No. _____

In the
Supreme Court of the United States

ROCKWOOD CASUALTY INSURANCE COMPANY, insurer of HIDDEN SPLENDOR RESOURCES, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and TONY KOURIANOS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Cheryl L. Intravaia
Counsel of Record
FEIRICH/MAGER/GREEN/RYAN
2001 West Main Street
P.O. Box 1570
Carbondale, IL 62903
(618) 529-3000
cintravaia@fmgr.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does requiring a wrongly-named Responsible Operator to issue benefits to a Claimant with normal pulmonary function and normal arterial blood gas testing under the Black Lung Benefits Act violate the Administrative Procedure Act when such result stems from amended agency regulations that (1) provide different time limits to submit evidence for opposing parties, (2) shift burdens of proof, and (3) create heightened rebuttal burdens that cannot be met, or is the Black Lung Benefits Act exempt from Administrative Procedure Act governance as claimed by the Secretary of Labor?

PARTIES TO THE PROCEEDINGS

Petitioner, Rockwood Casualty Insurance Company, insurer of Hidden Splendor Resources, was the appellant in the Tenth Circuit. Respondents are Director, Office of Workers' Compensation Programs, U.S. Department of Labor and Mr. Tony Kourianos.

RULE 29.6 STATEMENT

Rockwood Casualty Insurance Company's parent company is Argo Group International Holdings, Ltd. Argo Group is publicly traded on the New York Stock Exchange under the symbol "ARGO." Hidden Splendor Resources' parent company is American West Resources. American West Resources was previously publicly traded on NASDAQ under the symbol "AWSRQ" but AWSRQ was delisted. American West and its subsidiaries, including Hidden Splendor Resources, filed for bankruptcy on February 1, 2013 in Nevada.

LIST OF ALL PROCEEDINGS

1. U.S. Department of Labor - Office of Administrative Law Judges
   Docket No. 2014-BLA-05171
   Tony M. Kourianos v. Hidden Splendor Resources, Inc., and Rockwood Casualty Insurance Co., and Director, Office of Workers' Compensation Programs
   Order Denying Employer's Motion to Withdraw Stipulation as Responsible Operator and to Dismiss Hidden Splendor as the Responsible Operator and Supplemental Evidentiary Order and Briefing Schedule
   April 12, 2016

2. U.S. Department of Labor - Office of Administrative Law Judges
   Docket No. 2014-BLA-05171
   Tony M. Kourianos v. Hidden Splendor Resources, Inc., and Rockwood Casualty Insurance Co., and Director, Office of Workers' Compensation Programs
   Decision and Order Awarding Benefits
   February 28, 2017

3. U.S. Department of Labor - Benefits Review Board
   Docket No. 17-0323 BLA
   Tony M. Kourianos v. Hidden Splendor Resources, Inc., and Rockwood Casualty Insurance Co., and Director, Office of Workers' Compensation Programs
   Decision and Order
   March 29, 2018

4. Tenth Circuit Court of Appeals
   Docket No. 18-9520
   Rockwood Casualty Insurance Company, insurer of Hidden Spendor Resources, Inc., v. Director, Office of Workers' Compensation Programs, United States Department of Labor; Tony Kourianos
   Petition for Review from an Order of the Benefits Review Board
   March 5, 2019

5. Tenth Circuit Court of Appeals
   Docket No. 18-9520
   Rockwood Casualty Insurance Company, insurer of Hidden Spendor Resources, Inc., v. Director, Office of Workers' Compensation Programs, United States Department of Labor; Tony Kourianos
   Order (Denying Petition for Rehearing)
   April 2, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Public Laws

Federal Registers

PETITION FOR WRIT OF CERTIORARI

Rockwood Casualty Insurance Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Office of Administrative Law Judges (OALJ) issued a Decision and Order awarding benefits on February 28, 2017 (Pet. App. 78-123). The Benefits Review Board (BRB) affirmed the award on March 29, 2018. (Pet. App. 55-77). The Tenth Circuit Court of Appeals issued its opinion on March 5, 2019, which was reported at 917 F.3d 1198. (Pet. App. 3-54). Rockwood filed a petition for rehearing on April 1, 2019 which was denied by the Tenth Circuit on April 2, 2019. (Pet App. 1-2).

JURISDICTION

The Tenth Circuit's denial of the petition for rehearing was issued on April 2, 2019. App. 1 - 9. This Court's jurisdiction is timely invoked under 28 U.S.C. §1254(1) and U.S. Supreme Court Rule 13(3).

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Section 556(d) of the Administrative Procedure Act states:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant,

> immaterial, or unduly repetitious evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Section 557(c)(3)(A) of the Administrative Procedure Act states:

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.

Section 421(c) of Black Lung Benefits Act, 30 U.S.C. §921(c)(4) states:

> [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 title 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 Commissioner of Social Security 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.

The DOL's regulations are included in the appendix. (Pet. App. 131-140).

STATEMENT OF THE CASE

The Black Lung Benefits Act ("BLBA") was enacted in 1969 as Title IV of the Federal Coal Mine Safety and Health Act, to establish an occupational disease program that would provide benefits to coal miners who were totally disabled due to pneumoconiosis. Section 402(b), Pub. Law 91-173 (Dec. 30, 1969); *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 683-84 (1991). The program, initially administered as by the Social Security Administration with benefits paid by the government, is now administered by the Department of Labor (DOL) through the Office of Workers'

Compensation Programs (OWCP). *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7-10 (1976). The claims are now paid by the most recent coal mine that employed the Claimant as a miner. *See*, 20 C.F.R. §725.495(a)(1) and 20 C.F.R. §725.530. This entity is classified as Responsible Operator (RO). 20 C.F.R. §725.495. If no RO can be named, or the wrong RO is named by the Director, liability for the miner's benefits shifts to the Black Lung Disability Trust Fund (BLDTF). 65 Fed. Reg. 79919, 79985 (Dec. 20, 2000); 20 U.S.C. §9501. The DOL amended the regulations in 2001 and 2013. 65 Fed. Reg. 79920 (Dec. 20, 2000); 78 Fed. Reg. 59102 (Sept. 25, 2013).

Certiorari is warranted to determine whether the Administrative Procedure Act (APA) governs adjudications under the BLBA because the Secretary of Labor issued a public statement to the contrary when amending the BLBA regulations; which conflicts with this Court's holding in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270-71 (1994). If the APA does apply, certiorari is warranted to determine whether (1) the DOL's 2000 amended regulations violate the APA by limiting the time period an operator can submit evidence disputing its liability without similarly limiting the time period for other parties, or (2) the 2013 amended regulations conflict with the statutory language. Certiorari is also warranted because the Tenth Circuit's decision is in direct conflict with the amended regulations.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE ADMINISTRATIVE PROCEDURE ACT GOVERNS ADJUDICATIONS UNDER THE BLACK LUNG BENEFITS ACT BECAUSE THE SECRETARY'S CLAIM TO THE CONTRARY CONFLICTS WITH SUPREME COURT PRECEDENT.

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), which in turn requires that any hearing under the Longshore Act be conducted in accordance with section 5 of the APA, 5 U.S.C. § 554. The regulations provide that, in black lung adjudications, "hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 *et seq*." 20 C.F.R. § 725.452(a). Section 554(c)(2) says that where parties are unable to determine a controversy by consent, they are entitled to a "hearing and decision ... in accordance with sections 556 and 557 of this title."

After considering the statutory language of the BLBA and the LHWCA, this Court disagreed with the Secretary's assertion that the APA did not apply to adjudications under the BLBA. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270 (1994). Five years later, the Secretary, when promulgating the amended regulations, contended the BLBA was exempt from the provisions of Section 7 of the APA, and that under *Greenwich Collieries*, "the Department remains free to assign burdens of proof to parties as necessary

to accomplish the purposes of the Black Lung Benefits Act." 64 Fed. Reg. 54966, 54973 (Oct. 8, 1999).

The applicability of the APA, and its guarantee of a full and fair hearing, is at issue in this Petition. Certiorari is warranted to determine if the Secretary's regulations, and adjudications under the BLBA, are constrained by, or exempted from, the APA.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE AGENCY'S REGULATIONS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT BY ARBITRARILY LIMITING THE TIME AN OPERATOR CAN DISPUTE ITS LIABILITY WITHOUT SIMILARLY LIMITING THE TIME PERIOD FOR OTHER PARTIES, EFFECTING THE EVIDENCE, AS WELL AS THE ISSUES, THAT CAN BE PRESENTED AT A FORMAL HEARING.

On December 20, 2000, the Department of Labor issued sweeping changes to the BLBA. The validity of some of these amendments were addressed in *National Mining Ass'n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002).[1] The amendments provided the "potentially liable" responsible operator a 90-day deadline to submit evidence regarding five underlying RO issues. 20 C.F.R. §725.408(b)(1). One of the five

[1] Section 718.408, which is one of the sections at issue in this Petition, was addressed in *National Mining* but only regarding the shift in the burdens of proof and production and did not address the time period limitations. *See, Nat'l Mining*, 292 F.3d at 871-872.

issues was whether the claimant was employed as a miner for one full year at the mine. 20 C.F.R. §725.408(a)(2). The regulation further states that "No documentary evidence relevant to the grounds set forth in paragraph (a)(2) may be admitted in any further proceedings unless it is submitted within the time limits set forth in this section." 20 C.F.R. §725.408(b)(2). Thus, Section 725.408 limited the period a potentially liable RO could submit evidence regarding the "miner" status of any of its is employees to this 90-day period.

After the miner undergoes the DOL exam and the results are received by the Director, the Director issues a Schedule for the Submission of Additional Evidence ("SSAE"). 20 C.F.R. §725.406; 20 C.F.R. §725.410. The SSAE analyzes the medical evidence and names the "designated" RO. 20 C.F.R. §725.410. Section 725.410 allows the parties to submit evidence on both the merits of the claim as well as RO liability, however, the evidence is limited by the section's reference to Section 725.414. 20 C.F.R. §725.410(b).

With regard to the RO issue, Section 725.414 states:

> (b) Evidence pertaining to liability. (1) Except as provided by §725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.

> (2) Any other party may submit evidence regarding the liability of the designated responsible operator or any other operator.

20 C.F.R. §725.414(b) (emphasis added).

Therefore, anyone but the designated responsible operator can submit evidence related to the original five issues found in Section 725.408(a)(2) after the SSAE is issued. Conversely, the designated RO is prohibited from submitting any evidence related to the Section 725.408(a)(2) issues and is only allowed to submit evidence that reveals a different mine more recently employed the claimant.

After the time period to submit evidence has expired, the Director issues a Proposed Decision and Order (PDO) naming the RO for the claim, dismissing any other potentially liable operators and determining whether the claimant is entitled to benefits. 20 C.F.R. §725.418. If the claim is appealed and it is determined that the wrong RO was named, the claim liability is assumed by the BLTDF. See, 65 Fed. Reg. 79919, 79990 (Dec. 20, 2000) ("In the event the responsible operator designated by the district director is adjudicated not liable for a claim, the Black Lung Disability Trust Fund will pay any benefit award.").

Mr. Kourianos filed his claim for benefits in June 2012. (Pet. App. 79). On October 23, 2012, the DOL issued a Notice of Claim to Hidden Splendor Resources. (Pet. App. 145). After initially denying the RO status, Rockwood accepted Hidden Splendor's RO designation on November 30, 2012. (Pet. App. 125).

On February 6, 2013, (106 days after the Notice was issued and 16 days after the 90-day period expired) Hidden Splendor's staff accountant faxed correspondence to the DOL indicating that Hidden Splendor employed Claimant for a total of 367 days. (Pet App. 141, 145). The document stated that Claimant's employment was "at the mine" from December 26, 2006 to April 11, 2007 and from November 16, 2010 to January 21, 2011. (Pet. App. 141). The document further stated that Claimant's employment was "outside at the loadout" from April 5, 2011 to October 14, 2011. *Id*.

On May 8, 2013, the DOL issued the SSAE naming Hidden Splendor as the RO. (Pet. App. 19). Rockwood accepted the designation on behalf of Hidden Splendor. *Id*. On August 22, 2013, the DOL issued a PDO awarding benefits to Mr. Kourianos. *Id*. Rockwood requested a formal hearing before the OALJ; the request did not include the RO classification as an issue. *Id*.

The case proceeded to hearing before ALJ Almanza on August 12, 2014 in Price, Utah. (TR at 1). At the hearing, Mr. Kourianos testified that he worked as a security guard at Hidden Splendor during his last period of employment (April 5, 2011 to October 14, 2011) and further revealed that Hidden Splendor was a closed, non-functioning mine at the time of this last employment.[2] (Pet. App. 84). Following Claimant's

[2] In order to be a "miner" both the "situs" test, which requires work in or around a coal mine or preparation facility, and the "function" test, requiring performance of coal extraction or preparation work

testimony, Rockwood moved to withdraw its stipulation that it was the correctly named RO.[3] (Pet. App. 126).

On April 12, 2016, the ALJ denied Rockwood's motion to withdraw the stipulation based on 20 C.F.R. §725.463. (Pet. App. 126-127) which states, in part:

> (a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director (see §725.421) or any other issue raised in writing before the district director.
>
> (b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative

---

must be satisfied. *Stroh v. Director, OWCP*, 810 F.2d 61, 63 (3rd Cir. 1987) citing *Wisor v. Director, Office of Workers' Compensation Programs*, 748 F.2d 176, 178 (3d Cir. 1984). "To satisfy the situs test, a claimant must have worked in or around a coal mine or custom coal preparation facility and have been exposed to coal dust as a result of his transportation work." *Stroh*, 810 F.2d at 63. "Function" addresses duties involving the extraction or preparation of coal, or involving appropriate coal mine construction or transportation. *Falcon Coal Co. v. Clemons,* 873 F.2d 916, 921 (6th Cir. 1989).

[3] In order for a mine to be classified as the Responsible Operator, the employee must have worked one full year as a "miner" at the facility. 20 C.F.R. 725.494(c).

> Law Judges and prior to decision by an administrative law judge.

20 C.F.R. §718.463.

The ALJ found that 20 C.F.R. §725.463(b) prohibited consideration of the RO issue because "the nature of Claimant's employment with Employer was 'reasonably ascertainable' at the time the claim was before the district director." (Pet. App. 127). The ALJ's finding was based on "one significant piece of written documentation." (Pet. App. 128). The document was the February 6, 2013 facsimile. (Pet. App. 128). The ALJ contended that it was "reasonably ascertainable" to determine what "job duties Claimant performed, and thereby determine whether Hidden Splendor should have been named the R/O, by interviewing its agent regarding the evidence it submitted" *Id.*

The ALJ's finding conflated "the time the claim was before the director" which was 540 days (from June 27, 2012 to November 22, 2013) with the "time period allowed to contest the RO designation" which was from October 23, 2012 to January 21, 2013. 20 C.F.R. §725.408(b)(2). The latter has a concrete deadline.[4] While the operator could "interview" the agent to "reasonably ascertain" information related to Mr. Kourianos' employment while the claim was before the District Director, the operator was prohibited, by the DOL's regulations, from submitting any evidence on the issue. *See*, 20 C.F.R. §725.408(b)(2).

---

[4] The deadline to submit evidence can be extended, but the request must be filed prior to the expiration of the deadline. 20 C.F.R. §725.423.

The Tenth Circuit's decision compounded the ALJ's error by setting a time period for an RO to contest liability that directly conflicted with the regulations.

After addressing the February 6, 2013 facsimile (Pet. App. 39), the Court stated:

> Rockwood appears to argue that the regulations timeline prevented it from submitting new evidence after 90 days of receiving the district director's notice of claim. *See*, Pet'r's Br. At 18. The regulations show otherwise. *See* 20 C.F.R §725.417(b) ("In appropriate cases, the district director may permit a reasonable time for the submission of additional evidence following a conference . . . ."); *id*. §725.410(b) ("The [SSAE] shall allow *all parties* not less than 60 days within which to submit additional evidence, including evidence relevant to the claimant's eligibility for benefits and evidence *relevant to the liability of the designated responsible operator*." (emphasis added)). In addition, Hidden Splendor did not ask to submit additional evidence or suggest that it wanted to challenge its responsible operator status before the district director.

(Pet. App. 40-41)(emphasis in original).

In affirming the ALJ's decision, the Court relied on Sections 725.410(b) and 725.417(b) to determine the length of time a designated Responsible Operator had to submit evidence on the RO issue but ignored the

reference to Section 725.414 in both sections. (Pet. App. 40-41).[5]

Section 725.414 states, with regard to evidence pertaining to RO liability,:

> (1) Except as provided by §725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.
>
> (2) Any other party may submit evidence regarding the liability of the designated responsible operator or any other operator.

20 C.F.R. §725.414(b)(1) and (2) (emphasis added).

As noted above, Section 725.408(b)(1) limits the submission of any evidence by a potentially liable operator on whether the claimant was employed as a miner for a full year at the mine to 90 days after the Notice of Claim is issued and Section 725.408(b)(2) forbids the potentially liable operator from submitting any evidence on the issue after the time limit has expired. 20 C.F.R. §725.408(b)(1) and (2).

The Tenth Circuit's reliance on Sections 725.410 and 725.417, without addressing the referenced

---

[5] The last sentence of Section 725.410(b) states, "Any such evidence must meet the requirements set forth in §725.414 in order to be admitted into the record." The first sentence of Section 725.417(b) states, "In appropriate cases, the district director may permit a reasonable time for the submission of additional evidence following a conference, provided that such evidence does not exceed the limits set forth in §725.414." (Emphasis added).

language in Section 725.414, resulted in a published decision in direct conflict to the regulations and created precedent setting a longer period to submit evidence than allowed under the regulations.

The Court ultimately found that the "nature of Mr. Kourianos' employment was 'reasonably ascertainable' the entire time his claim was pending before the District Director." (Order at 38). This statement ignores the limiting language in Sections 725.414 and 725.408. The Court's holding, that an RO can submit evidence on the issue of whether the claimant worked a full year as a miner after the SSAE is issued, creates a legal standard that is contrary to law.

The Court's decision also obscures the fact that the regulations violate the APA by creating two different time limits for opposing parties to submit evidence on the same issue. Sections 725.408 and 725.414 reveal that a potentially liable operator or a designated responsible operator must submit the evidence within the 90-day period after the Notice of Claim is issued. Conversely, any other party can submit any evidence regarding this issue during the initial Notice period or any period after the SSAE is issued. 20 C.F.R. §725.414(b)(2).

The regulation's 90-day limit for the operator is both arbitrary and capricious as no there is no reason the period should be limited for the operator when the claimant or the District Director have an unlimited period of time to submit evidence on the same issue. The regulation is also irrational in light of the agency's goal to ensure that the correct RO was named while the claim was before the Director. 65 Fed. Reg. 79919,

79985 (Dec. 20, 2000). While the agency claimed the operator would be in the best position to determine the claimant's prior employment, no explanation was provided as to why miners, who have the burden of proof under the BLBA, would not be equally knowledgeable about their employment. *Id*.[6]

The one-sided limitation violates the APA which states, in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 U.S.C. §556(d).

Despite the APA allowance for "any oral or documentary evidence," the regulations prohibit

---

[6] The agency provided this response to concerns that included the Secretary shifting the burden of proof from the claimant to the responsible operator in contravention of the APA and *Greenwich Collieries*. 65 Fed. Reg. 79986. It was then that the Secretary claimed exemption from Section 7 of the APA and stated that, pursuant to *Greenwich Collieries*, "the Department remains free to assign burdens of proof to parties as necessary to accomplish the purposes of the Black Lung Benefits Act." 64 Fed. Reg. 54966, 54973 (Oct. 8, 1999).

Responsible Operators from submitting either documentary or oral evidence on the issue of RO liability unless it was previously submitted within the 90-day window.[7] No similar limitation exists for any other party, as evidenced by Mr. Kourianos' testimony at the OALJ hearing. Allowing Mr. Kourianos to proceed with testimony on August 12, 2014, when Hidden Splendor was prohibited from submitting any evidence on the issue after January 21, 2013, is inequitable. The disparity violates the APA because the parties are treated differently regarding admissible evidence.

Finally, Claimant's testimony confirmed that Hidden Splendor could not be the RO for this claim as he did not work one full year as a miner at Hidden Splendor. The ALJ specifically found that Claimant's coal mine employment did not include the last period of employment at Hidden Splendor. (Pet. App. 84). Despite the Secretary's statement that the BLDTF would accept liability if it is determined on appeal that the wrong mine was named as the RO (65 Fed. Reg. 79919, 79985 (Dec. 20, 2000)), the government has not accepted liability.

The agency's regulations, regarding the time frame for a mine to dispute its RO status, violate the APA. The agency's selective enforcement of its regulations, as evidenced by the allowance of Mr. Kourianos' testimony at the hearing, burden shifting when it comes to proving who is the proper operator for the

[7] There is indication this evidence would be "irrelevant, immaterial or unduly repetitious evidence." 5 U.S.C. §556(d).

claim, and refusing to accept liability when the evidence established that Hidden Splendor could not be the correctly named RO, violates the APA and conflicts with *Greenwich Collieries*. Such violations are compounded by the Tenth Circuit's decision which proscribes a time period to address the length of a claimant's employment as a miner in direct conflict with the regulatory language. For these reasons, Rockwood's writ for certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED TO ESTABLISH, OR RE-ESTABLISH, THE MINIMUM REQUIREMENTS OF ADJUDICATORY DECISIONS UNDER THE BLACK LUNG BENEFITS ACT.

The purpose of the Act is to award benefits to miners (and their survivors) when the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §901. The burden of proof lies with the miner to establish all elements of his claim. 5 U.S.C. §556(d); *see also, Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 271 (1994). This burden is lightened if the claimant can rely on presumptions. *Greenwich Collieries*, 512 U.S. at 280.

To invoke the 15-year presumption, the claimant must establish that the miner worked 15 years in an underground mine, or in a mine with substantially similar conditions,[8] and the miner is totally disabled

[8] The "substantial similarity" standard is met 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). This standard, however, is not a standard. The Secretary conceded

due to a pulmonary condition. 30 U.S.C. §921(c)(4). A miner is "totally disabled" if he has complicated pneumoconiosis[9] or has a pulmonary or respiratory impairment due to pneumoconiosis that prevents him from doing his usual coal mine employment or comparable gainful employment. 30 U.S.C. §§921(c)(3) and 902(f).

The regulations provide four methods, in the absence of contrary probative evidence, that can be used to establish a miner's total disability. 20 C.F.R. §718.204(b). These methods include: (1) pulmonary

---

that, "current 20 CFR 725.492(c), presumes that each employee of a coal mine operator was regularly and continuously exposed to coal dust during the course of his employment." 64 Fed. Reg. 54966, 54973 (Oct. 8, 1999). Therefore Section 718.305(b)(2) is contrary to, the statutory language that limited the 15-year presumption to underground miners or miners who worked in other areas of the mine with "substantially similar" conditions. 30 U.S.C. §921(c)(4).

[9] A finding of complicated pneumoconiosis creates an irrebuttable presumption of total disability. 20 C.F.R. §718.304. There was no evidence that Mr. Kourianos had any level of clinical coal workers' pneumoconiosis. (Pet. App. 98, 118).

function testing[10]; (2) arterial blood gas studies[11]; (3) evidence or cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinion and (5) lay testimony. 20 C.F.R. §718.204(d).[12] The BRB has long held that the language in Section 718.204(b) does not establish a presumption of total disability upon a showing of qualifying evidence but rather provides that such evidence shall establish total disability in the absence of contrary probative evidence. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986). If contrary probative evidence exists, the fact finder must assign this evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *see also*, *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987).

The ALJ found Claimant's work performed at West Ridge Resources between April 2007 and June 2010 was Claimant's "penultimate coal mining employment"

---

[10] Pulmonary function studies, also called spirometry, are tests that show how well miners move air in and out of their lungs and "measure the degree to which breathing is obstructed." *See, Yauk v. Director, OWCP*, 912 F.2d 192, 196 n. 2)(8th Cir. 1989). The DOL uses the FEV1 (the volume of air that a miner can expel in one second after taking a full breath, the FVC (the total volume of air that miner can expel after a full breath) and the FEV1/FVC ratio to determine disability. See, Part 718 Appendix B.

[11] "Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange." 20 C.F.R. §718.105(a).

[12] Lay testimony may only be used in establishing total disability in circumstances not applicable to this claim.

and "usual coal mine work." (Pet. App. 95).[13] The ALJ classified the employment as "medium work." (Pet. App. 96).

A. The pulmonary function testing

The initial pulmonary function testing was performed on May 6, 2010. (Pet. App. 101, 143). The testing revealed an FEV1 of 3.43, an FVC of 4.39 and an FEV1/FVC ratio of 78%. *Id.* A qualifying value required values less than: FEV1: 2.23, FVC: 2.82, and FEV1/FVC: <55%.[14] See, Appendix B to Part 718. The spirometry was interpreted as "normal." (Pet. App. 143).

The second testing performed on August 23, 2012, revealed improved values with the FEV1 at 3.80 (99% of predicted), the FVC at 5.33 (111% of predicted), an MVV of 123 (85% predicted) and an FEV1/FVC ratio of 71% (92% of predicted). (Pet. App. 101, 150). A qualifying value required values less than: FEV1: 2.18, FVC: 2.78, MVV: 087 and FEV1/FVC: <55%. Appendix

---

[13] The ALJ stated, " "If I found that the work Claimant performed for Hidden Splendor Resources was his usual coal mine employment, then there would be little question that Claimant is not totally disabled" because Claimant stated that his work at Horizon was "a piece of cake" and that "he could perform those duties 'for another ten, fifteen years'." (Pet. App. 94).

[14] A "qualifying" value for pulmonary function testing is based on the Appendix B to Part 718 and lists values that qualify for a finding of total disability if the testing values are below the values listed in the Appendix. See, 20 C.F.R. §718.204(b)(2).

B, Part 718. All of these values were with the range of normal.[15]

B. The arterial blood gas testing

The 2010 arterial blood gas testing, taken only at rest, revealed a pCO2 of 43 and a pO2 of 60. (Pet. App. 103). A qualifying pO2 for this testing would be any value less than 55.[16] *See*, Appendix C to Part 718. This testing did not establish total disability. (Pet. App. 103).

The 2012 testing included testing performed at rest and with exercise. (Pet. App. 103). The resting pCO2 was 39 with a pO2 of 68. *Id*. A qualifying pO2 would be a value less than 56. *See*, Appendix C to Part 718. The exercise testing revealed a pCO2 of 33 and a pO2 of 59. (Pet. App. 103). A qualifying pO2 for this testing would be a value less than 62. *See*, Appendix C to Part 718. While the exercise value would qualify for a finding of total disability, the documentation containing the testing values revealed that the "predicted normal values" for the testing were between 28 and 41 for the pCO2 and between 57 and 68 for the pO2. (Pet. App. 144). Therefore, while the post-

---

[15] "[A]n impairment in lung function is defined as an FEV1 <80% of predicted normal values." 65 Fed. Reg. 79920, 79943 (Dec. 20, 2000); Mr. Kourianos' FEV1 was 99% of predicted. (Pet. App. 150).

[16] A "qualifying" value for arterial blood gas testing is based on the Appendix C to Part 718 and lists values that qualify for a finding of total disability if the testing values are below the values listed in the Appendix; the Appendix contains three tables related to the altitude where the testing was performed. See, 20 C.F.R. §718.204(b)(2).

exercise pO2 was "qualifying" based on the DOL Appendix, both the resting and the post-exercise pO2 were "normal" based on the predicted normal values for testing at Castleview Hospital. *Compare*, Appendix to Part 718 and Pet. App. 144.

C. The ALJ's analysis of this evidence

Afer placing greater weight on the more recent testing, the ALJ found the pulmonary function testing and arterial blood gas testing yielded "equivocal results." (Pet. App. 115). The conclusion is confounding since neither of the pulmonary function tests revealed any evidence of total disability. Further only one of the arterial blood gas testing values yielded a qualifying value, and that value was within the "predicted normal values" for testing at the facility. (Pet. App. 101, 103, 143, 144, and 150). The ALJ ultimately found that Claimant failed to meet his burden of proof to establish total disability with regard to the pulmonary function and arterial blood gas testing. (Pet. App. 115).

D. The medical opinion evidence.

Determinations of whether a physician's report is sufficiently documented and reasoned is a matter of credibility left to the trier of fact. *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir. 1985). A medical opinion evidence can be used to establish total disability if the opinion is well-reasoned and well-documented. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based his diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). An opinion may be adequately

documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 BLR 1-65, 1-66 (1985). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields, supra.* An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.,* 9 BLR. 1-67 (1986).

The ALJ found that Dr. Gagon's opinion was entitled to "great weight" after finding it was well-documented and well-reasoned because he was the only physician who discussed the specific duties Claimant performed as a fire boss. (Pet. App. 115-16). Conversely, the ALJ gave little weight to the opinions of Dr. Zaldivar and Dr. Selby who found Miner was not totally disabled stating neither physician's finding was informed by details of Miner's usual coal mine employment. (Pet. App. 116). The ALJ's analysis was contrary to law because if a physician finds no evidence of respiratory or pulmonary impairment, it is unnecessary for the physician to address the specific character of the coal mine work. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Grayson v. North American Coal Co.*, 6 B.L.R. 1-851 (1984).

The ALJ also discounted the opinions of Dr. Zaldivar and Dr. Selby regarding the post-exercise ABG result because they found the DOL table did not

properly account for Price, Utah altitude. (Pet. App. 116). However, even Dr. Gagon admitted that Claimant's post-exercise arterial blood gas value was normal for testing performed at the Price, Utah lab. (Pet. App. 46). Dr. Gagon's admission, and the actual lab report containing the values for the "normal range," supported Dr. Zaldivar and Dr. Selby's opinions. (Pet. App. 46, 144). Therefore, the ALJ's discredit of the opinions was irrational and not supported by the evidence.

At no time, did the ALJ address the unanimous opinions provided by Drs. Gagon, Zaldivar and Selby, that agreed the arterial blood gas values obtained during Claimant's DOL exam were "normal." (Pet. App. 114-16). Nor did the ALJ explain how Dr. Gagon's opinion, that Claimant was totally disabled from performing coal mining, could be "well-reasoned and well-documented," when Dr. Gagon's own testing revealed normal testing values. *Id*. The ALJ's analysis of the medical opinion evidence was not rational or supported by substantial evidence.

E. Analysis of all the medical evidence.

The APA provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). While the ALJ stated he was to weigh all evidence relevant to total disability at this stage (Pet. App. 115), the ALJ never considered the normal pulmonary function values or the normal arterial blood

gas values with the medical opinion evidence; nor did the ALJ ever explain why the medical opinion evidence was entitled to greater weight than the objective medical testing. (Pet. App. 114-16). The ALJ's failure to explain why the medical opinion evidence was entitled to greater weight than the objective medical evidence was also contrary to the Section 557(c)(3)(A) APA requirements.

Rather than address these errors and remand the claim back to the ALJ for a proper review of the evidence, the Tenth Circuit weighed the evidence itself and concluded that the DOL disability table was entitled to greater authority than the medical opinions.[17] (Pet. App. 46–47, n. 14). Even if the Court had the authority to re-weigh the evidence,[18] just like the ALJ, the Court failed to provide a rationale for the conclusion, as required by the APA. *See*, 5 U.S.C. §557(c)(3)(A). Nor did the Court explain why the unanimous medical opinion evidence confirming that Claimant's objective testing values were all within the range of normal was not "contrary probative evidence" that undermined reliance on the DOL table.

An ALJ's findings must be rational, supported by substantial evidence and not contrary to law to be

---

[17] This conclusion ignores the "in the absence of contrary probative evidence" standard at 20 C.F.R. 718.204(b)(2) and further ignores the fact that the ALJ found Claimant failed to establish total disability under this method. (Pet. App. 115).

[18] The Courts are not entitled to re-weigh the evidence on review. *Antelope Coal Company / Rio Tinto Energy America v. Goodin,* 743 F.3d 1331, 1341 (10th Cir. 2014).

affirmed. The ALJ's decision failed every requirement, but was affirmed by the BRB and the Tenth Circuit. The ALJ's decision was contrary to the minimum requirements of the APA. Certiorari should be granted to re-establish the requirements for adjudicatory decisions under the BLBA.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE AGENCY'S 2013 AMENDED REGULATIONS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT BY SETTING HEIGHTENED REBUTTAL STANDARDS IN CONFLICT WITH THE STATUTORY LANGUAGE.

The authority of administrative agencies is constrained by the language of the statute they administer. *See*, *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Under the *Chevron* doctrine, courts assess the validity of challenged administrative regulations by determining whether (1) a statute is ambiguous or silent concerning the scope of secretarial authority and (2) the regulations reasonably flow from the statute when viewed in context of the overall legislative framework and the policies that animated Congress's design. *See, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

The initial step of a *Chevron* inquiry, is "whether Congress has directly spoken to the precise question at issue." *Id*. at 842. Judicial deference is due only "if the agency interpretation is not in conflict with the plain language of the statute." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988)).

"Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Section 921(c)(4) of the BLBA creates a rebuttable presumption:

> If a miner was employed for fifteen years or more in one or more underground coal mines . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. §921(c)(4).

The agency's regulations are in conflict with the statutory language.

A. Rebuttal of pneumoconiosis.

After the ALJ invoked the 15-year presumption (Pet. App. 117), it became the Operator's burden to

establish that the miner did not have either clinical or legal pneumoconiosis or "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1). The August 23, 2012 chest x-ray was unanimously read by the B-readers[19] as negative for coal workers' pneumoconiosis. (Pet. App. 98). The ALJ found that Rockwood rebutted the presumption of clinical pneumoconiosis (Pet. App. 118) leaving rebuttal of legal pneumoconiosis and total disability due to legal pneumoconiosis.

"Legal pneumoconiosis" includes:

> [A]ny chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(2) and (b).

---

[19] "A 'B-reader' is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See,* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51." *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n.2 (3rd Cir. 1995).

The Department's proposed regulatory change creating "legal pneumoconiosis" emphasized that the proposed revision was designed to make clear that an obstructive lung disease may fall within the definition of pneumoconiosis, but only if it is shown to have arisen from coal mine employment. 65 Fed. Reg. 79920, 79937 (Dec. 20, 2000). In support of the proposed change, the DOL provided research supporting the amended definition showing that COPD and emphysema could arise from coal mine employment in the absence of clinical pneumoconiosis. 65 Fed. Reg. at 79939-79944 (Dec. 20, 2000).

In the case at bar, there is no evidence of any obstructive (or restrictive pulmonary condition) as the pulmonary function testing revealed normal values. (Pet. App. 98, 101). The only abnormality was the fact that Mr. Kourianos' pO2 value dropped with exercise. (Pet. App. 103). While this value qualified for a finding of total disability based on the DOL's disability table, all of the physicians agreed that this value was within the range of normal for testing performed at Castleview Hospital. (Pet. App. 46) ("All three doctors, however, including Dr. Gagon, stated that Mr. Kourianos' PO2 value of 59 at Price, Utah was 'normal.'"). Legal pneumoconiosis is rebutted by evidence revealing no pulmonary impairment.

However, even if the "normal" value was considered "totally disabling" there is nothing in the Secretary's research that supports, or even postulates, that a decreased pO2 with exercise is linked by any medical or scientific research to "legal pneumoconiosis." *See*, 65 Fed. Reg. 79920-80107. The arterial blood gas testing

has long been included as a method of disability for clinical pneumoconiosis. *See*, 20 C.F.R. §410.424; *see also*, 37 Fed. Reg. 20634, 20643 (Sept. 30, 1972). However, in this case, the ALJ found that the presumption of clinical pneumoconiosis was rebutted. (Pet. App. 118). Requiring rebuttal evidence for a reduced pO2 - that is still within the range of normal - as a form of "legal pneumoconiosis" is contrary to law because there is no scientific or medical basis for such presumption that a normal pO2 value is indicative of legal or clinical pneumoconiosis.

The Tenth Circuit tried to create a medical condition for Mr. Kourianos that would fall within the definition of legal pneumoconiosis. (Pet. App. 48). However, the Court misapprehended the evidence to find that "[a]ll three doctors found that Mr. Kourianos had respiratory problems, which qualified his impairment as legal pneumoconiosis pursuant to *Antelope Coal*, 743 F.3d at 1335 and 20 C.F.R. §718.201(a)(2). *Id*.

According to the ALJ, there were only two diseases diagnosed: chronic bronchitis and asthma, and the ALJ discredited both diagnoses. (Pet. App. 119-121). The ALJ discounted Dr. Gagon's diagnosis of chronic bronchitis as being "conclusory and not well-reasoned" (Pet. App. 119) and further discounted Dr. Selby's diagnosis of asthma because Dr. Selby was the only physician to diagnose the condition and Dr. Selby's diagnosis was not well-documented and inconsistent with the other medical evidence. (Pet. App. 120).

The regulations provide criteria that, if met, should allow the party opposing entitlement to rebut a

presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(d). The Tenth Circuit stated that an employer can rebut the presumption of legal pneumoconiosis "by proving that the miner's lung disease was not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" *Consolidation Coal Company v. Director, OWCP and Noyes,* 864 F.3d 1142, 1152 (10th Cir. 2017). In the case at bar, two board certified pulmonologists testified that Mr. Kourianos did not have any pulmonary disease or any pulmonary disease related to coal dust exposure. The opinions were supported by the objective medical testing that revealed normal values for both the pulmonary function and arterial blood gas testing. Further, all three physicians agreed that Mr. Kourianos' testing was normal and that Mr. Kourianos did not have any evidence of either an obstructive or a restrictive pulmonary condition. Yet with this evidence, neither the ALJ, the BRB, nor the Tenth Circuit found that legal pneumoconiosis was rebutted.

Such conclusion raises the question of what level of evidence is required to rebut the presumption and whether the agency's rebuttal regulation creates a burden of proof substantially greater than for any other claim. In Longshore and Harbor Workers' Compensation claims, an employer is required to submit "substantial evidence to the contrary" to rebut the presumptions. 33 U.S.C. § 920(a).

> The substantial evidence standard of proof requires the employer to put forward as much relevant factual matter as a reasonable mind

> would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir.1998). The standard requires more than a scintilla of evidence, but it is not a preponderance standard. *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386 (4th Cir.2000). The employer need not show that natural causes more likely than not explain the employee's symptoms, it need only provide enough facts to support one rational conclusion. *See Moore,* 126 F.3d at 263.

Newport News Shipbuilding and Dry Dock Co. v. Holiday and Director, OWCP, 591 F.3d 219, 226 (4th Cir. 2009); *see also, Sprague v. Director, OWCP and Bath Iron Works Corp.*, 688 F.2d 862, 865-866 (1st Cir. 1987).

Once the employer provides substantial evidence, "the presumption falls out of the case." *St. Louis Shipbuilding Co. v. Director of Office Workers' Compensation Programs, U. S. Dept. of Labor*, 551 F.2d 1119, 1124 (8th Cir. 1977). The presumption serves only to control the result where there is a total lack of competent evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). Thereafter, the ALJ "must weigh all of the record evidence to determine whether the claimant has established the necessary causal link between the injury and employment." *Bath Iron Works Corp. v. Fields*, 559 F.3d 47, 53 (1st Cir. 2010). "The ultimate burden of proof always lies with the claimant." *Id*. citing *Greenwich Collieries*, 512 U.S. at 281.

If this is the standard of proof for presumptions, it is difficult to see how the evidence addressed above, was insufficient to rebut the presumption.

Under *Chevron*, an agency can be granted deference to interpret the statute and the regulations. However, in the case at bar, the Director took "no position on Mr. Kourianos' eligibility for benefits" before the Tenth Circuit or the BRB. (Pet. App. 35, 58) and provided no clarity regarding the regulations during either appeal.

In this case the ALJ found no evidence of any chronic obstructive or restrictive pulmonary disease for Rockwood to rebut and all the medical opinions agreed that Claimant's testing values were normal. Yet all three levels of adjudication under the OWCP, including the Director, the ALJ and the BRB, as well as the Tenth Circuit found that Rockwood failed to rebut the presumption of legal pneumoconiosis. Certiorari is warranted to determine if the agency's regulations, setting the criteria for rebuttal, are consistent with the statutory language allowing for rebuttal of the presumption. Certiorari is also requested for this Court to provide clarity as to what evidence is required to rebut a presumption of legal pneumoconiosis, when all of the medical testing and all of the medical opinion evidence confirms that claimant's testing values are within the range of normal and further confirms there is no evidence of either an obstructive or restrictive condition, is insufficient to rebut the presumption of legal pneumoconiosis.

B. Rebuttal of total disability due to pneumoconiosis.

After the ALJ found Employer failed to rebut the presumption of legal pneumoconiosis, the ALJ found Employer failed to rebut the presumption that Miner's total disability was due to pneumoconiosis. (D&O at 22) The ALJ found that neither Dr. Zaldivar nor Dr. Selby diagnosed pneumoconiosis and pointed to no other evidence to rebut the presumption that Miner's pneumoconiosis caused his total disability. (D&O at 22).

The regulations require the party opposing entitlement to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The court's have interpreted this section as requiring a "rule out" standard. *See, Noyes,* 864 F.3d at 1152. This requirement creates a heightened rebuttal standard in excess of what a miner is required to prove when the presumption is not invoked and conflicts with the statutory language which allows the Secretary to rebut the presumption by establishing that Miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

With no presumption, a miner must show that pneumoconiosis was "a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1). Conversely, when the presumption is invoked, it is insufficient for the party opposing entitlement to rebut the presumption by establishing that the miner's

pneumoconiosis was not a substantially contributing cause of the miner's disability.

While the operator's burden has been classified in theory as "heavy,"[20] in reality, "heavy" underestimates the burden as shown by the evidence in this case. All of Mr. Kourianos' pulmonary function study evidence was normal with the most recent testing in 2012 revealing improved FEV1 and FVC values from the testing in 2010. (Pet. App. 101, 143, 150). An improvement in pulmonary function is inconsistent with pneumoconiosis, which is a permanent and progressive disease. the disease. 20 C.F.R. §718.201(c). While one of the ABG tests was "qualifying, all of the physicians agreed that the "qualifying" value was "normal" for Castleview Hospital. (Pet. App. 46, 103, 144). This evidence was further supported by two board certified pulmonologists, who testified that Claimant did not have any pulmonary impairment or disease caused by coal dust exposure.

Certiorari is warranted to determine if the agency's regulations, requiring the party opposing entitlement to "rule out" that the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, is consistent with the statutory language. Certiorari is also warranted for this Court to provide clarity as to the level of evidence required to rebut the presumption.

---

[20] The "rule-out" standard "imposes a heavy burden on the employer." *See, W. Va. CWP Fund v. Director, OWCP and Smith*, 880 F.3d 691, 695 n.1 (4th Cir. 2018).

CONCLUSION

For the reasons set forth above, Rockwood Casualty Insurance Company respectfully requests this Court grant its writ of certiorari to determine if the Administrative Procedure Act governs adjudications under the Black Lung Benefits Act, and, if it does, determine whether the agency's regulations violate the Administrative Procedure Act or conflict with the statutory language.

Respectfully submitted,

Cheryl L. Intravaia
Counsel of Record
FEIRICH/MAGER/GREEN/RYAN
2001 West Main Street
P.O. Box 1570
Carbondale, IL 62903
(618) 529-3000
cintravaia@fmgr.com

Counsel for Petitioner