

No. 13-2495

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

**HARRIMAN COAL CORPORATION;
AMERICAN MINING INSURANCE COMPANY,**

Petitioners

v.

**MARYLOU SCHOFFSTALL (Widow of Charles Schoffstall);
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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**MARYLOU SCHOFFSTALL (Widow of Charles Schoffstall);
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
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Respondents.

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Harriman Coal Corporation and its insurance carrier American Mining Insurance Company (collectively Harriman) petition this Court to review the final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's (ALJ's) decision awarding federal black lung benefits to Marylou Schoffstall. This Court has jurisdiction over Harriman's petition under

Section 21(c) of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the Act or the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c)—Charles Schoffstall's (the miner's) exposure to coal mine dust—occurred in Pennsylvania, within the jurisdictional boundaries of this Court.

The petition also meets section 21(c)'s timeliness requirements. The ALJ issued her decision awarding benefits on April 17, 2012. Petitioner's Appendix (A.) 11. Harriman filed a notice of appeal with the Board on April 23, 2012, within the statutorily mandated thirty-day period. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(a)). The Board issued its final order on March 28, 2013. A. 3. Harriman petitioned this Court for review on May 28, 2013, within the statutorily mandated sixty-day period. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)); Fed. R. App. P. 26(a)(1) (the sixty-day period "continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."). Thus, this Court has both subject-matter and appellate jurisdiction to review the Board's order. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)).

STATEMENT OF THE ISSUES

Under 30 U.S.C. § 921(c)(4), a survivor of a coal miner who worked for at least 15 years in an underground coal mine, or at a surface mine in conditions

substantially similar to conditions in an underground mine, and who suffered from a totally disabling respiratory or pulmonary impairment, is entitled to a presumption that the miner's death was due to pneumoconiosis. The ALJ invoked the presumption, finding that the miner was totally disabled and had engaged in ten years of underground coal mine employment plus five years at the surface in conditions comparable to an underground mine. Harriman attempted to rebut the presumption by proving the miner did not have pneumoconiosis. The ALJ found that Harriman failed to carry its burden of proof because the most recent x-ray readings were positive for pneumoconiosis and Harriman's own expert conceded there was x-ray evidence of the disease. The ALJ accordingly awarded benefits.

Harriman concedes in its opening brief (OB at 13) that the miner worked ten years underground, and it did not challenge at the Board or in its opening brief here the ALJ's finding that the miner's five-plus years of coal mine work at the surface occurred in conditions substantially similar to those in an underground mine.

1. The first question presented is whether Harriman has waived its challenge to the ALJ and Board's finding of 15 years of qualifying coal mine employment.

2. The second question presented is whether the ALJ's determination that Harriman failed to rebut the 15-year presumption by proving the absence of pneumoconiosis is supported by substantial evidence.

STATEMENT OF THE CASE

Mrs. Schoffstall filed a claim for survivor's benefits soon after the death of her husband in March 2007. A. 65. A DOL district director issued a proposed decision and order denying her claim, A. 67, and Mrs. Schoffstall requested an ALJ hearing. DX 20. In a 2009 decision, ALJ Adele Higgins Odegard (the ALJ) denied her claim. A. 163. On appeal, the Benefits Review Board vacated the denial and remanded the claim for further consideration in light of intervening amendments to the Black Lung Benefits Act contained in the Patient Protection and Affordable Care Act (the ACA). Pub. L. No. 111-148, § 1556 (2010). A. 188. On remand, additional evidence was submitted, and the ALJ awarded benefits. A. 30. The Board affirmed. A. 9. Harriman then petitioned this Court for review of the survivor's award. A. 1.

STATEMENT OF THE FACTS

A. Statutory and regulatory background.

To obtain benefits under the BLBA, Mrs. Schoffstall must prove (1) that her husband had coal workers' pneumoconiosis, and (2) that the disease caused, contributed to, or hastened his death. 20 C.F.R. §§ 718.202, 718.203, 718.205,

725.212; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1003 (3d Cir. 1989).¹ A claimant bears the ultimate burden of proof on both issues, 20 C.F.R. § 725.103, but may be aided by certain statutory presumptions.

One such presumption is the “15-year presumption” found at 30 U.S.C. § 921(c)(4).² It can be invoked if the miner (1) “was employed for fifteen years or more in one or more underground coal mines” or in surface mines “substantially

¹A widow must also prove that she was dependent upon the miner and that she is not currently married. 20 C.F.R. § 725.212(a)(1), (2). Harriman does not dispute that Mrs. Schoffstall satisfies these requirements.

²Section 921(c)(4) provides in relevant part:

[I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with the miner’s...claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, 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 shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine *where he determines that conditions of a miner’s employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine*. 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) (emphasis added). *See also* 78 Fed. Reg. 59114 (implementing regulation 20 C.F.R. § 718.305(b), effective October 25, 2013).

similar to conditions in an underground mine” and (2) suffered from “a totally disabling respiratory or pulmonary impairment[.]” 30 U.S.C. § 921(c)(4) (2006 & Supp. IV 2010). If those criteria are met, the claimant invokes a rebuttable presumption that the miner was “totally disabled by pneumoconiosis [and] that his death was due to pneumoconiosis[.]” *Id.* An operator can rebut the 15-year presumption by demonstrating that the miner “does not, or did not, have pneumoconiosis,” *id.*, or that “no part of the miner’s death was caused by pneumoconiosis.” 78 Fed. Reg. 59115 (revised 20 C.F.R. § 718.305(d)(2), effective October 25, 2013).

When Mrs. Schoffstall filed her claim in 2007, and when the ALJ issued her first decision, the 15-year presumption was unavailable because it applied only to claimants who filed for benefits before January 1, 1982. *See* 30 U.S.C. § 921(a), (c)(4) (1982); 20 C.F.R. §718.305(a), (e) (2012). A widow could therefore establish her entitlement to benefits only by affirmatively proving that the miner had pneumoconiosis and that the disease caused, contributed to or hastened his death. A. 175; *see* 20 C.F.R. § 718.205(a), (c) (2012).

Congress, however, revived Section 921(c)(4) as part of the ACA and made it applicable to all claims, including survivor claims, filed after January 1, 2005, and pending on or after the enactment date of the ACA – March 23, 2010. Pub. L. No. 111-148, § 1556 (2010); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849

(7th Cir. 2011) (revived 15-year presumption applies to widow’s claim filed within applicable time period); *see also B & G Const. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 244 (3d Cir. 2011) (holding the amended sections of the BLBA apply to widows’ claims filed after January 1, 2005 and pending on or after the ACA enactment date).³ Mrs. Schoffstall’s 2007 claim was pending at the Board when the ACA was enacted; therefore, the ACA amendment applies to her claim and she may establish her entitlement with the aid of the 15-year presumption.

B. Mr. Schoffstall’s work history.

Over a forty-year period, from 1961 to 2000, Mr. Schoffstall was “continually” exposed to coal dust while working for numerous coal companies in Pennsylvania. Director’s Exhibit (DX) 60 at 23; DX 3.⁴ His Social Security earnings records reflect significant earnings at four coal companies in particular:

- (1) 9 quarters (2.25 years) employment at Kramer S. Adams Coal Co in 1951-53;
- (2) 28 quarters (7 years) of earnings of more than \$50 a quarter at KDT Coal Co from 1949 through 1961;

³ACA section 1556 also revived automatic entitlement to survivors of miners who are found to be totally disabled due to pneumoconiosis. Pub. L. No. 111-148, § 1556 *amending* 30 U.S.C. § 932(*l*) (2006 & Supp. IV 2010). Mrs. Schoffstall, however, cannot take advantage of this provision because her husband’s claim was denied. *Supra* n.1.

⁴The Director Exhibits are identified, but not paginated, in the Board’s July 8, 2013, Index of Documents. *See* A. 33. We cite to the exhibit number when not included in the Appendix.

(3) 14 years at Underkoffler Coal Service Inc. from 1973 through 1979 and from 1989 through 1997; and

(4) 3 years at Harriman Coal Corporation from 1997 through 2000.

DX 8. Mr. Schoffstall described his work as a “laborer” primarily “picking slate,” which involved, “running the bullshaker, after picking slate,” and emptying and filling [the] hopper for coal.”⁵ DX 4. He also delivered coal by truck, which involved getting inside the truck “to push coal out and shovel coal out of [the] box.” DX 4.

In 2001, as part of a state disability claim against Harriman, the miner testified about his work history. A. 36. He stated that he had worked around coal since he was 16 and that he worked about 10 years underground. A. 43. Above ground, he worked at “a shaker,” which separated coal, and where he “pick[ed]

⁵In Pennsylvania’s anthracite coal mining, “picking slate” is part of the process of removing impurities from coal as it broken and sorted into various useful sizes at a coal breaker or coal processing plant that is usually located at or near the mouth of an underground mine. See http://en.wikipedia.org/wiki/Coal_breaker.

A “bull shaker” is a “shaking chute where large coal from the dump is cleaned by hand” The Free Dictionary, referencing McGraw-Hill Dictionary of Scientific & Technical Terms, 6E (2003), available at <http://encyclopedia2.thefreedictionary.com/bull+shaker>

“A hopper is a funnel-shaped chamber or bin in which coal is stored temporarily; it is filled through the top and dispensed through the bottom.” *Consolidation Coal Co. v. Director, OWCP [Burriss]*, ___ F.3d ___, 2013 WL 5530986, at *9 (7th Cir. 2013) (citing Webster’s Unabridged Dictionary of the English Language, RHR Press (2001)).

slate” and was exposed to coal dust. A. 43-44. He worked for Harriman picking slate from around November 1997 until April 14, 2000. A. 40-41. He said picking slate was physical labor and involved exposure to “a lot” of coal dust. A. 42. He testified that he did that same job for Underkoffler. A. 44.

Mrs. Schoffstall testified that her husband was working in the mines when they married in 1959. A. 97-98. She stated that his work for KDT Coal and Company, in Lykens, Pennsylvania, for various periods between 1948 and 1961, involved coal mining. A. 100. She knew that his employment from 1951 to 1953 for Kramer S. Adams Coal Company involved picking slate and driving coal trucks. A. 101. She testified that his work for Reilly Contracting in 1954-55, for Wiconisco Washery in 1954 and again in 1958-60, and for Meadowbrook Coal Company and for Parkway Anthracite Company in 1962, was all coal work. A. 101-02. She said that his work for Lykens Valley Briquette Company in 1961 and 1962 involved making charcoal briquettes for home barbeques. A. 102. She explained that between 1962 and 1973 he worked mainly in construction until he returned to coal employment in 1973 at Underkoffler Coal where he worked until 1979, and again from 1989 through 1997. A. 105-06. She said he last worked in coal mining for Harriman Coal Company from 1997 through 2000. A. 107.

Mrs. Schoffstall testified that her husband worked full-time for Harriman and she understood that his job involved picking slate, driving a coal truck and

delivering coal. A. 108. She said that he had worked underground before they were married but that he only worked above ground afterwards. A. 109.

C. The relevant medical evidence.

Mrs. Schoffstall submitted Dr. Frederick Seidel's treatment records of her husband. DX 12 (55 pages, unpaginated). These included the reports of two pulmonary function tests.⁶ The June 26, 2000, test revealed a mild pulmonary restriction and described the miner's effort as "good;" a January 16, 2004, test showed a severe pulmonary restriction and likewise indicated a good effort. DX 12 at pp. 33, 35. In June 2000, Dr. Seidel noted "COPD (Black Lung?)" on the miner's chart.⁷ DX 12 at p. 53. In 2004, Dr. Seidel reported to the Pennsylvania

⁶A pulmonary function (or ventilatory) test is one measure of a miner's pulmonary capacity. The test measures three values: the FEV1 (forced expiratory volume), the FVC (forced vital capacity), and the MVV (maximum voluntary ventilation). The FEV1 value measures the amount of air exhaled in one second on maximum effort. It is expressed in terms of liters per second. Obtaining a FVC value requires the miner to take a deep breath and then exhale as rapidly and forcibly as possible. The FEV value is taken from the first second of the FVC exercise. The MVV value measures the maximum volume of air that can be moved by the miner's respiratory apparatus in one minute, and is expressed in liters. *See Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1138 nn.6, 7 (7th Cir. 1988); 20 C.F.R. § 718.103; 20 C.F.R. Part 718 App. B.

⁷Chronic obstructive pulmonary disease, commonly abbreviated "COPD," is a lung disease characterized by airflow obstruction. The Merck Manual at 568 (17th ed. 1999). COPD "includes three disease processes characterized by airway (continued...)"

Bureau of Workers' Compensation that the miner was totally and permanently disabled by a restrictive lung disease. DX 12 at pp. 14-15.

The death certificate lists "renal carcinoma" as the cause of the miner's death. DX 11. No autopsy was performed. *Id.*

At the request of Harriman, Dr. Gregory Fino reviewed the miner's medical records and provided a medical opinion. A. 130. He first noted his previous opinion, given in 1995 and 1996, that the miner did not have coal workers' pneumoconiosis or a respiratory or pulmonary impairment. A. 130. Looking at the records before him, however, Dr. Fino reported that the majority of the chest x-ray readings was positive for pneumoconiosis and, therefore, there was evidence that Mr. Schoffstall had simple coal workers' pneumoconiosis. A. 134. Dr. Fino believed that none of the pulmonary function studies (including the two from Dr. Seidel's records) were valid and opined that the results would have been normal had the miner given a better effort. A. 134. Dr. Fino concluded that there was no evidence that Mr. Schoffstall was disabled due to coal mine dust inhalation or that he died as a result of coal workers' pneumoconiosis. A. 134. Dr. Fino stated that

(...continued)

dysfunction: chronic bronchitis, emphysema, and asthma." 65 Fed. Reg. 79939 (Dec. 20, 2000).

the cause of death was kidney cancer and that coal mine dust does not cause kidney cancer. A. 134.

In deposition, Dr. Fino reiterated his findings. He explained that an x-ray he had personally interpreted in conjunction with one of his prior reports was negative for pneumoconiosis, but that the later x-rays readings provided for his review in 2008 were positive for pneumoconiosis. A. 141, 143. He stated that he found no objective evidence of any pulmonary or respiratory impairment or disability because the miner “never gave a maximum effort on the lung function studies.” A. 144. Based on the death certificate, Dr. Fino restated that the miner’s death from kidney cancer was not related to any respiratory impairment or to coal dust inhalation. A. 145, 147.

D. Summary of the decisions below.

1. ALJ Denial, June 25, 2009.

Regarding the miner’s employment history, the ALJ first noted that Harriman’s current stipulation of 16 years of coal mine employment was less than its prior stipulation of 20 years before ALJ Teitler.⁸ A. 167. Analyzing the

⁸Harriman’s stipulation of 20 years of coal mine employment arose during the adjudication of the miner’s lifetime disability claim for benefits. ALJ Teitler denied the miner’s claim, finding that the miner was totally disabled, but did not suffer from pneumoconiosis because, *inter alia*, the x-ray evidence was “evenly balanced.” A. 55, 60. The miner’s claim was on appeal at the Board when he
(continued...)

evidence, the ALJ credited the miner with coal mine work for 18.68 years prior to 1997 and for 2.59 years from 1997 to 2000, for a total of 21.27 years. A. 170, n.7.

In denying Mrs. Schoffstall's claim, the ALJ found that the weight of the x-ray evidence and medical opinions did not establish that the miner had pneumoconiosis, a finding that precluded entitlement. A. 175-76. The ALJ further found, assuming the presence of pneumoconiosis, that Mrs. Schoffstall failed to prove that pneumoconiosis was a substantially contributing cause of death because the record then did not contain any evidence addressing the cause of the miner's death. A. 177.

2. Benefits Review Board Remand, July 29, 2010.

Acting *pro se*, Mrs. Schoffstall appealed to the Board. While her appeal was pending, the ACA was enacted. Finding that Mrs. Schoffstall's claim met the time

(...continued)

died. His counsel requested that his claim be consolidated with Mrs. Schoffstall's survivor's claim, and the Board remanded, treating the request as one for modification under 20 C.F.R. § 725.310. A. 165. ALJ Odegard then denied the miner's claim and the Board affirmed the denial (although it remanded Mrs. Schoffstall's claim for reconsideration under the ACA amendments). A. 163, 188. Unlike Mrs. Schoffstall's claim, the miner's claim did not meet the ACA's time restrictions, and so it affirmed ALJ Odegard's denial as supported by substantial evidence. A. 183, 186. Because the Board remanded Mrs. Schoffstall's claim, this Court dismissed as premature her *pro se* petition for review of the denial of the miner's claim. *Schoffstall v. Harriman Coal Corp*, Case No. 11-2053 (3d Cir., Sept. 8, 2011). Mrs. Schoffstall did not cross-appeal following the Board's affirmance of the award of her claim.

limitations for applying the ACA amendments, the Board vacated the ALJ's denial and remanded the claim for consideration under the restored 15-year presumption. A. 183, 188.

The Board also rejected Harriman's contention that the finding of no pneumoconiosis precluded Mrs. Schoffstall's entitlement under the 15-year presumption. A. 187. Although the Board agreed that substantial evidence supported the ALJ's finding that Mrs. Schoffstall had failed to prove the presence of the disease, a remand was necessary because the 15-year presumption requires consideration of total respiratory disability, a factual issue not previously relevant in her claim, and invocation of the presumption would then shift the burden of proof to Harriman to disprove the existence of pneumoconiosis. A. 186-87. The Board accordingly directed the ALJ to determine whether the miner's 21.27 years of combined underground and surface mining was equivalent to at least fifteen years of mining in conditions substantially similar to those of an underground mine. A. 187. The Board also instructed the ALJ to allow the parties the opportunity to submit additional evidence in light of the shifted burdens of proof. A. 187.

3. ALJ Award on Remand, April 17, 2012.

The ALJ determined that all 21.27 years of coal mine employment qualified to invoke the presumption, finding that the work occurred either underground or at

the surface in dusty conditions similar to those of an underground mine. In making this determination, the ALJ credited the miner's 2004 uncontradicted testimony that he had at least 10 years of underground mining work and his above-ground work picking slate at coal breakers involved continual exposure to coal dust. This above-ground exposure, the ALJ found, was comparable to dust exposure in an underground mine and, combined with his ten years of underground mine work, established just over 15 years of qualifying coal mine employment. A. 16-17. Additionally, the ALJ found that the miner's six years driving a coal truck at the breakers took place in conditions similar to those underground because the miner testified that he was "continually" exposed to coal dust. A. 17-18. Thus, the ALJ counted all 21.27 years as qualifying coal mine employment for the purpose of invoking Section 921(c)(4)'s 15-year presumption.⁹ A. 18.

The ALJ then found that the medical evidence established a totally disabling respiratory condition. The ALJ accorded only minimal weight to Dr. Fino's diagnosis of no respiratory disability because (1) the doctor's rejection of the

⁹The ALJ alternatively determined that the coal breakers, although above-ground, were located at an underground mine site, and therefore constituted underground coal mine work for purposes of invoking the 15-year presumption. A. 17 *citing, inter alia, Muncy v. Elkay Mining Co.*, 25 Black Lung Rep.1-23, 1-29, 2011 WL 6140705 at *5 (Ben. Rev. Bd. 2011). *See also Kanawha Coal Co. v. Director, OWCP*, __ Fed. Appx. __, 2013 WL 4828724 at *2 (4th Cir. 2013).

pulmonary function test results for poor effort was unexplained and contradicted by first-hand observations recorded during the tests, (2) his belief that better effort would have produced normal results was unexplained and speculative, and (3) the doctor's statement that Dr. Seidel did not diagnose a respiratory impairment was incorrect. A. 23-25, 28. The ALJ instead accorded greater weight to Dr. Seidel's opinion finding total disability. A. 25. The ALJ thus invoked the 15-year presumption and shifted the burden to Harriman to rebut by proving that the miner did not have pneumoconiosis or that his disabling respiratory impairment was not related to his coal mine employment.¹⁰ A. 25-26.

The ALJ then determined that Harriman did not rebut the presumption by ruling out the presence of pneumoconiosis. The ALJ accorded greater weight to the positive x-ray readings of Dr. Smith because he had better credentials than Dr. Fino and his positive interpretations were the most recent of record. A. 27 n.36.

¹⁰As we explained to the Board on Harriman's appeal of the award, the ALJ misstated the two paths for rebuttal here. See Director's November 16, 2012 letter brief to the Board at 2, 3 n.1. In a widow's claim, rebuttal may be established by showing that the miner did not have pneumoconiosis or that no part of his *death* was caused by pneumoconiosis. 78 Fed. Reg. 59115 (revised 20 C.F.R. § 718.305(d)(2), effective October 25, 2013); *Copley v. Buffalo Mining Co.*, 25 Black Lung Rep. 1-81, 1-89 (2012). As the Board found (A. 6), Harriman waived any challenge to the latter rebuttal standard by not raising it before the Board and limiting its rebuttal challenge to arguing that it established the absence of pneumoconiosis. Harriman has pursued this same litigation strategy before this Court.

She further observed that Dr. Fino conceded the presence of pneumoconiosis based on these later x-ray readings (despite his own negative interpretation of an earlier x-ray). A. 27, 134, 143. Moreover, the ALJ ruled that Harriman did not rebut the presumption by proving the miner's disability was not occupationally related. She found Harriman's only affirmative evidence, Dr. Fino's opinion, insufficient because Dr. Fino simply and wrongly believed the miner was not totally disabled. A. 29. Accordingly, the ALJ ruled that Mrs. Schoffstall had "established that the Miner died due to pneumoconiosis, based on Employer's failure to rebut the presumption at Section 718.305," and she awarded benefits. A. 30.

4. Benefits Review Board Affirmance, March 28, 2013.

The Board held that the ALJ properly invoked and found un rebutted the 15-year presumption. It accordingly affirmed the award of benefits.

It upheld the ALJ's finding that the miner engaged in a combined total of at least 15 years of underground coal mine work and surface mine work in substantially similar conditions. A. 7. In particular, the Board affirmed as unchallenged on appeal the ALJ's findings that the miner had ten years of underground mine work and an additional five years of work at the breakers in dust

conditions substantially similar to conditions in an underground mine.¹¹ A. 7. Moreover, the Board affirmed as unchallenged the ALJ's finding of total respiratory disability. It thus affirmed invocation of the 15-year presumption. A. 7.

The Board also ruled that Harriman had failed to rebut the presumption by proving the miner did not have pneumoconiosis. The Board explained that Harriman's challenge wrongly focused on ALJ Teitler's finding of no pneumoconiosis in the miner's claim (*see supra* n.1), which did not govern because different standards of proof applied in the two claims: to rebut the 15-year presumption in the widow's claim, Harriman bore the burden of disproving pneumoconiosis, whereas the miner bore the burden of affirmatively proving the existence of pneumoconiosis. A. 8. The Board determined that the ALJ applied the proper burden of proof; and that her findings that Dr. Fino conceded the presence of pneumoconiosis by x-ray and Harriman failed to prove the absence of pneumoconiosis were supported by substantial evidence. A. 8. Because Harriman "d[id] not raise any additional contentions of errors, [the Board] affirmed the

¹¹The Board explicitly declined to address Harriman's challenge to the ALJ's alternative finding—that the miner's 5 years at the breakers constituted underground work because the breakers were located at underground mine sites. A. 7 n.7; *see* Director's Supplemental Appendix (S.A.) 4 (Harriman's Board brief at 4); A. 16 (ALJ's finding).

administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the Section [92]1(c)(4) presumption." A. 9.

SUMMARY OF THE ARGUMENT

Under 30 U.S.C. § 921(c)(4), a widow of a coal miner who worked for at least 15 years in an underground coal mine, or at a surface mine in conditions substantially similar to conditions in an underground mine, and who suffered from a totally disabling respiratory or pulmonary impairment, is entitled to a presumption that the miner had pneumoconiosis and that his death was due to pneumoconiosis. In awarding black lung benefits here, the ALJ invoked the 15-year presumption of entitlement and then found that Harriman failed to rebut it by proving that the miner did not suffer from pneumoconiosis. This Court should affirm the award.

First, Harriman has waived any challenge to the ALJ's invocation of the 15-year presumption. In cases arising under the BLBA, this Court reviews issues that were properly raised before the Board. The Board affirmed invocation of the 15-year presumption because Harriman did not challenge either the ALJ's determination that the miner's surface work occurred in conditions substantially similar to conditions of an underground mine (giving the miner more than 15-years of qualifying coal mine employment) or the ALJ's determination that the miner

had a totally disabling respiratory impairment. Harriman cannot now challenge these findings or invocation of the 15-year presumption.

Second, the Court should affirm as supported by substantial evidence the ALJ's finding that Harriman failed to rebut the presumption. The ALJ reasonably determined that Harriman did not establish the absence of pneumoconiosis. The ALJ relied on the most recent x-ray readings, which were positive for pneumoconiosis, and she reasonably understood Harriman's expert as conceding the existence of the disease. And as with invocation, the Board correctly found that Harriman waived any other potential rebuttal challenges by not raising them to the Board.

ARGUMENT

The ALJ's invocation of the 15-year presumption and her ruling that Harriman failed to rebut the presumption should be affirmed.

A. Standard of Review.

This Court reviews decisions of the Benefits Review Board “for errors of law and to assure that [the Board] has adhered to its own standard of review.” *BethEnergy Mines, Inc. v. Director, OWCP*, 39 F.3d 458, 462-63 (3d Cir. 1994). To determine whether the Board properly reviewed the ALJ's decision, the Court independently reviews “the entire record to determine if the ALJ's factual findings are rational, consistent with applicable law, and supported by substantial evidence.” *Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004). If

supported by substantial evidence, the ALJ's factual findings are conclusive upon the Board and the Court. *Id.* "Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

B. Harriman has waived any challenge to invocation of the 15-year presumption.

Harriman contends that the ALJ erred in invoking the 15-year presumption because the miner had only ten years of underground coal mine employment. Harriman, however, misconstrues section 921(c)(4), and as a result has waived any challenge to the ALJ's invocation of the presumption.

Before the Board and in its opening brief here, Harriman claims the ALJ erred in invoking the 15-year presumption because the evidence establishes just ten years of underground coal mining. OB at 13; S.A. 4 (Harriman's Board brief at 4); A. 7 (recognizing that Harriman did not challenge ALJ's finding of ten years of underground coal mine employment). Harriman, however, fails to recognize that section 921(c)(4) plainly provides that a miner's surface coal mine work may also count toward the 15 years needed to invoke the presumption. 30 U.S.C. 921(c)(4) (15-year presumption may be invoked if the miner "was employed for fifteen years or more . . . in surface mines with conditions "substantially similar to conditions in

an underground mine”); *see supra* n.3 for relevant text of section 921(c)(4).¹² Because of this misunderstanding, Harriman has never disputed the ALJ’s finding, A. 17-18, that the miner’s work picking slate and driving a coal truck at the breakers occurred in conditions substantially similar to an underground mine. S.A. 4 (Harriman’s Board brief at 4); OB at 12-15. The Board thus correctly affirmed as unchallenged on appeal the ALJ’s determination that the miner had an additional five years of surface mine work at the breaker that was in conditions comparable to an underground mine. A. 7.

By failing at any stage of these proceedings to allege error in the ALJ’s “substantially similar” determination, that finding is binding on Harriman, and this Court should affirm the Board’s holding that the miner’s ten years underground and five years of comparable surface mine work satisfied section 921(c)(4)’s 15-year prerequisite. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d 1993) (“[A]ppellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief.”); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 624 n. 8 (3d Cir. 1990) (issues waived before the Board will not be

¹²*See Burris*, ___ F.3d ___, 2013 WL 5530986, at *6-*7 (7th Cir. 2013) (invoking revived 15-year presumption for above-ground miner); *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789, 795 (7th Cir. 2013) (same); *see generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 49 (1976) (explaining that surface miners receive the benefit of the 15-year presumption).

considered for the first time on appeal); *Bernardo v. Director, OWCP*, 790 F.2d 351, 353 (3d Cir. 1986) (same, *citing Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 1143 (3d Cir.1980); *accord Burris*, __ F.3d __, 2013 WL 5530986 at *4; *Hix v. Director, O.W.C.P.*, 824 F.2d 526, 527-28 (6th Cir.1987).

In any event, the ALJ reasonably concluded, A. 18, based on the miner's uncontradicted testimony, that his five years picking slate at the breakers "continually" exposed him to substantial coal dust and that these conditions were comparable to the conditions in an underground mine. *See* 78 Fed. Reg. 59114 (revised 20 C.F.R. § 718.305(a)(2) (conditions at a surface mine will be "substantially similar" to an underground mine where the miner was "regularly exposed to coal-mine dust while working there")); *Burris*, __ F.3d __, 2013 WL 5530986 at *6-*7 (miner's uncontradicted testimony of being exposed to coal dust "all the time" sufficient to establish substantial similarity); *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512-13 (7th Cir. 1988) (claimant "bears the burden of establishing comparability" but "must only establish that [the miner] was exposed to sufficient coal dust in his surface mine employment").

The ALJ's "substantially comparable" finding, which the Board affirmed as unchallenged, thus established that the miner worked at least five years in qualifying surface coal mining in addition to his ten years underground. The ALJ's determination that Mrs. Schoffstall proved the prerequisite fifteen years of

qualifying coal mine employment should be affirmed as unchallenged and supported by substantial evidence.¹³

C. The ALJ reasonably determined that Harriman failed to carry its burden of proof on rebuttal.

The ALJ reasonably found that Harriman failed to prove that the miner did not suffer from pneumoconiosis. Moreover, as the Board held, Harriman did not otherwise attempt to rebut the presumption (*i.e.*, by proving that no part of the miner's death was caused by pneumoconiosis). Thus, the ALJ's finding of no rebuttal should be affirmed.

Harriman argues that the ALJ erred in not finding the presumption rebutted because "there was no evidence in this matter that the miner had pneumoconiosis" and because ALJs Teitler and Odegard had previously found the disease not affirmatively established. OB at 19 (*citing* A. 60-61, 176-77). Harriman, however, simply overlooks the significance of the presumption's invocation: Mrs. Schoffstall was no longer required to prove affirmatively the presence of pneumoconiosis (or that the miner's death was due to pneumoconiosis); rather, that

¹³In addition to proving 15 years of qualifying coal mine employment, Mrs. Schoffstall was required to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. Harriman did not challenge the ALJ's finding of total disability before the Board and has not argued it here. *See* S.A. 4-5 (Harriman's Board brief at 4-5); OB at 14-15. It is therefore bound by the ALJ's finding of total respiratory disability.

fact was presumed, and the burden shifted to Harriman to prove its *absence*. “[R]ebuttal requires an affirmative showing ... that the claimant does *not* suffer from pneumoconiosis....” *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011), quoting *Hatfield v. Sec’y of Health and Human Servs.*, 743 F.2d 1150, 1157 (6th Cir.1984), *overruled on other grounds by Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987). Thus, any failure of proof works against Harriman, not Mrs. Schoffstall.¹⁴ *Burris*, ___ F.3d ___, 2013 WL 5530986 at *8 (15-year presumption not rebutted where x-ray evidence was in equipoise); *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789, 195 (7th Cir. 2013) (“It is no secret that the 15-year presumption is difficult to rebut”).

Here, the ALJ reasonably found that Harriman failed to prove the absence of pneumoconiosis. The ALJ first observed that the earlier x-ray evidence (prior to the Board’s remand) was “evenly balanced.” A. 27. She then accorded greater weight to the positive x-ray readings of Dr. Smith because he had better credentials than Dr. Fino and his interpretations were the most recent of record. A. 27 n.36; *see* 20 C.F.R. § 718.202(a)(1) (in evaluating conflicting x-ray readings, the

¹⁴ALJ Teitler’s denial of the miner’s claim illustrates this very point. He found that the x-ray readings were evenly balanced with an equal number of negative and positive x-ray interpretations. He concluded that, because the evidence was evenly balanced, the miner had failed to carry his burden of persuasion. A. 55.

radiological qualifications of the readers shall be taken into account); *Kowalchick*, 893 F.2d at 621 (crediting more recent positive x-rays over older negative readings “is not inconsistent with progressive nature of pneumoconiosis”). Most important, the ALJ recognized that Harriman’s own expert, Dr. Fino, confirmed that the most recent x-ray readings were positive for pneumoconiosis, A. 134, 143, and thus, she reasonably understood his opinion to be a concession of the existence of the disease. A. 27; *see Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004) (ALJ’s reasonable interpretation of physician’s statement satisfies substantial evidence review even though other interpretations may be possible).¹⁵ In short, substantial evidence supports the ALJ’s determination that Harriman failed to prove that the miner did not have pneumoconiosis.

In addition, the Board correctly ruled that Harriman waived any other potential rebuttal issue by failing to raise it to the Board. A. 6; S.A. 3-5 (Harriman’s Board brief at 3-5); *Hix v. Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987) (claimant could not argue for the first time on appeal to the court that

¹⁵Although Harriman did not challenge the ALJ’s interpretation of Dr. Fino’s opinion before the Board (and thus waived it), *see* Harriman Board Brief at 5, it now argues that the ALJ misread Dr. Fino’s opinion. OB at 17-19. However, the quoted passage from Dr. Fino’s deposition discusses the doctor’s (rejected) diagnosis of no respiratory disability, not whether the miner suffered from pneumoconiosis in the first place. *Compare* A. 144-45 *with* A. 143.

the ALJ erred in finding rebuttal where only the length of mine employment was challenged at the Board). Not only has Harriman failed to dispute the Board's waiver finding in its opening brief, it does not raise now raise any other rebuttal challenge. Thus, the Court need go no further to affirm the ALJ's finding of no rebuttal and affirm the award of benefits to Mrs. Schoffstall.

But, in any event, the record does not contain a credible medical opinion establishing that pneumoconiosis played no role in the miner's death, the second available method of rebuttal here. Harriman's only affirmative evidence is Dr. Fino's opinion that pneumoconiosis did not play a role in the miner's death due to cancer. The ALJ, however, permissibly accorded "minimal weight" to his opinion because Dr. Fino failed to explain his conclusions. A. 24; *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997) ("The mere statement of a conclusion by a physician, without any explanation of the basis for that statement, does not take the place of the required reasoning"). Moreover, Dr. Fino excluded pneumoconiosis as a cause of death solely on the basis of the death certificate and his own misdiagnosis of no pulmonary impairment whatsoever. A. 145. As a result, his opinion is neither well-documented nor well-reasoned. *Cf. Garcia v. Director, OWCP*, 869 F.2d 413, 1417 (10th Cir. 1989) (doctor's failure to have a complete picture of miner's health and his misdiagnosis greatly weakened opinion that breathing impairment was due to non-respiratory cause). In sum, even if the

Court were to address the issue, the ALJ permissibly accorded little weight to Dr. Fino's unreasoned opinion, and Harriman failed to rebut the 15-year presumption with persuasive proof that no part of the miner's death was caused by pneumoconiosis.

CONCLUSION

For the foregoing reasons, the Court should deny Harriman's Petition for Review and affirm the award of Mrs. Schoffstall's survivor's claim.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 6,616 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee Security VirusScan Enterprise 8.0.0. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, the Director's brief was served electronically using the Court's CM/ECF system on, and copies mailed, postage prepaid, to the Court and the following:

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