# No. 12-1777

## UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

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## ISLAND CREEK COAL COMPANY

**Petitioners**

**v.**

## CARLES DYKES;
## DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

**Respondents**

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**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:

- No. 11-2416, West Virginia CWP Fund v. Gump
- No. 12-1104, West Virginia CWP Fund v. Reed
- No. 12-1398, Elk Run Coal Co., Inc. v. Harvey
- No. 12-1655, West Virginia CWP Fund v. Adkins
- No. 12-2034, Logan Coals, Inc. v. Bender
- No. 12-2581, Laurel Run Mining Co. v. Maynard
- No. 13-1042, Consolidation Coal Co. v. Lake
- No. 13-1193, Island Creek Coal Co. v. Hargett
- No. 13-1220, Consol of Kentucky, Inc. v. Atwell
- No. 13-1738, Hobet Mining, LLC v. Epling
- No. 13-1914, West Virginia CWP Fund v. Cline

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# BRIEF FOR THE FEDERAL RESPONDENT

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## STATEMENT OF JURISDICTION

Island Creek Coal Company (Island Creek or Employer) petitions this Court for review of a Benefits Review Board decision affirming an administrative law judge's award of benefits under the Black Lung Benefits Act (BLBA or Act), 30

U.S.C. §§ 901-944 (2006 & Supp. VI 2012).[1] Carles Dykes, a former coal miner, filed this claim on November 20, 2007. Joint Appendix (JA) 1. Administrative law judge Pamela Lakes (the ALJ) awarded benefits to Dykes on April 27, 2011. JA 26-46. Island Creek timely appealed to the Benefits Review Board on May 9, 2011. R. at 136-162[2]; *see* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On May 17, 2012, the Board issued a final order affirming the ALJ's award of benefits. JA 48-56. On June 18, 2012, Island Creek timely petitioned this Court to review the Board's Order. JA 59-62; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions).

This Court has jurisdiction over Island Creek's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c)—Dykes's exposure to coal dust—last occurred in Virginia,

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[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* pp. 11-12; Addendum to brief at A-2.

[2] "R" refers to record materials not in the Joint Appendix, but listed in the Board's consecutively paginated certified case record index. *See* JA 66-67.

within the jurisdictional boundaries of this Court. JA 5; *see Kopp v. Director, OWCP*, 877 F.2d 307, 308 (4th Cir. 1989) ("[J]urisdiction is appropriate only in the circuit where the miner's coal mine employment, and consequently his harmful exposure to coal dust, occurred.").

## STATEMENT OF THE ISSUE

30 U.S.C. § 921(c)(4) provides a rebuttable presumption that certain claimants who worked as coal miners for at least fifteen years and suffer from a totally disabling respiratory or pulmonary impairment are totally disabled by pneumoconiosis and therefore entitled to federal black lung benefits. 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. Island Creek argues that the ALJ erred in applying the rule-out standard.

The question presented is whether the regulation adopting the rule-out standard is permissible.[3]

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[3] Island Creek also argues that the ALJ's assessments of the conflicting expert (continued…)

## STATEMENT OF THE CASE

Because the Director addresses only Island Creek's legal challenges to the ALJ's decision, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the history of the relevant statutory and regulatory provisions (summarized *infra* pp. 11-13) and the decisions below applying those provisions.

### A. The ALJ's Decision and Order Granting Benefits

The ALJ awarded benefits in a decision dated April 27, 2011. JA 26-46. Based on the parties' stipulation that Dykes worked as a miner for 30 years and Dykes's testimony about the nature of his work, the ALJ found that Dykes "worked underground for well over fifteen years[.]" JA 35. The ALJ noted that all four doctors of record (including Island Creek's experts, Drs. Fino and Castle) testified that Dykes was totally disabled from a respiratory or pulmonary standpoint, although they disagreed on the disease causing that disability. JA 37. Based on that testimony and the objective pulmonary test results in the record, the ALJ found that the evidence "convincingly shows that Claimant, who is on oxygen, would be unable to perform this coal mine employment or comparable

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(…continued)

testimony and ultimate decision awarding BLBA benefits to Dykes are not supported by substantial evidence. Petitioner's Brief (Pet. Br.) 20-34. The Director only addresses Island Creek's legal challenges.

employment in the area from a pulmonary or respiratory standpoint."[4] JA 38. Accordingly, the ALJ determined that Dykes established the employment and total disability pre-requisites to invoke the fifteen-year presumption of entitlement. JA 35, 38 (citing 30 U.S.C. § 921(c)(4)).

The ALJ then considered whether Island Creek had rebutted the presumption by demonstrating either that Dykes did not have pneumoconiosis or that his disability did not arise out of his mining work. JA 38 (citing 30 U.S.C. § 921(c)(4) and 20 C.F.R. § 718.305 (2011)).[5] The ALJ recognized that, to rebut the presumption by showing that Dykes does not suffer from pneumoconiosis, Island Creek must demonstrate the absence of both clinical and legal pneumoconiosis.[6]

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[4] Miners are "totally disabled" for purposes of the BLBA if they suffer from a respiratory or pulmonary impairment that prevents them from performing their usual coal mine work or work requiring comparable skills or abilities. 20 C.F.R. § 718.204(b)(1).

[5] 20 C.F.R. § 718.305, the regulation implementing the fifteen-year presumption, was substantially revised on September 25, 2013. *See* Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits; Final Rule, 78 Fed. Reg. 59101, 59114-15 (Sept. 25, 2013) (to be codified at 20 C.F.R. § 725.305). While the revised regulation is phrased differently, it does not change the Department's interpretation of the fifteen-year presumption in any way relevant to this case. *See infra* pp. 12-13; Addendum to brief at A-3. The previous version of the regulation had remained essentially unchanged from 1980-2013. *See infra* at 17; Addendum to brief at A-4. The 2011 version of the rule is cited to avoid any confusion between the prior and revised versions, and because the ALJ's decision was issued in 2011.

[6] "Clinical pneumoconiosis" refers to a particular collection of diseases. 20

(continued…)

JA 39. The ALJ found that Island Creek had successfully proved that Dykes does not suffer from clinical pneumoconiosis. JA 40. But she found that Island Creek had failed to prove that Dykes did not have legal pneumoconiosis. JA 43.

This finding was based on her evaluation of the medical evidence, in particular her conclusion that neither Dr. Fino nor Dr. Castle offered a credible opinion that Dykes did not have "a pulmonary or respiratory impairment that was 'significantly related to, or substantially aggravated by' his over 30 years of dust exposure in unground coal mining." JA 43 (quoting 20 C.F.R. § 718.201(b)). Drs. Fino and Castle diagnosed asthma unrelated to coal dust exposure. JA 41-42. The ALJ agreed with Drs. Fino and Castle that Dykes suffers from bronchial asthma. JA 43. But she found that neither doctor had explained why Dykes did not suffer from both asthma and legal pneumoconiosis or, more generally, why Dykes's thirty years of coal mine dust exposure could be excluded as an etiological factor contributing to Dykes's disabling lung impairment. JA 43.[7] Therefore, she concluded that neither doctor persuasively addressed the presence of legal pneumoconiosis. Acknowledging that it was "a close one," the ALJ nevertheless

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(…continued)

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).

[7] The ALJ noted that Dykes "was essentially a lifelong non-smoker." JA 29.

concluded that Island Creek failed to establish that Dykes does not have pneumoconiosis. *Id*.

The ALJ then addressed disability causation, the second rebuttal method, and found that Island Creek failed to rule out pneumoconiosis as a cause of Dykes's disability. JA 44. Citing the Director's brief, the ALJ stated that an employer must rule out any connection between a miner's disability and exposure to coal dust to rebut the presumption on that ground. JA 38, 41. She determined that Dr. Fino had conceded that a "clinically [in]significant" portion of Dykes's impairment was likely due to his coal mine employment. JA 44. While Dr. Castle did not find a causal connection between coal mine employment and Dykes's respiratory disability, the ALJ concluded that Dr. Castle "did not provide support from his conclusion that he could rule out the contribution by coal mine dust to the claimant's disability." JA 44. Accordingly, the ALJ concluded that Island Creek had "failed to establish that Claimant's disabling lung disease was not caused at least in part by his coal mine employment" and thus failed to carry its burden of rebutting the presumption that Dykes is totally disabled due to pneumoconiosis. JA 44. Finding the fifteen-year presumption invoked and not rebutted, the ALJ awarded BLBA benefits to Dykes. JA 46.

**B. The Benefits Review Board's Decision and Order affirming the award.**

The Board affirmed the award of benefits on May 17, 2012. JA 48-56. The

Board rejected, as contrary to established precedent, Island Creek's arguments that application of the revived fifteen-year presumption was unconstitutional, that section 921(c)(4)'s rebuttal provisions do not apply to claims brought against a responsible operator, and that applying the fifteen-year presumption was premature because the Department has not yet promulgated regulations implementing it.[8] JA 51-52. The Board affirmed as unchallenged the ALJ's findings that Dykes established at least thirty years of coal mine employment with at least fifteen years underground and that Dykes has a totally disabling respiratory impairment. JA 50 n.6. Based on these unchallenged findings, the Board affirmed the ALJ's invocation of the fifteen-year presumption. JA 52.

On rebuttal of that presumption, the Board held that the ALJ properly imposed the burden of proof on Island Creek to disprove the existence of pneumoconiosis or to prove that Dykes's respiratory impairment did not arise out of, or connection with, coal mine employment. JA 53. The Board then held that the ALJ properly discredited the opinions of Dr. Castle and Dr. Fino for failing to adequately explain how thirty years of coal mine dust exposure was excluded as an additional, contributing factor to claimant's impairment. JA 54-55. Having

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[8] Island Creek also challenged the ALJ's failure to comply with 20 C.F.R. § 725.476 and issue her decision within twenty days of the close of the hearing. The Board held that the employer waived this objection by not raising it before the ALJ. JA 51. Island Creek does not raise this argument on appeal.

permissibly discounted the only two opinions potentially supportive of either rebuttal prong, the Board held that the ALJ reasonably found Island Creek failed to carry its burden of rebutting the presumption. JA 55. Accordingly, the Board affirmed the ALJ's award of benefits. JA 56.

## 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.*

The regulation is also perfectly consistent with the Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 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 Island Creek'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. Consequently, the ALJ did not err in requiring the coal company to "rule out" pneumoconiosis as a cause of Dykes's disability.

## ARGUMENT

### A. Standard of Review.

This brief addresses only Island Creek's legal challenges to the regulatory rule-out standard. This Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (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 rule-out standard in context.

Island Creek's primary legal argument is that the ALJ improperly required it to rule out any connection (rather than any "substantial" connection) between Dykes's disability and pneumoconiosis to rebut the fifteen-year presumption on disability-causation grounds. Pet. Br. 9-20. Because the BLBA's implementing regulations adopt the rule-out standard, the ultimate legal question is simple: in light of the statute'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 Island Creek's challenge to the regulatory rule-out standard.

### 1. 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 medical and scientific 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.[9] In 2010, however, Congress restored the presumption for all claims filed after January 1, 2005, and pending on or after March 23, 2010.[10] The presumption therefore applies to Dykes's claim, which was filed in 2007 and remains pending. JA 1.

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

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

[10] 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).

[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).

predecessor in all respects relevant to this case.[12] *See infra* pp. 16-17; Pet. Br. 16 n.5. Because the new regulation applies to this claim and is clearer than its predecessor, this brief primarily discusses Island Creek's petition through the lens of revised section 718.305.[13]

**2. 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

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[12] 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).

[13] The revised regulation applies to all claims affected by the statutory amendment. *See* Revised 20 C.F.R. § 718.305(a). Island Creek does not argue that the revised regulation should not be applied. Nor could it, in light of its admission that amended 718.305(d) "generally traces the prior language of 20 C.F.R. § 718.305(d) (2011)." Pet. Br. 16 n.5. 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).

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 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]

**3. The fifteen-year presumption and methods of rebuttal.**

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

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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* pp. 32-33.

[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).

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).

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, *see supra* p. 14) or 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 the 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.

The former version of the regulation also provided for those same methods

of rebuttal, albeit in language that was less clear.[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." Clause (A) allowed employers to rebut the presumption by proving that a miner does not have legal or clinical pneumoconiosis, while proving that a miner's disability is unrelated to pneumoconiosis or that a miner's clinical pneumoconiosis was not caused by coal-mine employment was permitted under clause (B).[17]

**4. The rule-out standard.**

The revised regulation also specifies 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-

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[16] The revised regulation's language was designed "to more clearly reflect that all three of the presumed elements may be rebutted." 78 Fed. Reg. 59106. It does not reflect any substantive change. *Id.* at 59107.

[17] Former section 718.305(d)'s rebuttal provision uses the same language that 30 U.S.C. § 921(c)(4) uses to describe the rebuttal options available to "the Secretary." Since the definition of pneumoconiosis was expanded in 1978 to include legal pneumoconiosis, however, it has logically exhausted all possible methods of rebuttal for employers as well as the government. *See infra* pp. 35-36.

year presumption. Revised 20 C.F.R. § 718.305(d)(i).[18] 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 the miner's pneumoconiosis contributes to his 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

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[18] The ALJ applied that rule in this case. JA 39 ("[T]o rebut the existence of legal pneumoconiosis, the Employer has the burden of establishing that a pulmonary disease or respiratory impairment was *not* 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'") (citing 20 C.F.R. § 718.201(b)).

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.[19] 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.[20]

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

Island Creek argues that the ALJ committed reversible error by applying the rule-out standard instead of allowing it to rebut the presumption by proving that pneumoconiosis did not "substantially" or "significantly" contribute to Dykes's total disability. Pet. Br. 13, 15, 20.[21] Because revised 20 C.F.R.

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

[20] 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.*

[21] At times, Island Creek describes its proposed "substantial connection" standard as a "third method" of rebuttal and frames its argument as whether the ALJ

(continued…)

§ 718.305(d)(1)(ii) adopts the rule-out standard, Island Creek'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."

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(…continued)

improperly limited it to the two statutory methods of rebuttal contained in 30 U.S.C. § 921(c)(4): disproving pneumoconiosis or disproving that total disability was due to pneumoconiosis. Island Creek asserts that it should have been permitted to rebut the presumption by proving that Dykes's "pneumoconiosis did not substantially contribute to his total disability." Pet. Br. 15. But Island Creek's "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." *Big Branch Resources*, 737 F.3d at 1070; *see* 20 C.F.R. § 718.204(c) (including substantially contributing cause standard in the definition of disability causation). And Island Creek identifies no limitation imposed on its ability to rebut other than the rule-out standard.

*Id.* (quoting *Chevron*, 467 U.S. at 843-44).[22]

**1. *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.[23] Congress has therefore left a gap for the Department to fill.

**2. *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 Island Creek's "substantial

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

[23] 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* pp. 16-17. But it does not specify what showing the government must make to establish rebuttal on that ground.

contribution" standard may also be a permissible interpretation is irrelevant.[24] "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.[25]

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

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[24] The Director's rule-out standard and Island Creek's "substantially contributing cause" standard are just two of many standards that could permissibly fill the statutory gap. For example, standards requiring employers to prove that 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 standard the Director actually adopted, falls within the range of permissible alternatives, it must be upheld.

[25] *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).

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

**a. *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.[26] 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).

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

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 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.[27] 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.[28]

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[27] Island Creek suggests that the Board misapplied the rule-out standard to rebut the existence of pneumoconiosis. Pet. Br. 16 n.4. Any misuse of the rule-out standard by the Board is harmless error because the ALJ stated and applied the correct legal standard. She explained that, in order to rebut the presumption of legal pneumoconiosis, the employer bears "the burden of establishing that a pulmonary disease or respiratory impairment was *not* 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" JA 39 (quoting 20 C.F.R. § 718.201(b) (emphasis in original). She applied that standard (and her discretion as fact finder), in finding Island Creek's evidence lacking on that point. JA 43.

[28] *Cf. Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 365 (7th Cir. 1985) (continued…)

**b. *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. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir. 2009) (Deferring to agency interpretation that was "longstanding, has been consistently applied in the same manner, and comports with the congressional intent of the governing statute."). 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

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(…continued)

(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).

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.

**c. *The regulatory rule-out standard is consistent with this Court's case law 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.*, 737 F.3d at 1061 (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.[29]

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.*,

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[29] Judge Niemeyer, concurring, stated that he would have rejected the rule-out standard as inconsistent with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Owens*, 724 F.3d at 559. Island Creek advances the same argument, which is addressed *infra* pp. 30-37. The revised regulation implementing the rule-out standard had not been enacted when *Owens* was decided.

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.[30] The key disputed issue was whether the employer had rebutted the fifteen-year presumption. The Board denied the claim because the claimant failed to demonstrate 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 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

[30] *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.").

quotation omitted ). Island Creek 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.[31] 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. *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).[32] This, of course, is the same language

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[31] 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).

[32] 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

(continued…)

that the initial version of 20 C.F.R. § 718.305(d) used to articulate the rule-out standard. *See supra* p. 17.

And as this Court held in *Massey*, "[t]he underscored [in whole or in part] 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.[33] 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

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(…continued)

C.F.R. § 727.203(b)(1)-(2) (1999).

[33] *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).

mandate." 736 F.2d at 124.[34] 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 fill a statutory gap in a way that advances section 921(c)(4)'s purpose, were implicitly endorsed when Congress re-enacted that provision without change in 2010, and are consistent with this Court's interpretations of both the 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.

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

Island Creek repeatedly argues that the regulatory rule-out standard is inconsistent with the Supreme Court's decision in *Usery*. *See* Pet. Br. 12, 18-20.

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[34] Island Creek 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).

From Island Creek'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* pp. 15-17, 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.[35]

Before 1978, miners afflicted with, for example, totally disabling

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[35] 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 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").

emphysema caused solely by coal dust would not be entitled to benefits.[36] 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 (because the miner in question did suffer from that condition), or (B) that the miner's disability did not arise from the miner's exposure to coal dust (because the miner's disabling emphysema did arise from coal dust exposure). 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, miners invoking against the federal government were effectively entitled to benefits even though they were not disabled by clinical pneumoconiosis.

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

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[36] Given the long-established judicial acceptance of the concept of "legal pneumoconiosis," *see Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995), it may be difficult to imagine a time when legal pneumoconiosis was not compensable. But before 1978, that was the case.

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."[37] 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 avoided the constitutional controversy by holding that section 921(c)(4)'s rebuttal-limiting sentence "is inapplicable to operators." *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

[37] 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.

(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, a rebuttal method that "would otherwise be available" 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).[38] As a result, the scenario 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

[38] *See supra* note 14.

pneumoconiosis.[39] 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.[40]

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

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[39] The irrelevance of the rebuttal-limiting sentence in the post-1978 regime is similarly illustrated by the Court's description of its effect, which was 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[.]" 428 U.S. at 34. Today, of course, every respiratory or pulmonary impairment arising from coal mining *is* a case of (legal) pneumoconiosis.

[40] 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 has been expanded to include legal pneumoconiosis, "[t]he only ways that any liable party—whether a mine operator or the government—can rebut the fifteen-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 directly applied to operators, it encompassed 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.

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.[41] It is also consistent with the plain text of section 921(c)(4), which is 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

[41] 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 be permissible. 428 U.S. at 37 and n.40 (observing that "the role of regulations is not merely interpretive; they may instead be designedly creative in a substantive sense, if so authorized").

substantially-contributing-cause standard, or any other standard.[42] Island Creek's argument that the ALJ's use of the rule-out standard was error should be rejected.

[42] Island Creek speculates that the rule-out standard "derives from" section 921(c)(4)'s rebuttal-limiting sentence. Pet. Br. 7, 15. But 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's preamble and the fact that the rule-out standard also applied to 20 C.F.R. § 727.203's interim presumption, which obviously did not derive from section 921(c)(4)'s text.

## CONCLUSION

Island Creek's legal challenges to the "rule-out" standard 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 contains 6,356 words, as counted by Microsoft Office Word 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, copies of the Director's brief were 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.[43]

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