No. 13-3994

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAVISTAR nka INTERNATIONAL TRUCK & ENGINE CORPORATION,

Petitioner

v.

TERRY FORESTER

and

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

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Director agrees with Navistar that oral argument is unnecessary in this case.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a 2008 claim for disability benefits filed by Terry

Forester pursuant to the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944

(2006 & Supp. V 2011).[1] On April 30, 2012, Administrative Law Judge John P. Sellers, III (the ALJ), issued a decision awarding Forester benefits and ordering his former employer, Navistar n/k/a International Truck & Engine Corporation (Navistar), to pay them. Certified Case Record (CCR) 37. Navistar appealed this decision to the United States Department of Labor Benefits Review Board (the Board) on May 25, 2012, CCR 33, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On June 27, 2013, the Board affirmed the award. CCR 1. Navistar petitioned this Court for review on August 26, 2013. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury, within the meaning of section 21(c), arose in Kentucky, within this Court's territorial jurisdiction.[2]

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[1] Unless otherwise noted, all references to the BLBA are to the 2011 edition of Title 30.

[2] The Court dismissed Navistar's appeal on September 11, 2013, because it had failed to submit an appearance form and a corporate disclosure statement. The Court reinstated the appeal on the same date upon Navistar's motion, with attached appearance form and disclosure statement.

STATEMENT OF THE ISSUE

Certain former miners who worked for more than fifteen years in underground coal mines are entitled to a statutory presumption of entitlement to federal black lung benefits. 30 U.S.C. § 921(c)(4). The BLBA defines "miner" as "any individual who works . . . in or around a coal mine . . . in the extraction or preparation of coal[.]" 30 U.S.C. § 902(d). Forester worked as a miner for Navistar for roughly five years, after which he worked as a federal mine inspector for roughly twelve years. The question presented is:

Whether Forester's work as a federal coal mine inspector is work as a "miner" for purposes of determining whether he is entitled to the fifteen-year presumption.

STATEMENT OF THE CASE

Forester filed this claim for BLBA benefits in 2008. DX 4.[3] He requested a

[3] The Index of Documents in the Certified Case Record, submitted on October 24, 2013, by Board Clerk Thomas O. Shepherd, does not contain separate entries for the hearing exhibits, hearing transcript, or administrative proceedings occurring before the ALJ's April 30, 2012, award of benefits. The Director therefore has not provided separate references to the Certified Case Record for these documents, which are instead referenced as Director's Exhibit No. (DX) and 2011 Hearing Transcript at (HT).

formal hearing after the district director recommended that the claim be denied.[4] DX 33 at 1. After that hearing, administrative law judge John P. Sellers, III, (the ALJ) awarded BLBA benefits to Forester, payable by his former employer, Navistar. CCR 37, 39-40. The ALJ found, *inter alia*, that Forester was entitled to 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement.[5] CCR 59. In reaching that conclusion, he rejected the Director's and Navistar's argument that Forester's work as a federal mine inspector should not be considered employment as a miner for purposes of the BLBA. CCR 41-44. The Board affirmed. CCR 1. Navistar's petition for review to this Court followed.

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[4] Forester filed prior claims for benefits in 1993 and 2000, DX 1 at 335 and 2 at 75, both of which were finally denied. DX 1 at 2; DX 2 at 5. Because pneumoconiosis can be a latent and progressive disease, previously unsuccessful miners are permitted to file subsequent claims so long as they prove that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d); *see generally Buck Creek Coal Co. v. Sexton*, 706 F.3d 756 (6th Cir. 2013), *petition for cert. filed*, No. 13-93 (U.S. July 17, 2013). Navistar does not argue that Forester failed to prove such a change.

[5] In general, a miner seeking BLBA benefits "must prove by a preponderance of the evidence that (1) he has pneumoconiosis; (2) his pneumoconiosis arose at least in part out of his coal mine employment; (3) he is totally disabled; and (4) the total disability is due to pneumoconiosis." *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011) (citing, *inter alia*, 20 C.F.R. §§ 718.202-.204). Under section 921(c)(4), however, claimants who establish the total disability element and fifteen or more years of underground mining employment (or substantially similar surface work) are presumed to be entitled to BLBA benefits. The employer can rebut the presumption by disproving one of the remaining elements of entitlement. *Id.* at 479-80.

STATEMENT OF THE FACTS

Factual Background

Forester worked for Navistar for approximately five years, from 1970 to 1975, as a dust sampler, safety inspector, and section foreman. HT 24, 29. He reported that his job was to "mak[e] sure that the safety aspects were being followed in the mines." HT 30. Forester was regularly exposed to coal mine dust during this work, which took place in underground coal mines. HT 31.

From 1975 to 1991, Forester was employed by the United States government, primarily by the Department of Labor's Mine Safety and Health Administration (MSHA), as a federal mine inspector.[6] HT 19, 30; DX 9; DX 1 at 318. During this period, Forester "[i]nspected all areas of an underground coal mine, intake air courses, return air courses, beltlines, the face areas, just all aspects of underground coal mining." HT 20; see also HT 34-35, 43, DX 1 at 330, 6 at 1 (again mentioning these duties). When asked, Forester agreed that he "inspected underground mine workings for compliance or non-compliance with Federal mine safety regulations," and would "write . . . a violation" if he found an operator "out of compliance" with those regulations. DX 1 at 136-37. While this job required

[6] While this period lasted fifteen years, the private parties apparently agreed that Forester actually worked as a federal mine inspector for approximately twelve years and this brief uses that approximation. *See* HT 38; CCR 40. This inconsistency is ultimately irrelevant; it is clear that Forester has the required fifteen years of coal mine employment if and only if his inspection work is included.

some office work, Forester testified that he worked in underground mines every day – often crawling through mines with coal seams as narrow as thirty inches. HT 22-23, 42-43.

Forester stopped working for MSHA in January 1991, shortly after he suffered a knee injury during an inspection. HT 25, 30; DX 8 at 2. He was awarded compensation under Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq*., for the resulting disability. HT 25; DX 1 at 173. After "several doctors" informed Forester that he "was totally disabled because of [his] lungs[,]" HT 31, he filed a FECA claim seeking compensation for pneumoconiosis, which was approved in 1993, DX 14. The details of the awards are not clear from the few FECA claim documents in the record. *See* DX 1, 173-179; DX 14. Forester testified that he has "been drawing my federal compensation" continuously since approximately 1992, and that "[f]rom May '92 on it is for my lung, work as a coal mine inspector and my systemic heart condition." HT 33. In his claim for benefits, Forester checked "yes" in the section asking if he had filed a federal or state workers' compensation claim seeking benefits "on account of your disability, due to coal workers' pneumoconiosis." DX 4 at 2. The form also indicates that he is still receiving benefits under FECA in the amount of $3,719 per month. *Id.*

Decisions Below

Proceedings before the ALJ

During the hearing, Navistar stipulated that Forester worked as a coal miner for seventeen years.[7] HT 47. In its post-hearing brief, however, Navistar argued that the stipulation was contrary to law and therefore ineffective. Navistar's Post-Hearing Brief (NPB) (Sept. 30, 2011) at 10 n.7. Navistar then argued that Forester was not entitled to the fifteen-year presumption because his work for MSHA did not qualify as coal mine employment under the Act.[8] *Id.* at 7-9. The Director agreed, urging the ALJ to adopt his position that federal mine inspectors are not miners as defined by the BLBA, as the Fourth Circuit had in *Kopp v. Director, OWCP*, 877 F.2d 307 (4th Cir. 1989) and *McGraw v. Director, OWCP*, 908 F.2d 967 (4th Cir. 1990). Director's Written Position Statement (April 19, 2012) at 4-5. Forester objected, relying on a line of Board decisions, beginning with *Moore v. Duquesne Light Co.*, 4 Black Lung Rep. 1-40.2 (1981), holding that mine

[7] The hearing was held on April 6, 2011, roughly one year after Congress restored the fifteen-year presumption (which had previously been available only in claims filed before 1982). *See* Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *Morrison*, 644 F.3d at 479.

[8] Navistar also argued that Forester was not totally disabled, that his claim was time barred, and that the evidence rebutted the fifteen-year presumption. NPB 2-7. It did not appeal the ALJ's adverse rulings on those issues to the Board or this Court. CCR 3. The ALJ's and Board's discussion of those issues, and the evidence relevant only to those issues, are therefore not summarized here.

inspectors are BLBA miners. Claimant's Brief in Response to Order (April 19, 2012) at 3-6.

The ALJ's Decision Awarding Benefits

The ALJ ruled that Forester's twelve years as a federal mine inspector qualified as coal mine employment and that the miner was therefore entitled to the fifteen-year presumption. CCR 44. Noting "the absence of case law from the Sixth circuit on this issue," the ALJ determined that he was bound by Board precedent holding "that a federal coal mine inspector is a 'miner' under the Act notwithstanding that the federal government is not a responsible operator, thus shifting liability down the line" to the miner's previous coal mine employer. CCR 42-43 (citing *Moore*; *Lynch v. Director, OWCP* 6 Black Lung Rep. 1-1088 (1984); *Mounts v. Director, OWCP*, 8 Black Lung Rep. 1-425 (1985); and *Bartley v. Director, OWCP*, 12 Black Lung Rep. 1-89 (1988)). The ALJ acknowledged the Fourth Circuit's contrary authority (which he described as "very weak") but concluded that "the Board's decision in *Moore* is still controlling" in cases arising outside that circuit. 42-43.

The ALJ accordingly ruled that Navistar's stipulation of seventeen years of coal mine employment "was not contrary to law and [was] binding with respect to length of coal mine employment," and that Forester was therefore eligible for the fifteen-year presumption. CCR 44. Finding that the presumption had been

invoked and not rebutted, the ALJ awarded BLBA benefits to Forester, payable by Navistar. CCR 63.

Benefits Review Board Decision

Navistar appealed to the Board, which affirmed. CCR 1, 33. The Board noted the Director's "continued objection to coverage of federal mine inspectors under the Act[.]" CCR 3. But it determined that the ALJ had not abused his discretion by relying on *Moore* to conclude "that employer's stipulation to seventeen years of coal mine employment was not contrary to law and was binding." CCR 4. It also affirmed, as unchallenged on appeal, the ALJ's findings that Forester was totally disabled and that Navistar had not rebutted the fifteen-year presumption. CCR 3 n.4, 4.

SUMMARY OF THE ARGUMENT

The ALJ and Board erred by including Forester's work as a federal mine inspector in determining whether he had fifteen years of employment. A BLBA "miner" is "any individual who . . . has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d). While Forester's work as an MSHA inspector took place in and around various coal mines, he was not employed "in the extraction or preparation of coal." Federal mine inspectors are not employed to further a commercial mining operation by facilitating the extraction or preparation of coal. They are employed

by the United States to perform a different, purely governmental function: ensuring that violations of federal mine health and safety standards are cited and promptly abated. While this work has an obvious impact on mining, it is not part of the mining process itself. MSHA inspectors who contract pneumoconiosis from their federal employment are covered by FECA, not the BLBA. Because Forester's work as a mine inspector was not work as a BLBA miner, the case should be remanded for consideration of whether he can prove his entitlement to benefits without the fifteen-year presumption, based only on his five years of coal mine employment with Navistar.

ARGUMENT

A. Standard of Review.

The question of whether Forester's work as a federal mine inspector qualifies as work as a "miner" under the BLBA is a question of law. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted);

see also Auer v. Robbins, 519 U.S. 452, 461-62 (1997). The Director's interpretation of the Act in a legal brief is entitled to *Skidmore* deference. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 556 (6th Cir. 2013), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The Board's interpretation of the Act, in contrast, is not entitled to any deference. *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 427 (6th Cir. 1998).

B. Forester is not entitled to the fifteen-year presumption because his work as a federal mine inspector was not work as a BLBA "miner."

To be eligible for the fifteen-year presumption, a "miner" must have been "employed for fifteen years or more in one or more underground coal mines" or in surface mines with similar conditions. 30 U.S.C. § 921(c)(4); *see also* 20 C.F.R. § 718.305(b)(i), 78 Fed. Reg. 59114 (Sept. 25, 2013) (claimant must establish that "[t]he miner engaged in coal-mine employment for fifteen years" to invoke the presumption). There is no dispute that Forester worked in underground mines throughout his employment with both Navistar and MSHA. It is equally clear that Navistar employed him as a miner for approximately five years. The case turns on whether he was also employed as a miner by MSHA. He was not.

The BLBA defines "miner" as, *inter alia*, "any individual who . . . has worked in or around a coal mine or coal preparation facility in the extraction or

preparation of coal." 30 U.S.C. § 902(d); 20 C.F.R. § 725.202(a) (mirrors same).[9] To satisfy this definition, the individual must (1) work in or around a coal mine or coal preparation plant (the "situs" requirement), and (2) be employed in the extraction or preparation of coal (the "function" requirement). *Director, OWCP v. Consolidation Coal Co.*, 884 F.2d 926, 929 (6th Cir. 1989). With the situs element clearly satisfied, this appeal concerns only the function requirement.

Federal mine inspectors are not miners because they are not employed to extract or process coal. They are employed by the United States to regulate those operations. Their inspection and enforcement duties are purely governmental functions founded on concern for the safety and health of miners. *See* 30 U.S.C. § 813(a) (listing purposes of federal mine inspections, all of which focus on health and safety). The mine inspector's job is to ensure that violations of mine health and safety standards are cited and promptly abated. *Id.; see also Myers v. U.S.*, 17 F.3d 890, 898 (6th Cir. 1994) ("The MSHA inspectors whose conduct is at issue in the present case" were "to determine compliance" with the Department's regulations "and, in the event of non-compliance, issue the mandatory citations and orders."). They are therefore not miners as defined in the BLBA.

[9] The term "miner" also includes employees who work in coal mine construction or transportation to the extent they are exposed to coal dust. 30 U.S.C. § 902(d); 20 C.F.R. § 725.202(b).

To be sure, the BLBA's definition of "miner" is not limited solely to workers who directly extract or prepare coal. The function test also encompasses many "workers performing duties *incidental to* the extraction or preparation of coal[.]" *Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 92 (6th Cir. 1989) (emphasis added). The fact that a claimant is not a traditional miner does not, therefore, bar recovery under the Act. *See, e.g., Ratliff v. Chessie System Railroad*, 93-3535, 1994 WL 376891, *3 (6th Cir. July 18, 1994) (holding that worker who built and maintained railroad "spur" used to transport coal from mine mouth to tipple was a miner because "without properly functioning spurs, the cars could not have been transported and positioned to receive the coal . . . . Ratliff's work was necessary to enable coal to be loaded from the tipple, as part of the last step in its preparation"); *Norfolk and Western Railway Co. v. Director, OWCP*, 5 F.3d 777, 780 (4th Cir. 1993) ("We are of opinion that the delivery of empty cars to a preparation facility is integral to the process of loading coal at the preparation facility and therefore is part of coal preparation.").

While broad, the function test is not unlimited. Only workers performing incidental duties that are "an 'integral' or 'necessary' part of the coal mining process" can satisfy the function test; "[t]hose whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as 'miners.'" *Falcon Coal*, 873 F.3d at 922, 923. In *Falcon Coal*, for example,

this Court held that a night watchman who manned a guard post at a strip mine was not a miner. Quoting the language of a dissenting Board judge below, the court explained that not even coal mine employees themselves automatically qualify as "miners":

> In one sense or another, each and every employee of a coal mine operation can be said to be essential or integral to the extraction of coal. If not, common sense would dictate that they would not be retained on the company payroll. . . . We cannot say, however, that since all employees may be essential to some aspect or other of the overall operation, that they all qualify as "miners."

Falcon Coal, 873 F.2d at 923.[10] Thus, *Falcon Coal* stands for the proposition that not every worker who facilitates the extraction or preparation of coal is a BLBA miner.[11]

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[10] Similarly, in *Frost v. Director, OWCP*, No. 85-4034, 1987 WL 37851, *6 (6th Cir. June 26, 1987) (unpub.), this Court held that a claimant who delivered lunches to miners in an underground mine was not a "miner." The Court recognized that "the mineworkers obviously had to eat, and it was convenient to have someone bring the lunches to the workers," but nevertheless held that Frost's deliveries did not satisfy the function test because they were simply "too far removed from the extraction or preparation process to be considered coal mine employment." *Id.*

[11] Many BLBA coverage cases turn on whether the claimant is handling coal before or after the preparation process is complete. *See, e.g., Southard v. Director, OWCP*, 732 F.2d 66, 69-70 (6th Cir. 1984) (work "unloading coal from railroad cars into trucks or storage piles and delivering it to consumer homes" does not satisfy function test because coal was already prepared and within the stream of commerce). Because Forester inspected mines that were actively extracting coal during his work for MSHA, this line of authority does not bar his claim. The fact that he was not part of that extraction process, does.

Forester's BLBA claim faces a more fundamental problem. As a federal mine inspector, he was simply not a part (integral or otherwise) of the extraction or preparation processes at the coal mines he inspected. As explained above, his job was to ensure that violations of mine health and safety standards were cited and promptly abated. Performing that job can increase, decrease, or have no impact at all on the amount of coal extracted or prepared at a particular mine. Thus, while they work closely with miners and mine operators, and enforce legal standards that can have a substantial impact on coal extraction and preparation, MSHA inspectors are not themselves engaged in the process of extracting or preparing coal.[12] For

[12] In S*ammons v. EAS Coal Co*., No. 82-3030, 1992 WL 348976, *2 (6th Cir. Nov. 24, 1992), this Court held that a mine security guard who "worked part of each shift as a fire boss, checking the mine for safety and repairing and replacing pipes and pumps" was a covered miner because that work was "vital and essential to the production and extraction of coal, as it keeps the mine operational, safe, and in repair." In the Director's view, that decision is correct but distinguishable from this case. While Sammons's job involved safety, he was retained by the coal mine operator to further the mine's overall commercial operation – extracting and preparing coal. The same is true of Forester's work as a dust sampler and safety inspector for Navistar, which is why that work is properly treated as coal mine employment. Forester's work as an MSHA inspector was fundamentally different. Even though it also involved safety, and likely required him to engage in some of the same tasks he performed for Navistar (or that Sammons performed for EAS Coal), it was not performed for the purpose of furthering a mine's overall operations. It was therefore not integral to any mine's extraction or processing of coal.

this reason, the Director has long interpreted 30 U.S.C. § 902(d) as excluding mine inspectors from the Act's coverage.[13]

The Director's interpretation of the Act has been accepted by the only court of appeals to consider the issue, the Fourth. *Kopp v. Director, OWCP*, 877 F.2d 307 (4th Cir. 1989). Kopp worked as a coal miner in Pennsylvania before relocating to Virginia and becoming a federal mine inspector. *Id.* at 308. After his claim was denied by the Board, Kopp appealed to the Fourth Circuit. The Fourth Circuit held that, under 33 U.S.C. § 921(c), "jurisdiction [was] appropriate only in the circuit *where the miner's coal mine employment*, and consequently his harmful exposure to coal dust, occurred." *Id.* (emphasis added). The court explained that that "any coal dust exposure that claimant suffered while working for the federal government in Virginia cannot qualify as an injury under the [BLBA]" because FECA is "a federal mine inspector's exclusive remedy for on-the-job coal dust

[13] *See, e.g., Eastern Associated Coal Corp. v. Director, OWCP*, 791 F.2d 1129, 1131 n.2 (4th Cir. 1986) ("[T]he Director contends that a mine inspector is not a "miner" for purposes of the Act."); Brief of Director, OWCP at 15 n.4, *Tussey v. Island Creek Coal Co.*, No. 92-3032 (6th Cir. Mar. 18, 1992) ("A federal mine inspector performs a purely governmental function, having no commercial purpose, monitoring and regulating the conduct of private individuals. The inspector is not engaged in coal mining; he merely regulates it."). The *Tussey* claimant worked as a miner for more than fifteen years even excluding his federal mine inspection work, and the Court remanded the case for further consideration of the medical evidence without addressing the issue. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042-43 (6th Cir. 1993).

exposure[.]"[14] *Id.* at 309 n.2 (citing *Eastern Associated Coal Corp. v. Director, OWCP*, 791 F.2d 1129, 1131 (4th Cir. 1986)). Because Kopp had no covered coal mine employment in the Fourth Circuit's territory, that court transferred the miner's appeal to the Third Circuit based on his previous employment as a miner in Pennsylvania. In a later decision, *McGraw v. Office of Workers' Compensation Program*, 908 F.2d 967, 1990 WL 101412, at *1 (4th Cir. 1990) (unpublished), the Fourth Circuit again held, citing the *Kopp* decision, that federal mine inspectors do not qualify as BLBA "miners."

While the Director's regulatory definition of "miner" does not address the question of federal mine inspectors, *see* 20 C.F.R. §§ 725.101(a)(19); 725.202(a), his position on the issue is reflected in 20 C.F.R. § 725.491(f). That provision explicitly excludes the federal government from the definition of mine "operator,"[15] and its preamble explains that "federal mine inspectors . . . should not be considered 'miners.'" 65 Fed. Reg. 80007 (Dec. 20, 2000). The Director's construction of "miner" thus makes that term consistent with the definition of mine "operator." Particularly in light of the Fourth Circuit's endorsement, the Director

[14] FECA is the exclusive remedy only for pneumoconiosis arising out of federal employment. Miners who later become federal mine inspectors are entitled to BLBA benefits if they suffer from totally disabling pneumoconiosis as the result of their previous mining work. *See infra* at 19.

[15] "Congress did not waive the federal government's sovereign immunity in enacting the Black Lung Benefits Act." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180 (4th Cir. 1999).

submits that his long-held interpretation of 30 U.S.C. § 902(d) is entitled to deference.

The Board adopted the contrary view in *Moore v. Duquesne Light Co.*, 4 Black Lung Rep. 1-40.2 (Ben. Rev. Bd. 1981), and has continued to adhere to that position in cases outside the Fourth Circuit (where it has deferred to *Kopp* and *McGraw*), including this one. CCR 4. Unlike the Director's, the Board's interpretation of the Act is not entitled to deference. More importantly, its reasoning is unpersuasive. In *Moore*, the Board concluded that federal mine inspection work was integral to coal extraction and preparation because "the law requires that safety inspections occur on a regular basis" and "operators may face fines and penalties, and in the instance where an imminent danger is found to exist, the mining process may be delayed or come to a halt" if health and safety standards are not complied with. 4 Black Lung Rep. at 1-44.[16] But there are numerous laws which, if violated, could delay the mining process or bring it to a halt. This fact does not convert every federal, state, or local employee charged with investigating violations of those laws into a "miner" whenever they are on a mine site. True, the standards that MSHA inspectors enforce are intimately connected to mining in a

[16] The Board's subsequent decisions on the topic do not add anything to *Moore's* analysis. *See Lynch v. Director, OWCP* 6 Black Lung Rep. 1-1088, 1090 (1984) (citing *Moore* without additional analysis); *Mounts v. Director, OWCP*, 8 Black Lung Rep. 1-425, 426 (1985) (same); *Bartley v. Director, OWCP*, 12 Black Lung Rep. 1-89, 90-91 (1988) (same); CCR 4.

way that more general laws are not. But that does not change the reality that the MSHA inspector is charged with enforcing compliance with federal health and safety standards, not with facilitating the extraction or preparation of coal at any particular coal mine. *See supra* at 12, 15.

The Director's construction of 30 U.S.C. § 902(d) does not, importantly, leave federal mine inspectors who develop pneumoconiosis as a result of their federal employment without a remedy. They can file for compensation under FECA, as Forester himself has done. *See supra* at 6. MSHA inspectors who formerly (or subsequently) worked as coal miners can obtain BLBA benefits if they developed pneumoconiosis from their private employment. And inspectors who contract pneumoconiosis from both their federal and their private employment may be entitled to both BLBA and FECA benefits, though their BLBA benefits will be offset by the amount of their FECA benefits. *See* 30 U.S.C. § 932(g) ("The amount of benefits payable . . . shall be reduced . . . by the amount of compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis."); *Consolidation Coal Co.*, 171 F.3d at 180.

Because Forester's work as a federal mine inspector was not work as a "miner," he is not entitled to the fifteen year presumption. Accordingly, the Board's decision should be vacated and remanded to give the ALJ the opportunity

to determine whether Forester has proved his entitlement to BLBA benefits based only on his employment with Navistar and without the benefit of that presumption. If Forester fails to do so, he will be entitled only to his FECA remedy.[17]

[17] At the ALJ hearing, Navistar stipulated to seventeen years of coal mine employment. HT 47. Neither the ALJ nor the Board considered whether Navistar should be bound by that stipulation if Forester's MSHA work was not covered employment. The Director does not believe that Navistar should be bound by this stipulation because it involves a question of law, was withdrawn while the case was still pending before the ALJ, and was not detrimentally relied upon by Forester. *See Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002) ("Courts . . . are not bound to accept as controlling, stipulations as to questions of law.") (internal quotation marks omitted). In the alternative, the Court could remand this question along with the merits of the case for the ALJ to consider in the first instance. *Cf. Oatman v. Potter*, 92 Fed. Appx. 133, 139 (6th Cir. 2004) (unpub.) ("District courts have broad discretion in determining whether or not a party should be held to its stipulation[.]").

CONCLUSION

The Director respectfully requests that the Court vacate the ALJ's award of benefits and the Board's affirmance of that award, and that the Court remand the case to the ALJ for consideration of the evidence in light of the fact that Forester's work as a federal mine inspector was not covered employment under the BLBA.

Respectfully submitted,

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of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief is proportionally-spaced, using Microsoft Word, Times New Roman, 14 point, and contains 5,251words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, the foregoing Brief for the Federal Respondent was electronically served on the following:

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