IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2416

WEST VIRGINIA CWP FUND, as carrier for DANIEL BOONE COAL CO. OF WV,
Petitioner

v.

ARDIS GUMP 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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF RELATED CASES

The primary issue raised in the opening brief filed by the coal company challenges the Department of Labor's interpretation of 30 U.S.C. § 921(c)(4)'s fifteen-year presumption of entitlement. In particular, petitioner attacks the Department's regulation governing how that presumption can be rebutted. 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 (Sep. 25, 2013) (to be codified at 20 C.F.R. § 718.305).

At least twelve cases currently pending in this Court raise the same or closely related issues:

- West Virginia CWP Fund v. Reed, No. 12-1104
- Hobet Mining, LLC v. Epling, No. 13-1738
- Laurel Run Mining Co. v. Maynard, No. 12-2581
- Island Creek Coal Co. v. Hargett, No. 13-1193
- West Virginia CWP Fund v. Cline, No. 13-1914
- West Virginia CWP Fund v. Adkins, No. 12-1655
- Consolidation Coal Co. v. Lake, No. 13-1042
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- Consol of Kentucky v. Atwell, No. 15-1220

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves Ardis Gump's claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act) 30 U.S.C. §§ 901-944 (2006 & Supp. VI 2012).[1] The West Virginia CWP Fund's (the Fund) statement of jurisdiction is

[1] Unless otherwise noted, all citations to the BLBA in this brief are to the 2012 version of Title 30. Two portions of the BLBA – including 30 U.S.C. § 921(c)(4), the primary object of this appeal – were amended in 2010. *See infra* at 11.

correct but incomplete because it omits the jurisdictional basis for the Benefits Review Board to decide the appeal from Administrative Law Judge Thomas Burke's (the ALJ) September 30, 2010, decision awarding benefits. JA 26-49. The Board had jurisdiction because 33 U.S. C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a), allows an aggrieved party thirty days to appeal an ALJ's decision to the Board.

STATEMENT OF THE ISSUES

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain BLBA claimants who worked as coal miners for at least 15 years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. There is no dispute that Gump is entitled to this presumption.

One way an employer can rebut the presumption is to prove that the miner's disability was not caused by pneumoconiosis. The statute, however, does not specify what showing an employer must make to establish rebuttal on disability-causation grounds. The Department of Labor's implementing regulation adopts the rule-out standard, which requires an employer to prove that pneumoconiosis caused "no part" of the miner's disability.

The questions presented are:

1. Whether the regulation adopting the rule-out standard is permissible.

2. Whether, after finding the presumption of pneumoconiosis unrebutted, an ALJ can give less weight to opinions of medical experts who did not diagnose pneumoconiosis in considering whether pneumoconiosis caused the miner's disability.[2]

STATEMENT OF THE CASE

Because this brief addresses only the Fund's legal challenges to the Department's regulations and the ALJ's decision, a detailed recounting of the underlying procedural history and medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (summarized *infra* at 9-17) and the decisions below applying them.

A. The ALJ's Decision and Order awarding benefits

Based on the private parties' stipulation and the employment evidence of record, the ALJ found that Gump had worked as a coal miner for 34 years, at least most of which occurred underground. JA 27, 28-29. The ALJ also found, based on the most recent pulmonary function test results and the unanimous testimony of the medical experts, that Gump suffered from a totally disabling lung impairment.[3]

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[2] The Fund also raises several challenges to the ALJ's evaluation of the conflicting medical evidence and resulting award, which are not addressed in this brief.

[3] 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

JA 38. Consequently, the ALJ determined that Gump had invoked the 30 U.S.C. § 921(c)(4) presumption, and turned to the question of whether the Fund had rebutted it by proving that Gump "does not suffer from pneumoconiosis" or that Gump's "disability does not arise out of coal mine employment." JA 39. The ALJ concluded that the Fund had failed to prove that Gump did not have legal pneumoconiosis or that pneumoconiosis did not cause Gump's disability.[4] JA 43-46.

These conclusions were based on the ALJ's evaluation of the Fund's medical experts, Drs. Renn and Bellotte. Both doctors agreed that Gump's totally disabling impairment was caused, at least in part, by chronic obstructive

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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 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.

[4] Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). After evaluating the conflicting evidence on the issue, the ALJ ruled that the Fund had successfully proved the absence of clinical pneumoconiosis. JA 41-43. That ruling is not at issue in this appeal.

pulmonary disease (COPD).[5] JA 34-36, 43, 46. But they testified that Gump's COPD was unrelated to his occupational exposure to coal dust (and therefore was not pneumoconiosis). JA 43-44.[6]

According to the ALJ, Drs. Renn and Bellotte excluded coal mine dust as a cause of Gump's COPD because the pulmonary function tests showed that Gump's condition was "reversible" if bronchodilators were administered. JA 44. The ALJ found this testimony "not convincing in ruling out coal dust as a causative factor" because two of the pulmonary function tests, including the most recent one, "demonstrated only partial reversibility[.]" *Id.* Moreover, the ALJ concluded that Dr. Bellotte's opinion that Gump's COPD was not legal pneumoconiosis was based, in part, on the fact that Gump does not have clinical pneumoconiosis. *Id.* The ALJ explained that this opinion was "not well-reasoned" because legal and

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[5] COPD is an umbrella term that "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma." 65 Fed. Reg. 79939 (Dec. 12, 2000) (preamble to regulatory definition of "pneumoconiosis"); *see* 20 C.F.R. § 718.201(a)(2) ("Legal pneumoconiosis" includes "any chronic . . . obstructive pulmonary disease arising out of coal mine employment."). Dr. Renn diagnosed emphysema, (JA 34-35), while Dr. Bellotte diagnosed all three forms of COPD (JA 15-36).

[6] According to the ALJ, Dr. Renn attributed Gump's COPD entirely to smoking, while Bellotte attributed Gump's emphysema and chronic bronchitis entirely to smoking, and his asthma to genetics. JA 34-36; *accord id.* at 220 (Renn), 437 (Bellotte). Two other medical experts, Drs. Martin and Saludes, attributed Gump's COPD to a combination of smoking and coal dust exposure. JA 32-34, 44.

clinical pneumoconiosis are "distinct condition[s]" under the regulations. *Id*. Finding neither opinion credible on the subject, the ALJ held that the Fund "had failed to rebut the presumption that [Gump's] lung disease is caused in part by his exposure to coal dust." *Id.*

The ALJ then considered whether the Fund had rebutted the fifteen-year presumption by proving that pneumoconiosis did not cause Gump's disability. As the ALJ explained, this was a straightforward task:

> All physicians agree that Claimant's pulmonary disability is due to his obstructive lung disease. As discussed supra, Claimant's COPD is found to be caused in part by his exposure to coal dust. Thus, Dr. Renn's and Dr. Bellotte's opinion that none of Claimant's impairment is related to his occupation as a coal miner is not persuasive based on their failure to diagnose legal pneumoconiosis.

JA 46. Finding the presumption invoked and unrebutted on either ground, the ALJ awarded BLBA benefits to Gump. JA 47.

B. The Board's October 26, 2011 Decision affirming the award.

The Fund appealed to the Board, which affirmed the award in all respects in an unpublished opinion. JA 50-57.

SUMMARY OF THE ARGUMENT

The Department of Labor, after notice-and-comment rulemaking, promulgated revised 20 C.F.R. § 718.305(d), which implements the fifteen-year presumption and provides standards governing how it is invoked and rebutted.

Like its predecessor, the revised regulation provides that any party attempting to rebut the fifteen-year presumption on disability-causation grounds must rule out any connection – not merely a "substantial" connection – between pneumoconiosis and disability. The statute is silent on this issue, and the regulation fills that gap in a way that faithfully promotes the purpose of section 921(c)(4). Moreover, the regulatory rule-out standard was implicitly endorsed when Congress re-enacted the fifteen-year presumption without change in 2010 and is consistent with this Court's interpretations of that provision and the similar interim presumption. It is therefore a reasonable interpretation of the Act entitled to this Court's deference under *Chevron.*

Contrary to the Fund's suggestion, the regulation is perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976). *Usery* simply held that employers can rebut the fifteen-year presumption by proving that a miner's disability is unrelated to pneumoconiosis. Revised 20 C.F.R. § 718.305(d)(1)(ii) itself allows for rebuttal on that ground. Contrary to the Fund's suggestion, *Usery* does not hold that employers must be allowed to rebut the presumption merely by proving that pneumoconiosis is not a "substantial" cause of a miner's disability. Like the statute itself, *Usery* is silent on that point.

The ALJ apparently misapplied the standard by applying the rule-out standard to the question of whether the Fund had disproven the presumed fact that

Gump has pneumoconiosis. The rule-out standard applies only to attempts to disprove the presumed connection between pneumoconiosis and disability. This error, however, was harmless. The ALJ rejected the Fund's rebuttal evidence because its experts were not credible, not because they did not rule out the existence of pneumoconiosis.

The Fund also argues that the ALJ, after finding that it failed to rebut the presumption that Gump has legal pneumoconiosis, improperly discredited the opinions of Drs. Renn and Bellotte on disability causation because they did not diagnose pneumoconiosis. In the Fund's view, this was improper because Gump's pneumoconiosis was presumed rather than affirmatively found. But this argument misunderstands the role of presumptions. The ALJ's finding that the Fund had failed to rebut Gump's presumed legal pneumoconiosis is effectively a finding that Gump has legal pneumoconiosis, and the ALJ's decision to give the opinions of Drs. Renn and Bellotte less weight for that reason was well within his discretion.

ARGUMENT

A. Standard of review

This brief addresses only the Fund's legal challenges to Gump's benefits award. This Court reviews the Board's legal conclusions *de novo. Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010); *Milburn Colliery v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). The Director's interpretation of the BLBA, as

expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his interpretations of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *Elm Grove Coal v. Director, OWCP*, 480 F.3d 278, 293 (4th Cir. 2007); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The regulatory rule-out standard is a permissible interpretation of the Act

1. The rule-out standard in context

The Fund challenges the Department's regulation implementing the fifteen-year presumption, which requires employers to rule out any connection (rather than any "substantial" connection) between a miner's pneumoconiosis and disability to rebut the fifteen-year presumption on disability-causation grounds. Pet. Br. at 17-26. The ultimate legal question is simple: in light of 30 U.S.C. § 921(c)(4)'s silence on the topic, is the Department's regulation permissible under *Chevron*? Unfortunately, that question is presented in the context of a complicated regulatory regime. Rather than discussing that regulatory scheme piecemeal, this brief begins with an explanation of the fifteen-year presumption and its implementing

regulations before addressing the Fund's challenge to the regulatory rule-out standard.[7]

a. 30 U.S.C. § 921(c)(4) and its implementing regulations

The BLBA, originally enacted in 1969, is designed to provide compensation for coal miners who are totally disabled by pneumoconiosis and their survivors. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). Recognizing the difficulties miners face in affirmatively proving their entitlement to benefits, Congress has enacted various presumptions over the years. One of these is 30 U.S.C. § 921(c)(4)'s fifteen-year presumption, which was first enacted in 1972 and provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . ." 30 U.S.C. § 921(c)(4) (1972). In 1981, the fifteen-year presumption was eliminated for all claims filed after that year.[8] In 2010, however,

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[7] As explained *infra* at 37-39, it is unlikely that the rule-out standard played any role in the outcome of this case. This Court could therefore resolve this appeal without reaching the Fund's challenge to the regulation. The Director nevertheless requests that the Court address the Fund's legal challenge to the revised regulation implementing Section 921(c)(4), which is substantially identical to arguments presented in a number of other cases pending before this Court. *See* Statement of Related Cases, *supra.*

[8] Pub. L. No. 97-119 § 202(b)(1), 95 Stat. 1635 (Dec. 29, 1981).

Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[9] It therefore applies to Gump's claim, which was filed in 2008 and remains pending. JA 1-4.[10]

On September 25, 2013, the Department of Labor promulgated a regulation ("revised section 718.305" or "revised 20 C.F.R. § 718.305") implementing the fifteen-year presumption.[11] The regulation specifies what an employer (or the Department, if there is no coal mine operator liable for a claim) must prove to rebut the presumption once invoked. *See* Revised 20 C.F.R. § 718.305(d). While it uses different language, in substance the revised regulation is identical to its predecessor in all respects relevant to this case.[12] *See infra* at 14-15; Pet. Br. at 16.

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[9] Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 553 n.1 (4th Cir. 2013).

[10] The 2010 amendment passed while the case was pending before the ALJ. The ALJ granted the Fund's request to reopen the record to submit additional evidence addressing the amendment. *See* JA 28.

[11] 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).

[12] The regulation at 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 revision. *See* 20 C.F.R. § 718.305 (2011).

Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses the Fund's petition through the lens of revised section 718.305.[13]

b. Elements of entitlement

Miners seeking BLBA benefits are generally required to establish four elements of entitlement: ***disability*** (that they suffer from a totally disabling respiratory or pulmonary condition); ***disease*** (that they suffer from pneumoconiosis); ***disease causation*** (that their pneumoconiosis was caused by coal mine employment); and ***disability causation*** (that pneumoconiosis contributes to the disability). 20 C.F.R. § 725.202(d)(2) (listing elements); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

Pneumoconiosis comes in two forms, clinical and legal. "Clinical pneumoconiosis" refers to a particular collection of diseases. 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any

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[13] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). The Fund does not argue that the revised regulation should not be applied. Nor could it. The revised regulation does not change the law, but merely reaffirms the Department's longstanding interpretation of 30 U.S.C. § 921(c)(4). Regulations that do not "replace [] a prior agency interpretation" can be applied to "antecedent transactions" without violating the general rule against retrospective rulemaking. *Smiley v. Citibank*, 517 U.S. 735, 744 n.3 (1996); *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 741 (4th Cir. 1999).

chronic lung disease . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[14] Because legal pneumoconiosis encompasses both the disease and disease-causation elements, disease causation has independent relevance only when discussing clinical pneumoconiosis.[15]

c. Methods of rebutting the fifteen-year presumption

The same four basic elements of entitlement apply in claims governed by section 921(c)(4)'s fifteen-year presumption. To invoke the presumption, a miner must establish (in addition to fifteen years of qualifying mine employment) total disability by a preponderance of the evidence. Once invoked, the miner is presumed to satisfy the remaining elements of entitlement. The burden then shifts to the employer to rebut (again by a preponderance of the evidence) any of those presumed elements (disease, disease causation, and disability causation).

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[14] This has been true since 1978, when the current statutory definition of pneumoconiosis – "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" – was enacted. 30 U.S.C. § 902(b); *see* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239 § 2(b), 92 Stat. 95 (March 1, 1978) (enacting current 30 U.S.C. § 902(b)). Before 1978, the Act defined pneumoconiosis more narrowly as "a chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. § 902(b) (1972). Under the narrower definition, only clinical pneumoconiosis was generally compensable. *See infra* at 30-31.

[15] Miners with clinical pneumoconiosis and at least ten years of coal mine employment are rebuttably presumed to satisfy the disease-causation element by operation of 30 U.S.C. § 921(c)(1). *See* 20 C.F.R. § 718.203(b).

While there are three presumed elements available to rebut, there are in practice only two basic methods of rebuttal. This derives from the fact that, in order to rebut the disease element, the employer must prove that the miner does not have legal pneumoconiosis (which includes the disease-causation element) in addition to proving the absence of clinical pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); 78 Fed. Reg. 59106; *see Big Branch Resources, Inc. v. Ogle,* 737 F.3d 1063, 1071 n.5 (6th Cir. 2013) ("Due to the definition of legal pneumoconiosis, the [methods of rebutting the three presumed elements] are often expressed as 1) 'establishing that the miner does not have a lung disease related to coal mine employment' and 2) 'that the miner's totally disabling respiratory or pulmonary impairment is unrelated to his pneumoconiosis.'" (quoting 78 Fed. Reg. at 59106)).

The first method is to prove that the miner does not have a lung disease caused by coal mine employment. To do this, the employer must prove (A) that the miner does not have legal pneumoconiosis *and* (B) either that the miner does not have clinical pneumoconiosis, or that the miner's clinical pneumoconiosis was not caused by coal mine employment. These showings would rebut either the disease element (by demonstrating the absence of legal and clinical pneumoconiosis) or the disease-causation element (by demonstrating the absence of legal pneumoconiosis and that the miner's clinical pneumoconiosis was not

caused by coal mine employment). If the employer fails to prove the absence of a lung disease related to coal mine employment, it can only rebut by the second method: attacking the presumed causal relationship between that disease and the miner's disability (thus rebutting the disability-causation element).

Unsurprisingly, the revised regulation provides for these same two basic methods of rebuttal:

> (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.

Revised 20 C.F.R. § 718.305(d), 78 Fed. Reg. 59115.[16]

[16] From 1980 until 2013, 20 C.F.R. § 718.305(a) provided that the presumption could be rebutted "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." Showing that the miner does not have legal or clinical pneumoconiosis falls under clause (A), while showing that the disability was not caused by pneumoconiosis, or that the miner's clinical pneumoconiosis was not caused by coal-mine employment, falls under clause (B). The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted," not to reflect any substantive change. 78 Fed. Reg. 59106; *see* Pet. Br. at 18 n.3.

d. The rule-out standard

The revised regulations also specify what fact an employer must prove to establish rebuttal on any particular ground. Employers attacking the disease and disease-causation elements are simply required to prove the inverse of what claimants must prove to establish those elements without the benefit of the fifteen-year presumption. Revised 20 C.F.R. § 718.305(d)(i). For example, an employer can rebut presumed legal pneumoconiosis by proving that a miner does not have a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). But if the employer cannot rebut the presumption that a totally disabled miner has pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to that disability.

Claimants attempting to establish disability causation without the benefit of a presumption are required to prove that pneumoconiosis is a "*substantially* contributing cause" of their disability. 20 C.F.R. § 718.204(c)(1) (emphasis added). To rebut the presumed link between a miner's pneumoconiosis and disability, however, the employer must "establish that ***no part*** of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" Revised section 718.305(d)(1)(ii) (emphasis added). The same was true under the prior regulation. *See* 20 C.F.R § 718.305(d)(2011) (The presumption "will be

considered rebutted" if the liable party establishes that "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.") (emphasis added). This "no part" or "in whole or in part" standard is often referred to as the "rule-out" standard.[17] The primary dispute in this case is whether the regulation adopting the rule-out standard, revised 20 C.F.R. § 718.305(d)(1)(ii), is a permissible interpretation of the Act.[18]

2. The regulatory rule-out standard is entitled to *Chevron* deference.

The Fund argues that the Department's regulation adopting the rule-out rebuttal standard is invalid.[19] Pet Br. 15, 18 n.3. It appears to argue that employers

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[17] The Sixth Circuit sometimes describes it as a "contributing cause" standard. *See Ogle*, 737 F.3d at 1071. This brief avoids that formulation, as it invites confusion with the less demanding "substantially contributing cause" standard the Fund advocates.

[18] As explained in the preamble to the revised regulation, the rule-out standard does *not* (1) require employers to disprove disability causation by more than a preponderance of the evidence; or (2) govern the degree of medical certainty with which a doctor's opinion must be expressed. 78 Fed. Reg. 59107. It merely establishes the fact that must be proved – *i.e.*, that pneumoconiosis played no role in a miner's disability. "Thus, a party opposing entitlement may rebut the presumption when the preponderance of the evidence, including medical opinions that are documented and reasoned exercises of physicians' medical judgment, demonstrates that pneumoconiosis played no role in the miner's respiratory disability." *Id.*

[19] The Fund states more generally that "both the new and old versions of § 718.305 are invalid to the extent that they apply the limitations on the methods of rebutting the fifteen-year presumption to operators." Pet Br. 18 n.3. But the Fund identifies no "limitation" imposed by the regulation other than the rule-out standard. *See* Pet. Br. at 25 (ALJ Burke "required the Fund to rule out the

should be permitted to establish rebuttal by proving that pneumoconiosis does not "substantially" contribute to a miner's disability. Pet. Br. 22-25.[20] Because revised 20 C.F.R. § 718.305(d)(1)(ii) adopts the rule-out standard, the Fund's challenge is governed by *Chevron's* familiar two-step analysis. As this Court explained in upholding another BLBA regulation:

> In applying *Chevron*, we first ask "whether Congress has directly spoken to the precise question at issue." Our *Chevron* analysis would end at that point if the intent of Congress is clear, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Elm Grove Coal, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 842-43). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." In that regard, the courts have "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (quoting *Chevron*, 467 U.S. at 843-44).[21]

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existence of legal pneumoconiosis and disability due to coal dust exposure[.]." Pet. Br. at 25.

[20] At times, the Fund describes this as a "third method" of rebuttal. *See* Pet. Br. at 23. The substantial contribution standard is "not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain – that pneumoconiosis caused total disability." *Ogle*, 737 F.3d at 1070.

[21] Of course, *Chevron* only applies if Congress has delegated the necessary rule-making authority to the agency. *Elm Grove Coal*, 480 F.3d at 292. That is the

a. Chevron step one: section 921(c)(4) is silent on what an employer must prove to rebut the presumption on disability-causation grounds.

Applying *Chevron's* first step to this case is straightforward. The statute is silent on the question of what showing is required to establish rebuttal on disability-causation grounds. Indeed, it is entirely silent on the topic of employer rebuttal.[22] Congress has therefore left a gap for the Department to fill.

b. Chevron step two: the regulatory rule-out standard is a permissible interpretation of the Act.

The only remaining question is whether the regulatory rule-out standard is a permissible way to fill this statutory gap. The fact that the Fund's "substantial contribution" standard may also be a permissible interpretation is irrelevant.[23]

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case here. The regulation falls within the Secretary of Labor's statutory authority "to issue such regulations as [he] deems appropriate to carry out the provisions of [the BLBA.]" 30 U.S.C. § 936(a). *See also Bethlehem Mines Corp. v. Massey ("Massey")*, 736 F.2d 120, 124 (4th Cir. 1984) ("The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility determinations.").

[22] The statute addresses rebuttal only in the context of claims in which the government is the responsible party, explaining that the Secretary can rebut the presumption only by proving (A) that the miner does not have pneumoconiosis or (B) that the miner's "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). The second method encompasses disability causation. *See supra* at 14-15. But it does not specify what showing the government must make to establish rebuttal on that ground.

[23] The Director's rule-out standard and the Fund's "substantial contributing cause" standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that

"The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Revised 20 C.F.R. § 718.305(d)(1)(ii) must be affirmed so long as it is reasonable. *Chevron*, 467 U.S. at 845.[24]

Deference to this regulation is particularly appropriate because "[t]he identification and classification of medical eligibility criteria [under the BLBA] necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *Pauley*, 501 U.S. at 697. The fact that the rule-out standard establishes criteria for rebutting, rather than establishing, a claimant's entitlement does not change the fact that it establishes medical eligibility criteria. *Massey*, 736 F.2d at 124 ("The

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pneumoconiosis is not a "significant," "necessary," or "primary" cause of a miner's disability might also be permissible. So long as the rule-out standard the Director actually adopted falls within the range of permissible alternatives, it must be upheld.

[24] *Cf. Pauley*, 501 U.S. at 702 ("[I]t is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference.") (citations omitted).

wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate, for that judgment properly resides with Congress.").

i. The rule-out standard advances the purpose and intent of section 921(c)(4).

As explained in the preamble to amended section 718.305, the rule-out standard was adopted to advance the intent and purpose of the fifteen-year presumption. 78 Fed. Reg. 59106.[25] Congress amended the BLBA in 1972 because it was concerned that many meritorious claims were being rejected, largely because of the difficulty miners faced in affirmatively proving that they were totally disabled by pneumoconiosis. *See Pauley*, 501 U.S. at 685-86. Persuaded by evidence that the risk of developing pneumoconiosis increases after fifteen years of coal mining work, "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" those 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).

Revised section 718.305(d)(1)(ii) appropriately furthers that goal by imposing a rebuttal standard that is demanding but also narrowly tailored to benefit a subset of claimants who are particularly likely to be totally disabled by

[25] Notably, this explanation directly responded to comments suggesting that the Department eschew the rule-out standard in favor of the "substantially contributing cause" standard the Fund advocates here. *Id.*

pneumoconiosis. The most direct way for an operator to rebut the fifteen-year presumption is to prove that the miner does not have pneumoconiosis. The rule-out standard plays absolutely no role in that method of rebuttal. Revised 20 C.F.R. § 718.305(d)(1)(i); c*f. Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 187 n.5 (6th Cir. 1989). The rule-out standard is therefore relevant only if claimant worked for at least fifteen years in coal mines, has a totally disabling lung condition, and the employer cannot prove that the miner does not have pneumoconiosis. It is entirely reasonable to impose a demanding rebuttal standard on an employer's attempt to prove that such a miner's disability is unrelated to pneumoconiosis.[26]

ii. Congress endorsed the Department's longstanding interpretation of section 921(c)(4) when it re-enacted that provision without change in 2010.

The Department adopted the rule-out standard by regulation over thirty years ago. *See* 20 C.F.R. § 718.305(d) (1981) (Rebuttal is established if "the cause of . . . total disability did not arise ***in whole or in part*** out of dust exposure in the miner's coal mine employment.") (emphasis added). This fact alone supports the Department's claim for deference. *See, e.g., Shipbuilders Council of America v.*

[26] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (rejecting constitutional challenge to BLBA regulation; explaining "[u]nless the inference from the predicate facts of coal-mine employment and pulmonary function values to the presumed facts of total disability due to employment-related pneumoconiosis is 'so unreasonable as to be a purely arbitrary mandate,' we may not set it aside. . .") (quoting *Usery*, 428 U.S. at 28).

U.S. Coast Guard, 578 F.3d 234, 245 (4th Cir. 2009). More importantly, it suggests that Congress endorsed the rule-out standard when it re-enacted section 921(c)(4) in 2010.

"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, 580 (1978); *see also Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990). If Congress was dissatisfied with section 718.305(d)'s rule-out rebuttal standard when it re-enacted section 921(c)(4) in 2010, 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 choice can only be interpreted as an endorsement of the Director's longstanding adoption of the rule-out standard.

iii. The regulatory rule-out standard is consistent with this Court's caselaw interpreting the fifteen-year presumption and the similar interim presumption.

Only one court of appeals has addressed the rule-out standard since section 921(c)(4) was revived in 2010, and it affirmed the standard. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1061 (6th Cir. 2013) (agreeing with the Director that an employer "must show that the coal mine employment *played no part* in causing the total disability."). The issue was presented to this Court in

Owens, but the panel did not resolve the question because the ALJ and Board did not actually apply the rule-out standard in that case. 724 F.3d at 552.[27]

This Court did, however, apply the rule-out standard in cases analyzing the fifteen-year presumption as originally enacted. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App'x. 563, 567 (4th Cir. 2003). For example, the deceased miner in *Rose* had totally disabling lung cancer and clinical pneumoconiosis. 614 F.2d at 938-39.[28] The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant had not demonstrated a causal relationship between the miner's cancer and his pneumoconiosis, or between his cancer and coal mine work. *Id.* This Court properly recognized that the Board had placed the burden of proof on the incorrect party, explaining that "it is the [employer's] failure effectively to *rule out* such a relationship that is crucial here." *Id.* (emphasis added). After concluding that the

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[27] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with the Supreme Court's *Usery* decision. 724 F.3d at 559. The Fund advances the same argument, which is addressed *infra* at 29-35. The revised regulation implementing the rule-out standard had not been promulgated when *Owens* was decided.

[28] *Rose* was a claim for survivors' benefits by the miner's widow. The fifteen-year presumption applies to claims by survivors as well as miners. *See* 30 U.S.C. § 921(c)(4) ("[T]here shall be a rebuttable presumption . . . that such miner's death was due to pneumoconiosis.")

employer's evidence was "clearly insufficient to meet the statutory burden" because its key witness "did not rule out the possibility of such a connection [between the miner's disabling cancer and pneumoconiosis or his mining work]," this Court reversed the Board and awarded benefits. *Id.* at 939. *Accord Colley & Colley Coal Co.*, 59 F. App'x. at 567 ("[T]he rebuttal standard requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence.") (citation and quotation omitted). The Fund has given no reason for this Court to depart from *Rose*.

The fact that this Court (and many others) repeatedly affirmed the rule-out standard as an appropriate rebuttal standard in cases involving the now-defunct "interim presumption" established by 20 C.F.R. § 727.203 (1999) is yet further evidence that it is a permissible rebuttal standard.[29] The interim presumption was substantially easier to invoke than the fifteen-year presumption, being available to any miner who could establish ten years of employment (or, in some circumstances, even less) and either total disability or clinical pneumoconiosis.

[29] The Part 727 "interim" regulations, including the interim presumption, applied to claims filed before April 1, 1980, and to certain other claims. *See* 20 C.F.R. § 725.4(d); *Mullins Coal Co.*, 484 U.S. at 139. As this Court has recognized, the interim presumption is "similar" to the fifteen-year presumption, *Colley & Colley Coal Co.*, 59 F. App'x. at 567. Because few claims are now covered by the Part 727 regulations, they have not been published in the Code of Federal Regulations since 1999. 20 C.F.R. § 725.4(d).

See 20 C.F.R. § 727.203(a) (1999); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 111, 114-15 (1988). Like the fifteen-year presumption, the interim presumption could be rebutted if the operator proved that the miner's death or disability did not arise "*in whole or in part* out of coal mine employment [.]" 20 C.F.R. § 727.203(b)(3) (1999) (emphasis added).[30] As this Court held in *Massey*, "[t]he underscored language makes it plain that the employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption." 736 F.2d at 123.[31] This, of course, is the same language that 20 C.F.R. § 718.305(d) used to articulate the rule-out standard from 1980 until 2013. *See supra* at 15 n.16.

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[30] Rebuttal could also be established by proving that the miner did not have pneumoconiosis, 20 C.F.R. § 727.203(b)(4) (1999), or was not totally disabled, 20 C.F.R. § 727.203(b)(1)-(2) (1999).

[31] *See also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339 (4th Cir. 1996) ("This rebuttal provision requires the employer to *rule out* any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence, a standard we call the *Massey* rebuttal standard."). The overwhelming majority of other courts to consider the issue have agreed. *See Rosebud Coal Sales Co. v. Wiegand*, 831 F.2d 926, 928-29 (10th Cir. 1987) (rejecting employer's argument that rebuttal is established "upon a showing that [claimant's] disability did not arise in whole or in *significant* part out of his coal mine employment" as "wholly at odds with the decisions rendered by six courts of appeals" which "apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal mine employment be ruled out") (citing cases in the Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits).

In *Massey*, this Court rejected an employer's argument that the rule-out standard was impermissibly restrictive, explaining that "[t]he wisdom of the Secretary's rebuttal evidence requirement is not for this Court to evaluate" because there is "nothing in the Black Lung Act to indicate that the Secretary's rebuttal evidence rule exceeds its congressional mandate." 736 F.2d at 124.[32] The Fund's challenge to revised Section 718.305(d) should meet the same fate. If rule-out is an appropriate rebuttal standard for the easily-invoked interim presumption, it is hard to imagine how it could be an unduly harsh rebuttal standard in the context of the fifteen-year presumption.

In sum, the rule-out standard adopted in revised section 718.305(d)(1)(ii) and its predecessor fills a statutory gap in a way that advances section 921(c)(4)'s purpose, was implicitly endorsed when Congress re-enacted that provision without change in 2010, and is consistent with this Court's interpretations of both the

[32] The Fund cites no authority to support its suggestion that the regulatory rule-out standard is invalid simply because it is different than the standard a claimant must meet to prove disability causation without benefit of the presumption. Nor is it compelled by logic, because claimants who cannot invoke the section 921(c)(4) presumption are not similarly situated to claimants who can (most obviously, the latter worked for fifteen years or more in coal mines). This asymmetry is hardly unique in the black lung program. The most obvious example is the interim presumption, which also applied a rule-out rebuttal standard. Analogously, while a claimant can prove the existence of pneumoconiosis with x-ray evidence, a claim can never be denied solely on the basis of a negative x-ray. *See* 20 C.F.R. § 718.202(a)(1), (b). Indeed, the main point underlying congressional enactment (and restoration) of these presumptions was to make it easier for claimants to prove entitlement. The company then can hardly complain about its heavier burden; that's what Congress intended.

fifteen-year presumption and the similar interim presumption. The rule-out standard is therefore a reasonable interpretation of the Act entitled to this Court's deference.

3. The rule-out standard is consistent with *Usery v. Turner Elkhorn Mining*

The Fund repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *See* Pet. Br. at 18-22. From the Fund's brief, one might expect to find, in *Usery*, a holding that employers can rebut the fifteen-year presumption by proving that pneumoconiosis did not substantially contribute to a miner's disability. But *Usery* says nothing about what fact an employer must prove to establish rebuttal on disability-causation grounds. It addresses an entirely distinct issue: whether, before legal pneumoconiosis was compensable under the Act, an employer could rebut the presumption by proving that a miner was totally disabled by a lung disease caused by coal dust that was not clinical pneumoconiosis. The answer (yes) is historically interesting. But because every disease caused by coal dust is now (legal) pneumoconiosis, its interest is only historical.

Usery held that 30 U.S.C. § 921(c)(4)'s rebuttal-limiting sentence does not apply to operators. That sentence provides: "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." This is the same language that the prior version of section 718.305 used to describe rebuttal options for employers as well as the government. As explained *supra* at 14-16, these options now exhaust the logically possible methods of rebuttal because they encompass all three presumed elements of entitlement.

But this was not true when section 921(c)(4) was enacted in 1972 or when *Usery* was decided in 1976. Before the statutory definition of pneumoconiosis was expanded in 1978, only miners disabled by *clinical* pneumoconiosis were generally entitled to BLBA benefits. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006) ("When the BLBA was originally enacted," the definition of pneumoconiosis encompassed "only those diseases the medical community considered pneumoconiosis [,]" *i.e.* clinical pneumoconiosis.); *Usery*, 428 U.S. at 6-7.[33]

[33] This is also clear from the pre-1978 regulatory definitions of pneumoconiosis, which are very similar to the modern definition of clinical pneumoconiosis. *Compare* 20 C.F.R. § 718.201(a)(1) (2013) ("***clinical pneumoconiosis*** . . . includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis") (emphasis added) *with* 20 C.F.R. § 410.110(o) (1970) ("***pneumoconiosis*** . . . includes anthracosis, silicosis, or anthracosilicosis") (emphasis added) *and* 20 C.F.R. § 410.110(o)(1) (1976) ("***pneumoconiosis*** . . . includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis") (emphasis added). After several presumptions (including

Before 1978, miners afflicted with, for example, totally disabling emphysema caused solely by coal dust would not be entitled to benefits. This would be true even for miners who also had a mild case of clinical pneumoconiosis that did not contribute to the disability. If such a miner invoked the fifteen-year presumption, however, section 921(c)(4)'s rebuttal-limiting sentence would prevent the Secretary from rebutting the miner's entitlement. The Secretary could not prove either (A) that the miner did not have clinical pneumoconiosis, or (B) that the miner's disability did not arise from the miner's exposure to coal dust (it did, via the disabling emphysema). The government could prove (C) that the miner's disability resulted from a disabling lung disease caused by coal dust exposure that was not pneumoconiosis. But that rebuttal method is not listed in section 921(c)(4). Thus, under section 921(c)(4)'s rebuttal-limiting sentence, certain miners were effectively entitled to benefits even though they were not disabled by clinical pneumoconiosis.

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the fifteen-year presumption) were added to the BLBA in 1972, the regulatory definition was amended to include situations where a presumption was invoked and not rebutted as well as the listed diseases. *See* 20 C.F.R. § 410.110(o)(2)-(3) (1976). But the general regulatory definition of pneumoconiosis did not include what is now called "legal" pneumoconiosis until after the statutory definition was broadened in 1978. *See* 20 C.F.R. § 718.201 (1981) ("pneumoconiosis" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure").

This is the precise scenario animating *Usery's* discussion of the fifteen-year presumption. The operator-plaintiffs in *Usery*, concerned that section 921(c)(4)'s rebuttal-limiting sentence would be applied to private employers as well as the government, argued that the sentence effectively created an unconstitutional irrebuttable presumption "because it establishes liability even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability" and "that the disability was wholly a product of other disease" caused by coal dust exposure, that "is not otherwise compensable under the Act."[34] 428 U.S. at 34-35. The Court recognized this problem, *Usery*, 428 U.S. at 34 ("The effect of this limitation on rebuttal evidence is . . . to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis."), but held that section

[34] Although the quoted sentences of *Usery* do not specify that the disabling disease was caused by coal dust, it is clear from the topic sentence of that paragraph that the Court is discussing a miner who is "totally disabled by some respiratory or pulmonary impairment arising in connection with his employment[.]" 428 U.S. at 34. It is equally true from context. If the disabling disease was not caused by exposure to coal dust, the employer could establish rebuttal by proving that the miner's disability was unrelated to coal mine employment and there would have been no need whatsoever to address the application or constitutionality of the second rebuttal method allowed under section 921(c)(4)'s rebuttal-limiting sentence.

921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators," *id*. at 35. It therefore had no need to address the constitutional question. *Id.* at 35-37.

It is true that *Usery* "confirmed the existence of *a limitation* on the Secretary that does not apply to the employer, necessarily recognizing that rebuttal methods (A) and (B) identified in § 921(c)(4) are not logically equivalent to the methods that would otherwise be available." *Owens*, 724 F.3d at 561 (Niemeyer, J. concurring). Section 921(c)(4)'s rebuttal-limiting sentence barred the Secretary from defeating the presumption by proving that a miner was disabled by a disease caused by coal dust other than pneumoconiosis, which was a logically available method of rebuttal in 1976. As a result, certain miners disabled by legal pneumoconiosis were effectively entitled to BLBA benefits long before legal pneumoconiosis was generally compensable under the Act, but only if they invoked the presumption against the Secretary.

This special limitation on the Secretary became irrelevant in 1978, when the definition of pneumoconiosis was expanded to include what is now known as legal pneumoconiosis, *i.e.*, any "chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).[35] As a result, the scenario

[35] *See supra* at 12-13 and n.14. The Fund claims that the Director's explanation, in the preamble to the revised regulation, that the methods of rebuttal listed in Section 921(c)(4)'s rebuttal-limiting sentence have exhausted all the methods of rebuttal logically available to employers since 1978 is inconsistent with the

motivating *Usery's* discussion of the rebuttal-limiting sentence became moot. Proving that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis is no longer a valid method of rebuttal because every lung disease caused by coal dust exposure is legal pneumoconiosis.[36] To the contrary, because an employer must rebut legal as well as clinical pneumoconiosis, it must establish that the miner is *not* disabled by such a disease.[37]

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position he took in *Owens.* Pet. Br. at 23 n.6. Not so. The Director made that same argument to this Court in *Owens. See Owens,* 724 F.3d at 555.

[36] Similarly, the Court's observation that the rebuttal-limiting sentence effectively "grant[s] benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis [,]" 428 U.S. at 34, is now irrelevant, because every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis.

[37] The many authorities applying the rebuttal-limiting sentence's language to operators – including 20 C.F.R. § 718.305 (1981) and this Court's decision in *Rose*, 614 F.2d at 939 – simply reflect the fact that, after 1978, operators were effectively limited to the same rebuttal methods as the Secretary. *See generally* 78 Fed. Reg. 59106 (Since the definition of pneumoconiosis was expanded to include legal pneumoconiosis, "[t]he only ways that any liable party – whether a mine operator or the government – can rebut the 15-year presumption are the two set forth in the presumption, which encompass the disease, disease-causation, and disability-causation entitlement elements."). While Section 921(c)(4)'s rebuttal-limiting sentence has never applied to operators itself, it encompasses all logically available rebuttal methods for employers as well as the Secretary after 1978. The prior regulation's wording has produced understandable confusion on that point, which is one reason the revised regulation no longer uses the same text.

Most importantly for present purposes, *Usery* has nothing at all to do with the rule-out standard. At most, *Usery* stands for the proposition that operators must be allowed to rebut the fifteen-year presumption by proving that a miner's disability is caused by a disease other than pneumoconiosis. Both the old and revised version of 20 C.F.R. § 718.305 allow operators to do just that. But nothing in *Usery* even suggests that an operator must be allowed to establish disability-causation rebuttal by proving that pneumoconiosis is not a "substantial" contributing cause of a miner's disability. To the contrary, the words the Court used to frame the operators' argument – the rebuttal-limiting sentence can prevent rebuttal "even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability [and] that *the disability was* ***wholly*** *a product of other disease*" – are not only consistent with the rule-out standard, they essentially articulate the rule-out standard. *Usery*, 428 U.S. at 34-35 (emphasis added).

In sum, the regulatory rule-out standard is entirely consistent with *Usery*, which simply does not hold that employers can rebut the fifteen-year presumption by proving that pneumoconiosis is not a "substantial" cause of a miner's disability.[38] It is also consistent with the plain text of section 921(c)(4), which is

[38] In any event, *Usery* explicitly left open the possibility that a regulation limiting operators to the same two rebuttal methods available to the Secretary might have

entirely silent on the subject of whether attempts to rebut the presumption by disproving disability causation should be governed by a rule-out standard, a substantially-contributing-cause standard, or any other standard.[39] The Fund's argument that revised 20 C.F.R. § 718.305(d)(1)(ii) is invalid should be rejected.

C. The ALJ's misapplication of the rule-out standard was harmless error

While it is a focal point of the Fund's brief, the rule-out standard played no role in the outcome of Gump's claim. The ALJ did not cite or quote the rule-out standard as articulated in 20 C.F.R. § 718.305(d) (2011'), *Rose*, or the many cases applying that standard to the interim presumption. To the contrary, the ALJ cited 20 C.F.R. § 718.204(c)(1)'s "substantially contributing cause" rule as the applicable standard governing the Fund's attempt to rebut the presumption on disability-causation grounds. JA 46-47. This, of course, is the very standard the Fund champions as a replacement for the rule-out standard.

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been permissible even before the definition of pneumoconiosis was expanded. 428 U.S. at 37 and n.40.

[39] To the extent that the Fund's brief could be read to suggest that the rule-out standard itself is an interpretation of the text of section 921(c)(4)'s rebuttal-limiting sentence, it cites nothing in *Usery* or any other case supporting that claim. Such an interpretation would also be inconsistent with the Director's explanation for adopting the rule-out standard in the revised regulation and the fact that the rule-out standard also applied to 20 C.F.R. § 727.203's interim presumption, which did not derive from section 921(c)(4)'s text.

The term "rule out" only appears in the ALJ's discussion of pneumoconiosis, in particular legal pneumoconiosis. *See, e.g.*, JA 43 ("Employer bears the burden of ruling out the existence of legal pneumoconiosis."), 45 ("Employer bears the burden of ruling out coal dust as a cause of Claimant's lung disease."). To the extent that these statements suggest that the Fund was required to rule out any connection between Gump's lung disease and exposure to coal dust to rebut the presumption that Gump has legal pneumoconiosis, it is incorrect. The rule-out standard applies only to attempts to disprove the presumed connection between pneumoconiosis and disability. *See supra* at 22-23. An employer can disprove the presumed connection between dust exposure and lung disease by showing that the disease is not "significantly related to, or substantially aggravated by" exposure to coal mine dust. 20 C.F.R. § 718.201(a)(2).

This error does not, however, merit reversal. The ALJ did not reject Dr. Renn's or Dr. Bellotte's diagnosis as insufficient because those doctors did not rule out any connection between Gump's COPD and his exposure to coal mine dust. Nor could he have. Both doctors quite clearly stated that Gump's mining work did not contribute to his COPD. *See* JA 438 (Renn) ("coal dust played no role" in Gump's obstructive disease), 437 (Bellotte) ("[Gump] would be in the same condition that he currently is, had he never worked in the coal mines.").

Instead, the ALJ rejected those opinions on the more mundane ground that they were not credible. In the ALJ's view, Drs. Renn and Bellotte failed to explain why the irreversible portion of Gump's lung disease was not caused by coal dust, and Dr. Bellotte additionally failed to distinguish properly between legal and clinical pneumoconiosis. JA 44. Assuming that those credibility findings were supported by substantial evidence, no remand is necessary.[40] If the Court finds the evidence insufficient to support the ALJ's award, the ALJ should be instructed to apply the rule-out standard only to the issue of disability-causation on remand.

D. The ALJ permissibly discredited Dr. Renn's and Dr. Bellotte's disability-causation analysis because they did not diagnose legal pneumoconiosis

The Fund also argues that the ALJ improperly limited its ability to rebut the presumption by rejecting the opinions of Drs. Renn and Bellotte on disability causation "on the ground that they did not diagnose legal pneumoconiosis." Pet. Br. at 37-42. In the ALJ's view, the conclusions of both physicians that Gump's disability was unrelated to pneumoconiosis was based on the premise that Gump did not have pneumoconiosis in the first place. The premise turned out to be false because the ALJ found that Gump did have pneumoconiosis (or, more precisely, that the Fund had not rebutted the statutory presumption that Gump has pneumoconiosis), fatally undermining the physicians' respective conclusions.

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[40] The Director takes no position on the question of whether the ALJ's credibility determinations are supported by substantial evidence.

The Fund concedes that a physician's opinion may properly be deemed ill-reasoned "where the opinion is premised on factual error, *i.e.*, disagreement with the predicate factual findings of the agency fact-finder," but argues that it is improper to discredit an expert's opinion because it conflicts with a *presumed* rather than an affirmatively-found fact. Pet. Br. at 39. But it cites no authority for that position. Moreover, it understates the role of presumptions under the Act. One way to "determin[e] the existence of pneumoconiosis" is for the fifteen-year presumption to be invoked and not rebutted. Revised 20 C.F.R. § 718.202(a)(3), 78 Fed. Reg. 59114. The ALJ's determination that the Fund had failed to disprove Gump's presumed legal pneumoconiosis is essentially a finding that Gump has pneumoconiosis.

As the Sixth Circuit recently explained in rejecting a similar argument, the Fund's position is "based on the view that the ALJ merely presumed legal pneumoconiosis." *Ogle*, 737 F.3d at 1074. That court explained that, "[w]hile the fifteen-year presumption did at first allow the ALJ to presume pneumoconiosis, the Fund . . . fought vigorously to rebut the presumption, while Ogle strived to buttress it." *Id.* In finding the presumption of legal pneumoconiosis unrebutted, the "ALJ determined that it was at least as likely as not that Ogle suffered from legal pneumoconiosis[,]" a determination the ALJ permissibly used to discredit the opinions of doctors who did not diagnose legal pneumoconiosis. *Id.*

In this case, as in *Ogle*, legal pneumoconiosis (i.e., whether Gump's lung disease was caused solely by smoking or some combination of smoking and coal dust) was a hotly contested issue. The ALJ focused on the opinions of Drs. Renn and Bellotte, which were the only opinions in evidence that could rebut the presumption that Gump suffers from legal pneumoconiosis. Having discredited those opinions, there was no need for the ALJ to make an affirmative finding that Gump has legal pneumoconiosis. Instead, the ALJ concluded that "Employer has failed to rebut the presumption that Claimant's lung disease is caused in part by his exposure to coal dust." JA 45. It was not error for the ALJ to discredit Dr. Renn's and Bellotte's opinions on disability causation because they conflicted with that finding. *Id.*

Indeed, given his findings about Dr. Renn's and Bellotte's opinions on legal pneumoconiosis, the ALJ's conclusion about disability causation is the only rational one he could reach. Both doctors agreed that Gump was totally disabled by COPD. JA 43. Once the ALJ determined (by presumption or otherwise) that Gump's COPD was legal pneumoconiosis, it necessarily follows (by Dr. Renn's and Dr. Bellotte's own logic) that Gump was totally disabled by pneumoconiosis. In effect, their opinions about the cause of Gump's disabling COPD were opinions about both legal pneumoconiosis and disability causation. *See Island Creek Kentucky Mining Co. v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013).

This does not lead, as the Fund suggests, to the conclusion that any operator failing to show that a miner does not have pneumoconiosis will necessarily fail to establish rebuttal on disability-causation grounds, effectively limiting operators to only one method of rebuttal. Pet. Br. at 41.[41] It simply means that, where the only seriously disputed medical issue in a case is whether the claimant's disabling lung disease was caused by coal dust, the employer can only establish rebuttal by proving that it was not. *See Ramage*, 737 F.3d at 1062.

[41] It is not difficult to imagine scenarios where a doctor's discussion of a miner's alleged pneumoconiosis is entirely distinct from his disability-causation analysis. Consider a case where the miner has very mild emphysema and severe lung cancer. The operator's medical expert testifies that both diseases were caused solely by smoking and that the miner's disability is entirely due to the cancer. The ALJ finds (via presumption or otherwise) that the miner's emphysema was caused, in part, by coal dust exposure, and is therefore legal pneumoconiosis. This finding would not undercut the expert's opinion that the cancer was the sole cause of the miner's disability.

CONCLUSION

The Fund's legal challenges to the regulatory rebuttal standard and the ALJ's decision to give little weight to the opinions of Drs. Renn and Bellotte on disability causation should be rejected. If the Court determines that the ALJ's findings of fact are supported by substantial evidence, the award should be affirmed. If not, the case should be remanded for further consideration.

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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 9,990 words as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption

30 U.S.C. § 921 (2006 & Supp. VI 2012) – 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.

Revised section 718.305

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) Applicability. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.
* * *
(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.[42]

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