**No. 14-3672**

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

---

**BRANDYWINE EXPLOSIVES & SUPPLY and**
**KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY,**

**Petitioners**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,**
**UNITED STATES DEPARTMENT OF LABOR and**
**RICHARD DEAN KENNARD,**

**Respondents**

---

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

---

# BRIEF FOR THE FEDERAL RESPONDENT

---


**M. PATRICIA SMITH**
Solicitor of Labor

**RAE ELLEN JAMES**
Associate Solicitor

**SEAN G. BAJKOWSKI**
Counsel for Appellate Litigation

**RITA A. ROPPOLO**
Attorney
U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of
Workers' Compensation Programs

## TABLE OF CONTENTS

**Page**

ARGUMENT

## TABLE OF AUTHORITIES

**Cases:** **Page**

**Statutes:**

**Regulations:**

**Other Administrative Materials:**

**Miscellaneous:**

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

---

**No. 14-3672**

**BRANDYWINE EXPLOSIVES & SUPPLY and**
**KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY,**

**Petitioners**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and RICHARD DEAN KENNARD,**

**Respondents**

---

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

---

# BRIEF FOR THE FEDERAL RESPONDENT

---

## JURISDICTIONAL STATEMENT

This case involves a 2009 claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2012), filed by Richard D. Kennard, a former coal miner.[1] On May 29, 2013, Administrative Law Judge Joseph E. Kane (the ALJ) issued a decision awarding Kennard benefits and ordering his former

[1] Unless otherwise noted, all citations to the BLBA in this brief are to the 2012 version of Title 30.

employer, Brandywine Explosives and Supply, and its insurance carrier, Kentucky Employers Mutual Insurance Company (together, Brandywine or the employer), to pay them. Appendix, page (A.) 11. Brandywine appealed this decision to the United States Department of Labor Benefits Review Board on June 10, 2013, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on May 12, 2014, A.3, and Brandywine petitioned this Court for review on July 10, 1014. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Kennard's exposure to coal dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in Kentucky, A.23, within this Court's territorial jurisdiction.

## STATEMENT OF THE ISSUES

Former miners who (1) have a totally disabling respiratory or pulmonary condition and (2) worked for at least fifteen years in either underground coal mines or surface mines with "substantially similar" conditions are rebuttably presumed to be totally disabled by pneumoconiosis, and therefore entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4). The implementing regulation provides that time worked in surface mines counts toward this fifteen-year presumption if the miner proves that he or she was "regularly exposed to coal-mine dust while working there" and that employers can rebut the presumption by showing (1) that the miner does not have pneumoconiosis or (2) that "no part" of the miner's disability is due to pneumoconiosis. 20 C.F.R. § 718.305. The ALJ found that Kennard had invoked the presumption and that Brandywine failed to rebut it. He therefore awarded benefits. The issues presented are:

1. Is 20 C.F.R. § 718.305(b)'s "regularly exposed to coal-mine dust" invocation standard a permissible interpretation of the statute.

2. Is 20 C.F.R. § 718.305(d)(1)(ii)'s "no part" rebuttal standard a permissible interpretation of the statute.

3. Should the ALJ's finding that Brandywine failed to rebut the presumption with credible medical evidence be affirmed.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

#### 1. The Black Lung Benefits Act

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a).[2] Clinical (or "medical") 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," including the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP." 20 C.F.R. § 718.201(a)(1). Clinical pneumoconiosis is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).[3]

Legal pneumoconiosis is a broader category including "any chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease (whether obstructive or restrictive) or

---

[2] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (explaining clinical and legal pneumoconiosis).

[3] *See Cumberland River Coal*, 690 F.3d at 482; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003).

respiratory impairment that is "significantly related to, or substantially aggravated by" exposure to coal-mine dust "arises out of coal mine employment" and therefore is legal pneumoconiosis; coal-mine dust need not be the sole or even primary cause of the disease. 20 C.F.R. § 718.201(b).[4]

**2. Section 921(c)(4)'s fifteen-year presumption**

The Act contains several presumptions designed to aid claimants in establishing that they are totally disabled by pneumoconiosis arising out of coal-mine employment. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act … prescribes several 'presumptions' for use in determining compensable disability."). One such presumption, 30 U.S.C. § 921(c)(4)'s "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 aboveground 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).[5] If so, there is a rebuttable presumption that the miner "is

---

[4] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000).

[5] 30 U.S.C. § 921(c)(4) also requires that at least one "chest roentgenogram" [*i.e.*, x-ray] submitted in connection with the claim" must be interpreted as negative for complicated pneumoconiosis—a particularly advanced form of clinical pneumoconiosis—for the claimant to invoke the presumption. If the x-ray evidence uniformly demonstrates complicated pneumoconiosis, the claimant is entitled to a separate, irrebuttable presumption of entitlement under 30 U.S.C. § 921(c)(3) and 20 C.F.R. § 718.304, and "there would have been no need to

totally disabled due to pneumoconiosis" and therefore entitled to benefits. *Id*.

Congress enacted the fifteen-year presumption in 1972, revoked it in 1981, and restored it in 2010. Black Lung Benefits Act of 1972, Pub. L. 92-303 § 4(c), 86 Stat. 154 (1972); Black Lung Benefits Amendments of 1981, Pub. L. 97-119 § 202(b)(1), 95 Stat. 1635 (1981); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a), 124 Stat. 119, 260 (2010). This restoration applies to claims, such as this one, that were filed after January 1, 2005, and were pending on or after March 23, 2010, the amendment's enactment date. Pub. L. No. 111-148, § 1556(c); *see generally Vision Processing, LLC v. Groves*, 705 F.3d 551, 55-543 (6th Cir. 2013 ) (discussing history of the presumption and retroactive effect of the 2010 amendment).

On September 25, 2013, the Department of Labor promulgated a regulation, 20 C.F.R. § 718.305, implementing the fifteen-year presumption as restored in 2010.[6] The revised regulation applies to all claims affected by the statutory amendment, s*ee* 20 C.F.R. § 718.305(a), and provides standards governing how the presumption can be invoked and rebutted.

---

invoke the [rebuttable fifteen-year] presumption." *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), *quoted in Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011).

[6] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59102, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 718.305).

***a. 20 C.F.R. § 718.305(b): invoking the presumption as a surface miner***

The statute does not elaborate on how surface miners can prove that they worked in conditions "substantially similar" to those in underground coal mines. That gap is filled by the regulation implementing the presumption, which provides that conditions in a surface 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." 20 C.F.R. § 718.305(b)(2) (emphasis added).

The previous version of section 718.305 did not specifically address this issue.[7] The Director asserts that the previous regulation was interpreted consistently with the express language of the current version. *See Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 489-90 (6th Cir. 2014) ("The 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption. . . . It also reflects an interpretation of the regulation that has been accepted by both of the courts of appeals that have considered the issue.") (citations omitted). Brandywine appears to disagree with this. *See* OB 21.

[7] 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress's removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 version was promulgated. *See* 20 C.F.R. § 718.305 (2012).

***b. 20 C.F.R. § 718.305(d)(1): rebutting the presumption as an employer***

The regulation also specifies how employers (or the Director, in a case where the Black Lung Disability Trust Fund is responsible for the payment of benefits) can rebut the presumption.[8] There are two methods of rebuttal. The first and most straightforward is to establish that the miner does not have a lung disease caused by his or her coal mine employment. This is done by proving the miner does not have either (a) legal pneumoconiosis or (b) clinical pneumoconiosis arising out of coal mine employment.[9] 20 C.F.R. § 718.305(d)(1)(i).

The second rebuttal method is to attack the presumed link between pneumoconiosis and the miner's disability. To do so, the employer must prove that

---

[8] 20 C.F.R. § 718.305(d)(1) provides:

> (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.

[9] Legal pneumoconiosis, by definition, arises out of coal mine employment. 20 C.F.R. § 718.201(a)(2), (b). On the other hand, it is possible to develop one of the diseases explicitly recognized as clinical pneumoconiosis in 20 C.F.R. § 718.201(a)(1) from a source other than coal mining (e.g. silicosis from working in a metal mine or even coal workers' pneumoconiosis developed from handling coal after it has been prepared and shipped away from the mine).

"no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. § 718.305(d)(2)(ii). This is frequently called the "rule-out standard."

The rebuttal provisions in the previous version of the regulation provided for the same methods of rebuttal, albeit in different and less precise language. *See* 78 Fed. Reg. 51905 It allowed employers to rebut the presumption by showing that the miner did not have pneumoconiosis or by ruling out any connection between the miner's disability and pneumoconiosis, albeit in different words. 20 C.F.R. § 718.305(d) (2012) (If the "total disability did not arise *in whole or in part* out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted.") (emphasis added).[10]

[10] The statute does not explain how employers can rebut the presumption, but provides that "[t]he Secretary" can do so "only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. § 921(c)(4). For reasons that are both complicated and irrelevant to this brief, before legal pneumoconiosis was made generally compensable in 1978 this language made it more difficult for DOL to rebut the presumption than for private employers. *See* 78 Fed. Reg. 59105-06 (explaining history).

## B. Factual Background

### 1. Uncontested background facts

Kennard was fifty-nine years old at the time of the 2011 ALJ hearing. DX 2. He ceased coal mine work in 2009. Director's Exhibit No. (DX) 3. He smoked cigarettes for forty years, until 2009, with a habit ranging from a pack to two packs a day. DX 26 at 19-20; ALJ Hearing Transcript, pp. (HT) 25-26. The ALJ found at least sixty-pack years of smoking. A.16.

### 2. Kennard's coal mine employment

Kennard worked as a dynamite blaster at various surface or "strip" coal mines. HT 15-20, 26-35. Sometimes he was employed directly by the strip mines; other times he worked for explosives companies hired by the strip mines. HT 16, 19-20, 26-27-29. The ALJ found that this work, regardless of the employer, qualified Kennard as a miner under the BLBA, and that he performed this work for over twenty-one years. A.15.[11] The judge also found that Brandywine, an explosives company and Kennard's last employer of at least one year's duration, was liable for any BLBA benefits due Kennard. A.13-15; *see* 20 C.F.R.

[11] Anybody who works in or around coal mines performing duties that are integral or necessary to the extraction, preparation, or transportation of coal are "miners" covered by the BLBA. 20 C.F.R. § 725.202; *see Navistar, Inc. v. Forester*, 767 F.3d 638, 645 (6th Cir. 2014).

§§ 725.494-495 (providing criteria for identifying the operator liable for BLBA benefits).

Brandywine does not dispute that Kennard's dynamiting work qualifies him as a miner under the BLBA. *See* Opening brief at (OB) 11-12 (summary discussion limited to the validity of the Director's revised regulation and the ALJ's consideration of the methods of rebuttal). And the employer questions only a few years of the ALJ's twenty-one year finding. OB 22-23; *see infra* at 18 n.16. Instead, Brandywine's real dispute is with the ALJ's conclusion that the conditions of the miner's dynamiting work at the strip mines were "*substantially similar* to conditions in an underground coal mine," so as to qualify Kennard for the fifteen-year presumption. The following facts are relevant to that issue.

At the administrative hearing, Kennard described a "regular" day as a dynamite blaster at surface coal mines. Hearing Transcript, pp. (HT) 16-17. After a fellow worker drilled a number of holes in the rock to be blasted, Kennard loaded the holes with dynamite and caps and set off the charge. HT 17. When asked if he was exposed to rock dust or coal dust, he answered: "Yeah, plenty of it. You couldn't get away from it. Most time, you'd be right on the shot. You didn't have an air conditioner. You just had to work right there close to it. All the dust was flying and you [were] breathing it." *Id.* In answer to further questioning, he

reiterated his coal-mine dust exposure:

> Q And whenever you would blast the holes . . . which were drilled, what would happen then?
>
> A A whole lot of dust. Dust would be flying because you're putting off a charge in the ground and you got a whole lot of dust comes in the air.
>
> Q Was that mainly rock dust or coal dust or ---
>
> A Rock dust, coal dust, everything you could get. I mean, when you put off a shot, you're not limited to the one thing.
>
> Q In other words, it was just whatever was under the ground where you'd put it?
>
> A Whatever was in the ground. If you're drilling through little coal seams, sometimes you'd drill through little seams five or six inches thick and then when you shoot that, it's all like a big cloud of smoke.

HT 18; *see also* DX 26 at 18. Kennard also explained that the dust came not just from the explosion itself, but also from the drilling because the drill "covers" were never sufficient to contain the dust. HT 17, 31.

In deposition, Kennard explained that the coal-mine dust did not disappear once the dynamite was set off. Instead, it stayed in the air for two hours:

> Q Obviously though when the shot is set off you are well away from [the dynamite] area?
>
> A Yeah, but you have dust to contend with there because it takes so long to get back you know and get away from it. Do you know what I'm saying?

> Q Do they not wait before they go back in to check after a shot until it's settled?
>
> A There's still a lot of [d]ust in the air just floating in the air. It would be like two hours before you completely settle it on the ground.

DX 26 at 18-19. Kennard would typically be the first person to go back to the area before moving on to the next "shot." *Id.* at 19.

**3. Relevant medical evidence**

Kennard was examined by three doctors: Dr. Mahmood Alam, who examined the miner pursuant to the Director's obligation to provide each miner-claimant with a complete pulmonary examination, 30 U.S.C. § 923(b); and Drs. Bruce Broudy and A. Dahhan, who examined the miner on Brandywine's behalf. A.38, 63, 81. All three doctors are Board-certified internists and pulmonologists. A.44, 87. They physically examined the miner, took smoking and work histories, and performed pulmonary function testing and blood gas analyses. A.38-41, 63-66, 81-83. They all reported that Kennard's respiratory condition was totally

disabling, based upon the results of pulmonary function testing,[12] A.41, 64-65, 82; that Kennard's right lung had been removed as a result of cancer due to smoking, A.40, 45, 64, 82; and that the miner did not suffer from "clinical" pneumoconiosis, A.41, 50, 65, 79, 92. All three doctors either diagnosed chronic obstructive lung disease (COPD), or diagnosed emphysema or chronic bronchitis, which are types of chronic obstructive lung disease.[13] A.41, 46, 66, 82.

As the following explains, all three doctors also reported that COPD contributed to the miner's impairment, but differed as to the cause of the COPD: Dr. Alam reported that the miner's COPD was due to both smoking and coal-mine

---

[12] Pulmonary function tests, also called spirometry, "measure the degree to which breathing is obstructed." *See Yauk v. Director, OWCP*, 912 F.2d 192, 196 n.2 (8th Cir. 1989). These tests measure data such as the volume of air that a miner can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two data points. *See* Occupational Safety and Health Administration, U.S. Department of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), available at https://www.osha.gov/Publications/OSHA3637.pdf. Pulmonary function tests resulting in certain values established in the regulations are evidence of total disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B.

[13] COPD is an umbrella term that encompasses chronic bronchitis, emphysema, and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); see also The Merck Manual 1889 (19th ed. 2011). Both cigarette smoking and coal-mine dust can cause COPD. *See* 65 Fed. Reg. 79939-43 (Dec. 20, 2000) (summarizing medical and scientific evidence of the link between COPD and coal mine employment).

dust exposure, but Drs. Broudy and Dahhan reported smoking as the sole cause of the miner's COPD.

***Dr. Alam*** reported in 2008 that the main reason for the miner's respiratory disability was the removal of his right lung, but that emphysema due to smoking and coal dust exposure was also a cause, with fifteen percent of the miner's respiratory disability being due to coal dust exposure. A.41. Dr. Alam stated in deposition that the removal of Kennard's right lung left him "automatically disabled." A.52. At the same time, the doctor suggested that the miner's respiratory condition would be disabling even if his right lung had not been removed. He explained: the miner's remaining lung was twenty-four percent of normal, so if his removed lung were hypothetically given back, then the miner's two lungs totaled forty-eight percent of normal, which met the criteria for disability. A.52. Dr. Alam observed that the question of cause was "not a simple answer,"A.52, noting that, " if the [miner's] black lung was bad, he would not have tolerated the [lung removal] surgery, which he did, A.52-53.

Dr. Alam answered in the affirmative when questioned whether smoking contributed "almost 100 percent" to Kennard's respiratory disability. A.59. When asked how much coal dust exposure contributed to the miner's respiratory disability, Dr. Alam at one point reported "at least 10 percent," A.55, and at another stated no "more than 10 percent," A.59; and in between those statements

observed: "I would say coal dust could have done some aggravation in his underlying disease which was caused by tobacco abuse," A.58. Finally, when asked whether the miner would be in the same respiratory condition if he had never worked in coal mine employment, Dr. Alam stated: "That's a possibility." A.60.

***Dr. Broudy*** reported in 2009 that Kennard's impairment, as shown by spirometry (i.e., pulmonary function testing), was due to the removal of his right lung and to smoking-related cancer and COPD. He categorized the impairment as "restrictive" because there was no improvement in the pulmonary function study results when the miner was administered bronchodilators.[14] A.65. In deposition, Dr. Broudy explained that his interpretation of an x-ray of Kennard's remaining lung revealed "no evidence of pneumoconiosis or silicosis[.]" A. 79. He concluded that Kennard's respiratory impairment was "easily explained" by the miner's lung removal and his history of smoking, that "[t]here was no evidence of pneumoconiosis in the remaining lung," and that the miner "therefore did not have

---

[14] "*Restrictive* disorders are characterized by a reduction in lung volume." The Merck Manual 1855 (19th ed. 2011) (emphasis added). "*Obstructive* disorders are characterized by a reduction in airflow." *Id.* at 1853 (emphasis added). In lay terms, restrictive disease makes it more difficult to inhale while obstructive disease makes it more difficult to exhale. *See Gulf & Western Indus. v. Ling*, 176 F.3d 226, 229 n.6 (4th Cir. 1999). Clinical pneumoconiosis is generally restrictive while legal pneumoconiosis can be either restrictive or obstructive. 20 C.F.R. § 718.201(a)(2).

A *bronchodilator* is a drug used to treat COPD. The Merck Manual at 1894. It expands the "air passages of the lung." Dorland's Illustrated Medical Dictionary 253 (32nd ed. 2012).

legal pneumoconiosis either." A.80 ("[I]t was my opinion that he did not have respiratory impairment due to the inhalation of coal mine dust and therefore did not have legal pneumoconiosis.").

***Dr. Dahhan*** reported in 2010 that Kennard had severe restrictive ventilatory impairment due to the removal of his right lung, and that the miner also suffered from bronchitis due to smoking. A.82. He stated that the miner's obstructive impairment was due to smoking rather than coal-mine dust exposure because, according to the doctor, Kennard's $FEV_1$ value (obtained during pulmonary function testing) was reduced by an amount that could not be accounted for by coal-mine dust exposure alone. A.83. Dr. Dahhan gave as an additional reason the fact that the miner's treating doctor prescribed bronchodilators, which meant that the doctor "believes [the miner's respiratory condition] to be partially responsive to such treatment which is a finding inconsistent with the permanent adverse affect [sic] of coal dust on the respiratory system." A.83.

In deposition, Dr. Dahhan reiterated that the miner's restrictive defect was due to his lung removal rather than coal dust exposure. A.94, 96. He also reported that the "bulk" of Kennard's respiratory impairment was due to his lung removal, but admitted it would be "speculative" of him to state whether the miner would be disabled had his lung not been removed. A.95. In a 2011 report, Dr. Dahhan

stated that he reviewed additional records and that his opinion had not changed. A.98.

Kennard's ***treatment records*** note his right lung removal and the fact that he suffered from COPD. A.99-121. The records, however, do not indicate the cause of the COPD.

## C. Procedural History

### 1. ALJ Decision (May 29, 2013, A.11)

The ALJ first determined that Brandywine qualified as a "responsible operator" under the BLBA.[15] A.14. He then computed the length of Kennard's coal mine employment in surface mines, arriving at "twenty-one years and seven and one-half months of coal mine employment."[16] A.15.

Next, the ALJ considered whether Kennard had invoked the fifteen-year presumption by proving that (1) he worked fifteen or more years in conditions "substantially similar" to those in underground mines and (2) he had a totally disabling respiratory or pulmonary impairment. A.24-27. The judge found the

---

[15] While Brandywine disputed its liability before the ALJ and the Board, it no longer contests that issue.

[16] The ALJ found that Kennard had twenty-three years of employment with various coal mine and blasting companies, but subtracted 16.5 months from that total because half of Kennard's 33 months with Brandywine involved blasting at road construction sites rather than coal mines. A.15; *see* DX 3 (Kennard's report of his employment history); DX 8 (Kennard's Social Security Earnings Statement); HT 28-35 (Kennard's testimony about his work).

similarity requirement met because Kennard had more than twenty-one years of coal mine employment in surface coal mines and credibly "testified that he was exposed to 'plenty' of coal dust" during that work:

> [Kennard] testified that "all the dust was flying around and you was breathing it," and that there was "a lot of dust flying and it wasn't self-contained." He later testified that when he blasted the holes, he encountered "a whole lot of dust. Dust would be flying because you're putting off a charge in the ground and you got a whole lot of dust comes in the air." Finally, the Claimant testified that drilling through certain seams of coal would release "a big cloud of smoke."

A.24 (quoting HT 17-18). The ALJ also observed: "The Claimant's testimony regarding clouds of smoke and dust flying through the air is similar to the dust conditions described by underground coal miners." A.24-25. Citing, *inter alia*, the Seventh Circuit's decision in *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988) (holding that "a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment" to satisfy the similarity requirement), the ALJ concluded that the first invocation criterion was met by Kennard's surface coal-mine dust exposure.

The ALJ found the second criterion—total respiratory or pulmonary disability—satisfied based on the pulmonary function test results, which qualified to establish total respiratory disability under 20 C.F.R. § 718.204(b)(2)(i), and the unanimous testimony of Drs. Alam, Broudy, and Dahhan. A.25-27.

With these criteria satisfied, the ALJ found the fifteen-year presumption of entitlement invoked, leading to the presumption that Kennard was totally disabled by pneumoconiosis arising out of coal mine employment. A.28. The ALJ then turned to rebuttal, considering whether the medical evidence established either (1) that Kennard had neither clinical nor legal pneumoconiosis or (2) that Kennard's respiratory impairment was not caused by pneumoconiosis. A.28. The ALJ found that the x-ray, lung biopsy, and medical opinion evidence proved the absence of clinical pneumoconiosis. A.32. He then considered whether the medical evidence disproved the existence of legal pneumoconiosis. *Id*.

Turning first to ***Dr. Alam***'s testimony, the ALJ observed that the doctor had diagnosed legal pneumoconiosis: Dr. Alam reported, in his written opinion, that Kennard's years of mining "contributed fifteen percent to his pulmonary impairment," and, during his deposition, that "coal dust exposure was 'at least 10 percent' to blame for [Kennard's] disability." A.33 (quoting A.53). But the ALJ also noted Dr. Alam's later statement that smoking was the main cause of Kennard's emphysema and that "coal dust could have done some aggravation" of that disease. A 33 (quoting A.58-59). The ALJ concluded that "[i]t is unclear if Dr. Alam considers coal dust exposure to have been a substantial cause of the Claimant's emphysema." *Id.* He therefore discredited Dr. Alam's diagnosis of legal pneumoconiosis as equivocal and vague. *Id*.

The ALJ then considered ***Dr. Broudy***'s opinion. A.33. While Dr. Broudy reported that coal-mine dust exposure contributed nothing to the miner's pulmonary impairment—which would support a finding of rebuttal—the ALJ discredited the opinion as conclusory: "Dr. Broudy [in his report] did not . . . explain why he discounted the Claimant's coal mine employment history as a causative factor in the development of his COPD. He merely stated, in a conclusory fashion, that the Claimant's COPD—the 'damage to his lung'—is due entirely to smoking." *Id.* The ALJ also recognized that "the only support Dr. Broudy offered for this opinion was the absence of pneumoconiosis in the remaining lung," based on the doctor's x-ray interpretation. A. 33-34. The ALJ found this unpersuasive because the question was not whether the miner suffered from clinical pneumoconiosis, but rather whether the miner's emphysema was legal pneumoconiosis (i.e., whether it was caused or aggravated by coal-mine dust). *Id.* The ALJ explained:

> In the preamble to the revised regulations, the Department of Labor favorably cited a study finding that "exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP."[17] Thus, the absence of clinical pneumoconiosis in the Claimant's left lung does not eliminate coal dust inhalation as a causative factor in his emphysema.

A.34.

---

[17] "CWP" refers to coal workers' pneumoconiosis, a form of clinical pneumoconiosis. *See supra* at 4.

Finally, the ALJ considered ***Dr. Dahhan***'s opinion, observing that the doctor gave two reasons for concluding that coal-mine dust exposure did not contribute to Kennard's pulmonary condition: smoking causes greater loss of the $FEV_1$ value on pulmonary function testing than does coal-mine dust exposure, and the miner's treating doctor prescribed bronchodilators as treatment, which is not a typical treatment for pneumoconiosis. A.34.

The ALJ, in turn, gave three reasons why he found this opinion to be insufficiently reasoned. First, the opinion was inconsistent—at one point, the doctor diagnosed obstructive impairment, but at another diagnosed restrictive impairment; and at one point the doctor stated that the miner's COPD contributed to his impairment, but at another stated that the miner's lung removal was the sole cause of his impairment. Second, none of the pulmonary function test results showed improvement following the administration of a bronchodilator. And third, while the doctor reported that the miner's coal-mine dust exposure could not have caused all of the loss in the $FEV_1$ value, the doctor failed to explain why coal-mine dust exposure could not at least have contributed to the loss. A.34-35.

Finding that the medical evidence failed to disprove legal pneumoconiosis—which eliminated rebuttal by the first method—the ALJ then considered whether Brandywine established the second method of rebuttal by proving that "pneumoconiosis played no part in causing [Kennard's] disability[.]" A.35

(citing, *inter alia*, *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984)).[18]

The ALJ recognized that "the major cause of the Claimant's impairment is his right pneumonectomy cause by lung cancer" unrelated to Kennard's mining work. A25. But he found that "the evidence also suggests that the Claimant's COPD/emphysema, which constituted legal pneumoconiosis by presumption, is a contributing factor to [Kennard's] disability." *Id.* In particular, the ALJ pointed out that Dr. Alam attributed at least ten percent of Kennard's disability to COPD, and that Drs. Broudy and Dahhan also stated that the miner's obstructive disease contributed to his disability. *Id.* While those doctors claimed that coal-mine dust did not cause Kennard's COPD, the ALJ had already found their reasoning on that issue to be unpersuasive in his analysis of legal pneumoconiosis. Concluding that it was "clear that the Claimant's COPD is, in fact, a contributing cause of his total disability," the ALJ concluded that Brandywine had failed to establish rebuttal under the second method. A.34-35.

---

[18] *Island Creek Coal* and *Gibas* involved the now-defunct "interim presumption" of entitlement implemented by 20 C.F.R. § 727.203 (2000). It, like the previous version of 20 C.F.R. § 718.305(d) (which was in effect when the ALJ's decision was issued), allowed for rebuttal if "if the evidence established that the total disability or death of the miner did not arise *in whole or in part* out of coal mine employment[.]" 20 C.F.R. § 727.203(b)(3) (2000) (emphasis added). *See supra* at 9.

Having found that the fifteen-year presumption of entitlement was invoked and not rebutted, the ALJ awarded BLBA benefits. A.36.

**2. Benefits Review Board's decision (May 12, 2014, A.3)**

On appeal to the Board, Brandywine argued that the ALJ erred, inter alia, in finding that Kennard satisfied the fifteen-year presumption's "substantial similarity" requirement, A.7; and in finding the fifteen-year presumption unrebutted, A.8-9. The Board rejected the invocation argument, ruling that the ALJ properly credited Kennard's statements that he was exposed to "a whole lot of dust," which was consistent with 20 C.F.R. § 718.305(b)(2), as amended in September 2013, providing that "substantial similarity" is established by proving that the miner was "regularly exposed to coal-mine dust." A.7. *See supra* at 7.

Finally, the Board rejected Brandywine's rebuttal argument. A.8-9. The Board observed first that Brandywine disputed only the ALJ's weighing of Dr. Alam's opinion on this issue, thus waiving the ALJ's weighing of the opinions of Drs. Broudy and Dahhan. A.9. The Board then concluded that it was within the ALJ's discretion to discredit Dr. Alam's opinion as equivocal and vague and therefore insufficient to prove that the miner's emphysema was unrelated to coal

dust exposure. A.8-9. Accordingly, the Board affirmed the ALJ's award of benefits.[19] A.10.

## SUMMARY OF THE ARGUMENT

The ALJ's findings that Kennard successfully invoked section 921(c)(4)'s fifteen-year presumption and that Brandywine failed to rebut it, are correct and supported by substantial evidence. The regulatory invocation standard, which allows surface miners who were regularly exposed to coal-mine dust to invoke the fifteen-year presumption, is a codification of the Director's longstanding interpretation of the Act, has been adopted by both courts of appeals to consider the issue, and was implicitly reaffirmed by Congress when it re-enacted the presumption in 2010. Contrary to Brandywine's suggestion, it is entirely consistent with the intent of Congress and should be upheld as a valid regulation.

The ALJ's finding that Brandywine failed to rebut the presumption should also be affirmed. Brandywine's primary argument on this point is that the ALJ

---

[19] In its Petition for Review and Brief to Benefits Review Board, dated August 15, 2013, Brandywine argued that the ALJ erred in finding no rebuttal, and indicated that the opinions of Drs. Alam, Broudy and Dahhan were sufficient to establish rebuttal, Brandywine brief at 10. The employer, however, then proceeded to explain why Alam's opinion should have been credited. *Id* at 10-11. In Brandywine's Petitioner's Reply Brief to Benefits Review Board, dated January 13, 2014, the employer again argued why Dr. Alam's opinion should have been credited, but there is no discussion of the opinions of Drs. Broudy and Dahhan. Finally, Brandywine in its opening brief to this Court does not argue that the Board erred in finding waiver as to the ALJ's weighing of the opinions of Drs. Broudy and Dahhan.

applied an incorrect legal standard by requiring it to show that there was no connection, rather than no "substantial" connection, between Kennard's disability and pneumoconiosis. This argument is foreclosed by *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013), which affirmed the "rule-out" rebuttal standard that the regulation provides and the ALJ applied below.

Brandywine also challenges the ALJ's evaluation of the medical evidence on rebuttal. In particular, it challenges the ALJ's finding that Dr. Broudy's and Dr. Dahhan's diagnoses (which attributed Kennard's COPD entirely to smoking) were not credible. But the employer waived these arguments by not challenging the ALJ's weighing of those diagnoses in its appeal to the Benefits Review Board. Even if those arguments were not waived, the ALJ's credibility determinations fall comfortably within his broad discretion as fact-finder. Brandywine's invitation to re-weigh the evidence should be declined, and the ALJ's award of BLBA benefits to Kennard should be affirmed.

## ARGUMENT

### A. Standard of Review

The first two issues, involving the validity of the revised regulation's invocation and rebuttal provisions, present questions of law. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the

BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013)

The third issue, involving the ALJ's weighing of the medical evidence relevant to rebuttal, is a question of fact. The Court reviews the ALJ's decision "to determine whether it is supported by substantial evidence and is consistent with applicable law." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 489 (6th Cir. 2003). "When the question is whether the ALJ reached the correct result after weighing conflicting medical evidence, [the Court's] scope of review is exceedingly narrow. Absent an error of law, findings of fact and conclusions flowing therefrom must be affirmed if supported by substantial evidence." *Id.* Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* "As long as the ALJ's conclusion is supported by the evidence, [the Court] will not reverse 'even if the facts permit an alternative conclusion.'" *Id.* (quoting *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995)).

### **B. 20 C.F.R. § 718.305(b)(2)'s "regularly exposed to dust" standard is a permissible interpretation of section 921(c)(4) entitled to *Chevron* deference.**

The fifteen-year presumption is available to miners who worked in surface mines if "the conditions of [the] miner's employment" were "substantially similar

to conditions in an underground mine." 30 U.S.C. § 921(c)(4). The implementing regulation explains that conditions in surface mines "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." 20 C.F.R. § 718.305(b)(2). Brandywine's lead argument is that the new regulation is invalid because it does not "require[] that surface miners prove what dust conditions prevail in an underground mine[.]" OB 11, 19-22. This issue was recently addressed by the Tenth Circuit, which upheld the revised regulation's "regularly exposed" standard as a permissible construction of the Act against a similar challenge in *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014). Like the employer-petitioner in *Antelope Coal*, Brandywine has fallen far short of the showing necessary to invalidate a regulation promulgated after notice-and-comment rulemaking.

While the decision is not cited in Brandywine's opening brief, this Court has already had occasion to apply the new regulation. *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483 (6th Cir. 2014), held that the revised regulation applies retroactively to cases pending when it was promulgated because it did not change the law. As this Court explained, "[t]he 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption," an interpretation "that has been accepted by both of the courts of appeals that have considered the issue."

726 F.3d at 489-90 (citing *Antelope Coal*, 743 F.3d at 1342; *Freeman United Coal Mining Co. v. Summers*, 272 F3d 473, 479-80 (7th Cir. 2001) (citing *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988))).

The employer-petitioner in *Central Ohio Coal* challenged the validity of the new regulation in its brief, but waived the point at oral argument. 762 F.3d at 489 n.2. Brandywine picks up that flag here. But, before turning to the merits of the issue, it is important to clarify what Brandywine is not challenging. First, it does not argue that the regulation is inapplicable because it was promulgated after the ALJ decision (nor could it, in light of *Central Ohio Coal)*. Second, it does not dispute that the evidence concerning Kennard's dusty working conditions satisfies the regulation's "regular exposure to coal-mine dust" requirement. *See* OB 22 (arguing only that, "[w]ithout reliance on section 718.305(b)((2), Kennard's testimony would be insufficient to establish comparability").[20] Instead, the employer challenges the regulation on the merits.

Because the Director's long-held interpretation of the presumption's similarity requirement is now expressed in a regulation promulgated after notice-

---

[20] In any event, the ALJ's finding that Kennard worked regularly in dusty conditions is supported by substantial evidence. Kennard explained that, in a typical day, he was exposed to "plenty" of dust, "a whole lot of dust," and that the dust flew through the air and did not settle until two hours after the blast. A.17-19, 31; DX 28 at 18. Brandywine points out that Kennard spent some time blasting for road-construction companies, OB 22-23, but the ALJ excluded that time in calculating the length of Kennard's employment, A.5.

and-comment procedures, Brandywine's challenge is governed by *Chevron's* familiar two-step analysis. As this Court recently explained, regulations implementing the BLBA will be upheld "as long as [1] Congress has not spoken directly on the issue and [2] the agency's interpretation is reasonable." *Island Creek Kentucky Min.*, 737 F.3d at 1058 (citing *Chevron*, 467 U.S. at 843).

**1. Chevron step one (Congress has not spoken directly)**

The first step of the *Chevron* analysis is straightforward. Section 921(c)(4) provides no guidance about what factors to consider in determining whether an aboveground miner worked under conditions "substantially similar" to conditions in underground mines. When called upon to interpret this requirement, a Seventh Circuit panel confessed that "[it could] discern no plain meaning of the requirement of 'substantial similarity,'" noting that "immediately apparent [was] the fact that the Act does not specify whether a claimant must establish similarity to a particular underground mine, a hypothetical underground mine, the best, worst, or an average underground mine." *Midland Coal*, 855 F.2d at 511. Nor does the statute explain *how similar* an aboveground miner's working conditions must be to conditions underground to qualify as "substantial[ly]" similar, another source of ambiguity. Indeed, Brandywine candidly admits that the statute "neither limit[s] nor define[s] the proof required for surface coal miners to satisfy their burden of proving comparability." OB 18. Congress therefore left a gap for the

Department to fill.

During the rulemaking process, three commenters argued (as Brandywine suggests here) that revised section 718.305(b)(2) was contrary to section 921(c)(4)'s text because "it does not require the claimant to prove any type of similarity between exposures in underground and non-underground work." 78 Fed. Reg. 59104. This is not so. It is true that the revised regulation does not require a comparison between an aboveground miner's dust exposure and dust conditions in a particular underground mine. Instead, it requires a comparison between the aboveground miner's dust exposure and a legislative fact about working conditions in underground coal mines: that they are dusty. *Id.* at 59104-05 (citing *Midland Coal*, 855 F.2d at 512).

The Act is predicated on the fact that dusty conditions exist in underground mines and that these conditions are the cause of black lung disease.[21] *See Midland Coal*, 855 F.2d at 512 ("Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis."). The crucial condition that exists in underground mines, for purposes of the BLBA, is

[21] When the BLBA was originally enacted as Title IV of the Federal Coal Mine Safety and Health Act of 1968, benefits were limited to miners who worked in underground coal mines. *See* 30 U.S.C. § 902(d) (1970) (defining "miner" as "any individual who is or was employed in an underground coal mine"); *see also* 30 U.S.C. §§ 901, 902(b), (d), 932(h) (1970). Coverage was generally expanded to aboveground miners in 1972. *See* 30 U.S.C. § 902(d) (1972).

coal-mine dust. Aboveground miners who are regularly exposed to that dust are therefore experiencing conditions similar—in the respect relevant to the BLBA—to conditions in underground mines. *See* 78 Fed. Reg. 59104-05. Revised section 718.305(b)(2)'s "regularly exposed to dust" standard is therefore consistent with the statutory text.[22]

### *2.* Chevron step two (the agency's interpretation is reasonable)

#### *a. The Director's "regularly exposed to dust" standard is a reasonable and practical interpretation of section 921(c)(4).*

In the preamble to the revised regulation, the Department explained why it rejected competing interpretations of section 921(c)(4)'s "substantial similarity" language advanced by various commenters. For example, the Department rejected suggestions to "adopt technical comparability criteria, such as requiring a claimant to produce scientific evidence specifically quantifying the miner's exposure to coal

---

[22] While the "regularly exposed to dust" standard is not onerous, Brandywine's argument that the regulation eliminates the distinction between surface and underground miners, OB 12, 21-22, is not true. Surface miners do bear the burden of proving that they were exposed to coal-mine dust for the requisite fifteen years. *Midland Coal*, 855 F.2d at 512. An employer is also free to develop evidence establishing, for example, that the miner was not exposed to coal dust (or was only exposed to a de minimis amount) for a substantial period of surface employment. If so, that period cannot be used to establish the required fifteen years. As the Director made clear in the preamble to the regulation, "[t]he term 'regularity' [was] added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105 (Sept. 15, 2013). Miners who worked aboveground for more than fifteen years can fail to invoke the presumption. *See, e.g.*, *Hansbury v. Reading Anthracite Co.*, BRB No. 11-0236 BLA, 2011 WL 6140714 (DOL Ben. Rev. Bd., Nov. 29, 2011).

dust in non-underground mining," as impractical because many miners do not have access to such information. 78 Fed. Reg. 59105. As the Supreme Court explained, "a showing of the degree of dust concentration to which a miner was exposed [is] a historical fact difficult for the miner to prove." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976).

The other side of the proposed comparison—establishing what conditions prevail in underground mines—presents similar impracticalities for claimants. The dust conditions in different underground coal mines, and in different sections of the same underground mine (which includes areas on the surface as well as underground), vary significantly.[23] In any event, aboveground miners are unlikely to have access to detailed information about dust conditions in underground mines. Nor could the Department avoid this problem by developing an objective, universal standard representing conditions in underground mines, effectively

---

[23] An "underground coal mine" includes not only the underground coal deposit but "all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto." 20 C.F.R. § 725.101(a)(30). This was even true before 1972, when the Act covered only miners working at underground mines. *See* 20 C.F.R. § 410.110 (i) (1971) (defining "underground coal mine" to include "all land, buildings, and equipment appurtenant thereto"). Because section 921(c)(4) defines miners by the type of mine they work in rather than whether they actually work on the surface or underground, claimants who work on the surface of underground mines for fifteen years are entitled to the fifteen-year presumption without demonstrating "substantially similar" conditions. *See Ramage*, 737 F.3d at 1058. Their surface work took place, for BLBA purposes, in an underground mine.

setting a target that aboveground miners must hit to establish substantial similarity. Because there is no practical way for most aboveground miners to objectively quantify their dust exposure, their "dust exposure evidence will be inherently anecdotal[.]" 78 Fed. Reg. 59105. As a result, "it would serve no purpose for the Department to "develop an objective, and therefore dissimilar, benchmark of underground mine conditions for comparison purposes." *Id.*

Notably, while three commenters stated that the Department should develop "an objective standard for proving substantial similarity," none of them actually suggested such a standard. 78 Fed. Reg. 59104. Nor has Brandywine. The Department can hardly be faulted for not adopting an alternative interpretation of the Act that was not presented to it. And the commenters' inability to articulate any workable competing standard reinforces the conclusion that revised section 718.305(b)(2) is a reasonable interpretation of the Act entitled to *Chevron* deference.

***b. The Director's interpretation of section 921(c)(4) was adopted by the Seventh Circuit even before the revised regulation.***

Revised 718.305(b)(2) is a new regulation, but its interpretation of section 921(c)(4)'s similarity requirement is not new. As this Court recognized in *Central Ohio Coal*, it merely codifies the Department's longstanding interpretation of the regulation. Even before the regulation, "[t]he only court of appeals to address the issue ha[d] long held that surface miners do not need to provide evidence of

underground mining conditions to compare with their own working conditions." *Antelope Coal*, 743 F.3d at 1342 (citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995); *Dir., OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988)); *see also* 77 Fed. Reg. 19461. As the Tenth Circuit recently explained in upholding the regulation against a similar challenge, those Seventh Circuit decisions "validate the Department's longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions" to invoke the fifteen-year presumption. *Antelope Coal*, 743 F.3d at 1342 .

In *Director, OWCP v. Midland Coal Co.*, the Seventh Circuit rejected an employer's argument that surface miners must present evidence addressing the conditions in underground mines to prove "substantial similarity." 855 F.2d at 512. Instead, an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id. Accord, Blakely*, 54 F.3d at 1319 (holding that an ALJ, "relying on the testimony of two witnesses, who both testified that Blakely was exposed to coal dust while a surface miner," permissibly concluded that the miner was "exposed to dust conditions substantially similar to those underground"; explaining that the claimant "'bears the burden of establishing comparability' but 'must only establish that he was

exposed to sufficient coal dust in his surface mine employment'") (quoting *Midland Coal*, 855 F.2d at 512-13); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001) (holding that miner's "unrebutted testimony" that "clearly delineated, in objective terms, the awful conditions on the surface of the mine[]" was "sufficient" to support a finding of substantial similarity).[24]

The Seventh Circuit recently reaffirmed this position in a case applying the fifteen-year presumption as revived in 2010. *Consolidation Coal Co. v. Director, OWCP*, 732 F.3d 723, 732-33 (7th Cir. 2013) (holding that the miner's credible testimony that he was exposed to coal and rock dust "all the time" was "more than enough evidence" to support the ALJ's finding that the miner worked in conditions substantially similar to an underground coal mine). The Benefits Review Board, which has nationwide jurisdiction over BLBA claims, applies the same standard in cases outside the Seventh Circuit's jurisdiction. *See, e.g.*, JA 78; *Harris v. Cannelton Indus., Inc.*, 24 Black Lung Rep. (MB) 1-217, 1-223 nn.3, 5, 2011 WL 1821519 (Ben. Rev. Bd. 2011) (claim within the Fourth Circuit's jurisdiction).

---

[24] The revised regulation's requirement that aboveground miners prove that they were "regularly" exposed to dust was added to the regulation "to clarify that a demonstration of sporadic or incidental exposure [to coal dust] is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105. But it is entirely consistent with the Director's and the Seventh Circuit's interpretation of section 921(c)(4)'s "substantial similarity" inquiry before the new regulation was promulgated. *See Summers*, 272 F.3d at 480 (rejecting claimant's argument that "a miner can prove substantial similarity simply by showing that he was in or around a coal mine for at least 15 years.").

And, as mentioned above, the only court of appeals to consider the regulation's validity (the Tenth) upheld it as a permissible interpretation of the statute. *Antelope Coal*, 743 F.3d at 1344.

***c. Congress endorsed the Director's interpretation of section 921(c)(4) when it re-enacted that provision without alteration.***

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990); *United States. v. O'Flanagan*, 339 F.3d 1229, 1235 (10th Cir. 2003). When it re-enacted section 921(c)(4) in 2010, Congress was therefore aware that the administrator of the BLBA and the only court of appeals to consider the issue had both concluded that aboveground miners can prove that they labored in "substantially similar conditions" by establishing that they were exposed to coal-mine dust in the course of their surface-mining employment. If Congress was dissatisfied with that administrative and judicial interpretation of section 921(c)(4), it could have imposed a different standard in the amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This decision can only be interpreted as an endorsement of the Director's and the Seventh Circuit's longstanding interpretation of the "substantial similarity" requirement.

***d. The regulation is consistent with Congress's intent.***

Brandywine argues that the regulation is inconsistent with Congressional intent as expressed in 1972 when the fifteen-year presumption was first enacted. OB 14-15. But the snippets of legislative history Brandywine relies on are largely irrelevant, and are certainly insufficient to invalidate a validly-promulgated regulation. Brandywine suggests that Congress never wanted to make it easy for surface miners to obtain BLBA benefits. OB 14-15. In support, the employer cites a statement from one congressman who, in advocating for the bill in 1972, stated that the "very limited prevalence studies conducted by the Public Health Service indicated that surface coal miners were not subject to pneumoconiosis." OB 15. Brandywine fails to explain, however, why the fact that Congress arguably assumed that few surface miners would be found entitled to benefits provides insight concerning the limits Congress intended to put on surface miners' eligibility for the presumption. The most straightforward way to rebut the presumption, after all, is to show that the miner does not have pneumoconiosis.

Brandywine next argues that "Congress' [sic] understanding of the differences between surface and underground mining" was reflected in the fact that "Congress proposed—and enacted—a higher tax for underground-mined coal." OB 16. While this arguably suggests that Congress assumed more underground coal miners than surface miners would be found entitled to benefits, it again gives

no insight to the similarity requirement, and Brandywine proffers none.

The employer also finds significance in the fact that the 1980 revocation of the fifteen-year presumption occurred during a time when Congress was investigating whether unqualified miners were being found entitled to benefits. OB 17. But since the 1980 revocation affected both underground miners and surface coal miners—both lost entitlement to the fifteen-year presumption—this argument again offers no insight concerning the similarity requirement. More importantly, Congress's decision to reinstate the presumption in 2010 renders the 1980 revocation irrelevant.

The most that can be said about the limited legislative history of section 921(c)(4)'s "substantial similarity" requirement as originally enacted in 1972 is that it is unclear and largely unexplained. On the other hand, the legislative history of section 921(c)(4) as a whole is clear and consistent with the Director's interpretation of the "substantial similarity" requirement. "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No. 92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17). Imposing a demanding standard on surface miners attempting to invoke the presumption—especially a quantitative standard requiring evidence that BLBA claimants rarely have access to, *see supra* at 33-34—would hardly be consistent with that intent. The Director's

"regularly exposed to dust" standard is.

It is also important to consider the limited impact this standard has in any individual claim. Proving that a surface miner worked in conditions "substantially similar" to conditions underground is only a small part of the puzzle. Fifteen years of qualifying work does not, standing alone, trigger anything. Miners must also prove that they suffer from a totally disabling respiratory or pulmonary impairment to invoke section 921(c)(4)'s presumption of entitlement. Moreover, an employer can rebut that presumption by showing either that the miner does not have pneumoconiosis or that pneumoconiosis does not contribute to the miner's disability. Given these other substantial impediments to a successful claim, it is unnecessary to impose an onerous dust-exposure requirement on surface miners as a gatekeeping mechanism.[25]

In sum, the Director's regular exposure standard is a reasonable interpretation of section 921(c)(4)'s similarity requirement and is entitled to this Court's deference. Brandywine's argument that the revised regulation is invalid because the statute requires a more direct or quantifiable comparison between an

[25] If conditions in aboveground mines are, on the whole, substantially less dusty than conditions in underground mines, aboveground miners will be able to invoke the presumption less frequently (because fewer will suffer from totally disabling respiratory impairments) and their employers will be able to rebut the presumption more frequently (by showing that miners do not have pneumoconiosis) than in cases involving underground coal miners.

aboveground miner's work and conditions in a real or hypothetical underground mine should be rejected. And, while the ALJ's decision was made before the current regulation was promulgated, his finding that Kennard's surface-mine work was sufficient to invoke the fifteen-year presumption should be affirmed as entirely consistent with the regulation.

### C. Brandywine's challenge to 20 C.F.R. § 718.305(d)'s rebuttal standard is foreclosed by this Court's decision in *Big Branch Resources*.

There are two ways to rebut the fifteen-year presumption under its implementing regulation. The first and most straightforward is to prove that the miner does not have pneumoconiosis (either clinical or legal) caused by coal mine employment. 20 C.F.R. § 718.305(d)(1). The second is to prove that "*no part* of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. § 718.305(d)(2) (emphasis added). Because the second method requires employers to disprove any connection between pneumoconiosis and disability, it is often referred to as the "rule-out" standard. Brandywine argues that the rule-out standard is too strict, and that rebuttal should be established if "the claimant's pneumoconiosis did not *substantially* contribute to the miner's disability." OB 25.

Unfortunately for Brandywine, this Court already adopted the rule-out standard in *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) ("Where the burden is on the employer to disprove a presumption, the

employer must 'rule out' coal mine employment as a cause of the disability.").[26] While *Big Branch Resources* did not directly apply the current regulation, the panel noted that the position it adopted was "in accord with those new regulations." *Id.* at 1071 n.5. And the prior version of the regulation (which was promulgated in 1980) also adopted the rule-out standard, albeit in different language. *See* 20 C.F.R. § 718.305(d) (2012) (rebuttal established if the miner does not have pneumoconiosis or if the miner's "total disability did not arise *in whole or in part* out of pneumoconiosis[.]") (emphasis added)*; see also* 78 Fed. Reg. 59107 (explaining that the current regulation's "in no part" standard was designed to "simplify and clarify the 'in whole or in part standard'").

Brandywine's opening brief simply ignores *Big Branch Resources.* Instead, it argues that the rule-out standard is inconsistent with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Arch on the Green v. Groves*, 761 F.3d 594 (6th Cir. 2014). OB 24-27. But the *Usery* argument was raised and rejected in both *Big Branch Resources* and the rulemaking process. *See Big Branch Resources*, 737 F.3d at 1070, 1071 n.5 (recognizing that the preamble to the current regulation addresses the employer's arguments against the rule-out

---

[26] Brandywine's claim that "[t]his court has not addressed the question of whether rebuttal of the fifteen-year presumption can be accomplished by proof that a claimant's pneumoconiosis was too mild to have substantially contributed to the claimant's total disability[,]" OB 26, is simply incorrect. The employer appears to have simply overlooked *Big Branch Resources*, which is not cited in its brief.

standard, including the argument that it is contrary to *Usery*) (citing 78 Fed. Reg. 59105-06).[27] And *Arch on the Green* is simply irrelevant because it did not involve the fifteen-year presumption. *Arch on the Green* stands for the unexceptional proposition that miners who have ***not*** invoked the fifteen-year presumption must prove that "pneumoconiosis was 'a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment'" to be awarded benefits. 761 F.3d at 599 (quoting 20 C.F.R. § 718.204(c)(1). That decision says nothing about section 718.305(d)(2), which plainly requires employers to show that pneumoconiosis played "no part"—not merely any substantial part—in a miner's disability to rebut the fifteen-year presumption. *Arch on the Green* therefore does nothing to undermine *Big Branch Resources*, which entirely disposes of Brandywine's challenge to the rule-out standard.[28]

---

[27] *Big Branch Resources* also disposes of Brandywine's argument that proving the absence of a substantial connection between pneumoconiosis and disability is a distinct "third method" of rebuttal in addition to proving the absence of pneumoconiosis or that no part of the miner's disability was due to pneumoconiosis. 737 F.3d at 1070.

[28] Brandywine also relies on a concurring opinion in *Mingo Logan Coal Co. v. Owens*, 742 F.3d 550 (4th Cir. 2013), which criticizes the rule-out standard. To eliminate any possible confusion, the quotation and analysis on pages 24-25 of Brandywine's brief are from the concurring opinion, not the majority opinion. The majority found it unnecessary to address the "dispute over the correct rebuttal standard" because it had no impact on the outcome of that case. 742 F.3d at 555. In any event, an out-of-circuit concurring opinion that predated the current regulation has no persuasive value in light of *Big Branch Resources.*

### D. The ALJ's finding that Brandywine failed to rebut the presumption should be affirmed.

Brandywine also challenges the ALJ's evaluation of the medical opinions offered by its experts, Drs. Broudy and Dahhan, who attributed Kennard's COPD entirely to smoking. If credible, these opinions could (together with the ALJ's finding of no clinical pneumoconiosis) establish rebuttal by proving that Kennard did not suffer from legal pneumoconiosis. But the ALJ, finding Dr. Broudy's opinion to be unpersuasive, and Dr. Dahhan's to be inconsistent and insufficiently explained, determined that they were insufficient to establish rebuttal. A. 33-35. These findings should be affirmed.

#### 1. Brandywine waived its right challenge the ALJ's finding that Dr. Broudy's and Dr. Dahhan's testimony was insufficient to establish rebuttal.

The most immediate problem with Brandywine's attempt to defend Drs. Broudy and Dahhan is that it did not raise this argument at the Board. As the Board explained, it affirmed "the administrative law judge's determination that the opinions of Drs. Dahhan and Broudy were insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis, *as it is unchallenged by employer on appeal*." A.9 (emphasis added).

Review of the pleadings submitted to the Board confirms that holding. In its opening brief, the employer argued that the ALJ had incorrectly characterized *Dr. Alam's* opinion. Brandywine BRB Br. at 10-12 (Aug. 15, 2013). But it did not

challenge the ALJ's findings that Drs. Broudy and Dahhan were not credible. *Id.* The Director's response brief explicitly pointed out the employer's failure to "challenge the ALJ's finding that the opinions of its experts—Dr. Dahhan and Dr. Broudy—are not credible and thus do not establish rebuttal of the presumption. Director BRB Br. at 3 n.4 (Dec. 5, 2013). The employer did not challenge this characterization in its reply brief, which again focused on the ALJ's evaluation of Dr. Alam. Brandywine BRB Reply Br. at 3-4 (Jan. 13, 2014). Nor does Brandywine address the Board's waiver ruling in its opening brief to this Court.

It is well established that petitioners in BLBA claims cannot raise issues on appeal to this Court that they did not press before the Board. *See, e.g., Greene v. King James Coal Min., Inc.*, 575 F.3d 628, 636 n.4 (6th Cir. 2009) ("Greene waived any challenge to the ALJ's factual finding regarding the length of his coal mine employment by failing to raise it before the Board."); *see generally United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) (holding that "it is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (quotation marks omitted). Brandywine's attempt to challenge the ALJ's evaluation of Dr. Broudy's and Dr. Dahhan's credibility for the first time on appeal should be rejected.

**2. Even if the Court considers the issue, the ALJ permissibly found that Brandywine failed to rebut the fifteen-year presumption.**

Even if Brandywine had not waived its right to challenge the ALJ's evaluation of its medical experts, the ALJ's finding that neither Dr. Broudy nor Dr. Dahhan provided credible evidence sufficient to rebut the fifteen-year presumption should be affirmed. Brandywine's discussion largely focuses on the etiology of Kennard's lung cancer (and hence his pneumonectomy). OB 25-26, 29-30. That issue is a red herring. There is no dispute that Kennard's cancer was caused by smoking and is therefore not pneumoconiosis. *See, e.g.,* A.25 (ALJ opinion) ("[T]here is no credible evidence to suggest that coal dust contributed to or aggravated the lung cancer."). If lung cancer was the only lung disease Kennard had, the presumption would have easily been rebutted. But Kennard suffered from COPD in addition to lung cancer. The relevant issues are the cause of Kennard's COPD and that COPD's impact on the miner's disabling respiratory condition.

Given these facts, Brandywine could rebut the fifteen-year presumption in either of two ways. First, it could prove that Kennard's COPD was not legal pneumoconiosis, 20 C.F.R. § 718.305(d)(1)(i)(A).[29] This would require credible

[29] The ALJ's finding that Brandywine proved that Kennard did not suffer from clinical pneumoconiosis was not challenged below, *see* A.8, so 20 C.F.R. § 718.305(d)(1)(i)(B)'s requirement that an employer must disprove the existence of both clinical and legal pneumoconiosis would have been met if Brandywine had proved to the ALJ's satisfaction that Kennard did not have legal pneumoconiosis.

evidence establishing that the miner's COPD was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2). Failing that, it could also rebut Kennard's entitlement to benefits by proving that "no part" of Kennard's disability was caused by the COPD. 20 C.F.R. § 718.305(d)(1)(ii). This could be established by proving, for example, that all of Kennard's respiratory impairment was due to his lung cancer.

The ALJ found that Brandywine failed to establish rebuttal under either method. A.32-36. These findings fall comfortably within the ALJ's broad discretion to weigh conflicting medical evidence and evaluate the credibility of the key medical experts, Drs. Alam, Broudy, and Dahhan. They should be affirmed.

As the ALJ observed, the only reason Dr. Broudy gave for finding Kennard's respiratory disability unrelated to coal mine employment was that an x-ray of the miner's remaining lung did not reveal clinical pneumoconiosis. A.33-34, 79-80. It is well-established that ALJs can give less weight to such opinions. *See, e.g., Cumberland River Coal Co.*, 690 F.3d at 490 (affirming award by ALJ who discredited Dr. Dahhan's opinion because, *inter alia*, "Dr. Dahhan relied on the lack of evidence of clinical pneumoconiosis to rule out coal dust exposure as a cause of [the miner's] condition—a position that is inconsistent with Department regulations[,]" which provide that a miner may have legal pneumoconiosis without also having clinical pneumoconiosis.) (internal quotations omitted).

Dr. Dahhan gave two reasons for concluding that Kennard's respiratory disability was unrelated to coal-mine dust exposure. The first was that, in his view, Kennard's dust exposure was insufficient to account for all of the miner's impairment. A.83. But, as the ALJ recognized, the alleged fact that Kennard's dust exposure was insufficient to cause all of the miner's disability does not answer the relevant question, which is whether Kennard's COPD was not "significantly related to, or substantially aggravated by, dust exposure in coal-mine employment." 20 C.F.R. § 718.201(b).

Dr. Dahhan's second justification for excluding coal-mine dust as a cause of Kennard's COPD was the fact that Kennard's doctor prescribed a bronchodilator. This, according to Dr. Dahhan, is inconsistent with treating pneumoconiosis, a "permanent" condition that cannot be effectively reversed by bronchodilators. A.34. But, as the ALJ correctly pointed out, this conclusion is undermined by Kennard's pulmonary function test results, which did not significantly improve when bronchodilators were administered. *See* A.7. And, even if bronchodilators reversed a portion of Kennard's impairment, that fact does not establish that legal pneumoconiosis is not responsible for the remaining, irreversible impairment. As this court explained in *Cumberland River Coal Co.*, it was well within the ALJ's discretion to discredit this reasoning. F.3d at 489 (affirming award by ALJ who discredited Dr. Broudy's opinion that the miner did not have legal pneumoconiosis

because "'treatment with bronchodilator agents and partial reversibility are not credible evidence,' to support an opinion that coal dust did not contribute to [the miner's] respiratory impairment.") (quoting ALJ decision).

Contrary to Brandywine's suggestion, the ALJ did not reject Dr. Dahhan's or Dr. Broudy's opinion for failing to contain an explicit statement that Kennard's COPD was unrelated to his coal-mine employment. OB 27-29. The doctors made those statements, but the ALJ found that they were not backed up by sound reasoning—that is why Brandywine lost the case. A.33-35. In any event, the case Brandywine relies on to support this argument, *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988), is inapposite.

The deceased miner in *Amax Coal* suffered from amyotrophic lateral sclerosis (ALS). 855 F.2d at 500. He was never diagnosed with a chronic lung disease, and had no lung disease at all six months before dying of pneumonia consistent with ALS. *Id.* at 500-01. The Seventh Circuit affirmed the ALJ's conclusion that this evidence was sufficient to establish that the miner was not disabled by pneumoconiosis when he died. *Id.* at 501-502.[30] Unlike the petitioner in *Amax Coal*, Brandywine asks this Court to reverse the ALJ's weighing of the

[30] *Amax Coal* involved 30 U.S.C. § 921(c)(5), which provided (until it was eliminated for claims filed after 1981) that the eligible survivors of miners who (1) worked for twenty-five years or more before July 1971, and (2) died before March 1978 were entitled to BLBA benefits "unless it is established that at the time of his or her death such miner was not partially or totally disabled by pneumoconiosis."

evidence, not to defer to it.[31] And, unlike the miner in *Amax Coal*, Kennard suffers from a chronic lung disease that can be caused by exposure to coal-mine dust (COPD), and the record contains at least one medical opinion (Dr. Alam's) explicitly diagnosing legal pneumoconiosis. Under these facts, the ALJ reasonably expected Brandywine's medical experts to credibly explain why coal-mine dust did not cause or aggravate Kennard's COPD.

Far more relevant than *Amax Coal*—a twenty-six-year-old, out-of-circuit decision addressing a long-defunct statutory presumption—is this Court's 2013 decision in *Big Branch Resources*, which reaffirmed, in the context of the fifteen-year presumption, the longstanding position that "determining whether a 'doctor's report was sufficiently documented and reasoned[] [is] a credibility decision we have expressly left to the ALJ." 737 F.3d at 1072 (quoting *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ's finding that Dr. Broudy's and Dr. Dahhan's opinions were insufficient to prove that Kennard's COPD was not legal pneumoconiosis should be affirmed.

After determining that Brandywine had failed to prove that Kennard's COPD was not legal pneumoconiosis, the ALJ ruled that the employer had also failed to establish rebuttal by the second method because the credible evidence did not rule out any connection between that legal pneumoconiosis and Kennard's

[31] In *Amax Coal*, the ALJ's decision denying benefits was reversed by the Board before being reinstated by the court of appeals. 855 F.2d at 500.

disability. A. 35. This finding, too, was reasonable and supported by substantial evidence. Dr. Alam attributed at least ten percent of Kennard's disability to the COPD. A.25. Dr. Broudy reported that the miner's respiratory impairment was due to *both* lung removal and COPD. A.66. And Dr. Dahhan stated that, while the "bulk" of the miner's impairment was due to lung removal, it would be "speculative" for him to relate the miner's impairment solely to the lung removal. A.95. As a result, none of these opinions could establish that "no part" of Kennard's disability was caused by his COPD, and therefore by legal pneumoconiosis.

The employer admits that ALJs who determine that a miner has pneumoconiosis can discredit a doctor's opinion on disability causation if the doctor did not diagnose pneumoconiosis, but states that this rule does not apply where pneumoconiosis is established by presumption. OB 31-32.[32] This Court, however, held in *Big Branch Resources*, 737 F.3d at 1704, that ALJs may employ this same reasoning in cases governed by the presumption. Dr. Broudy's and Dr. Dahhan's conclusion that Kennard's disability was not related to his coal-mine

---

[32] Citing *Skukan v. Consol. Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vacated*, 512 U.S. 1231 (1994); and *Mountain Clay, Inc. v. Collins*, 256 Fed. App'x 757, 762 (6th Cir. 2007); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (affirming award by ALJ who "discounted the opinions of Drs. Jarboe and Dahhan because they based their disability causation opinions on the premise that Banks did not suffer from any form of pneumoconiosis" contrary to the ALJ's contrary finding.").

employment was based entirely on the premise that Kennard's COPD was not caused by coal-mine dust. Once the ALJ found that premise to be unpersuasive in the first step of the rebuttal analysis, he necessarily rejected their conclusion about disability causation in the second.[33]

Finally, to the extent Brandywine's citation of *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990), is intended to suggest that pneumoconiosis must be a "but for" cause of the miner's total disability (*i.e.*, that but for pneumoconiosis, the claimant would have the respiratory capacity to work as a miner), the suggestion should be rejected. Even assuming the facts here support the employer's "but for" argument, later Seventh Circuit decisions cast doubt on *Shelton's* continuing viability. *See, e.g.*, *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 494 (7th Cir. 2004). More importantly, *Shelton's* but-for test is not the law of this Circuit, which has recognized that miners totally disabled by a lung condition unrelated to coal dust are nevertheless entitled to BLBA benefits if they develop pneumoconiosis that "made [the miner's] already poor condition even worse." *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611 (6th Cir. 2001), *superseded*

---

[33] Brandywine suggests that this reasoning makes it "impossible to rebut the fifteen-year presumption" on disability-causation grounds "by any evidence at all" after an ALJ determines that the existence of legal pneumoconiosis has not been rebutted. OB 32. But this is not so. Had Brandywine submitted credible evidence establishing that all of Kennard's disability was due to cancer rather than COPD, it could have rebutted the presumption via the second rebuttal method even if it failed to prove that the COPD was not legal pneumoconiosis.

*by regulation on other grounds as recognized by Cumberland River Coal*, 690 F.3d at 485-86; *see generally* 20 C.F.R. § 718.204(c)(1)(ii) (pneumoconiosis that "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment" is compensable even in the absence of a presumption).[34]

Once the fifteen-year presumption was invoked, Brandywine's task was to prove that Kennard's COPD either was not legal pneumoconiosis or played no part in the miner's disability. The ALJ reasonably found that the testimony of Drs. Broudy and Dahhan was insufficient to satisfy this burden because the testimony was not credible. Even if Brandywine had not waived the issue, the ALJ's conclusion that the employer failed to rebut the presumption should be affirmed.

---

[34] *See also* 65 Fed. Reg. 79948 (preamble to 20 C.F.R. § 718.204(c)(1)(ii)) ("The Department believes a miner should not be denied benefits if the miner's pneumoconiosis causes further deterioration of a totally disabling (non-occupationally related) pulmonary or respiratory impairment. Although the effect is cumulative or additive, the pneumoconiosis nevertheless further diminishes the miner's already-compromised lung function.").

## CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's award of benefits to Richard D. Kennard.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660 - telephone
(202) 693-5687 - facsimile
BLLS-SOL@dol.gov
Roppolo.rita @dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

## 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 12,922 words, as counted by Microsoft Office Word 2010.

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Roppolo.rita @dol.gov

## CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2014, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

Evan Smith evan@appalachianlawcenter.org
Laura Klaus klausl@gtlaw.com

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
roppolo.rita @dol.gov

## The fifteen-year presumption

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

* * *

(c) Presumptions

* * *

(4) if 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.

**20 C.F.R. § 718.305**
**(promulgated Sept. 25, 2013)**

(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.

* * *

(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

* * *

(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.

## Former 20 C.F.R. § 718.305 (1980-2013)

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, 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 such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of 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 it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

***

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

(e) This section is not applicable to any claim filed on or after January 1, 1982.[1]

[1]Subsection (e) was added on May 31, 1983, by 48 Fed. Reg. 24271, 24288.