No. 20-71449

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DECKER COAL COMPANY,

Petitioner

v.

JERRY PEHRINGER

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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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901–944, filed by former coal miner Jerry Pehringer. On February 26, 2019, United States Department of Labor (DOL) Administrative Law Judge (ALJ) John P. Sellers, III, issued a decision and order awarding benefits to Mr. Pehringer, and ordering Decker Coal Company, Mr.

Pehringer's former coal mine employer, to pay them. Decker sought reconsideration of this decision on March 11, 2019, within the thirty-day time limitation prescribed by 20 C.F.R. § 725.479(b). The ALJ denied reconsideration on April 11, 2019.

Decker appealed the ALJ's decisions to the United States Department of Labor Benefits Review Board (Board) on May 6, 2019, within the thirty-day period prescribed by 33 U.S.C. § 921(a) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), as incorporated into the BLBA by 30 U.S.C. § 932(a); *see also* 20 C.F.R. § 725.479(c) (timely motion for reconsideration to ALJ suspends thirty-day appeal period). The Board had jurisdiction to review the ALJ's decisions pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the ALJ's decisions on March 23, 2020, and Decker petitioned this Court for review on May 22, 2020, within the sixty-day period prescribed by 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a).[1] The

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[1] On December 3, 2020, Decker filed for bankruptcy. *In re Lighthouse Resources, Inc. et al*, Case No. 20-13056 (Bankr. D. Del). It is the Director's understanding that the instant appeal is not subject to an automatic stay in light of the bankruptcy court's approval of the debtors' request for authority to continue meeting their obligations under the Black Lung Benefits Act and other workers' compensation programs. *See* Debtors' Mot. for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and

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 relevant injury, Mr. Pehringer's occupational exposure to coal mine dust, occurred in Montana.

STATEMENT OF THE ISSUES

1. 5 U.S.C. § 7521 provides that an ALJ may be removed by the employing agency "only for good cause established and determined by" the Merit Systems Protection Board, whose members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). Decker argues that Section 7521 is unconstitutional, but the case law it cites simply does not apply to DOL ALJs, like ALJ Sellers. The questions presented are whether Decker has raised a viable challenge to ALJ Sellers' appointment based on his removal protection, and if so, whether, in accordance with the canon of constitutional avoidance, it is fairly possible to construe Section

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Reimburse Expenses and (B) Continue Employee Benefits Programs, and (II) Granting Related Relief, Case No. 20-13056, Dkt. No. 6, at ¶¶ 71–74 (Dec. 3, 2020); Interim Order (I) Authorizing the Debtors to (A) Pay Prepetition Wages, Salaries, Other Compensation, and Reimburse Expenses and (B) Continue Employee Benefits Programs, and (II) Granting Related Relief, Case No. 20-13056, Dkt. No. 33, at ¶ 8 (Dec. 4, 2020).

7521 to render DOL ALJs, like ALJ Sellers, sufficiently accountable under Article II of the Constitution.

2. The BLBA provides for the incorporation of various provisions of the Longshore Act, 33 U.S.C. § 901 *et seq*., "except as otherwise provided by" the black lung regulations. One such provision is Section 22 of the Longshore Act, 33 U.S.C. § 922, which permits any party to a proceeding to request modification of the terms of an award or denial of benefits prior to one year from the date of the last payment of benefits or at any time before one year following the denial of a claim. The black lung regulation at 20 C.F.R. § 725.310 implements Section 22, and provides that modification proceedings must begin before the district director, not an ALJ or the Benefits Review Board. 20 C.F.R. § 725.310(b).

Following the ALJ's award of benefits here, Decker timely moved for reconsideration by the ALJ, and included in the motion a request for modification. The ALJ denied reconsideration, but did not address Decker's modification request. The question presented is whether the ALJ properly declined to act on Decker's modification request.

3. In considering Mr. Pehringer's entitlement to benefits, the ALJ invoked the rebuttable presumption of total disability due to pneumoconiosis under 30 U.S.C. § 921(c)(4) and 20 C.F.R. § 718.305(a) based on Mr. Pehringer's totally disabling respiratory impairment and his 16.7 years of qualifying coal mine

employment. To rebut this presumption of entitlement, Decker was required to prove that Mr. Pehringer did not suffer from clinical and legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1). Although the ALJ found that the x-ray evidence disproved the existence of clinical pneumoconiosis, Decker submitted no medical evidence regarding the existence of legal pneumoconiosis, and the two medical opinions of record linked Mr. Pehringer's respiratory impairment to his coal mine employment. The question presented is whether substantial evidence supports the ALJ's finding that Decker did not rebut the presumption of legal pneumoconiosis.[2]

STATEMENT OF THE CASE

A. Legal Background

1. Constitutional Provisions

The Appointments Clause provides that Congress may authorize inferior officers to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. By vesting in the President "[t]he executive Power" of the United States, U.S. Const. art. II, § 1, cl. 1, and charging him with the duty to "take Care that the Laws be faithfully executed," *id.* § 3,

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[2] Decker could have also rebutted the presumption by proving that pneumoconiosis played no part in Mr. Pehringer's respiratory disability. 20 C.F.R. § 718.305(d)(1)(ii). The Board upheld the ALJ's determination that it failed to do so, Excerpts of Record (ER) 15–16, and Decker has not challenged this finding on appeal. Pet. Bf. 38–40.

Article II of the Constitution "confers on the President the general administrative control of those executing the laws." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (internal quotations omitted).

2. The Administrative Procedure Act's Removal Provisions

The Administrative Procedure Act provides that an ALJ may be removed by an agency head "only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. § 7521(a), whose members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d).

3. The BLBA's Entitlement Provisions

The BLBA provides disability compensation and medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. § 718.1; *Peabody Coal Co. v. Director, OWCP [Opp]*, 746 F.3d 1119, 1121 (9th Cir. 2014). Pneumoconiosis is "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).

There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201. "Clinical pneumoconiosis" refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent

deposition of substantial amounts of particulate matter in the lungs." 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).

Coal miners seeking federal black lung benefits must prove that (1) they suffer from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) they are totally disabled by a respiratory or pulmonary impairment; and (4) the pneumoconiosis contributes to the totally disabling impairment. 20 C.F.R. § 725.202(d); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000). These elements are generally referred to as "disease," "disease causation," "disability," and "disability causation."

The elements of entitlement can be established with medical evidence or by presumption. One such presumption is 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," which the ALJ applied here. The fifteen-year presumption is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from a "totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If those criteria are met, then it is presumed that the miner is totally disabled by pneumoconiosis, and therefore entitled to benefits. *Id.*; *Mingo Logan Coal Co. v, Owens*, 724 F.3d

550, 554 (4th Cir. 2013).

Once a miner invokes the fifteen-year presumption, the burden shifts to the employer to rebut it by demonstrating (1) that the miner does not have pneumoconiosis arising out of coal mine employment or (2) that "no part" of the miner's disability was caused by pneumoconiosis. 20 C.F.R. § 718.305(d); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015). To satisfy its burden under the first method of rebuttal, the employer must demonstrate that the miner has neither clinical nor legal pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(i). With regard to legal pneumoconiosis, the employer must "[e]stablish[] *** that the miner does not *** have *** [l]egal pneumoconiosis *as defined in § 718.201(a)(2)*." 20 C.F.R. § 718.305(d)(1)(i)(A) (emphasis added). That section, in turn, defines legal pneumoconiosis as "any chronic lung disease or impairment *** arising out of coal mine employment," 20 C.F.R. § 718.201(a)(2), with the term "arising out of coal mine employment" to "include[] any chronic pulmonary disease *** significantly related to, or substantially aggravated by" exposure to coal-mine dust, 20 C.F.R. § 718.201(b); *Opp*, 746 F.3d at 1121. To satisfy its burden under the second rebuttal method, the employer must "rule out" pneumoconiosis as a cause of the miner's disability. 20 C.F.R. § 718.305(d)(1)(ii); *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 141 (4th Cir. 2015).

4. The BLBA's Modification Provisions

30 U.S.C. § 932(a) incorporates various provisions from the Longshore Act, 33 U.S.C. § 901 *et seq*., but authorizes the Secretary to "prescribe in the Federal Register such additional provisions [ ] as he deems necessary" and specifies that the incorporated Longshore Act sections apply "except as otherwise provided *** by regulations of the Secretary." 30 U.S.C. § 932(a); *see Director, OWCP v. Nat'l Mines Corp.*, 554 F.2d 1267, 1273–74 (4th Cir. 1977) (holding Congress empowered the Secretary to depart from specific requirements of Longshore Act); *Bethenergy Mines, Inc. v. Director, OWCP*, 854 F.2d 632, 634–35 (3d Cir. 1988) (Secretary's broad rulemaking authority under BLBA includes "discretion to deviate from the [Longshore Act] procedures and to prescribe 'such additional provisions *** as [the Department] deems necessary.' "); *West v. Director, OWCP*, 896 F.2d 308, 310 (8th Cir. 1990) (observing that black lung regulations may deviate from Longshore Act provisions, and holding that "as long as the Department complied with applicable notice requirements in the regulations promulgated pursuant to its authority under the Act, the Department is not bound by the stricter notice requirements in [Longshore Act] 33 U.S.C. § 919(e)."); Senate Conference Committee Report, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969* 1624 (Comm.

Print 1975) (explaining that "[t]he objective of this provision is to provide adequate flexibility" to the Secretary in carrying out the terms of the BLBA).

One such incorporated provision is Section 22 of the Longshore Act, 33 U.S.C. § 922, which reads in pertinent part:

> Upon his own initiative, or upon the application of any party in interest ... on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case ... in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.[3]

33 U.S.C. § 922.

DOL promulgated 20 C.F.R. § 725.310 to implement Section 22. Section 725.310(a), like Section 22, permits any party to a proceeding to request modification of the terms of an award or denial at any time prior to one year from the date of the last payment of benefits or at any time before one year following the

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[3] The Longshore Act uses the term "deputy commissioner," whereas DOL employs the term "district director" to refer to the same administrative actor/position. 20 C.F.R. § 725.101(a)(16); 20 C.F.R., § 701.301(a)(7). The two terms are interchangeable.

denial of a claim. 20 C.F.R. § 725.310(a). Section 725.310(e), however, qualifies the right to modification in cases where the responsible operator seeks to modify an ALJ's order awarding benefits (as here). In that circumstance, the operator must first become current on all outstanding monetary benefits and interest due to the claimant (among other obligations); if the operator has not done so, the modification request must be denied.[4] 20 C.F.R. § 725.310(e).

Section 725.310(b) outlines the procedures to be used for processing a modification request. It specifies that modification proceedings are to be conducted according to the procedures used for processing and adjudicating of

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[4] In promulgating subsection (e), the Department explained, *inter alia*, that the requirement to become current on outstanding debts was necessary to "prevent operators from taking advantage of the safeguards built into the Act to protect claimants, mainly the payment of benefits by the Trust Fund when the liable operator fails to pay." 81 Fed. Reg. 24466 (Apr. 26, 2016). The Department moreover observed that under the Longshore Act "[t]here simply is no secondary payor—like the Trust Fund in black lung claims—available to serve as an alternative source of compensation payments in every case in which an employer does not meet its legal obligations, so there is no need to address this issue explicitly." *Id*. at 24467. Here, Decker did not commence the payment of benefits to Mr. Pehringer after the district director's proposed award in March 2016 or after the ALJ's February 2019 decision. As a result, the Black Lung Disability Trust Fund, which the Director administers, paid interim benefits to Mr. Pehringer. *See* 26 U.S.C. § 9501(d); 20 C.F.R. § 725.522. The Office of Workers' Compensation informed us that Decker first paid Mr. Pehringer's monetary benefits in September 2020 (including reimbursing the Trust Fund), but still owes approximately $6,000 in interest on those benefits.

claims generally, *i.e.* the 20 C.F.R. Part 725 rules, as appropriate.[5] 20 C.F.R. § 725.310(b); *accord* 33 U.S.C. § 922 (directing the review of modification requests according to the general framework for adjudicating claims in Section 19, 33 U.S.C. § 919.).[6] Indeed, many courts have held that a modification request may simply allege a mistake in the "ultimate fact of entitlement" and essentially trigger a de novo adjudication of a claim. *Keating v. Director, OWCP*, 71 F.3d 118, 1123 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Eifler v. OWCP*, 926 F.2d 663, 667 (7th Cir. 1991).

Those claim procedures designate the district director, not an ALJ, as DOL's initial adjudication officer for black lung claims. *See* 20 C.F.R. § 725.350(b). As such, the district director receives and processes new claims, including developing and receiving evidence, making findings of fact, and attempting to resolve the

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[5] Some procedures in Part 725 are generally not "appropriate" for modification provisions because they already have been fully accomplished and are not subject to change. *E.g.* 20 C.F.R. §§ 725.303–.305 (filing of claim), and 20 C.F.R. §§ 725.405–.406 (securing the DOL-sponsored medical examination).

[6] Longshore Act Section 19 was amended in 1972 to remove the district director's authority to conduct hearings and transferred that authority to ALJs. *See* 33 U.S.C. § 919(d). But these same amendments did not otherwise transfer to ALJs the district director's non-hearing functions, like the initial processing of claims. *See Healy Tibbits Builders, Inc. v. Cabral*, 201 F.3d 1090, 1094–1095 (9th Cir. 2000) (noting that section 919(d) merely relieved deputy commissioners of the responsibility of holding hearings and transferred those duties to the OALJ).

claim informally. *See* 20 C.F.R. §§ 725.401–.417. After the processing is complete, the district director issues a proposed decision on the claim, 20 C.F.R § 725.418, which the parties can then accept, request revision, or reject and request an ALJ hearing. 20 C.F.R § 725.419. Because modification procedures mirror the procedures for claims generally, it is the district director who performs the initial processing of petitions for modification. *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 1282 (6th Cir. 1987) (explaining that "[t]he initial stages of a modification proceeding, like the initial stages of a new claim proceeding, do not involve hearings"); *Director, Officer of Workers' Compensation Programs v. Peabody Coal Co. [Sisk],* 837 F.2d 295, 298 (7th Cir. 1988) (observing that "the process of modifying a compensation award must, under the statutory scheme, begin with the deputy commissioner because the initial stages of a modification proceeding, like the initial stages of a new claim proceeding, do not involve hearings") (internal quotation omitted). Accordingly, Section 725.310(b) explicitly states that "[m]odification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board." 20 C.F.R. § 725.310(b).

However, as relevant here, one exception to the Part 725 general procedures exists for modification proceedings. Unlike an initial claim where the parties must request an ALJ hearing following the district director's proposed decision, in any case in which the district director initiates modification proceedings to alter the

terms of an award or denial of benefits issued by an ALJ, the district director must, at the conclusion of the modification proceedings, forward the claim for a hearing, even in the absence of a private party's request to do so. 20 C.F.R. § 725.310(c). This provision was promulgated in response to the decisions of four courts of appeal, including this Court, which held that the district director lacks the statutory authority to initiate modification proceedings to correct factual errors by an ALJ. 62 Fed Reg. 3353 (Jan. 22, 1997) (citing *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); *Director, OWCP v. Peabody Coal Co.[Sisk]*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP v. Kaiser Steel Corp.*, 860 F.2d 377 (10th Cir. 1988) ; *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987)).

B. Relevant Medical Evidence

Decker's challenge to the underlying merits of Mr. Pehringer's entitlement only addresses the ALJ's finding that the company did not rebut the fifteen-year presumption of legal pneumoconiosis. Two medical opinions are relevant to this issue:

Dr. Barbara C. Cahill (ER 129–157), who is Board-certified in internal medicine, with subspecialties in pulmonary disease and critical care medicine, examined Mr. Pehringer pursuant to DOL's statutory obligation to provide each miner-claimant with a complete pulmonary evaluation. *See* 30 U.S.C. § 923(b).

She reported that, although Mr. Pehringer's chest x-ray was negative for clinical pneumoconiosis, Mr. Pehringer suffered from totally disabling chronic obstructive pulmonary disease (COPD).[7] She stated that Mr. Pehringer's coal dust exposure and his approximately 50-year smoking history "are significant contributors to his COPD impairment." ER 133.

Dr. Jason Ackerman (ER 164), who is a general practitioner and one of Mr. Pehringer's treating physicians (*see* ER 67), stated in a May 19, 2016 office note that Mr. Pehringer's "physical exam and spirometry are consistent with very severe obstructive lung disease" and that "[b]ased on history of extensive work in the mines, it is certainly possible, if not probable, that coal dust exposure is playing a role in this." ER 164.

C. Proceedings Below

1. Initial Claim Processing

Mr. Pehringer filed this claim for benefits on November 7, 2014. ER 19. A

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[7] "COPD" is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011). COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); *Opp*, 746 F.3d at 1121, n.2. Both cigarette smoking and dust exposure during coal mine employment can cause COPD. *See* 65 Fed. Reg. 79939–43 (Dec. 20, 2000) (summarizing medical and scientific evidence of link between COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as a cause of COPD).

district director issued a proposed decision awarding the claim on March 8, 2016. DX 29.[8] In response, Decker requested a *de novo* hearing before the Office of Administrative Law Judges. DX 36.

2. Proceedings Before ALJ Sellers

The case was assigned to ALJ John P. Sellers, III. On February 1, 2018, ALJ Sellers issued a Notice of Hearing and Pre-Hearing Order setting the hearing for May 15, 2018. On April 13, 2018, Decker moved to continue the hearing. Decker's primary reason for continuance was a scheduling conflict, but Decker also stated that the case should be continued until the Supreme Court issued a decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018). In the company's view, ALJ Sellers lacked authority to decide the case because he was an inferior officer who should have been appointed by the President or agency head. Although Secretary of Labor Alexander Acosta had ratified ALJ Sellers' appointment on December 17, 2017, Decker charged that the ratification was "highly questionable," and that the entire DOL ALJ forum "may well be

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[8] Documents not reproduced in the Petitioner's Excerpts of Record but identified and paginated in the Index of Documents in the Certified Case Record (CCR) are cited to the CCR Index. Because the CCR Index does not provide separate entries or page numbers for the exhibits admitted by the ALJ, the Director cites to their original exhibit number. "DX" refers to the Director's Exhibits.

unconstitutional;" thus, according to Decker, it should be relieved from liability for the claim.[9] ER 42–47.

On May 4, 2018, ALJ Sellers issued an Order rescheduling the hearing without addressing the *Lucia* issue. At the June 26, 2018 hearing, held five days after *Lucia* was decided, Decker renewed its *Lucia* challenge as set forth in its April motion. ER 101.

The ALJ issued a decision awarding benefits on February 26, 2019.[10] He noted Decker's pleadings concerning *Lucia*, but determined that the decision did not preclude him from adjudicating the case because he had not taken any significant action on it before Secretary Acosta ratified his appointment. ER 170 n.2.

Turning to the merits, the ALJ credited Mr. Pehringer with 16.70 years of

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[9] Secretary Acosta ratified ALJ Sellers' appointment in conformity with DOL's conclusion that its ALJs were inferior officers of the United States who must be so appointed. *See* Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Dept. of Labor Administrative Law Judges (Dec. 20, 2017), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf (last visited October 7, 2020); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 744 (6th Cir. 2019).

[10] The ALJ's decision was filed with the district director on March 4, 2019. Once filed, the decision became "effective," 20 C.F.R. § 725.502(b), thus triggering Decker's responsibility to become current on its payment obligations before accessing modification procedures. 20 C.F.R. § 725.310(e).

qualifying coal mine employment (ER 181), and found that the medical evidence established a totally disabling respiratory impairment, thus invoking the fifteen-year presumption. The ALJ then found that Decker did not rebut the presumption. He observed that the company did not submit any evidence disproving legal pneumoconiosis or ruling out that pneumoconiosis contributed to Mr. Pehringer's total respiratory disability, and that the opinions of Drs. Cahill and Ackerman (the only two medical opinions of record) did not help Decker to rebut the presumption because both doctors implicated coal dust exposure as a cause of Mr. Pehringer's totally disabling COPD.[11] ER 183.

On March 11, 2019, Decker requested reconsideration, explaining that it wanted to submit new evidence regarding Mr. Pehringer's coal mine employment. ER 188–190. In support, Decker cited 20 C.F.R. § 725.479(b), the general black lung provision allowing for reconsideration of an ALJ decision and Longshore Act Section 22.[12] ER 191–192.

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[11] Because the only chest x-ray reading of record was interpreted as negative for pneumoconiosis (ER 140), the ALJ concluded that Decker had rebutted the presumption of clinical pneumoconiosis. ER 183.

[12] Decker also cited 20 C.F.R. § 726.313(f) in support (ER 188), but that provision is not relevant because Part 726 "provides rules directing and controlling the circumstances under which a coal mine operator shall fulfill his insurance obligation under the Act," 20 C.F.R. § 726.2(a), and insurance is not at issue in this case.

The ALJ denied Decker's request. He explained that he had provided the coal company sufficient time to submit evidence prior to the closing of the record. Specifically, the ALJ observed that he had granted the company two extensions of time to submit evidence into the record, but the company "never filed any evidence into the record" and "did not file a post-hearing brief." ER 227.

3. Proceedings Before The Board

Decker appealed the ALJ's decisions to the Board. The company first challenged the ALJ's authority to decide the case, arguing that the Secretary's ratification of the ALJ Sellers' appointment was invalid, and that the ALJ's appointment was otherwise unconstitutional because the statute governing removal of ALJs, 5 U.S.C. § 7521, violates the separation of powers doctrine. As support, Decker cited *Free Enterprise Fund* and *Arthrex, Inc. v. Smith & Nephew, Inc., et al.*, 941 F.3d 1320 (Fed. Cir. 2019) (petition for cert. granted Oct. 13, 2020). Decker also renewed its charge that the ALJ should have initiated modification and reopened the record to admit its post-hearing evidence. Finally, the company disputed the ALJ's fact-finding with regard to Mr. Pehringer's length of coal mine employment and his entitlement to benefits under the fifteen-year presumption. CCR 66–108.

The Board rejected Decker's arguments. It held that the Secretary validly ratified ALJ Sellers' appointment, and dismissed the company's removal argument

as speculation because it was based on *Free Enterprise Fund* and *Arthrex, Inc.*, neither of which addressed DOL ALJs.[13] ER 8–10.

The Board also held that the ALJ acted within his discretion in refusing to reopen the record for admission of Decker's new evidence, especially given that the ALJ had twice granted the company additional time to submit its evidence. With regard to Decker's charge that the ALJ was obligated to reopen the record on modification, the Board held that the implementing black lung regulation, 20 C.F.R. § 725.310(b), clearly requires that modification proceedings begin before DOL's district director, not the ALJ. ER 11.

The Board then affirmed the ALJ's finding of 16.70 years of coal mine employment and invocation of the fifteen-year presumption.[14] It found harmless any error in the ALJ's crediting of Dr. Cahill's diagnosis of legal pneumoconiosis. The Board reasoned that because the company did not submit any countervailing evidence, the company had failed to carry its burden to disprove the presumed existence of legal pneumoconiosis. ER 14–15.

Decker's petition to this Court followed.

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[13] In this appeal, Decker does not challenge the Board's holding that the Secretary's ratification of ALJ Sellers' appointment was valid.

[14] The company did not challenge the ALJ's finding that Mr. Pehringer suffered from a totally disabling respiratory impairment. *See* ER 11 n.7.

SUMMARY OF THE ARGUMENT

Decker has not raised a viable constitutional challenge to 5 U.S.C. § 7521. The case law it now cites in support, *Free Enterprise Fund* and *Seila Law LLC v. Consumer Finance Protection Board,* 140 S. Ct. 2183 (2020), simply do not apply to DOL ALJs. As a result, Decker has not shown, as it must under the canon of constitutional avoidance, that Section 7521 is incapable of being interpreted in a constitutionally-sound manner. Accordingly, this Court need not address the interpretation and validity of Section 7521 here.

In any event, the removal restrictions for administrative law judges (ALJs) contained in 5 U.S.C. § 7521 would raise grave constitutional concerns if certain ambiguous statutory phrases were construed in a manner that unduly impinges on the authority of the President and the Heads of Departments to hold accountable those subordinate officials entrusted with exercising a significant portion of the executive power. Against that constitutional backdrop, however, Section 7521 is properly read in a manner that renders ALJs sufficiently accountable for Article II purposes, while providing ALJs with permissible protections against removal from their positions as inferior adjudicative officers.

Section 7521 provides that an ALJ may be removed by the employing agency "only for good cause established and determined by" the Merit Systems Protection Board (MSPB), whose members are themselves removable by the

President "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). This construction of Section 7521 herein has two critical elements. *First,* "good cause" must be construed broadly: it must authorize removal of an ALJ for misconduct, poor performance, or failure to follow lawful directions. *Second,* MSPB's role in "establish[ing] and determin[ing]" such good cause must be construed narrowly: it must be confined to adjudicating whether factual evidence exists to support the employing agency's proffered, good-faith grounds for cause, rather than making the independent policy determination whether those grounds warrant removal as opposed to a lesser sanction.

Both of these elements are necessary to ensure that ALJs—who exercise "significant authority" over the parties before them, *Lucia v. SEC,* 138 S. Ct. 2044, 2052 (2018)—are subject to the constitutionally requisite level of accountability in exercising the executive function of agency adjudication. If poorly performing, insubordinate, or misbehaving ALJs cannot be removed, or if their Department Heads' policy judgment concerning the sanction for such conduct can be second-guessed by MSPB, the President's exercise of "the executive power" and responsibility to "take Care that the Laws be faithfully executed" would be impaired. U.S. Const., art. II, §§ 1, 3. Although ALJs perform adjudicatory tasks, they do so as inferior officers within executive agencies, on behalf of, and subject to the review and supervision of, Department Heads accountable to the President.

This construction of Section 7521 would eliminate any Article II concerns that implicate the rights of private parties appearing before ALJs. Department Heads would ultimately have the power to remove ALJs for the types of misbehavior where removal is a constitutionally necessary remedy for an officer of this kind. Although Department Heads still could not remove ALJs at will and would be somewhat constrained in the lawful directions that they could give ALJs, such constraints are consistent with the Supreme Court's longstanding conclusion that Article II permits some limits on executive control of inferior adjudicative officers. *See Myers v. United States,* 272 U.S. 52, 127, 135 (1926). Section 7521 would nevertheless be far afield of the "unusually high" removal standard invalidated in *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 561 U.S. 477 (2010), where the inferior officers at issue were removable only for certain types of gross misconduct and the principal officers making the policy decision whether to remove them were removable only (the Court assumed) under the usual standard governing the heads of independent agencies. *See id. a*t 487, 502–03. Here, instead, the Secretary of Labor, who is removable at will by the President, would have the power to make the policy decision whether to remove ALJs under a broad "good cause" standard, and MSPB's authority would be limited to adjudicating whether factual evidence exists to support the Secretary's proffered good-faith grounds for cause.

Nothing in Section 7521 forecloses this textual construction, particularly given the judicial obligation to adopt an interpretation of the statute that would save it from unconstitutionality so long as that is "fairly possible," regardless of whether it is "most natural." *National Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 563 (2012) (opinion of Roberts, C.J.). Nor does *Free Enterprise* foreclose the government's textual construction, as the removal standard applicable to the inferior officers there did not use the same language and also applied to different types of officers.

Decker's second argument that the ALJ abused his discretion by refusing to act on its modification request is groundless and contrary to law. The black lung program regulation, 20 C.F.R. § 725.310(b), mandates that modification proceedings begin with a district director, not an ALJ. This requirement accords with the plain language of the incorporated Longshore Act Section 22, and to the extent Sections 22 and 725.310(b) differ, the black lung regulation governs. This is so because the BLBA states that Longshore Act provisions are incorporated "except as other provided by regulation[]." 30 U.S.C. § 932(a). The requirement that modification begin with the district director also does not run afoul of this Court's decision in *Palmer Coking* because Section 725.310(c) also prohibits the district director from exceeding his authority by unilaterally modifying an ALJ's factual findings. 20 C.F.R. § 725.310(c).

Decker's final argument, that it has rebutted the presumption of legal pneumoconiosis because the opinions of Drs. Cahill and Ackerman do not satisfy the regulatory definition of the disease, is also meritless. Decker ignores the fact that once the fifteen-year presumption is invoked, Decker bears the burden to disprove the presence of legal pneumoconiosis, and here, it presented no evidence on the issue. The opinions of Drs. Cahill and Ackerman, which implicate coal dust exposure as a cause of Mr. Pehringer's totally disabling COPD, simply do not aid Decker's case. The ALJ correctly concluded that Decker did not rebut the fifteen-year presumption by disproving the presence of legal pneumoconiosis.

ARGUMENT

A. Standard Of Review

Decker's removal and modification arguments present questions of law that are subject to de novo review. *Opp*, 746 F.3d at 1225. This Court also reviews questions of constitutional law, including Appointments Clause questions, *de novo*. *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016); *see Willy v. Administrative Rev. Bd.*, 423 F.3d 483, 490 (5th Cir. 2005) (reviewing constitutional Appointments Clause challenge *de novo*). The Director's reasonable interpretation of the BLBA as set forth in duly-promulgated program regulations is entitled to deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

Absent an error of law, the ALJ's findings and conclusions must be affirmed if supported by substantial evidence. *Opp*, 746 F.3d at 1227. Substantial evidence means evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

B. The Court Should Reject Decker's Argument That Section 7521's Removal Protections Deprive The ALJ Of Authority To Adjudicate This Claim.

1. Decker Has Not Met Its Burden Of Demonstrating That Section 7521 Is Incapable Of Being Interpreted In A Constitutionally-Sound Manner.

Decker contends that Section 7521's removal protections unconstitutionally limit the Secretary of Labor's power to remove DOL ALJs. Pet. Bf. 31–36. This argument must fail for the simple reason that Decker has not shown, as it must under the canon of constitutional avoidance, that Section 7521 is incapable of being reasonably construed in a constitutionally sound manner. To make its case, Decker relies on *Free Enterprise Fund v. PCOAB*, 561 U.S. 477 (2010), and *Seila Law LLC v. Consumer Finance Protection Board*, 140 S. Ct. 2183 (2020) (Pet. Bf. 31–32, 34–35 respectively). But these decisions do not concern Section 7521 and are clearly distinguishable.

In *Free Enterprise Fund*, the Court held that Congress violated Article II of the Constitution by protecting members of the Public Company Accounting Oversight Board from removal. In doing so, however, the Court expressly noted that its holding did not address ALJs. 561 U.S. at 507 n.10. And it emphasized

that it was not making a "general pronouncement[]" that "two levels of good-cause tenure" are *always* unconstitutional. *See* 561 U.S. at 505–06. Significantly, *Free Enterprise* also involved far more stringent removal criteria than those imposed by Section 7521. *Cf. Free Enterprise Fund*, 561 U.S. at 486, 496 (PCAOB member may be removed for willful violation of Sarbanes-Oxley Act, the securities laws, or the PCAOB's rules; willful abuse of authority; or failure to enforce compliance with the statutes, rules, or PCAOB standards "without reasonable justification or excuse.") with Section 7521 (ALJs may be removed for good cause).

Decker also cites *Seila Law LLC v. Consumer Finance Protection Board*, 140 S. Ct. 2183 (2020), but *Seila Law* does not support its argument either. *Seila Law* addressed the status of a principal officer who is the sole Head of a Department and does not relate to inferior officers like ALJs. *Id.* at 2200–01. Moreover, the statutory grounds for removal in *Seila Law* were limited to "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), which were narrower and textually distinct from the broad and general "good cause" language in Section 7521. Nothing in *Seila Law* modifies the Court's statement in *Free Enterprise* that "our holding also does not address" ALJs. *Id*. at 507 & n.10. Nor did the Court expand upon *Free Enterprise Fund*'s holding that two layers of for-cause removal protection are not permissible in certain

circumstances. Accordingly, *Seila Law* does not help Decker.[15]

Congressional enactments are presumed to be constitutional and will not be lightly overturned. *U.S. v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Decker has clearly failed to make the required showing that there is no reasonable and constitutional way to interpret Section 7521. Without a valid legal basis for the Court to question the validity of Section 7521, Decker presents no viable challenge to the provision, and the Court should summarily reject Decker's argument.[16]

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[15] Similarly, the Board correctly dismissed Decker's reliance on *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) as "speculation" because the court in that case held that Administrative Patent Judges (APJs) were principal officers who were subject to a different removal statute, 5 U.S.C. § 7513. ER 10. Decker mentions, but does not actually challenge, the Board's holding in this regard. Pet. Bf. 22. In any event, the Board is correct that *Arthrex* does not support Decker's argument. First, the court considered the APJ removal provision in the context of determining whether APJs were principal or inferior officers. It did not address whether that provision was inherently unconstitutional. Indeed, the court recognized that the provision applied to federal employees in general. *Id*. at 1336. More important, the court expressly noted that Section 7521, the removal provision applicable to DOL ALJs, did not apply to APJs. 941 F.3d at 1333, n.4. Thus, *Arthrex* says nothing about whether Section 7521 is constitutional.

[16] Decker also suggests that the issuance of Executive Order 13843 does not cure the removal defect. Pet. Bf. 12–13. But, as noted above, Decker has not established that there is constitutional defect to cure in the first instance.

2. Section 7521 Can And Constitutionally Must Be Construed To Allow The Secretary Broad Authority To Remove ALJs.

a. Under Article II, Department Heads Accountable To The President Must Be Able To Remove Inferior Officers Like ALJs For Misconduct, Poor Performance, Or Failure To Follow Lawful Directions.

The Constitution vests in the President alone "[t]he executive power" of the United States and obligates him to "take Care that the Laws be faithfully executed." U.S. Const., art. II, §§ 1, 3. And as James Madison explained during the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834). Likewise, the Supreme Court has long recognized that, as "the President alone and unaided could not execute the laws," it is "essential" that his executive power include authority both in the "selection of administrative officers" *and* in "removing those for whom he cannot continue to be responsible." *Myers v. United States,* 272 U.S. 52, 117 (1926). The "power to oversee executive officers through removal" is a "traditional executive power," *Free Enterprise,* 561 U.S. at 492, because "[o]nce

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Moreover, any argument based on the Executive Order is meritless because the Order does not state that appointment procedures in place before issuance of the Order are impermissible or violate the Appointments Clause. The Order is also directed at the government's internal management and does not create any right enforceable against the United States. E.O. 13843 § 4(c). As such, it is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8–9 (D.C. Cir. 1999).

an officer is appointed, it is only the authority that can remove him *** that he must fear and, in the performance of his functions, obey," *Bowsher v. Synar,* 478 U.S. 714, 726 (1986) (quotation marks omitted).

The Constitution's vesting of executive power and responsibility in the President protects individual liberty through political accountability. "The Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.' " *Free Enterprise,* 561 U.S. at 501 (citation omitted). As "[t]he people do not vote for the 'Officers of the United States,' " they must "look to the President to guide the 'assistants or deputies *** subject to his superintendence.' " *Id.* at 497–98 (citation omitted). For "those who are employed in the execution of the law," it is thus imperative that "the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (Madison). This "clear and effective chain of command" is necessary so that the people can "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Free Enterprise,* 561 U.S. at 498 (citation and internal quotations omitted). Restricting the President's power to effectuate the removal of subordinate officers therefore creates the risk that the Executive Branch "may slip from the [Chief] Executive's control, and thus from that of the people." *Id. a*t 499.

The Supreme Court has held that principal officers answering directly to the President generally must be removable at will by the President himself, with the sole exception of the heads of certain "quasi-legislative and quasi-judicial" independent agencies. *See Free Enterprise,* 561 U.S. at 493, 513–14 (citing *Humphrey's Executor v. United States,* 295 U.S. 602, 627–29 (1935)). But for non-Senate-confirmed "inferior" officers—subordinate officials "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond v. United States,* 520 U.S. 651, 663 (1997)—the Court has issued three decisions concluding that Congress may vest removal authority in a Department Head rather than the President personally, and subject to limited restrictions that do not place such officers beyond adequate presidential control. *See Free Enterprise,* 561 U.S. at 493–95.

First, in *United States v. Perkins,* 116 U.S. 483 (1886), the Court upheld a removal restriction that required the Secretary of the Navy to make a misconduct finding or convene a court-martial before removing a naval cadet-engineer during peacetime. *Id.* at 485. Notably, though, it was undisputed that the cadet there was discharged, not for any reason related to misbehavior, but solely for want of a vacancy. *Id.* at 483. The Court thus had no need to consider what sort of behavior would warrant removal under the terms of the statute and Article II. *Cf. Free*

Enterprise, 561 U.S. at 507 ("Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief.").

Second, in *Morrison v. Olson,* 487 U.S. 654 (1988), the Court upheld a statute that allowed the Attorney General to remove only for "good cause" an independent counsel appointed to investigate and prosecute serious crimes committed by certain high-ranking executive officers. *Id.* at 685–93. The Court declined to decide "exactly what is encompassed within the term 'good cause,' " but stressed its understanding that "the Attorney General may remove an independent counsel for 'misconduct.' " *Id. a*t 692 (citation omitted). Through that removal authority, the Court asserted, the President "retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities." *Id.* The Court also emphasized that its conclusion rested in part on the independent counsel's "limited jurisdiction and tenure and lack[of] policymaking or significant administrative authority." *Id. a*t 691. Although the independent counsel did exercise "discretion and judgment" in carrying out his responsibilities, the Court concluded that "the President's need to control the exercise of that discretion [was not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id. a*t 691–92.

Third, in *Free Enterprise,* the Court invalidated a statutory provision that imposed stringent limitations on the removal of inferior officers (the members of the Public Company Accounting Oversight Board (PCAOB)) by the principal officers of an agency (the Securities and Exchange Commission (SEC)) who themselves were assumed to be subject to removal restrictions. In particular, PCAOB members could be removed by SEC commissioners only for willfully violating specific laws, willfully abusing their authority, or unreasonably failing to enforce certain rules, and it was assumed that SEC commissioners could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office" and not "simple disagreement with the [Commission's] policies or priorities." 561 U.S. at 486–87, 502–03. The Court concluded "the dual for-cause limitations" were unconstitutional, as that "novel" and "rigorous" structure meant that "the President [was] no longer the judge of the [PCAOB]'s conduct" because he lacked "the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee." *Id. a*t 492, 496.

Article II's mandate that inferior executive officers remain accountable to the President and their Department Heads through the removal power applies to ALJs. As the Supreme Court held in *Lucia v. SEC,* 138 S. Ct. 2044 (2018), ALJs like those used by DOL are inferior officers exercising "significant authority" under the laws of the United States. *See id.* at 2052; *see supra* n.9 (DOL's

acknowledgment that its ALJs are inferior officers). They can "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 2048 (quotation marks omitted); *see also* 29 C.F.R. § 18.12 (setting forth the powers of DOL ALJs generally); 20 C.F.R. § 725.351(b) (outlining powers of DOL ALJs in black lung proceedings). At the conclusion of black lung proceedings, DOL ALJs also render decisions containing factual findings, conclusions of law, and remedies, which become final unless appealed to the Benefits Review Board. 20 C.F.R. §§ 725.477, .479, .481; 33 U.S.C. § 921(b)(3) as incorporated into the BLBA by 30 U.S.C. § 932(a). *See* 29 C.F.R. § 18.95 (generally providing for review of DOL ALJs' decisions according to "[t]he statute or regulation that conferred hearing jurisdiction"). Absent adequate means to remove ALJs for misbehavior, the Secretary of Labor would lack the ability "to control [these] inferior officer[s]" who exercise significant executive authority on his and the President's behalf, *Free Enterprise,* 561 U.S. at 504, rendering them "immune from Presidential oversight, even as they exercised power in the people's name," *id.* at 497.

b. The MSPB's Construction Of Section 7521 Would, If Accepted, Violate Article II.

Accordingly, depending on how it is construed, the statute providing that ALJs may be removed by their employing agency "only for good cause established and determined by" MSPB, 5 U.S.C. § 7521, could pose serious constitutional

problems. In particular, MSPB's view that Section 7521 "reserves to itself" both "the final decision on good cause" as well as "the appropriate penalty if it finds good cause," *Social Sec. Admin. v. Glover,* 23 M.S.P.R. 57, 64 (1984), would, if accepted, violate Article II for two reasons.

First, MSPB's understanding of the standard for "good cause" is too high. MSPB has never made clear that misconduct, poor performance, or failure to follow lawful directions always constitute "good cause" justifying removal of an ALJ. To the contrary, while it has sometimes found cause to exist in particularly egregious instances of such misbehavior, *see, e.g., Social Sec. Admin. v. Anyel,* 58 M.S.P.R. 261, 265, 269 (1993) (removal warranted for a "large proportion" of "significant" adjudicatory errors or for "ignor[ing] binding agency interpretations of law"), it also has sometimes made it too difficult to show cause, *compare, e.g., Social Sec. Admin. v. Goodman,* 19 M.S.P.R. 321, 331 (1984) (ALJ could not be disciplined for productivity far below national averages in absence of specific evidence that ALJ's docket was comparable to those of peers), *with Shapiro v. Social Sec. Admin.,* 800 F.3d 1332, 1338 (Fed. Cir. 2015) (declining to follow *Goodman* as it established "a virtually insurmountable burden of proof"). If an ALJ cannot be removed for misconduct, poor performance, or insubordination, that would be the type of "unusually high standard" for removal that was invalidated in

Free Enterprise, see 561 U.S. at 503, and it would find no support in *Morrison* or *Perkins, see supra* pp. 31–32.

Second, MSPB's understanding of its role in "establishing and determining" good cause is too expansive. Rather than merely adjudicating whether factual evidence exists to support the employing agency's proffered good-faith grounds for cause to remove an ALJ, the independent MSPB has usurped the employing agency's policy determination whether the appropriate discipline for misbehavior that concededly exists is removal or a lesser sanction. *See* 5 C.F.R. § 1201.140(b) (MSPB "will specify the penalty to be imposed"); *see also, e.g., Social Sec. Admin. v. Brennan,* 27 M.S.P.R. 242, 248, 251 (1985), *aff'd* 787 F.2d 1559 (Fed. Cir. 1986) (ALJ's pattern of "disruptive conduct," including refusal to follow office procedures, supported only a 60-day suspension rather than removal); *Glover,* 23 M.S.P.R. at 80 (ALJ's "intemperate" remarks to supervisor supported 120-day suspension without pay but not removal). Forcing a Department Head to retain inferior officers who have engaged in sanctionable conduct merely because the independent MSPB believes that removal is excessive would cause "a diffusion of accountability" by eliminating the "clear and effective chain of command" required by Article II. *Free Enterprise,* 561 U.S. at 497–98. Moreover, as the members of MSPB are protected by the *Humphrey's Executor* removal standard that is generally understood to prevent the President from removing them based on

policy disagreements, *see* 5 U.S.C. § 1202(d); *Free Enterprise,* 561 U.S. at 502, allowing MSPB to exercise policy judgment about whether an ALJ's misbehavior warrants removal, even after good-faith factual evidence of cause for removal is provided, would create the type of "two layers of good-cause tenure" that *Free Enterprise* rejected, *see* 561 U.S. at 497.

In sum, Article II does not permit Congress either to prevent the removal of ALJs who have engaged in misconduct, poor performance, or insubordination, or to vest the policy judgment whether to remove such misbehaving ALJs in the independent MSPB. Where an agency provides factual evidence to MSPB to support its good-faith determination that an ALJ has, for example, violated binding agency rules governing adjudications, failed to meet deadlines or quotas for issuing decisions, or engaged in unacceptable behavior for a government official, Department Heads must have the ability to remove that ALJ in order to ensure that they and the President have sufficient control over the exercise of the significant executive function of agency adjudication. Section 7521 can and must be construed in this manner, *see infra* pp. 38–44, as it would be plainly unconstitutional otherwise.

c. It Is Fairly Possible To Construe Section 7521 To Render ALJs Sufficiently Accountable Under Article II.

This Court not only has "the power to adopt [a] narrowing construction[]" of Section 7521 "to avoid constitutional difficulties," but an affirmative "duty" to do so if "fairly possible." *Boos v. Barry,* 485 U.S. 312, 330–31(1988); *see id.* (avoiding First Amendment concerns with a statute that on its face appeared to prohibit "*any* congregation within 500 feet of an embassy for *any* reason" and appeared to "place no limits at all on the dispersal authority of the police," by affirming this Court's construction of the statute to allow dispersal of a congregation only if its activities are "directed at an embassy" and "the police reasonably believe that a threat to the security or peace of the embassy is present"). As *Boos* demonstrates, a "fairly possible" construction for constitutional-avoidance purposes need not be "the most natural interpretation" of the statute. *National Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 563 (2012) (opinion of Roberts, C.J.); *see Id. a*t 562–63 (refusing to adopt "[t]he most straightforward reading" of the Affordable Care Act's individual mandate).

Indeed, the imperative to avoid "constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 466 (1989); *see id.* at 465–66 (rejecting "a straightforward reading of 'utilize' " in the Federal

Advisory Committee Act in light of (among other things) the "decisive []" consideration that such a reading would raise "formidable constitutional difficulties" under Article II); *see also Judicial Watch, Inc. v. U.S. Secret Serv.,* 726 F.3d 208, 231 (D.C. Cir. 2013) (construing the statutory term "agency records" not to include records possessed by the Secret Service concerning visitor entry to the White House complex, in order to "avoid substantial separation-of-powers questions"). Accordingly, if a narrowing construction of statutory "[g]ood-cause limits" for "non-principal officers and adjudicators" is available that ensures constitutionally adequate supervision by the Department Head and President, then courts should "interpret the statutory requirements" of such limits "alongside [the applicable] constitutional concerns." *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control,* 65 Ala. L. Rev. 1205, 1250–51 (2014).

Here, it is, at a minimum, "fairly possible" to construe Section 7521 to avoid any Article II concerns that implicate the rights of private parties to adjudications conducted by ALJs. That is so for each of the two critical elements of the government's construction.

First, Section 7521's "good cause" standard can reasonably be read as broadly authorizing a Department Head to remove ALJs for misconduct, poor performance, or failure to follow lawful directions, but not for reasons that are invidious or otherwise improper in light of their adjudicatory function. *See Black's*

Law Dictionary 822 (4th ed. 1951) (defining "good cause" to include "any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration,* 94 Colum. L. Rev. 1, 110–11 (1994) ("Purely as a textual matter, the words 'good cause' *** seem best read to" allow removal of officers for "lack of diligence, ignorance, incompetence, or lack of commitment to their legal duties."); *Morrison,* 487 U.S. at 724 n.4 (Scalia, J., dissenting) ("*for cause* *** would include, of course, the failure to accept supervision"). Indeed, the Supreme Court has squarely held that, while Congress did not intend for hearing examiners (the initial term for ALJs) to be removed "at the whim or caprice of the agency or for political reasons," the agency could remove them for "legitimate reasons" even if those would not justify removal of Article III judges. *See Ramspeck et al. v. Federal Trial Examiners Conference et al.,* 345 U.S. 128, 142–43 (1953); *see also Cal. Trout v. F.E.R.C.*, 572 F.3d 1003, 1027 (9th Cir. 2009) (Gould, J., dissenting) ("[T]he phrase 'good cause' is used throughout our legal system, and often it means little more than that there is a good reason for the action proposed to be taken."); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258–59 (9th Cir. 2010) (Good cause is "a non-rigorous standard").

Under the foregoing construction of the "good cause" standard, an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law. *See*, *e.g.*, 42 U.S.C. 2000e-16(a) ("All personnel actions affecting employees *** in executive agencies *** shall be made free from any discrimination based on race, color, religion, sex, or national origin."). And the President, acting through his principal officers, would be restrained from removing an ALJ in order to influence the outcome in a particular adjudication. As *Myers* explained, "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." 272 U.S. at 135. But *Myers* also made clear that "even in such a case," the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.." *Id.*

Second, MSPB's power to "establish[] and determine[]" the existence of "good cause" under Section 7521 can reasonably be read to limit MSPB's role to adjudicating whether factual evidence exists to support the employing agency's proffered, good-faith grounds for cause, rather than making the policy determination whether those grounds warrant removal as opposed to a lesser

sanction. Textually, the statute authorizes MSPB only to "determine" whether the employing agency has provided good cause for removing the ALJ and to "establish" the factual basis (or lack thereof) in a written opinion. *Cf. Ramspeck,* 345 U.S. at 142 (holding that the original version of Section 7521 "leaves with the agency the responsibility" to determine whether unneeded hearing examiners should be discharged, subject to appeal to MSPB's predecessor to "prevent any devious practice by an agency which would abuse" that power). Alternatively, the phrase "established and determined" could be read to refer to MSPB's adjudicatory responsibility, as a "doublet[] - two ways of saying the same thing that reinforce its meaning," which are common throughout the U.S. Code. *Doe v. Boland,* 698 F.3d 877, 881–82 (6th Cir. 2012) (collecting examples); *see also Marx v. General Revenue Corp.,* 568 U.S. 371, 385 (2013) (presumption against surplusage "is not an absolute rule").

This construction of Section 7521 is consistent with *Free Enterprise.* There, unlike here, the statutory grounds for removing PCAOB members were both unusually high and unambiguously delineated: members were removable only if they "willfully violated" certain laws, "willfully abused [their] authority," or "without reasonable justification or excuse *** failed to enforce compliance with" specified rules or standards. 15 U.S.C. § 7217(d)(3); *see Free Enterprise,* 561 U.S. at 486–87, 502–03. Moreover, DOL ALJs, in many subject areas, have been

delegated the statutory authority vested in the Department Head to adjudicate matters within the agency's jurisdiction, subject to final review and decision by the Secretary or another delegee,[17] so it is eminently reasonable for the Secretary of Labor to expect compliance with his "policies or priorities." *Id.* at 502.

Accordingly, there is no legal impediment to construing Section 7521 as authorizing Department Heads to remove an ALJ who has engaged in misconduct, poor performance, or insubordination, while limiting MSPB's role to adjudicating whether the employing agency has provided good-faith factual support for removal under that standard. And that construction eliminates any Article II concerns that implicate the rights of private parties appearing before ALJs.

Although Department Heads still could not remove ALJs at will or for invidious or other improper reasons in light of their adjudicatory function, those

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[17] DOL ALJs "hear and decide cases arising from over 80 [ ] labor-related statutes, Executive Orders, and regulations." Mission Statement of the Department of Labor Office of Administrative Law Judges, available at: https://www.dol.gov/agencies/oalj/about/ALJMISSN. Whether their authority to decide a case derives from the Secretary or comes directly from congressional enactment depends on the type of case they are adjudicating. In claims for black lung benefits, as here, Congress authorized an ALJ hearing and decision, followed by Board review, *see* 33 U.S.C. §§ 919(d), 921(b), as incorporated by 30 U.S.C. § 932(a). But there are others areas where an ALJ decisional power stems from the Secretary's. *See e.g.*, 29 C.F.R. § 6.19 implementing 41 U.S.C. § 6507. The Secretary has also delegated to the DOL Administrative Review Board his final review authority over a wide range of ALJ decisions. 85 Fed. Reg. 13186 (March 6, 2020).

limitations would be consistent with Article II, because the broad removal grounds identified above give the Department Heads and the President sufficient ability to supervise and control the exercise of executive adjudication. *See supra* pp. 39-40. And this is true even where, unlike here, the Department Heads themselves have for-cause protection from removal by the President. Although that would constitute a "second level of tenure protection" with respect to the policy judgment whether to initiate removal proceedings against an ALJ who has engaged in misbehavior, it would not be as "rigorous" as the structure invalidated in *Free Enterprise,* given the much broader power of the Department Head to remove the ALJ. *See Free Enterprise,* 561 U.S. at 496. Nor would it be as "novel," *see id.,* given the long history of providing tenure protection to inferior adjudicative officers even at independent agencies, *see, e.g., Zitserman v. FTC,* 200 F.2d 519, 520–21 (8th Cir. 1952). And notably, *Free Enterprise* emphasized that it was not making a "general pronouncement[]" that "two levels of good-cause tenure" are *always* unconstitutional. *See* 561 U.S. at 505–06.

Nor is there an additional level of tenure protection under our construction solely because the independent MSPB must adjudicate claims under the "good cause" removal standard, as construed above. The Supreme Court has repeatedly upheld "cause" restrictions on removal of inferior officers that were subject to judicial review by federal courts, *see Morrison,* 487 U.S. at 663–64; *Perkins,* 116

U.S. at 484–85, and the President has *greater* control over MSPB than the courts. So long as MSPB is limited to adjudicating whether the employing agency has provided good-faith factual support for "good cause" under the broad legal standard identified above, rather than second-guessing the agency's policy judgment whether to remove an ALJ where evidence of good cause exists, MSPB's role in the review process does not alone create an Article II problem with the President's ability to supervise and control ALJs.

Finally, if this Court nonetheless rejects the proffered statutory construction of Section 7521, then the Court would be left with a question of how to remedy the constitutional infirmity. In that event, it would be appropriate to sever whatever portion or portions of Section 7521 cannot be interpreted, even under principles of constitutional avoidance, to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies. That remedy would be consistent with the "normal rule" that "partial, rather than facial, invalidation is the required course." *Free Enterprise,* 561 U.S. at 508.

C. The ALJ Did Not Err In Failing To Act On Decker's Modification Request.

Decker's second argument is that the ALJ erred by not acting on its request to modify Mr. Pehringer's award of black lung benefits, which Decker included in a motion for reconsideration to the ALJ. Pet. Bf. 36–38. Decker argues that that black lung regulation, 20 C.F.R. § 725.310, which specifies that modification must

begin with the district director and may not be initiated before an ALJ, contravenes incorporated Longshore Act Section 22. Pet. Bf. 36–37. Decker's understanding of the BLBA's incorporation of Section 22 and its reliance on *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1988) are misguided.

Although the BLBA incorporates many Longshore Act provisions, that incorporation is qualified. The BLBA states that the incorporated Longshore Act sections apply "*except as otherwise provided *** by regulations of the Secretary*." 30 U.S.C. § 932(a) (emphasis added). Duly-promulgated black lung regulations, like Section 725.310, may therefore deviate from the Longshore Act provisions. *See supra* p. 9 (citing cases). Decker's contention that Section 725.310 violates Section 22 is therefore fundamentally mistaken. Per the BLBA, Section 725.310 may permissibly depart from Section 22, and to the extent the two provisions are inconsistent, Section 725.310 governs in black lung proceedings. And on this score, Section 725.310(b) expressly prohibits Decker from instituting modification before the ALJ. The ALJ thus properly declined to consider Decker's modification request.

Regardless, Decker is incorrect that Section 725.310 contravenes Section 22. Section 22, like Section 725.310(b), explicitly states that modification proceedings are to be commenced before the district director. 33 U.S.C. § 922 ("[up]on his own initiative, or upon the application of any party in interest ... the *deputy*

commissioner may, at any time prior to one year after the date of the last payment of compensation *** review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, *** and issue a new compensation order.") (emphasis added); *Eifler*, 926 F.2d at 666 (noting that "as is plain from the reference to deputy commissioners in section 22, such a [modification] petition is submitted to the deputy commissioner in the first instance.") (internal parenthesis omitted).

Further, both Section 22 and Section 725.310(b) specify that modification requests are to be adjudicated according to the procedures used for adjudicating claims generally. 33 U.S.C. § 922 (referencing the use of the Longshore Act Section 19's procedural requirements); 20 C.F.R. § 725.310(b) (stating the Part 725 procedures govern modification). Thus, both sections envision that the district director (the DOL official in charge of the initial processing of claims) will administratively process the modification request in the first instance. *See Keating*, 71 F.3d at 1123; *Worrell*, 27 F.3d at 227; *Jessee*, 5 F.3d at 725; *Eifler*, 926 F.2d at 667 (observing that a modification request essentially triggers a de novo adjudication of a claim).

There are good reasons for the usual procedural framework to be followed. As the Sixth Circuit observed, "[i]t is always possible that by following the procedure mandated by the regulations, it will be found at the [district director]

level that no dispute exists, thereby eliminating any need for a hearing before the ALJ," and "[even] if a dispute does exist, the district director will have narrowed the contested issues for transmittal to the ALJ." *Saginaw Mining*, 818 F.2d at 1282; *see also* 64 Fed. Reg. 54986 (Oct. 9, 1999) ("In fact, filing a modification request before the district director allows him to administratively process the request, develop the appropriate evidence, and attempt an informal resolution of the claim."). Section 725.310(b) thus reasonably makes explicit what is implicit in Section 22, namely, that modification cannot begin with an ALJ or the Benefits Review Board.[18]

Decker's reliance on *Palmer Coking*, 867 F.2d 552, to support its argument that the ALJ was required to act on its modification petition is likewise misguided. In that case, a district director, on his own accord, instituted modification of an

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[18] As discussed above, Section 725.310(b)'s prohibition against commencing modification before an ALJ must govern even if inconsistent with Section 22. *Supra* p. 46. Aside from the benefit of establishing a bright line where all modification requests begin, it is important to start with the district director to effectuate Section 725.310(e)'s requirement that operators be current on their payment obligations before accessing the modification process. *Supra* p. 11. It is the district director who computes the precise amount owed on an award, 20 C.F.R. § 725.502(b), including the amount the operator must reimburse the Trust Fund for interim benefits it has paid to the awarded claimant. *See supra* n.4. *See also* 43 Fed. Reg. 36772, 86 (Aug. 18, 1978) (explaining that Section 725.310 advances DOL's "continuing responsibility to insure that the correct amount of benefits is being paid").

ALJ decision transferring liability from the employer to the Trust Fund, and issued a proposed order transferring liability back to the employer. 867 F.2d at 554. Following the employer's objection, the ALJ and Board held that the district director lacked the authority to modify the ALJ's decision. *Id*. On appeal, this Court focused on the scope of the district director's modification authority, and held that Section 22 authorizes the district director to correct only his own factual errors, not those of the ALJ. 867 F.2d at 556 (concluding that "[i]n its present form, [Section 22] plainly places the factual determination of the ALJ beyond the modification authority of the deputy commissioner"). In so finding, the Court agreed with those circuits that likewise held that "Section 22 authorizes the district director to correct only his own errors, not those of the ALJ." [19] *Id*. at 555 (citing *Director, Office of Workers' Compensation Programs v. Kaiser Steel Corp.,* 860 F.2d 377, 379 (10th Cir. 1988); *Sisk,* 837 F.2d at 298; *Director, Office of Workers' Compensation Programs v. Drummond Coal Co.,* 831 F.2d 240, 245 (11th Cir. 1987)). Contrary to Decker's interpretation, *Palmer Coking* did not rule that the initial administrative processing of a modification request may begin before the ALJ, or conversely, that Section 725.310(b), requiring commencement before the

[19] As explained *supra* pp. 13-14, the Director amended Section 725.310(b) to account for this holding.

district director, was invalid. Similarly, none of the decisions that *Palmer Coking* relied on reached that conclusion. Indeed, one of those relied-on cases, *Sisk*, agreed with *Saginaw Mining* that "the process of modifying a compensation award must, under the statutory scheme, begin with the deputy commissioner because 'the initial stages of a modification proceeding, like the initial stages of a new claim proceeding, do not involve hearings.' " *Sisk*, 837 F.2d at 298. Simply put, although snippets in *Palmer Coking* include language regarding the "initiation" of modification, 867 F.2d at 555, the procedural question presented here—whether a modification proceeding may begin with the ALJ—was not raised or decided in *Palmer Coking*. Accordingly, *Palmer Coking* does not make Decker's case that the ALJ was compelled to act on its modification request.[20]

In sum, 20 C.F.R. § 725.310 accords with Section 22 by directing that that processing of modification petitions begin before the district director. To the extent Section 725.310 departs from Section 22, the BLBA allows such variance so long as the regulation advances the statutory mandate, which Section 725.310 does

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[20] Decker also mistakenly cites as support *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Pet. Bf. 37. That decision, like *Palmer Coking*, did not address the procedures for instituting modification, but rather, the evidence needed to establish it. 404 U.S. at 256 (holding that modification may be "demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on evidence initially submitted").

here. Decker's argument that the ALJ abused his discretion by refusing to act on its modification request is therefore groundless and must be dismissed as contrary to law.[21]

D. ALJ Sellers Correctly Concluded That Decker Did Not Rebut The Fifteen-Year Presumption By Disproving Legal Pneumoconiosis.

Decker's final argument is that rebuttal of the fifteen-year presumption has been established because the opinions of Drs. Cahill and Ackerman do not satisfy the regulatory definition of legal pneumoconiosis by diagnosing "a chronic pulmonary disease *** significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). Decker focuses on Dr. Cahill's opinion that Mr. Pehringer's COPD was "smoking + dust related" and Dr. Ackerman's statement that "it was certainly possible, if not probable" that coal dust exposure is playing a role in Mr. Pehringer's severe obstructive disease. Pet. Bf. 38–40.

As the Board recognized (ER 15), the fundamental flaw in Decker's argument is that, because Mr. Pehringer successfully invoked the fifteen-year

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[21] In any event, the ALJ's refusal to act on Decker's modification request was harmless. At the time, Decker had not met its existing legal obligations as mandated by 20 C.F.R. 725.310(e), making denial foreordained. *Id*.; *supra* p. 11, and n.4. In fact, by failing to pay interest due on Mr. Pehringer's benefits, Decker still has not complied with Section 725.310(e). *Id*.

presumption, it was Decker's burden to affirmatively disprove the existence of legal pneumoconiosis, not Mr. Pehringer's burden to establish its presence. Following invocation, its presence is *presumed until disproved*. 20 C.F.R. § 718.305(d)(1)(i)(A); *Consolidation Coal Co. v. Director, OWCP*, 864 F.3d 1142, 1149 (10th Cir. 2017) ("[A] claimant's successful invocation of the fifteen-year presumption shifts the burdens of production and persuasion to the employer."); *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) ("Rebuttal requires an affirmative showing... that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work."); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320 (7th Cir. 1995) ("The burden of proof lies on the employer to rebut the [fifteen-year] presumption."); *Barber v. Director, OWCP*, 43 F.3d 899, 900 (4th Cir. 1995) (error to place affirmative duty on claimant to prove pneumoconiosis contributed to respiratory disability following invocation); *U.S. Steel Corp. v. Gray*, 588 F.2d 1022, 1027–28 (5th Cir. 1979) (explaining that once the fifteen-year presumption is triggered, "[t]he statute shifts to the Secretary or to the mine operator the burden ... to prove by a preponderance of evidence that the claimant does not suffer pneumoconiosis ... or that the impairment is not connected with his employment in the mines"). Because neither Dr. Cahill nor Dr. Ackerman affirmatively opined that Mr. Pehringer's lung disease did not arise out of coal mine employment (the definition of legal

pneumoconiosis, 20 C.F.R. § 718.201(a)(2)), any alleged flaws in their diagnoses of legal pneumoconiosis cannot assist Decker in meeting its burden of disproving the existence of the disease. Underscoring its evidentiary failure is the simple fact that Decker submitted no medical evidence whatsoever to rebut the presumption. Accordingly, the ALJ did not err in concluding that the presumption of legal pneumoconiosis was not rebutted. ER 183.

In any event, Decker's argument that these two doctors' opinions are insufficient to establish legal pneumoconiosis fails on its merits. Contrary to Decker's contention, Dr. Cahill did not merely opine that Mr. Pehringer's COPD was "smoking + dust related." ER 132. She also stated that the miner's coal dust exposure and his approximately 50-year smoking history "are significant contributors to his COPD impairment." ER 133. This diagnosis plainly satisfies the regulatory definition of legal pneumoconiosis, which includes lung diseases "significantly related to *** dust exposure in coal mine employment." 20 C.F.R. § 718.201(b); *see e.g. Eastover Mining v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003) ("Legal pneumoconiosis includes all lung diseases meeting the regulatory definition of any lung disease that is significantly related to, or aggravated by, exposure to coal dust."). Although treating physician Dr. Ackerman's tentative diagnosis may not itself satisfy the regulatory definition of legal pneumoconiosis, it nonetheless lends support to Dr. Cahill's diagnosis. *See generally Opp*, 746 F.3d

at 1223 (observing that treating physician's diagnosis that coal dust "most probably [was] a contributing factor" to miner's COPD amounted to an opinion that miner's respiratory impairment was attributable to his coal mine employment). In any event, Dr. Ackerman's report plainly cannot show that Mr. Pehringer's dust exposure did *not* contribute to his COPD.

In sum, the ALJ's finding that Decker failed to rebut the fifteen-year presumption by disproving the existence of legal pneumoconiosis is supported by substantial evidence and should be affirmed.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 12,706 words, as counted by Microsoft Office Word 2010 and excluding those items exempted by Federal Rule Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, copies of the Brief for the Federal Respondent were served electronically using the Court's CM/ECF system on counsel of record.

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FOR THE NINTH CIRCUIT

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ADDENDUM

Table of Contents

U.S. Const., art. II, § 1, cl. 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

U.S. Const., art. II, § 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art II, § 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

5 U.S.C.A. § 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are--

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include--

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

30 U.S.C.A. § 921 Regulations and presumptions

(c) Presumptions

(4) if2 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 such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent'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, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. 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.A. § 932 Failure to meet workmen's compensation requirements

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4,,[1] 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator

33 U.S.C. § 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

20 C.F.R. § 718.201 Definition of pneumoconiosis.

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.305 Presumption of pneumoconiosis.

(a) Applicability. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

(b) Invocation.

(1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) The miner or survivor cannot establish entitlement under § 718.304 by means of chest x-ray evidence; and

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) does not apply.

(2) The conditions in a mine other than an underground mine will be considered "substantially similar" to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.

(4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(c) Facts presumed. Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis,

or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) Rebuttal—

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

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

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

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

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

(2) Survivor's claim. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

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

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

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

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in § 718.201.

(3) The presumption must not 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. § 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings must be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, are each entitled to submit no more than one additional chest X–ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414. Modification proceedings may not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings before the district director, the district director may issue a proposed decision and order (§ 725.418) or, if appropriate, deny the claim by reason of abandonment (§ 725.409). In any case in which the district director has initiated modification proceedings on his own initiative to alter the terms of an award or denial of benefits issued by an administrative law judge, the district director must, at the conclusion of modification proceedings, forward the claim for a hearing (§ 725.421). In any case forwarded for a hearing, the administrative law judge assigned to hear such case must consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact.

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order must not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section will be

subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) will be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) will be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings under paragraph (a) will be subject to collection or offset under subpart H of this part.

(e)(1) In this paragraph, an order is "effective" as described in § 725.502(a) and "final" as described in §§ 725.419(d), 725.479(a) or 802.406.

(2) Any modification request by an operator must be denied unless the operator proves that at the time of the request, the operator has:

(i) Paid to the claimant all monetary benefits, including retroactive benefits and interest under § 725.502(b)(2), due under any effective order;

(ii) Paid to the claimant all additional compensation (see § 725.607) due under an effective order;

(iii) Paid all medical benefits (see § 725.701 et seq.) due under any effective award, but only if the order awards payment of specific medical expenses;

(iv) Paid all final orders awarding attorney's fees and expenses under § 725.367 and witness fees under § 725.459, but only if the underlying benefits order is final (see § 725.367(b)); and

(v) Reimbursed the Black Lung Disability Trust Fund, with interest, for all benefits paid under the orders described in paragraphs (e)(2)(i) or (iii) of this section and the costs for the medical examination under § 725.406.

(3) The requirements of paragraph (e)(2) of this section are inapplicable to any benefits owed pursuant to an effective but non-final order if the payment of such benefits has been stayed by the Benefits Review Board or appropriate court under 33 U.S.C. 921.

(4) Except as provided by paragraph (e)(5) of this section, the operator must submit all documentary evidence pertaining to its compliance with the requirements of paragraph (e)(2) of this section to the district director concurrently with its request for modification. The claimant is also entitled to submit any relevant evidence to the district director. Absent extraordinary circumstances, no documentary evidence pertaining to the operator's compliance with the requirements of paragraph (e)(2) at the time of the modification request will be admitted into the hearing record or otherwise considered at any later stage of the proceeding.

(5) The requirements imposed by paragraph (e)(2) of this section are continuing in nature. If at any time during the modification proceedings the operator fails to meet the payment obligations described, the adjudication officer must issue an order to show cause why the operator's modification request should not be denied and afford all parties time to respond to such order. Responses may include evidence pertaining to the operator's continued compliance with the requirements of paragraph (e)(2). If, after the time for response has expired, the adjudication officer determines that the operator is not meeting its obligations, the adjudication officer must deny the operator's modification request.

(6) The denial of a request for modification under this section will not bar any future modification request by the operator, so long as the operator satisfies the requirements of paragraph (e)(2) of this section with each future modification petition.

(7) The provisions of this paragraph apply to all modification requests filed on or after May 26, 2016.