

**No. 11-2418**

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

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**MINGO LOGAN COAL COMPANY**

**Petitioner**

**v.**

**ERMA JEAN OWENS, WIDOW OF DALLAS RAY OWENS;  
DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR**

**Respondents**

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

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**STATEMENT OF THE ISSUES<sup>1</sup>**

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that coal miners who worked underground for at least 15 years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis, and therefore entitled to federal black lung benefits. There is no dispute that this presumption, which was restored by Congress in 2010, applies to this case.

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<sup>1</sup> The Director concurs with the Petitioner's Statement of Jurisdiction and Statement of the Case. *See* Fed. R. App. P. 28(b)(1).

Section 921(c)(4) specifies that “the Secretary” may rebut the presumption only by establishing (A) that the miner does not have pneumoconiosis or (B) that the miner’s “impairment did not arise out of, or in connection with, employment in a coal mine.” The ALJ, consistent with this Court’s caselaw and the regulation implementing Section 921(c)(4), stated (1) that coal mine operators are also limited to the two methods of rebuttal listed in the statute, and (2) that an operator must “rule out” any connection between a miner’s impairment and coal mine employment to establish rebuttal under clause (B). The ALJ, finding that Mingo Logan had failed to rebut the presumption by either method, awarded benefits.

The questions presented are:

1. Did the ALJ commit reversible error by stating that coal mine operators are limited to the two methods of rebuttal listed in Section 921(c)(4).
2. Did the ALJ commit reversible error by stating that an operator must rule out any connection between a miner’s disability and coal mine employment to rebut the presumption by establishing that the miner’s impairment did not arise out of, or in connection with, employment in a coal mine.<sup>2</sup>

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<sup>2</sup> Mingo Logan also challenges the ALJ’s evaluation of the evidence as incomplete and inadequately explained. Pet br. 2, 50-58. The Director addresses only its legal challenges.

## STATEMENT OF THE FACTS

Because the Director addresses only Mingo Logan’s legal challenges to the ALJ’s decision, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions and the ALJ’s application of them.

### A. Statutory and regulatory background.

“The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969 . . . to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners.” *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). The statute, now known as the Black Lung Benefits Act (BLBA), *see* 30 U.S.C. § 901(b), has been substantially amended over the years. The history of two provisions—Section 902(b)’s definition of pneumoconiosis and Section 921(c)(4)’s 15-year presumption—are particularly relevant to this case. 30 U.S.C. §§ 902(b), 921(c)(4).

#### 1. The definition of pneumoconiosis.

Since March 1, 1978, the Act has defined “pneumoconiosis” as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 30 U.S.C. § 902(b). The

implementing regulation divides pneumoconiosis into two types, “clinical” and “legal.” 20 C.F.R. § 718.201(a). “Clinical pneumoconiosis” refers to a particular collection of diseases “recognized by the medical community as pneumoconiosis” and is generally diagnosed by x-ray, biopsy, or autopsy. 20 C.F.R.

§ 718.201(a)(1). “Legal pneumoconiosis” is a broader category, including “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is “significantly related to, or substantially aggravated by” exposure to coal mine dust is legal pneumoconiosis. 20 C.F.R. § 718.201(b).

Before March 1, 1978, the BLBA defined pneumoconiosis more narrowly as “a chronic dust disease of the lung arising out of employment in a coal mine.” 30 U.S.C. § 902(b) (1976). This term encompassed only what is now known as clinical pneumoconiosis. *See* 20 C.F.R. § 410.101(o) (1970); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

## **2. The 15-year presumption.**

From its inception, the BLBA has included various presumptions to assist miners in proving that they are totally disabled by pneumoconiosis. Relevant to this case is 30 U.S.C. §921(c)(4)’s 15-year presumption, which was enacted in 1972 and provides, in relevant part:

If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates

the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. § 921(c)(4) (1972).

In 1980, DOL promulgated 20 C.F.R. § 718.305 to implement the 15-year presumption. Section 718.305(a) is substantially identical to the statute except that the last sentence specifying the two methods of rebuttal is not limited to “the Secretary.” Also relevant to this case is section 718.305(d), which provides:

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

20 C.F.R. § 718.305(d).

In 1981, the 15-year presumption was eliminated for all claims filed after that year. Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (1981). Accordingly, subsection (e) was added to 20 C.F.R. § 718.305 to explain that the 15-year presumption would not be available in such claims. The regulation has not been

amended since.<sup>3</sup>

In 2010, while Owens's claim was pending before 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 claims, such as this one, that were filed after January 1, 2005, and pending on or after March 23, 2010, the ACA's enactment date. *Id.*; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011).<sup>4</sup>

## **B. The Decisions Below.**

### **1. ALJ Bullard's October 13, 2010 Decision awarding benefits.**

The ALJ awarded benefits in a decision dated October 13, 2010. JA 73. Based on Owens's testimony and the parties' stipulation, the ALJ found that Owens worked as a coal miner for over 29 years, more than 15 of them underground. JA 75, 85. She then concluded that Owens had a totally disabling respiratory impairment based on his blood gas study results and the medical reports. JA 88-89. On the basis of these findings, the ALJ concluded that Owens had invoked the 15-year presumption of entitlement. JA 89 (citing 20 C.F.R.

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<sup>3</sup> While the current version of 20 C.F.R. § 718.305 does not, by its own terms, apply to claims filed after 1981, it remains the Department's definitive interpretation of Section 921(c)(4).

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

§ 718.305).

The ALJ then considered whether Mingo Logan had rebutted the presumption by proving that “pneumoconiosis either did not exist or that it did not cause the disability.” JA 87. With regard to the second method of rebuttal, the ALJ observed that the Fourth Circuit requires the party opposing entitlement to “rule out any causal relationship between the miner’s disability and his coal mine employment by a preponderance of the evidence.” *Id.* (citing *Colley & Colley Coal Co. v. Breeding*, 59 F. App’x 563, 567 (4th Cir. 2003)).

The ALJ found that the preponderance of the x-ray evidence was positive for pneumoconiosis. JA 91. Aside from the x-ray readings, her analysis focused primarily on the medical opinions of three doctors: Dr. Rasmussen, who conducted Owens’s OWCP-sponsored evaluation, and Drs. Zaldivar and Hippensteel, Mingo Logan’s medical experts. JA 76-82. According to the ALJ, all three doctors agreed that Owens suffered from a totally disabling pulmonary impairment. JA 89. But they disagreed as to the cause. Dr. Rasmussen attributed the impairment to Owen’s work as a miner, and also diagnosed clinical pneumoconiosis. JA 76-78. Drs. Zaldivar and Hippensteel attributed it to interstitial lung disease unrelated to dust exposure or other environmental factors. JA 78-82.

The ALJ gave Dr. Rasmussen’s testimony “substantial weight” because it was, in her view, supported by his examination of Owens, the x-rays, CT scans,

and other objective evidence; the opinions of two pulmonary experts who had treated Owens; Owens's long coal mining history and the absence of other risk factors; and the doctor's reliance of medical studies. JA 92. She gave "less weight" to the employer's experts, explaining that "neither doctor gave an adequate explanation for why dust inhalation could not have caused at least some of [Owens'] impairment[;]" faulting them for dismissing, in a "cursory" fashion, medical literature associating coal dust exposure with interstitial fibrosis; and finding that their opinions were not supported by the treatment records, x-rays, or CT scans. JA 93.

Based on this evaluation, the ALJ found that "the preponderance of the best documented and reasoned evidence of record establishes the presence of clinical and legal pneumoconiosis." JA 93. She further found that Mingo Logan had "failed to rebut the presumption that Claimant's pulmonary disability is due to his coal mine history." *Id.* She accordingly awarded the claim. JA 93-94.

**2. The Benefits Review Board's October 28, 2011 Decision affirming the award.**

Mingo Logan appealed to the Benefits Review Board, which affirmed. JA 95. The Board rejected Mingo Logan's argument that Section 921(c)(4)'s rebuttal provisions apply only to "the Secretary" and its constitutional challenge to the retroactive application of the 2010 amendment as contrary to established precedent. JA 97-98. It then affirmed, as supported by substantial evidence, the

ALJ's evaluation of the conflicting medical evidence and conclusion that Mingo Logan had not rebutted the 15-year presumption JA 100-105. The Board accordingly affirmed the award, and this appeal followed. JA 106, 107.

### **SUMMARY OF THE ARGUMENT**

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

The first argument is that operators are not limited to the two methods of rebuttal listed in Section 921(c)(4). Mingo Logan admits, however, that it was not prohibited from admitting any evidence or pursuing any theory of rebuttal by the ALJ. The ALJ's mention of Section 921(c)(4)'s rebuttal-limiting sentence therefore played no role in the outcome of this case. In any event, the ALJ's statement is correct despite the Supreme Court's holding in its 1976 *Usery* decision that Section 921(c)(4) does not by itself limit an operator's available rebuttal methods. As a result of the 1978 amendment expanding the definition of pneumoconiosis, there simply is no way for an operator to rebut the presumption other than the two methods listed in the statute.

The second argument attacks the ALJ's observation that an operator seeking to rebut the 15-year presumption on the ground that a miner's disability is unrelated to coal mine work must "rule out" any such connection. This observation, however, played no role in the outcome of this case; the ALJ rejected Mingo Logan's rebuttal evidence because it was not credible, not because it did not satisfy the rule-out standard. Moreover, this Court's precedents and Section 718.305 adopt the rule-out standard. Mingo Logan's many and varied attacks on those authorities miss the mark. The ALJ's award should not be overturned based on either of Mingo Logan's legal arguments.

## **ARGUMENT**

### **A. Standard of Review.**

This Court exercises de novo review over questions of law, including interpretations of the BLBA. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). As the administrator of the BLBA, the Director's reasonable interpretations of its ambiguous provisions are entitled to deference. *See Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999).

### **B. The ALJ's observation that operators may rebut the 15-year presumption only by the two methods listed in Section 921(c)(4) played no role in the outcome of this case and, in any event, is correct.**

- 1. The ALJ's observation that operators may rebut the 15-year presumption only by the two methods listed in Section 921(c)(4) played no role in the outcome of this case.**

Mingo Logan’s primary legal argument is that coal mine operators attempting to rebut the 15-year presumption are not limited to the two methods of rebuttal listed in Section 921(c)(4). The ALJ’s statement to the contrary, it says, “prejudicially restricted Mingo Logan’s ability to defend against Mr. Owens’s claim.” Pet br. 24. But this is not so. The ALJ did not reject any of the employer’s proffered evidence on this ground. And, even now, Mingo Logan is unable to even hypothesize a category of evidence or theory of the case that would permit rebuttal on another ground. *See* Pet br. 23-24.<sup>5</sup> The ALJ’s decision to apply Section 921(c)(4)’s rebuttal limitations to Mingo Logan had no impact on this case.

In essence, the employer is asking this Court to instruct ALJs and the Board that if, in a future case, an operator comes up with means of rebuttal that is not covered by the two methods listed in the statute and regulation, the operator should be allowed to do so. As the Fifth Circuit explained in refusing to consider a similar argument, the question of whether Section 921(c)(4)’s rebuttal limitations apply to operators should be addressed only in a case where the answer matters. *U.S. Steel*

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<sup>5</sup> Mingo Logan correctly claims that “[o]perators must be allowed to rebut the presumption with proof that a miner’s pneumoconiosis was mild and that the disability was a product of another disease.” Pet br. 24. An operator making this showing will have established that the miner’s “respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine” – one of the two rebuttal methods acknowledged by Section 921(c)(4) and 20 C.F.R. § 718.305(a).

*Corp. v. Gray*, 588 F.2d 1022, 1026 (5th Cir. 1979) (“Even assuming that a coal mine operator might wish to adduce a type of rebuttal evidence that is not encompassed by the rebuttal clause of section 411(c)(4), the petitioner in this case was not prevented by the hearing officer from submitting whatever rebuttal evidence it wished to submit.”). Mingo Logan’s request for an advisory opinion on the subject should be rejected.

**2. Operators may rebut the 15-year presumption only by the two methods listed in Section 921(c)(4).**

In any event, the ALJ’s observation that operators seeking to rebut the 15-year presumption are limited to the two methods listed in Section 921(c)(4) is correct. Mingo Logan’s legal attack is premised on the curious history of 15-year presumption’s rebuttal limitations. Section 921(c)(4), enacted in 1972, provides that “The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” In 1976, the Supreme Court held that “the §411(c)(4) limitation on rebuttal evidence is inapplicable to operators.” *Usery*, 428 U.S. at 35-36.

Nevertheless, when 20 C.F.R. 718.305 was adopted in 1980, it listed the same two exclusive methods of rebuttal, but did not limit their application to the Secretary.

And this Court has repeatedly observed that employers are limited to the two listed methods of rebuttal. *See, e.g., Clinchfield Coal Co. v. Fleming*, 606 F.2d 441, 442

(4th Cir. 1979); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Barber v. Director, OWCP*, 43 F.3d 899, 900 (4th Cir. 1995).

Mingo Logan argues that DOL and the courts have ignored the Supreme Court's clear command for decades, culminating in the ALJ's erroneous decision below. Pet br. 17-20. The truth, however, is more mundane. As a result of BLBA amendments that became effective in 1978, the only way that any liable party—whether a mine operator or the government—can rebut the 15-year presumption in a miner's case is to prove either that the miner does not suffer from pneumoconiosis or that the miner's disability was not caused by coal mine employment. This is clear from the relationship between the elements of entitlement and the 15-year presumption.

A miner seeking BLBA benefits is required to establish, with direct evidence or via presumption, four elements of entitlement: (1) **disease**: that he suffers from pneumoconiosis, whether clinical or legal; (2) **disease causation**: that his pneumoconiosis arose out of coal mine employment; (3) **disability**: that he has a pulmonary or respiratory impairment that prevents him from performing his usual coal mine work; and (4) **disability causation**: that his pneumoconiosis contributes to that disability. 20 C.F.R. § 725.202(d)(2); see *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

To invoke the presumption, the miner must prove the disability element by a

preponderance of the evidence. Once invoked, the claimant is presumed to satisfy the remaining elements of entitlement.<sup>6</sup> The burden then shifts to the operator to disprove one of those elements. One way to satisfy that burden is to rebut the first element by proving that the miner does not suffer from either clinical or legal pneumoconiosis. *See Barber*, 43 F.3d at 901. The other is to show that the miner’s disability does not arise from coal mine employment by proving either that the miner’s lung disease did not arise from coal dust exposure (thereby rebutting the second element) or that the miner’s disability was not caused by pneumoconiosis (thereby rebutting the fourth element). There is no other element of entitlement available that could serve as a ground for rebuttal, which explains Mingo Logan’s inability to hypothesize such a ground now.<sup>7</sup>

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<sup>6</sup> At first blush, the presumption triggered by Section 921(c)(4)—that the miner is “totally disabled by pneumoconiosis”—seems to establish only the first and fourth elements. But a miner who successfully invokes the 15-year presumption necessarily establishes the second element as well because he is presumed to suffer from both clinical and legal pneumoconiosis. *See Barber*, 43 F.3d at 901 (4th Cir. 1995) (to rebut the 15-year presumption, operator must prove that the claimant has neither clinical nor legal pneumoconiosis); *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011) (same). Any miner with legal pneumoconiosis (defined as any pulmonary or respiratory disease arising from coal mine employment) has necessarily established disease causation.

<sup>7</sup> This is not true in a survivor’s claim, where the operator can rebut the 15-year presumption by proving that the miner’s death did not arise out of coal mine employment. *See* 77 Fed. Reg. 19463 (preamble to proposed § 718.305, discussing rebuttal methods in a survivor’s claim).

This was not true when *Usery* was decided because, before 1978, only miners totally disabled by *clinical* pneumoconiosis arising out of coal mine employment were generally entitled to BLBA benefits. For example, a miner with totally disabling chronic obstructive lung disease caused solely by coal dust would not have a valid claim. This would be true even if the miner also had a very mild case of clinical pneumoconiosis that did not contribute to the disability. This is the scenario animating the Supreme Court’s discussion of Section 921(c)(4)’s rebuttal-limitation sentence in *Usery*. 428 U.S. at 34-35. If such a miner invoked the 15-year presumption, the liable operator would be in an impossible situation if it was limited to the two rebuttal methods listed in Section 921(c)(4). It could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner’s impairment did not arise out of employment in a coal mine. It could prove (C) that the miner’s disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But, because that method is not listed in Section 921(c)(4), the operator would be obligated to pay benefits to a former miner who was not disabled by clinical pneumoconiosis.

The operator-plaintiffs in *Usery* argued that the rebuttal-limiting sentence effectively created an unconstitutional irrebuttable presumption “because it establishes liability even though it might be medically demonstrable in an individual case that the miner’s pneumoconiosis was mild and did not cause the

disability” and “that the disability was wholly a product of other disease[.]” *Id.* The Court construed Section 921(c)(4)’s rebuttal-limiting sentence as not applying to coal mine operators, and thus had no need to address the constitutional question. *Id.* 35-37. That holding has never been overturned, but it has been rendered irrelevant by subsequent events.

On March 1, 1978, less than two years after *Usery* was decided, Congress expanded the definition of “pneumoconiosis” to include what is now known as “legal pneumoconiosis,” *i.e.*, any “chronic lung disease or impairment . . . arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2); *see supra* at 3-4. As a result, the scenario motivating *Usery*’s discussion of the rebuttal-limiting sentence became moot. Proving that a miner’s disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every disabling lung disease caused by coal dust exposure is legal pneumoconiosis. To the contrary, because an employer must rebut legal as well as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.

As a result of this amendment, the only ways to rebut the 15-year presumption are to prove either (A) that the miner does not suffer from pneumoconiosis (thus rebutting the disease element) or (B) that the miner’s disability does not arise from coal mine employment (thus rebutting the disease-

causation or the disability-causation elements). *See supra* at 13-14. The authorities post-dating the amendment—including 20 C.F.R. § 718.305 and this Court’s decisions in *Rose*, *Barber*, and *Breeding*—simply reflect that fact.<sup>8</sup> It remains true, as the Supreme Court held, that Section 921(c)(4)’s rebuttal-limiting sentence does not apply to private parties. But, since 1978, this holding has not mattered. Simple logic limits operators to the listed rebuttal methods.<sup>9</sup>

**C. The ALJ’s articulation of the rule-out standard played no role in the outcome of this case and, in any event, is correct.**

As the ALJ explained, in this Circuit an employer seeking to rebut the 15-

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<sup>8</sup> This fact undermines Mingo Logan’s argument that *Rose* should be overruled because it is inconsistent with *Tally v. Mathews*, 550 F.2d 911 (4th Cir. 1977). Pet br. 39-41. *Talley*, in a footnote, summarizes the *Usery* Court’s holding that Section 921(c)(4)’s rebuttal limitations do not apply to coal mine operators. *Id.* at 916 n.11. This creates no conflict with *Rose* because *Talley*, like *Usery*, was decided before the definition of pneumoconiosis was expanded in 1978. In any event, *Talley*’s summary of *Usery* is dicta.

<sup>9</sup> Mingo Logan’s extensive discussion of Supreme Court decisions limiting an agency’s power to re-interpret statutes that have been construed by the Court as unambiguous, *see* Pet br. 39-50, is beside the point. Section 718.305 does not defy *Usery*. It merely reflects statutory changes made by Congress after *Usery* was decided. Neither *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) nor *United States v. Home Concrete & Supply, Inc.*, --- U.S. ---, 132 S.Ct. 1836 (2012), forbid an agency from adopting a regulation that conflicts with a prior judicial decision when the new regulation is compelled by a subsequent amendment to the statute. Moreover, the *Usery* Court explicitly refused to decide whether the Department could impose Section 921(c)(4)’s rebuttal limitations on operators even prior to the 1978 amendment. *See* 428 U.S. at 37 and n.40.

year presumption on the ground that a miner's disability is unrelated to coal mine work must rule out any causal connection between the disability and mining work. JA 87. Mingo Logan objects to this standard, arguing that it should be allowed to establish rebuttal by proving that pneumoconiosis was not a "substantially contributing cause" of the miner's disability. Pet. br. 29; *see* 20 C.F.R. § 718.204(c)(1). Mingo Logan reasons that "the standard of proof required to satisfy [the operator's] burden [of persuasion] on rebuttal can be no greater than that required for the claimant to prove his case where the 15-year presumption does not apply." *Id.*

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

The most immediate problem with Mingo Logan's attack on the rule-out standard is that it played no role in the outcome of this case. To be sure, the ALJ mentioned the rule-out standard in her summary of relevant legal standards. JA 87. But it is nowhere to be found in her analysis. She did decide that Mingo Logan's primary evidence supporting rebuttal on disease-causation grounds—testimony by Drs. Zaldivar and Hippensteel, who opined that Owens's disabling lung disease had not been caused by exposure to coal dust—was entitled to little weight. But she did so because she found their opinions to be insufficiently explained and inadequately documented. JA 93. An inadequately reasoned, explained, or documented medical opinion is insufficient to establish rebuttal under any

standard. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9 (4th Cir. 1998) (“An ALJ has discretion to disregard an opinion unsupported by a sufficient rationale.”).

- 2. To rebut the 15-year presumption by establishing that the miner’s disability did not arise out of coal mine employment, the operator must rule out any connection between the disability and the miner’s work.**

Mingo Logan’s facial attack on the rule-out standard faces two imposing obstacles: this Court’s precedents and the Department’s implementing regulation, both of which adopt the rule-out standard.

- (a) This Court has adopted the rule-out standard, and Mingo Logan has given no legitimate reason to reject this precedent.**

The most immediate problem with Mingo Logan’s attack on the rule-out standard is that this Court has already adopted it. *See Rose*, 614 F.2d at 939 (“[I]t is the [employer’s] failure to effectively rule out such a relationship [between the miner’s lung disease and coal mine employment] that is crucial here.”); *Breeding*, 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).

Mingo Logan argues that *Rose*’s articulation of the rule-out standard is dicta. Pet br. 35-36. But an examination of the decision reveals otherwise. The deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614

F.2d at 938-39. The key disputed issue was whether the employer had rebutted the 15-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: "it is the [employer's] failure to effectively rule out such a relationship that is crucial." *Id.*

Mingo Logan points out that *Rose* "could have been resolved by vacating the denial of benefits and remanding the case with directions to shift the burden of proof to the operator to rebut the presumption." Pet. br. 35. And, if the *Rose* panel had done so, perhaps its articulation of the rule-out standard could be written off as dicta. But that is not what happened. Instead, it examined the medical expert's testimony, concluded that "the witness did not rule out the possibility of . . . a connection" between the miner's cancer and his previously existing pneumoconiosis or his work in the mines, and held that the claimant was therefore entitled to benefits. 614 F.2d at 939-40. Thus, contrary to Mingo Logan's suggestion, the rule-out standard was essential to the Court's disposition of *Rose*. It is not dicta.

Mingo Logan next argues that *Rose* is no longer binding because of a "considerable change" in the regulatory definition of "total disability" since that

decision. Pet br. 37-39 and nn. 13-14 (comparing 20 C.F.R. § 410.412(a) (1980) with 20 C.F.R. § 718.204(b)(1)). But the core element of both definitions—the miner must be unable to engage in work comparable to his or her former mining work—is the same. Mingo Logan fails to either specify the relevant “considerable change” or to explain why that change undermines *Rose*.<sup>10</sup>

**(b) 20 C.F.R. § 718.305(d) adopts the rule-out standard, and Mingo Logan has failed to demonstrate that the regulation is invalid.**

The second substantial impediment to Mingo Logan’s quest to abolish the rule-out standard is the regulation implementing the 15-year presumption. Mingo Logan concedes that “[t]he plain language of § 718.305 applies . . . a variant of the rule-out standard[] to the Secretary and operators alike.” Pet br. 43.<sup>11</sup> This is based on the last sentence of 20 C.F.R. § 718.305(d), which specifies that evidence of a chronic pulmonary or respiratory disease “of unknown origin” is insufficient to establish rebuttal. But the regulation’s adoption of the rule-out standard is more

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<sup>10</sup> Mingo Logan also suggests that *Rose*’s adoption of the rule-out standard is inconsistent with *Talley*. Pet br. 39-41. But *Talley* says nothing at all about what standard applies to an operator seeking to rebut the 15-year presumption by disproving the causal link between dust exposure and disability (or any other theory). 550 F.2d at 916 n.11. See also n.8, *supra*.

<sup>11</sup> As noted *supra* at n.3, the current version of Section 718.305 does not, by its own terms, apply to claims filed after 1981. It nevertheless represents the Department’s definitive interpretation of Section 921(c)(4) until supplanted by a new regulation. Mingo Logan does not challenge the ALJ’s reliance on Section 718.305 on this ground.

clear from the first sentence of that same subsection, which provides: “Where the cause of death or total disability did not arise *in whole or in part* out of dust exposure in the miner’s coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted.” 20 C.F.R. § 718.305(d) (emphasis added).

That section 718.305(d)’s “in whole or in part” language adopts the rule-out standard is reinforced by caselaw interpreting the now-defunct “interim presumption” of entitlement implemented by 20 C.F.R. § 727.203 (2000).<sup>12</sup> The interim presumption could be rebutted by several methods, one of which was “if the evidence established that the total disability or death of the miner did not arise *in whole or in part* out of coal mine employment[.]” 20 C.F.R. 727.203(b)(3) (2000) (emphasis added). As this Court held in *Bethlehem Mines Corp. v. 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 120 (4th Cir. 1984). The overwhelming weight of authority agrees that 20 C.F.R. § 727.203(b)(3) rebuttal was available only to operators that ruled out the connection

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<sup>12</sup> The Part 727 “interim” regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 718.1(b); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 134, 139 (1988).

between disability and coal mine work.<sup>13</sup> Section 718.305(d), which uses identical language to describe how a similar presumption can be rebutted, should be interpreted the same way.

Mingo Logan attacks 20 C.F.R. § 718.305's adoption of the rule-out standard as inconsistent with *Usery*. Pet br. 41-50. But this is impossible. *Usery* says nothing at all about how strong a showing an employer must make to establish rebuttal under any theory. It is therefore irrelevant to the rule-out standard, which specifies the showing an employer must make to establish rebuttal on the theory that the miner's disability does not arise out of coal mine employment. Both *Usery* and the statute are entirely silent on this issue.

The Department's decision to fill this gap with the rule-out standard falls comfortably within its broad discretion to promulgate regulations under the BLBA. See 30 U.S.C. §§ 932(a), 936(a); *Pauley*, 501 U.S. at 679 ("The Benefits Act has

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<sup>13</sup> 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."). Most other courts to consider the issue have agreed. See *Rosebud Coal Sales v. Wiegand*, 831 F.2d 926, 928-29 (10th Cir. 1987) (Rejecting employer's argument that rebuttal is established "upon a showing that [claimant's] disability did not arise in whole or in *significant* part out of his coal mine employment" as "wholly at odds with the decisions rendered by six courts of appeals" which "apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal mine employment be ruled out.") (citing cases in the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits).

produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria 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.”). As this Court explained in affirming 20 C.F.R. § 727.203(b)(3)—which similarly required operators to establish that a miner’s disability did not arise “in whole or in part” from coal mine employment to rebut a presumption of entitlement—“[t]he wisdom of the Secretary’s rebuttal evidence requirement is not for this Court to evaluate[.]” *Massey*, 736 F.2d at 124. Instead, “the litmus test of the regulation’s validity is whether it complies with the provisions and purposes of the Black Lung Act.” *Id.* at 123-24. The rule-out standard conflicts with no provision in the statute and, as the *Rose* court explained, furthers the Act’s remedial purpose. 614 F.2d at 938-39. It also benefits a fairly small group of claimants who are particularly likely to be totally disabled by pneumoconiosis.<sup>14</sup> While it may not be the only permissible

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<sup>14</sup> The rule-out standard only applies where an operator seeks to rebut the presumption by attacking the connection between the miner’s impairment and coal mine employment. 20 C.F.R. § 718.305(d). And this rebuttal method is only relevant where the operator cannot establish rebuttal by the more direct method of proving that the miner does not have pneumoconiosis. *Cf. Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore implicated only in cases like *Rose* where the miner suffers from a totally disabling respiratory or pulmonary impairment, worked underground for at least 15 years, and the operator is unable to establish that the miner does not have

interpretation of Section 921(c)(4)'s rebuttal requirements, Mingo Logan has fallen far short of proving that it is an impermissible one.

### **CONCLUSION**

Mingo Logan's argument that the ALJ's award should be overturned on legal grounds should be rejected.

Respectfully submitted,

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pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard in this situation.

## 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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 5,951 words as counted by Microsoft Office Word 2010. In combination with the private respondent's 8,254-word brief, this exceeds Rule 32(a)(7)(b)(i)'s 14,000-word limit for a principal brief by 205 words. The Director has filed, at the same time as this brief, an unopposed motion to accept this brief despite this fact.

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## CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, the Director's brief was served electronically using the Court's CM/ECF system, and by first-class mail, on the Court and the following:

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