‘a reasonable degree of medical *probability*’ that pneumoconiosis contributed to the miner’s death, rather than the usual phrase, ‘reasonable degree of medical *certainty*.’” 338 F.3d at 516-17. But *Eastover Mining* does not hold that any opinion that does not use the phrase “reasonable medical certainty” is insufficient *per se*. The Court’s concern was with the doctor’s decision to cast his opinion in terms of “medical probability,” which it viewed as unduly equivocal, rather than his failure to use the magic phrase.¹⁸ Dr.

¹⁸ As the Court explained, “‘certainty’ in medicine only means ‘nearly sure’ (continued...)”

Rasmussen's unequivocal conclusion that "coal mine dust is clearly a major contributing factor in [Farmer's] disabling lung disease" is a far cry from the opinion rejected in *Eastover Mining*. App. 49.

Moreover, the doctor's use of the phrase "reasonable degree of medical probability" was only one of several reasons this Court gave for finding the opinion at issue in *Eastover Mining* to be inadequate. The doctor had changed his opinion in the case without explanation under circumstances the Court viewed as suspicious, and possessed no relevant expertise. *Eastover Mining*, 338 F.3d at 517-18. Dr. Rasmussen, in contrast, has not given conflicting testimony in this case and has long been regarded as an expert in the field. *See, e.g., Morris v. Matthews*, 557 F.2d 563, 569 (6th Cir. 1977) (describing Dr. Rasmussen as "[a]n acknowledged expert in the field of pulmonary impairments of coal workers") (quoting S. Rep. 92-743, 92nd Cong., 2d Sess. (1972), 1972 U.S.C.C.A.N. 2305, 2314-15); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005) ("Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis.").

(...continued)

relative to the existential sense of the word 'certain.' If a 'medical certainty' is a conviction short of complete certainty, then a 'medical probability' must mean something even less sure" and reversed the award based on that opinion. 338 F.3d at 517.

Eastover Mining simply does nothing to advance Harlan-Cumberland's cause.

In sum, the ALJ properly reviewed the entirety of both medical opinions, including the underlying physical examinations and testing, and permissibly determined that Dr. Rasmussen's opinion was better explained and better supported by relevant medical evidence than Dr. Dahhan's contrary opinion. App. 26-31. While a different ALJ might have weighed the evidence differently, Harlan-Cumberland has fallen far short of proving that the ALJ abused his discretion or that the award is not otherwise supported by substantial evidence.

C. Petitioner's severability argument is moot.¹⁹

Finally, Harlan-Cumberland argues that Section 1556 of the ACA should be struck down as non-severable if the unrelated ACA provisions challenged in *State of Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011), and similar cases are found to be unconstitutional. Pet. Br. at 15. After the employer's brief was filed, the

¹⁹ Harlan-Cumberland's petition for review (the body of which appears to be a copy of its brief to the Board) purports to raise and preserve additional constitutional arguments: that the Affordable Care Act's retroactive reinstatement of the 15-year presumption and the application of that presumption to this pending claim violate the Fifth Amendment's Due Process Clause. Pet. at 8-9. Because these arguments were not raised in the petitioner's brief, they are waived. See *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir. 1999) (*en banc*) ("We do not address defendants' belated argument. . . . It was not presented to this court in the initial briefs on appeal and is therefore waived."). In any event, these due process arguments are without merit. See *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51 (7th Cir. 2011).

Supreme Court issued *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (*NFIB*), which disposes of this argument.

In *NFIB*, the Court upheld the so-called “individual mandate” as a valid exercise of Congress’s taxing power. *Id.* at 2598. It also concluded that the Secretary of Health and Human Services could not “apply” a preexisting provision of the Medicaid Act “to withdraw existing Medicaid funds for failure to comply with the requirements set out in the [ACA’s] expansion” of Medicaid. *Id.* at 2607 (plurality op.); *see id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Court determined that an order prohibiting such application “fully remedies the constitutional violation we have identified.” *Id.* at 2607 (plurality op.); *see id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Explaining that “[w]e are confident that Congress would have wanted to preserve the rest of the Act[,]” the Court held “that the rest of the Act need not fall in light of our constitutional holding.” *Id.* at 2607-08; accord *id.* at 2630-31 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Court has thus already rejected arguments, like Harlan-Cumberland’s, that other provisions of the ACA should be invalidated on inseverability grounds.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's award of benefits to Franklin Farmer.

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 7184 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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