No. 14-3719

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PREMIUM COAL CO., INC.;
OLD REPUBLIC INSURANCE CO.,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS;
REDDIN BYRGE,

Respondents

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

CORRECTED BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN FRANK JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

KATHLEEN H. KIM
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5326

Attorneys for the Director, OWCP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Regulations:

Other Administrative Materials:

Miscellaneous:

STATEMENT REGARDING ORAL ARGUMENT

This case presents an issue of first impression before this Court. The Director, Office of Workers' Compensation Programs, believes that oral arugment may materially aid the Court in the resolution of this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3719

PREMIUM COAL CO., INC.;
OLD REPUBLIC INSURANCE CO.,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS;
REDDIN BYRGE,

Respondents

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

---

CORRECTED BRIEF FOR THE FEDERAL RESPONDENT

JURISDICTIONAL STATEMENT

This case involves a 2010 claim for benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C. §§ 901-944 (2012), filed by Reddin Byrge, a former coal miner.[1] On January 16, 2013, Administrative Law Judge Daniel F. Solomon (the ALJ) issued a decision awarding Byrge benefits and ordering his former

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

employer, Premium Coal Co., Inc., and its insurance carrier, Old Republic Insurance Co. (together, Premium Coal or the employer), to pay them. Appendix, page (A.) 17. Premium Coal appealed this decision to the United States Department of Labor Benefits Review Board (Board) on February 11, 2013, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award on February 24, 2014, (A.10.) and denied Premium Coal's motion for reconsideration on May 28, 2014, (A.9.). Premium Coal petitioned this Court for review on July 23, 2014. A.1. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Byrge's exposure to coal-mine dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in Tennessee, Director's Exhibit (DX) 5, within this Court's territorial jurisdiction. [2]

[2] The Director's Exhibits are included in the Board's September 2, 2014 Index of Documents but are not paginated. The DX citation is employed for the reader's convenience to refer to record documents that are not also part of the Petitioner's Appendix.

STATEMENT OF THE ISSUES[3]

(1) In 2010, Congress restored a statutory presumption that former miners who have a totally disabling respiratory or pulmonary condition and worked for at least fifteen years in either underground coal mines or surface mines with "substantially similar" conditions are rebuttably presumed to be totally disabled by pneumoconiosis, and therefore entitled to federal black lung benefits. 30 U.S.C. § 921(c)(4). The implementing regulation provides that time worked in surface mines counts toward this fifteen-year presumption if the miner proves that he or she was "regularly exposed to coal-mine dust while working there." The first issue presented is whether 20 C.F.R. § 718.305(b)'s "regularly exposed to coal-mine dust" invocation standard is a permissible interpretation of the statute.

(2) The regulation implementing the fifteen-year presumption provides that it can be rebutted if an employer proves that the miner does not have pneumoconiosis arising out of coal mine employment or that "no part" of the miner's disability is due to pneumoconiosis. 20 C.F.R. § 718.305(d)(1)(ii). The second issue presented is whether 20 C.F.R. § 718.305(d)(1)(ii)'s "no part" rebuttal standard is a permissible interpretation of the statute.

---

[3] In addition to these legal arguments, Premium Coal also challenges the ALJ's evaluation of the evidence. These substantial-evidence challenges are not addressed in this brief. The Director argues only that, assuming that the ALJ's fact-findings are supported by substantial evidence, there is no legal error in awarding benefits based on those facts.

(3) Byrge filed an unsuccessful claim for federal black lung benefits in 2007. Consequently, to succeed on this claim he is required to demonstrate that his condition has changed by proving, with evidence addressing his current condition, that he now satisfies one of the elements of entitlement previously decided against him. The third issue presented is whether the Board's ruling that Byrge could utilize the fifteen-year presumption to prove a change in condition violates principles of finality.

STATEMENT OF THE CASE

Because the Director addresses only Premium Coal's legal challenge to the award of BLBA benefits, a detailed recounting of the procedural history and underlying medical evidence is unnecessary. The critical background facts are the relevant statutory and regulatory provisions and their application in the decisions below.

A. Statutory and Regulatory Background

1. The Black Lung Benefits Act

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1.[4]

[4] Unless otherwise noted, all regulatory citations are to the 2014 Code of Federal Regulations. Several BLBA regulations, including two relevant to this case—20 C.F.R. § 718.305 and 20 C.F.R. § 725.309—were amended in 2013.

Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a).[5] Clinical (or "medical") pneumoconiosis refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs," including the disease medical professionals refer to as "coal workers' pneumoconiosis" or "CWP." 20 C.F.R. § 718.201(a)(1). Clinical pneumoconiosis is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2).[6]

Legal pneumoconiosis is a broader category including "any chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease (whether obstructive or restrictive) or respiratory impairment that is "significantly related to, or substantially aggravated by" exposure to coal mine dust "arises out of coal mine employment" and therefore is legal pneumoconiosis; coal mine dust need not be the sole or even primary cause of the disease. 20 C.F.R. § 718.201(b).[7]

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, 59118 (Sept. 25, 2013).

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

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

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

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

The Act contains several presumptions designed to aid claimants in establishing that they are totally disabled by pneumoconiosis arising out of coal mine employment. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act prescribes several 'presumptions' for use in determining compensable disability[.]"). One such presumption, 30 U.S.C. § 921(c)(4)'s "fifteen-year presumption," is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in aboveground mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from "a totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If so, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis" and therefore entitled to benefits. *Id.*[8]

Congress enacted the fifteen-year presumption in 1972, revoked it in 1981,

[8] In addition to total disability and fifteen years of qualifying employment, 30 U.S.C. § 921(c)(4) also requires that at least one "chest roentgenogram" [*i.e.*, x-ray] submitted in connection with the claim" must be interpreted as negative for complicated pneumoconiosis—a particularly advanced form of clinical pneumoconiosis—for the claimant to invoke the presumption. If the x-ray evidence uniformly demonstrates complicated pneumoconiosis, the claimant is entitled to a separate, irrebuttable presumption of entitlement under 30 U.S.C. § 921(c)(3) and 20 C.F.R. § 718.304, and "there would have been no need to invoke the [rebuttable fifteen-year] presumption." *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), *quoted in Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011). Because none of Byrge's x-rays were read as showing complicated pneumoconiosis, this element of the fifteen-year presumption is not at issue.

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

On September 25, 2013, the Department of Labor promulgated a regulation, 20 C.F.R. § 718.305, implementing the fifteen-year presumption as restored in 2010.[9] The revised regulation applies to all claims affected by the statutory amendment, s*ee* 20 C.F.R. § 718.305(a); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 489 (6th Cir. 2014), and provides standards governing how the presumption is invoked and rebutted.

[9] 78 Fed. Reg. 59102, 59114-15 (now codified at 20 C.F.R. § 718.305). Full versions of both the 2014 and 2012 versions of 20 C.F.R. § 718.305 are provided in the appendix to this brief.

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

The statute does not elaborate on how surface miners can prove that they worked in conditions "substantially similar" to those in underground coal mines. That gap is filled by the regulation implementing the presumption, which provides that conditions in a surface mine "will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was *regularly exposed to coal-mine dust* while working there." 20 C.F.R. § 718.305(b)(2) (emphasis added).

The previous version of section 718.305 did not specifically address this issue.[10] The Director asserts that the previous regulation was interpreted consistently with the express language of the current version. *See Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 489-90 (6th Cir. 2014) ("The 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption. . . . It also reflects an interpretation of the regulation that has been accepted by both of the courts of appeals that have considered the issue.") (citations omitted). Premium Coal appears to disagree with this. *See* OB 27-28.

[10] 20 C.F.R. § 718.305 was originally promulgated in 1980. Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis, 45 Fed. Reg. 13677, 13692 (Feb. 29, 1980). Aside from the addition of subsection (e) to account for Congress's removal of the presumption in claims filed after 1981, the regulation remained unchanged until the 2013 version was promulgated. *See* 20 C.F.R. § 718.305 (2012).

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

The regulation also specifies how employers (or the Director, in a case where the Black Lung Disability Trust Fund is responsible for the payment of benefits) can rebut the presumption. There are two methods of rebuttal.[11] The first and most straightforward is to establish that the miner does not have a lung disease caused by his or her coal mine employment. This is done by proving the miner does not have either (a) legal pneumoconiosis or (b) clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. § 718.305(d)(1)(i).

The second rebuttal method is to attack the presumed link between pneumoconiosis and the miner's disability. To do so, the employer must prove that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. § 718.305(d)(2)(ii). This is frequently called the "rule-out standard."

---

[11] 20 C.F.R. § 718.305(d)(1) provides:

> (1) Miner's claim. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—
>
> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (see § 718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

The rebuttal provisions in the previous version of the regulation provided for the same methods of rebuttal, albeit in different and less precise language. *See* 78 Fed. Reg. 59105. It allowed employers to rebut the presumption by showing that the miner did not have pneumoconiosis or by ruling out any connection between the miner's disability and pneumoconiosis, albeit in different words. 20 C.F.R. § 718.305(d) (2012) (If the "total disability did not arise *in whole or in part* out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted.") (emphasis added).[12]

3. Subsequent Claims

A miner's medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a latent and progressive disease that may first become detectable—or disabling—after a claimant stops mining. 20 C.F.R. § 718.201(c). For this reason, miners who unsuccessfully pursued benefits in the past are permitted to file "subsequent claims," arguing that they now

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

satisfy the elements of entitlement. 20 C.F.R. § 725.309.

A subsequent claim is not, however, an opportunity to re-litigate the original claim. To prevail on a subsequent claim, a miner must prove, with "new evidence" addressing his present condition, that he now satisfies one of the elements of entitlement decided against him in the earlier claim. 20 C.F.R. § 725.309(c)(4) ("[T]he subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.").[13] If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(c).

[13] Section 725.309 was also amended in September 2013. *See* 78 Fed. Reg. 59102, 59118. These amendments made no substantive change to the regulatory language applicable to this case. But, as the result of two changes unrelated to the issues presented in this case, that language is now located in different subsections of the regulation. *Compare* 20 C.F.R. § 725.309(b), (c)(2-6) (2014) *with* 20 C.F.R. § 725.309(c), (d)(1-5) (2012). Former subsection (a), which applied only to claimants who initially filed BLBA claims before 1974, was deleted. Second, additional language and a new sub-paragraph (1) was added to former subsection (d) (now subsection c) to address subsequent claims for survivor's benefits. Full versions of both the 2014 and 2012 versions of 20 C.F.R. § 725.309 are provided in the appendix to this brief.

B. Factual and Procedural Background

1. Byrge's coal mine employment and smoking history

Byrge worked at surface coal mines, primarily as a tipple operator, for at least fifteen years. A.19, 20, 54, 111. He ceased coal mine work in 1986. A.19, 55, 63, 64. He was a non-smoker. A.48. [14]

2. Byrge's initial claim (2007)

In 2007, Byrge filed his initial claim for BLBA benefits. A.35. His claim was denied by the district director on November 5, 2007.[15] A.36. The district director concluded that the evidence did not show that the miner had pneumoconiosis, that "the disease was caused, at least in part, by the miner's coal mine work," or that the "miner is totally disabled by the disease." A.36. The

---

[14] Premium Coal does not dispute that Byrge's work qualifies him as a miner under the BLBA. *See* Opening brief (OB) 23-25 (summary discussion limited to the validity of the Director's revised regulation, alleged waiver of finality, and the ALJ's consideration of the methods of rebuttal). Nor does Premium Coal deny that Byrge was "regularly exposed to coal-mine dust" during this surface work, as required by 20 C.F.R. § 718.305(b)(2). Instead, Premium Coal's real dispute is with the validity of that regulation. Accordingly, this brief will not summarize the miner's testimony or the other evidence relied on by the ALJ in finding that Byrge worked in conditions substantially similar to conditions in an underground coal mine.

[15] Black lung claims are initially heard by district directors or their designees (typically OWCP claims examiners). *See generally* 20 C.F.R. §§ 725.350-725.351, 725.418-725.421. After the district director issues a proposed decision and order awarding or denying benefits, any party may request that the case be transferred to an ALJ for a de novo hearing. 20 C.F.R. §§ 725.450-725.451.

district director also noted that "a respiratory condition has been established, [and] the claimant is considered to be disabled," and that neither of the private parties disputed this finding. A.39. The denial became final when no party requested a formal hearing. *See* 20 C.F.R. § 725.419.

When Byrge's previous claim was denied in 2007, the fifteen-year presumption was not available because it applied only to claims filed before January 1, 1982. *See* 30 U.S.C. § 921(a), (c)(4) (2000); 20 C.F.R. § 718.305(a), (e) (2012).

3. The current claim

On March 23, 2010, Congress revived the fifteen-year presumption which now applies to all claims that were filed after January 1, 2005 and were pending on or after March 23, 2010. Pub. L. No. 111-148, § 1556(c). There is no dispute that the presumption applies to Byrge's subsequent claim, which was filed in June 2010. On April 15, 2011, the district director issued a proposed decision and order awarding benefits to the miner. DX 28. Premium Coal requested a hearing before an ALJ. *See* 20 C.F.R. § 725.451.

a. ALJ Decision (January 16, 2013, A.17)

The ALJ first acknowledged that this is Byrge's second claim for benefits under the BLBA. A.17. After noting that this is a subsequent claim adjudicated under 20 C.F.R. § 725.309, he found that "[a]lthough the Claimant failed to prove

total disability previously, I find that the Claimant has now established it." A.19, 21-22, 26. The ALJ therefore allowed the subsequent claim. A.27.

Next, the ALJ credited Byrge with a minimum of fifteen years of coal mine employment in surface mines, and considered whether the miner had invoked the fifteen-year presumption by proving that (1) he worked fifteen or more years in conditions "substantially similar" to those in underground mines and (2) he had a totally disabling respiratory or pulmonary impairment.[16] A.19, 20-21. Citing, *inter alia*, the Seventh Circuit's decision in *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988) (holding that "a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment" to satisfy the similarity requirement), the ALJ determined, based on the miner's testimony, that the first invocation criterion was met because Byrge's coal mine dust exposure during his fifteen years of surface mining was "equivalent to work in underground mining." A.20. The ALJ found the second criterion—total respiratory or pulmonary disability—to be satisfied based on pulmonary function test results and the unanimous assessments of the testifying physicians.[17] A.21.

---

[16] There is no dispute that Premium Coal is the responsible operator. A.18.

[17] 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

With these criteria satisfied, the ALJ found the fifteen-year presumption of entitlement invoked, leading to the presumption that Byrge was totally disabled by pneumoconiosis arising out of coal mine employment. A.21. The ALJ then turned to rebuttal, considering whether the medical evidence established either (1) that Byrge had neither clinical nor legal pneumoconiosis or (2) that Byrge's respiratory impairment was not caused by pneumoconiosis. A.22. With respect to whether the miner had clinical pneumoconiosis, the ALJ referred to seven readings of three x-rays (four negative and three positive for clinical pneumoconiosis). A.22. The ALJ found that the most recent x-ray was also the most dispositive because pneumoconiosis is a "progressive and irreversible disease." A.22. Because that x-ray had been read twice—once as positive and once as negative—by equally-qualified readers, the ALJ determined that Premium Coal had failed to prove the absence of clinical pneumoconiosis.[18] A.22.

---

can expel in one second after taking a full breath (forced expiratory volume in one second, or FEV1), the total volume of air that a miner can expel after a full breath (forced vital capacity, or FVC), and the ratio between those two data points. *See* Occupational Safety and Health Administration, U.S. Department of Labor, Spirometry Testing in Occupational Health Programs: Best Practices for Healthcare Professionals, at 1-2 (2013), available at https://www.osha.gov/Publications/OSHA3637.pdf. Pulmonary function tests resulting in certain values established in the regulations are evidence of total disability in BLBA claims. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B.

[18] Premium Coal does not challenge this factual finding before this Court.

Next, the ALJ considered whether the medical evidence disproved the existence of legal pneumoconiosis. A.22-26. The ALJ summarized the testimony of Premium Coal's medical experts, Drs. Rosenberg and Tuteur. Both doctors testified that Byrge suffered from a totally disabling pulmonary disease in the form of bronchiectasis. A.22-24.[19] They attributed Byrge's bronchiectasis entirely to rheumatoid arthritis and not at all to his coal-mine employment. *Id.*

The ALJ agreed that Byrge "has rheumatoid arthritis and bronchiectasis." A.24. But he was not convinced by Dr. Rosenberg's or Dr. Tuteur's claim that Byrge's bronchiectasis was not caused or aggravated by his exposure to coal-mine dust, explaining that:

> neither proved that bronchiectasis is mutually exclusive with the lung impairments referenced by the definition of legal pneumoconiosis. Neither account for the 15 years of mining exposure. Neither have presented a reasoned basis how the 15 years of mining exposure precluded aggravation of rheumatoid arthritis and bronchiectasis.

A.24-25.

Turning specifically to Dr. Rosenberg's testimony, the ALJ found that Dr. Rosenberg "sets forth a bald opinion that [Byrge's bronchiectasis] is entirely due to arthritis without a consideration of" the miner's coal dust exposure. A.25. The ALJ held that Dr. Rosenberg's opinion was unpersuasive because "[i]t is just as

---

[19] Bronchiectasis is the "dilation and destruction of larger bronchi [air passages] caused by chronic infection and inflammation." The Merck Manual at 1939 (19th Ed. 2011).

reasonable" that bronchiectasis falls within the definition of legal pneumoconiosis. A.25. Moreover, the ALJ determined that while Dr. Rosenberg explained how bronchiectasis is one manifestation of rheumatoid arthritis, "this does not mean that it is always diagnostic of rheumatoid arthritis and mutually exclusive to legal pneumoconiosis." A.25. Thus, he concluded that "the Rosenberg opinions do not exclude aggravation or a combination of causes." *Id.*

The ALJ then discussed Dr. Tuteur's testimony. A.23-26. Dr. Tuteur testified that the miner's bronchiectasis is not "related to, aggravated by, or caused by either inhalation of coal mine dust or the development of coal mine dust-induced pulmonary process." A.75. The ALJ, in turn, gave three reasons why he found this opinion to be insufficient and not credible. First, Dr. Tuteur reported that the miner's "anatomical findings are inconsistent with coal mine-induced obstructive lung disease," but he did not offer any basis for his conclusion. A.25. Second, the ALJ found that most of the factors that Dr. Tuteur noted regarding Byrge's medical symptoms (including pulmonary examination abnormalities, oxygen gas exchanges, and radiographs) were "hallmarks of clinical, rather than legal pneumoconiosis." A.26. And third, the ALJ discredited Dr. Tuteur's opinion because he "mischaracterized the [miner's] longitudinal history" which showed that the miner's impairments were worsening over time. A.26 (Byrge's "need for

oxygen has increased and the Claimant is no longer completely ambulatory. Therefore, the impairments are worsening.").

Finding that the medical evidence failed to disprove clinical and legal pneumoconiosis—which eliminated rebuttal by the first method—the ALJ then considered whether Premium Coal established the second method of rebuttal by proving that pneumoconiosis played no part in causing Byrge's disability. A.26.

After pointing out that Drs. Rosenberg and Tuteur "failed to render a diagnosis of pneumoconiosis," the ALJ discounted their opinions that no part of the miner's respiratory impairment was caused by pneumoconiosis. A.26 (citing *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231, *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995)). The ALJ thus concluded that Premium Coal had failed to establish rebuttal under the second method. A.26.

Having found that the fifteen-year presumption of entitlement was invoked and not rebutted, the ALJ awarded BLBA benefits. A.27.

b. Benefits Review Board's Decision (February 24, 2014, A.10)

The Board affirmed the ALJ's award of benefits. On appeal, Premium Coal argued that the ALJ erred, *inter alia*, in finding that Byrge satisfied the fifteen-year presumption's "substantial similarity" requirement, in finding the fifteen-year

presumption unrebutted, and in finding that Byrge had established a change in condition. A.11, 12-13, 14-15. All three arguments were rejected by the Board.

On the invocation issue, the Board pointed out that "a claimant is not required to present evidence of the conditions in an underground mine", but must establish comparable conditions by showing that the miner was exposed to sufficient coal mine dust at the aboveground mine." A.13 (citing *Midland Coal Co.*, 855 F.2d at 512). And it explained that, under the implementing regulation, surface miners need only prove that they were "regularly exposed to coal-mine dust" to qualify for the fifteen-year presumption. A.13 (quoting 20 C.F.R. § 725.305(b)(2)). Applying those standards, the Board concluded that the ALJ "acted within his discretion in accepting claimant's hearing testimony regarding the extent to which he was exposed to coal mine dust" and "affirm[ed], as supported by substantial evidence, the [ALJ's] finding that claimant had at least fifteen years of qualifying coal-mine employment for the purpose of invoking the presumption[.]" A. 13.

The Board also rejected Premium Coal's rebuttal argument. A.14-16. The Board held that the "administrative law judge acted within his discretion in determining that, although Drs. Rosenberg and Tuteur explained why they ruled out coal dust exposure as a *cause* of claimant's bronchiectasis, they did not set forth the rationale underlying their opinion that coal dust exposure did not

aggravate claimant's bronchiectasis." A.14-15. The Board also held that it was appropriate for the ALJ to give less weight to Dr. Rosenberg's and Dr. Tuteur's opinions on disability causation because they did not diagnose legal pneumoconiosis even though pneumoconiosis was established by presumption in this case. A.16.

Regarding the miner's subsequent claim, the Board noted that the ALJ erred in finding that the miner demonstrated a change in condition of entitlement by proving that he is totally disabled because that element was not decided against him in his 2007 claim. A.13 n.5. However, the Board held the error was harmless because the miner successfully invoked the section 411(c)(4) presumption that he has pneumoconiosis and is totally disabled by pneumoconiosis—two elements that were decided against the miner in the earlier claim—thereby satisfying the requisite change in an applicable condition of entitlement. A.13 n.5. Accordingly, the Board affirmed the award. A.16. Premium Coal filed a motion for reconsideration, which the Board denied on May 28, 2014. A.9.

SUMMARY OF THE ARGUMENT

The ALJ and Board applied the correct legal standards in concluding that Byrge successfully invoked section 921(c)(4)'s fifteen-year presumption, that Premium Coal failed to rebut it, and that Byrge had established a change in condition sufficient to permit this subsequent claim to proceed.

The regulatory invocation standard, allowing surface miners who were regularly exposed to coal-mine dust to invoke the fifteen-year presumption, is a codification of the Director's longstanding interpretation of the Act, has been adopted by both courts of appeals to consider the issue, and was implicitly reaffirmed by Congress when it re-enacted the presumption in 2010. Contrary to Premium Coal's suggestion, it is entirely consistent with the intent of Congress and should be upheld as a valid regulation.

The ALJ also applied the correct standard in judging Premium Coal's attempt to rebut the presumption. After failing to prove that the miner did not have pneumoconiosis (*i.e.*, that exposure to coal-mine dust did not cause or aggravate Byrge's bronchiectasis), the company could rebut the presumption only by showing that "no part" of the miner's respiratory disability was caused by that disease. Premium Coal's challenge to the "no part" standard is foreclosed by *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013). In any event, the result was preordained under any standard because Premium Coal's own doctors attributed Byrge's disability to bronchiectasis.

With respect to the miner's subsequent claim, the fifteen-year presumption may be applied to prove a change in condition of entitlement as a matter of law, pursuant to the plain language of the BLBA's implementing regulations. Thus, the Board properly held that the ALJ committed harmless error by finding a change in

condition regarding an element that was established in the miner's first claim.

ARGUMENT

A. Standard of Review

The Court exercises plenary review with respect to questions of law. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). The Director's interpretation of the BLBA, as expressed in his implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013)

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

The fifteen-year presumption is available to miners who worked in surface mines if "the conditions of [the] miner's employment" were "substantially similar to conditions in an underground mine." 30 U.S.C. § 921(c)(4). The implementing regulation explains that conditions in surface mines "will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. § 718.305(b)(2).

Premium Coal's lead argument is that the new regulation is invalid because it does not "require[] that surface miners prove what dust conditions prevail in an

underground mine[.]" OB 23, 26-29. This issue was recently addressed by the Tenth Circuit, which upheld the revised regulation's "regularly exposed" standard as a permissible construction of the Act. *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014). Like the employer-petitioner in *Antelope Coal*, Premium Coal has fallen far short of the showing necessary to invalidate a regulation promulgated after notice-and-comment rulemaking.

While the decision is not cited in Premium Coal's opening brief, this Court has already had occasion to apply the new regulation. *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483 (6th Cir. 2014), held that the revised regulation applies retroactively to cases pending when it was promulgated because it did not change the law. As this Court explained, "[t]he 2013 regulation reflects the DOL's longstanding interpretation of the statutory presumption," an interpretation "that has been accepted by both of the courts of appeals that have considered the issue." 726 F.3d at 489-90 (citing *Antelope Coal*, 743 F.3d at 1342; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001) (citing *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988))).

The employer-petitioner in *Central Ohio Coal* challenged the validity of the new regulation in its brief, but waived the point at oral argument. 762 F.3d at 489 n.2. Premium Coal continues that challenge here. But, before turning to the merits of the issue, it is important to clarify what Premium Coal is not challenging. First,

it does not argue that the regulation is inapplicable because it was promulgated after the ALJ decision (nor could it, in light of *Central Ohio Coal)*. Second, it does not dispute the ALJ's finding that Byrge's dusty working conditions satisfy the regulation's "regular exposure to coal-mine dust" requirement. Instead, the employer challenges the regulation on its merits.

Because the Director's long-held interpretation of the presumption's similarity requirement is now expressed in a regulation promulgated after notice-and-comment procedures, Premium Coal's challenge is governed by *Chevron's* familiar two-step analysis. As this Court recently explained, regulations implementing the BLBA will be upheld "as long as [1] Congress has not spoken directly on the issue and [2] the agency's interpretation is reasonable." *Island Creek Kentucky Min.*, 737 F.3d at 1058 (citing *Chevron*, 467 U.S. at 843).

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

The first step of the *Chevron* analysis is straightforward. Section 921(c)(4) provides no guidance about what factors to consider in determining whether an aboveground miner worked under conditions "substantially similar" to conditions in underground mines. When called upon to interpret this requirement, a Seventh Circuit panel confessed that "[it could] discern no plain meaning of the requirement of 'substantial similarity,'" noting that "immediately apparent [was] the fact that the Act does not specify whether a claimant must establish similarity

to a particular underground mine, a hypothetical underground mine, the best, worst, or an average underground mine." *Midland Coal*, 855 F.2d at 511. Nor does the statute explain *how similar* an aboveground miner's working conditions must be to conditions underground to qualify as "substantial[ly]" similar, another source of ambiguity. Congress therefore left a gap for the Department to fill.

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

The Act is predicated on the fact that dusty conditions exist in underground mines and that these conditions are the cause of black lung disease.[20] *See Midland*

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

Coal, 855 F.2d at 512 ("Congress, at the very least, was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis[.]"). The crucial condition that exists in underground mines, for purposes of the BLBA, is coal-mine dust. Aboveground miners who are regularly exposed to that dust are therefore experiencing conditions similar—in the respect relevant to the BLBA—to conditions in underground mines. *See* 78 Fed. Reg. 59104-05. Revised section 718.305(b)(2)'s "regularly exposed to dust" standard is therefore consistent with the statutory text.[21]

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

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

In the preamble to the revised regulation, the Department explained why it

---

aboveground miners in 1972. *See* 30 U.S.C. § 902(d) (1972).

[21] While the "regularly exposed to dust" standard is not onerous, Premium Coal's argument that the regulation eliminates the distinction between surface and underground miners, OB 23-24, 28-29, is not true. Surface miners do bear the burden of proving that they were exposed to coal-mine dust for the requisite fifteen years. *Midland Coal*, 855 F.2d at 512. An employer is also free to develop evidence establishing, for example, that the miner was not exposed to coal dust (or was only exposed to a de minimis amount) for a substantial period of surface employment. If so, that period cannot be used to establish the required fifteen years. As the Director made clear in the preamble to the regulation, "[t]he term 'regularity' [was] added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden." 78 Fed. Reg. 59105. Miners who worked aboveground for more than fifteen years can fail to invoke the presumption. *See, e.g.*, *Hansbury v. Reading Anthracite Co.*, BRB No. 11-0236 BLA, 2011 WL 6140714 (DOL Ben. Rev. Bd., Nov. 29, 2011).

rejected competing interpretations of section 921(c)(4)'s "substantial similarity" language. For example, the Department rejected suggestions to "adopt technical comparability criteria, such as requiring a claimant to produce scientific evidence specifically quantifying the miner's exposure to coal dust in non-underground mining," as impractical because many miners do not have access to such information. 78 Fed. Reg. 59105. As the Supreme Court explained, "a showing of the degree of dust concentration to which a miner was exposed [is] a historical fact difficult for the miner to prove[.]" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976).

The other side of the proposed comparison—establishing what conditions prevail in underground mines—presents similar impracticalities for claimants. The dust conditions in different underground coal mines, and in different sections of the same underground mine (which includes areas on the surface as well as underground), vary significantly.[22] In any event, aboveground miners are unlikely

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

to have access to detailed information about dust conditions in underground mines. Nor could the Department avoid this problem by developing an objective, universal standard representing conditions in underground mines, effectively setting a target that aboveground miners must hit to establish substantial similarity. Because there is no practical way for most aboveground miners to objectively quantify their dust exposure, their "dust exposure evidence will be inherently anecdotal[.]" 78 Fed. Reg. 59105. As a result, "it would serve no purpose for the Department to "develop an objective, and therefore dissimilar, benchmark of underground mine conditions for comparison purposes." *Id.*

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

---

work took place, for BLBA purposes, in an underground mine.

b. The Director's interpretation of section 921(c)(4) was adopted by the only court of appeals to consider the issue before the revised regulation.

Revised 718.305(b)(2) is a new regulation, but its interpretation of section 921(c)(4)'s similarity requirement is not new. As this Court recognized in *Central Ohio Coal*, it merely codifies the Department's longstanding interpretation of the regulation. Even before the regulation, "[t]he only court of appeals to address the issue ha[d] long held that surface miners do not need to provide evidence of underground mining conditions to compare with their own working conditions." *Antelope Coal*, 743 F.3d at 1342 (citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995); *Dir., OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988)); *see also* 78 Fed. Reg. 59104-05. As the Tenth Circuit recently explained in upholding the regulation against a similar challenge, those Seventh Circuit decisions "validate the Department's longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions" to invoke the fifteen-year presumption. *Antelope Coal*, 743 F.3d at 1342 .

In *Director, OWCP v. Midland Coal Co.*, the Seventh Circuit rejected an employer's argument that surface miners must present evidence addressing the conditions in underground mines to prove "substantial similarity." 855 F.2d at 512. Instead, a surface miner "is required only to produce sufficient evidence of

the surface mining conditions under which he worked." *Id.* *Accord*, *Blakley*, 54 F.3d at 1319 (holding that an ALJ, "relying on the testimony of two witnesses, who both testified that Blakley was exposed to coal dust while a surface miner," permissibly concluded that the miner was "exposed to dust conditions substantially similar to those underground"; explaining that the claimant "'bears the burden of establishing comparability' but 'must only establish that he was exposed to sufficient coal dust in his surface mine employment'") (quoting *Midland Coal*, 855 F.2d at 512-13); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80 (7th Cir. 2001) (holding that miner's "unrebutted testimony" that "clearly delineated, in objective terms, the awful conditions on the surface of the mine[]" was "sufficient" to support a finding of substantial similarity).[23]

The Seventh Circuit recently reaffirmed this position in a case applying the fifteen-year presumption as revived in 2010. *Consolidation Coal Co. v. Director, OWCP*, 732 F.3d 723, 732-33 (7th Cir. 2013) (holding that the miner's credible testimony that he was exposed to coal and rock dust "all the time" was "more than

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

enough evidence" to support the ALJ's finding that the miner worked in conditions substantially similar to an underground coal mine). The Board, which has nationwide jurisdiction over BLBA claims, applies the same standard in cases outside the Seventh Circuit's jurisdiction. *Harris v. Cannelton Indus., Inc.*, 24 Black Lung Rep. (MB) 1-217, 1-223 nn.3, 5, 2011 WL 1821519 (Ben. Rev. Bd. 2011) (claim within the Fourth Circuit's jurisdiction). And, as mentioned above, the only court of appeals to consider the regulation's validity (the Tenth) upheld it as a permissible interpretation of the statute. *Antelope Coal*, 743 F.3d at 1344.

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

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

amendment. Instead, Congress chose to re-enact the provision without changing any of its language. This decision can only be interpreted as an endorsement of the Director's and the Seventh Circuit's longstanding interpretation of the "substantial similarity" requirement.

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

Premium Coal argues that the regulation is inconsistent with Congressional intent as expressed in 1972 when the fifteen-year presumption was first enacted. OB 10-11. But the snippets of legislative history Premium Coal relies on are largely irrelevant, and are certainly insufficient to invalidate a validly-promulgated regulation. Premium Coal suggests that Congress never wanted to make it easy for surface miners to obtain BLBA benefits. OB 10-11. In support, the employer cites a statement from one congressman who, in advocating for the bill in 1972, stated that the "very limited prevalence studies conducted by the Public Health Service indicated that surface coal miners were not subject to pneumoconiosis." OB 11. Premium Coal fails to explain, however, why the fact that Congress arguably assumed that few surface miners would be found entitled to benefits provides insight concerning the limits Congress intended to put on surface miners' eligibility for the presumption. The most straightforward way to rebut the presumption, after all, is to show that the miner does not have pneumoconiosis.

Premium Coal next argues that "Congress' [sic] understanding of the

differences between surface and underground mining" was reflected in the fact that "Congress proposed—and enacted—a higher tax for underground-mined coal." OB 12. While this arguably suggests that Congress assumed more underground coal miners than surface miners would be found entitled to benefits, it again gives no insight to the similarity requirement, and Premium Coal proffers none.

The employer also finds significance in the fact that the 1980 revocation of the fifteen-year presumption occurred during a time when Congress was investigating whether unqualified miners were being found entitled to benefits. OB 12-13. But since the 1980 revocation affected both underground miners and surface coal miners—both lost entitlement to the fifteen-year presumption—this argument again offers no insight concerning the similarity requirement. More importantly, Congress's decision to reinstate the presumption in 2010 renders the 1980 revocation irrelevant.

The most that can be said about the limited legislative history of section 921(c)(4)'s "substantial similarity" requirement as originally enacted in 1972 is that it is unclear and largely unexplained. On the other hand, the legislative history of section 921(c)(4) as a whole is clear and consistent with the Director's interpretation of the "substantial similarity" requirement. "Congress enacted the presumption to '[r]elax the often insurmountable burden of proving eligibility'" miners faced in the claims process. 78 Fed. Reg. 59106-07 (quoting S. Rep. No.

92-743 at 1 (1972), 1972 U.S.C.C.A.N. 2305, 2316-17). Imposing a demanding standard on surface miners attempting to invoke the presumption—especially a quantitative standard requiring evidence that BLBA claimants rarely have access to, *see supra* at 27-28—would hardly be consistent with that intent. The Director's "regularly exposed to dust" standard is.

It is also important to consider the limited impact this standard has in any individual claim. Proving that a surface miner worked in conditions "substantially similar" to conditions underground is only a small part of the puzzle. Fifteen years of qualifying work does not, standing alone, trigger anything. Miners must also prove that they suffer from a totally disabling respiratory or pulmonary impairment to invoke section 921(c)(4)'s presumption of entitlement. Moreover, an employer can rebut that presumption by showing either that the miner does not have pneumoconiosis or that pneumoconiosis does not contribute to the miner's disability. Given these other substantial impediments to a successful claim, it is unnecessary to impose an onerous dust-exposure requirement on surface miners as a gatekeeping mechanism.[24]

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

In sum, the Director's regular exposure standard is a reasonable interpretation of section 921(c)(4)'s similarity requirement and is entitled to this Court's deference. Premium Coal's argument that the revised regulation is invalid because the statute requires a more direct or quantifiable comparison between an aboveground miner's work and conditions in a real or hypothetical underground mine should be rejected. And, while the ALJ's decision was made before the current regulation was promulgated, his finding that Premium Coal's surface-mine work was sufficient to invoke the fifteen-year presumption should be affirmed as entirely consistent with the regulation.

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

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

should be established if "the claimant's pneumoconiosis did not *substantially* contribute to the miner's disability." OB 38.

Unfortunately for Premium Coal, this Court already adopted the rule-out standard in *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) ("Where the burden is on the employer to disprove a presumption, the employer must 'rule out' coal mine employment as a cause of the disability.").[25] While *Big Branch Resources* did not directly apply the current regulation, the panel noted that the position it adopted was "in accord with those new regulations." *Id.* at 1071 n.5. And the prior version of the regulation (which was promulgated in 1980) also adopted the rule-out standard, albeit in different language. *See* 20 C.F.R. § 718.305(d) (2012) (rebuttal established if the miner does not have pneumoconiosis or if the miner's "total disability did not arise *in whole or in part* out of pneumoconiosis[.]") (emphasis added); *see also* 78 Fed. Reg. 59107 (explaining that the current regulation's "in no part" standard was designed to "simplify and clarify the 'in whole or in part standard'").

Premium Coal's opening brief simply ignores *Big Branch Resources.* Instead, it argues that the rule-out standard is inconsistent with *Usery v. Turner*

[25] Premium Coal's claim that "[t]his court has not addressed the question of whether the fifteen-year presumption can be rebutted by proof that a claimant's pneumoconiosis was too mild to have substantially contributed to his or her total disability[,]" OB 38, is simply incorrect. The employer appears to have overlooked *Big Branch Resources,* which is not cited in its brief.

Elkhorn Mining Co., 428 U.S. 1 (1976), and *Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014). OB 24-27. But the *Usery* argument was raised and rejected in both *Big Branch Resources* and the rulemaking process. *See Big Branch Resources*, 737 F.3d at 1070, 1071 n.5 (recognizing that the preamble to the current regulation addresses the employer's arguments against the rule-out standard, including the argument that it is contrary to *Usery*) (citing 78 Fed. Reg. 59105-06).[26] And *Arch on the Green* is simply irrelevant because it did not involve the fifteen-year presumption. *Arch on the Green* stands for the unexceptional proposition that miners who have ***not*** invoked the fifteen-year presumption must prove that "pneumoconiosis was 'a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment'" to be awarded benefits. 761 F.3d at 599 (quoting 20 C.F.R. § 718.204(c)(1)). That decision says nothing about section 718.305(d)(2), which plainly requires employers to show that pneumoconiosis played "no part"—not merely any substantial part—in a miner's disability to rebut the fifteen-year presumption.

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

Arch on the Green therefore does nothing to undermine *Big Branch Resources*, which entirely disposes of Premium Coal's challenge to the rule-out standard.[27]

In any event, the disability-causation rebuttal standard played no role in the outcome of this case. Premium Coal's doctors admitted that Byrge was totally disabled by a respiratory disease, bronchiectasis. The primary medical dispute was about *disease*-causation—*i.e.*, whether Byrge's bronchiectasis was legal pneumoconiosis. Due to the fifteen-year presumption, it was the employer's burden to prove that the disease was not caused or aggravated by Byrge's occupational exposure to coal-mine dust. The company's doctors failed to do that to the ALJ's satisfaction. As a result, the bronchiectasis is legal pneumoconiosis and, given the admission that Byrge's disability is due to bronchiectasis, rebuttal on disability-causation grounds was logically impossible. This is not an improper limitation on the employer's ability to rebut, but simple common sense. *See Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) ("Because Ramage was found to be totally disabled and because all medical experts agreed

[27] Premium Coal also relies on a concurring opinion in *Mingo Logan Coal Co. v. Owens*, 742 F.3d 550 (4th Cir. 2013), which criticizes the rule-out standard. To eliminate any possible confusion, the quotation and analysis on pages 37-38 of Premium Coal's brief are from the concurring opinion, not the majority opinion. The majority found it unnecessary to address the "dispute over the correct rebuttal standard" because it had no impact on the outcome of that case. 742 F.3d at 555. In any event, an out-of-circuit concurring opinion that predated the current regulation has no persuasive value in light of *Big Branch Resources.*

that Ramage's pulmonary problems were a significant cause of his total disability, the only question remaining was whether coal mine employment caused the pulmonary problems.").

D. The Board's ruling that Byrge established a change in condition was consistent with the regulations and this Court's precedents.

In addition to its attack on the ALJ's invocation and rebuttal findings, Premium Coal makes two arguments in support of its notion that the Board erred in ruling that Byrge had established a change in condition sufficient to allow this subsequent claim to proceed. The first is a broad attack on the subsequent-claim regulation. The second is a less ambitious objection to the Board's reference to the fifteen-year presumption in finding that Byrge's condition had changed. Both should be rejected because they are contrary to the BLBA's implementing regulations as interpreted by the Court.

1. 20 C.F.R. § 725.309 and its application by the Board

As explained *supra* at 10-11, miners who unsuccessfully pursued BLBA benefits in the past are permitted to file subsequent claims, arguing that they now satisfy the elements of entitlement. 20 C.F.R. § 725.309. To ensure that the previous denial's finality is respected, a subsequent claimant must prove that his condition has changed. *See, e.g., Buck Creek Coal Co. v. Sexton* (*Sexton*), 706 F.3d 756, 758-60 (6th Cir. 2013) (traditional principles of res judicata do not bar subsequent claims because the claimant is required to demonstrate a change in

condition). The method of proving such a change is prescribed by regulation: the miner must establish, with "new evidence"—*i.e.*, evidence addressing the miner's condition after the previous claim was denied—that he now satisfies one of the elements of entitlement that was decided against him in the earlier claim. 20 C.F.R. § 725.309(c)(4) ("the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.").[28] If he fails to do so, the subsequent claim will be denied. *Id*.

If the new evidence establishes a condition of entitlement previously decided against the miner, the subsequent claim is allowed and the ALJ goes on to consider all the evidence, old and new, to determine whether the miner satisfies all four elements of entitlement. 20 C.F.R. § 725.309(c)(5) ("If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim [other than those established by waiver or stipulation] shall be binding on any party in the adjudication of the subsequent claim."). Even if the claimant ultimately prevails in the subsequent claim, the prior

[28] As explained *supra* at n.13, the 2013 regulatory amendments made no substantive change to the regulatory language relevant to this case, but the location of that language moved. In particular, the language in subsection (c)(2)-(6) was formerly in subsection (d)(1)-(5).

denial remains effective in the sense that he cannot be awarded benefits for any period prior to that denial. 20 C.F.R. § 725.309(c)(6).

Determining whether a miner's condition has changed does not require the fact-finder to compare the evidence underlying the previous claim with the evidence in the current claim to judge whether it proves a literal change in the miner's physical condition. Indeed, that inquiry is forbidden. Instead, the fact-finder "will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present." *Cumberland River Coal Co. v. Banks (Banks)*, 690 F.3d 477, 486 (6th Cir. 2012); *accord Sexton*, 706 F.3d at 759. Thus, this Court "construe[s] the term 'change' to mean 'disproof of the continuing validity' of the original denial, rather than the 'actual difference between the bodies of evidence presented at different times.'" *Banks*, 690 F.3d at 486 (quoting *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc) and *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 609 (6th Cir. 2001)).

The ALJ misapplied the subsequent-claim regulation. He found that Byrge had established a change in condition because "the Claimant failed to prove total disability previously, . . . [but] has now established it." A.19. This was a mistake because the Byrge had established total disability in his initial claim. *See* A. 35-40.

But Premium Coal does not argue for reversal on this ground in its opening brief. Nor could it. As the Board correctly observed, this error was harmless.

While Byrge established total disability in his first claim, he failed to establish any of the remaining elements (disease, disease-causation, disability-causation). In the present claim, he established all of those elements with the aid of the fifteen-year presumption. He proved, with evidence addressing his current condition, that he is totally disabled. This, combined with the fact that Byrge had more than fifteen years of qualifying employment, invoked the presumption. When Premium failed to rebut that presumption by proving (with all available evidence) that Byrge did not have pneumoconiosis, those elements were established. As a matter of law, this means that Byrge's condition changed from the time his previous claim was denied.

2. 20 C.F.R. § 725.309 does not violate res judicata

Premium argues that the Board's decision should be vacated as "a significant departure from the rules of finality[.]" For the most part, this consists of a discussion opposing the very idea of subsequent claims, or at least the rule that changes in condition are determined by comparing new evidence with the holding in a previous claim rather than the evidence underlying that earlier holding. OB 29-34. According to the employer, the "founding fathers would not approve" of 20 C.F.R. § 725.309(c), a scheme "concocted" by DOL "with no apparent

authority" that returns us "to the days when finality of judgments made no difference if the losing party was a friend of the king." OB 32.

This general attack on 20 C.F.R. § 725.309(c) is answered by its own climax: an admission that this Court affirmed the regulation in *Banks* (2012) and *Sexton* (2013), combined with a plea to ignore those controlling precedents in favor of a dissenting opinion in the Fourth Circuit's 1994 *Lisa Lee Mines* decision. OB 34-35. This entreaty should be denied. The various arguments Premium Coal marshals against 20 C.F.R. § 725.309(c)—that it conflicts with "a phalanx of Supreme Court decisions," cherished principles of finality and res judicata, and the D.C. Circuit's decision in *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002) —were considered and rejected in *Banks* and *Sexton*. There is no need to revisit them here.[29]

[29] Premium Coal's certainty that nothing about Byrge's physical condition changed and that the different result is only due to a change in law is unwarranted. First, the ALJ found that the miner's condition had, in fact, deteriorated. A. 26. Second, it overstates our ability to discern Byrge's past condition. There is a practical reason why the subsequent-change inquiry forbids a direct comparison between the current evidence and the evidence underlying the previous denial. As the Fourth Circuit explained:

> Accepting the correctness of a final judgment is more than legalistic tunnel vision; it is a practical—perhaps the only practical—way to discern a concrete form in the mists of the past. The ease we might feel at second-guessing *this* final judgment ought not tempt us to overestimate our retrospective perspicacity; most black lung claims involve a mixed bag of test results and wildly divergent medical opinions. The final decision of the ALJ (or BRB or claims examiner)

3. The fifteen-year presumption can be used to establish a change in condition

While Premium Coal spends most of its energy trying to overturn *Banks* and *Sexton*, it briefly attempts to distinguish them on the ground that the fifteen-year presumption was not relied on to establish a change in condition in those cases. OB 35. But that distinction is irrelevant. The BLBA's various presumptions are an integral part of how the various elements of a claim are established. It is unsurprising, then, that the only court of appeals to consider the question had little difficulty concluding that the fifteen-year presumption can be used to establish elements of entitlement for the purpose of proving a change in condition. *See Consolidation Coal Co. v. Director, OWCP ("Bailey")*, 721 F.3d 789, 794 (7th Cir. 2013).[30]

As the Seventh Circuit recognized, the answer is clear from the BLBA's implementing regulations, which incorporate the BLBA's various presumptions into the very definition of the elements of entitlement. A subsequent claimant must show that "one of the applicable conditions of entitlement (see § 725.202(d)

---

on the spot is the best evidence of the truth at the time.

Lisa Lee Mines, 86 F.3d at 1360.

[30] Premium Coal argues that the Seventh Circuit "failed to consider the temporal differences involved in invoking the fifteen-year presumption and applying the fifteen-year presumption to additionally find a change in a claimant's condition." OB at 35 n.10. But it is clear from the decision (and the briefs) that the *Bailey* court considered the res judicata issue explicitly. 721 F.3d at 794-95.

(miner) . . .) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(c). Section 725.202(d) lists the familiar elements of a miner's claim, including that the claimant "[h]as pneumoconiosis (*see 718.202*)" and that "[t]he pneumoconiosis contributes to the [miner's] total disability (*see § 718.204(c)*)[.]" 20 C.F.R. § 725.202(d)(2)(i), (iv) (emphasis added).

The referenced subsections, in turn, state that the elements of pneumoconiosis and disability causation, respectively, can be established by the fifteen-year presumption, implemented at 20 C.F.R. § 718.305. *See* 20 C.F.R. §§ 718.202(a)(3) ("If the presumption[] described in § . . . 718.305. . . [is] applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis."); 718.204(c)(2) ("Except as provided in § 718.305 . . . proof that the miner suffers . . . from a totally disabling respiratory pulmonary impairment . . . shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.").

Under the plain language of these regulations, subsequent claimants may invoke the fifteen-year presumption to prove a change in condition. *Bailey*, 721 F.3d at 794 ("As the 15-year presumption is now built into the definitions of elements, the 15-year presumption can be used to show a change in condition.").[31]

[31] Even if their text is susceptible to other readings, the Director's interpretation of

As the product of notice-and-comment rulemaking, the regulations are entitled to *Chevron* deference. *Ramage*, 737 F.3d at 1058. Premium Coal has not even attempted to make the kind of showing that would be necessary to strike down these regulations under the *Chevron* standard. Indeed, it does not even acknowledge their relevance despite the fact that these regulations were central to the *Bailey* court's analysis of this issue.

Premium Coal, understandably, is unhappy that Congress revived the presumption in a way that, in the company's view, caused it to lose this case. The presumption's revival created an "anomalous situation" because Byrge "enjoys a 15-year presumption in the evaluation of the present claim but not in previous claims." *Bailey*, 721 F.3d at 795. But, "of course, [Byrge's] adjudicators must apply the law in effect at the time of a decision. Congress has reintroduced the presumption and [Byrge] can utilize that presumption, regardless of the law in effect at previous evaluations." *Id.*

It is important to note that this pendulum swings both ways. As this Court explained, "[a]ll that the [2010] legislation does is alter the methods of proof for

---

the BLBA's implementing regulations is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary of Labor's construction of his own regulations is "controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks and citations omitted); *see also Bailey*, 721 F.3d at 794 ("Even if the language regarding the use of the 15-year presumption were susceptible to other readings, we would defer to the Director's reasonable interpretation of the statute.").

miner and survivor claims, something Congress has done periodically for the last forty-four years, and something that has favored companies on some occasions and miners on others." *Vision Processing, LLC*, 705 F.3d at 558. While this change benefitted miners, the next may aid employers. For example, in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997), the claimant's initial, unsuccessful claim was governed by the "claimant favorable" interim regulations, 20 C.F.R. Part 727. 117 F.3d at 1003. When he filed a subsequent claim in 1981, the Part 727 regulations had been restricted to claims filed before March 31, 1980. *Id.* As a result, the Seventh Circuit ruled that Spese's subsequent claim was governed by the stricter, then-new 20 C.F.R. Part 718 regulations, including the original subsequent claim provision, 20 C.F.R. § 718.309 (1981). *Id*. at 1004. The lesson—that subsequent claims are governed by current law, not the law in effect during the original claim—applies equally here. There is no legal error in the Board's ruling that Byrge's condition had changed.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court reject Petitioner's legal challenges to the award below. If the Court believes that the ALJ's findings are supported by substantial evidence, the award should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Kathleen H. Kim
KATHLEEN H. KIM
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5326 - telephone
(202) 693-5687 - facsimile
BLLS-SOL@dol.gov
kim.kathleen@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

DESIGNATION OF DOCUMENTS
IN THE ADMINISTRATIVE RECORD

Item	Date	Record Page No.	Petitioner's Appendix Page No.
Order on Reconsideration, Benefits Review Board	May 28, 2014	1-2	9
Decision and Order, Benefits Review Board	Feb. 24, 2014	16-23	10-16
Decision and Order, Administrative Law Judge	Jan. 16, 2013	__	17-27
Director's Exhibit No. 1 Proposed Decision and Order Denial of Benefits	Nov. 5, 2007	__	35-40

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 11,486 words, as counted by Microsoft Office Word 2010.

/s/ Kathleen H .Kim
KATHLEEN H. KIM
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
kim.kathleen@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2015, the Director's corrected brief was served electronically using the Court's CM/ECF system on the Court and the following:

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

/s/ Kathleen H. Kim
KATHLEEN H. KIM
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
kim.kathleen@dol.gov

ADDENDUM OF STATUTES AND REGULATIONS

The fifteen-year presumption

30 U.S.C. § 921 (2014)

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.

Current regulation implementing the fifteen-year presumption

20 C.F.R. § 718.305 (2014)

Presumption of pneumoconiosis.

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

(b) Invocation.

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

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

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

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 7 18.204, except that § 7 18.204(d) does not apply.

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

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

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

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

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

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

(d) *Rebuttal*—

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

(i) Establishing both that the miner does not, or did not, have: (A) Legal pneumoconiosis as defined in § 718.20 1(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 § 7 18.201.

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

(i) Establishing both that the miner did not have: (A) Legal pneumoconiosis as defined in § 718.20 1(a)(2); and (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

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

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

Previous regulation implementing the fifteen-year presumption

20 C.F.R. § 718.305 (1980-2013)

Presumption of pneumoconiosis.

(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 § 7 18.304, 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.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 7 18.204.

(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 disease of unknown origin.

(e) [added on May 31, 1983, by 48 Fed. Reg. 24271, 24288] This section is not applicable to any claim filed on or after January 1, 1982.

Current regulation governing subsequent claims

20 C.F.R. § 725.309 (2014)

Additional claims; effect of prior denial of benefits.

(a) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim must be merged with the earlier claim for all purposes. For purposes of this section, a claim must be considered pending if it has not yet been finally denied.

(b) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a request for modification of the prior denial and will be processed and adjudicated under § 725.310.

(c) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a subsequent claim for benefits. A subsequent claim will be processed and adjudicated in accordance with the provisions of subparts E and F of this part. Except as provided in paragraph (1) below, a subsequent claim must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules apply to the adjudication of a subsequent claim:

(1) The requirement to establish a change in an applicable condition of entitlement does not apply to a survivor's claim if the requirements of §§ 725.212(a)(3)(ii), 725.218(a)(2), or 725.222(a)(5)(ii) are met, and the survivor's prior claim was filed— (i) On or before January 1, 2005, or (ii) After January 1, 2005 and was finally denied prior to March 23, 2010.

(2) Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(3) For purposes of this section, the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(4) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(5) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725 .463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

(6) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(d) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid will be subject to collection or offset under subpart H of this part.

Former regulation governing subsequent claims

20 C.F.R. § 725.309 (2001-2013)

Additional claims; effect of a prior denial of benefits.

(a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.702.

(b) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes. For purposes of this section, a claim shall be considered pending if it has not yet been finally denied.

(c) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a request for modification of the prior denial and shall be processed and adjudicated under § 725.3 10.

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.2 18 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725 .463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter (see § 725.4(d)), a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine

20 C.F.R. § 725.309 (2001-2013) continued:

operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart H of this part.