No. 19-23

In The
Supreme Court of the United States

ROCKWOOD CASUALTY INSURANCE CO.,
Insurer of Hidden Splendor Resources, Inc.,

Petitioner,

v.

TONY N. KOURIANOS and Director,
Office of Workers' Compensation Programs,
United States Department of Labor,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether requiring a Responsible Operator to pay benefits in a claim, after it previously agreed to its status as the liable operator, is appropriate under the Administrative Procedure Act when the Claimant has been deemed entitled to benefits under the Black Lung Benefits Act due to qualifying medical testing.

PARTIES TO THE PROCEEDINGS

The Petitioner is Rockwood Casualty Insurance Company, insurer for Hidden Splendor Resources, Inc. These companies were the appellants in the Tenth Circuit. Respondents are Mr. Tony Kourianos and Director, Office of Workers' Compensation Programs, Department of Labor.

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JURISDICTIONAL STATEMENT

This appeal arises from a *Decision and Order* issued by the Benefits Review Board ("BRB" or "the Board"), United States Department of Labor, under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, most commonly known as the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§901-944. The Tenth Circuit Court of Appeals had authority to review decisions issued by the Board pursuant to 33 U.S.C. §921(c), as incorporated by Section 422(a) of the BLBA, 30 U.S.C. §932(a).

The Board issued a *Decision and Order* on March 29, 2018 affirming the *Decision and Order* awarding benefits issued by the Administrative Law Judge ("ALJ") on February 28, 2017. Rockwood Casualty Insurance Co. ("Employer") filed a Petition for Review with the Tenth Circuit Court of Appeals on April 2, 2018. Mr. Tony N. Kourianos ("Mr. Kourianos") last worked as a coal miner in the State of Utah. Thus, jurisdiction was properly before the Tenth Circuit Court of Appeals.

The Tenth Circuit issued its denial of Employer's Petition for Rehearing on April 2, 2019. Under U.S. Supreme Court Rule 13 there were 90 days to file a petition for a writ of certiorari. Employer's petition was filed within the 90 days and thus this Court's jurisdiction was invoked timely.

STATEMENT OF THE CASE

Mr. Tony Kourianos filed the current living miner's claim in June 2012.[1] *Petitioner's Appendix*[2] ("*Appx*") 79. The District Director issued a *Proposed Decision and Order Award of Benefits* dated August 22, 2013. *Appx* 60. Rockwood Casualty Insurance Co. ("Employer"), disagreed with the award of benefits and requested a formal hearing. *Appx* 60. The claim was transferred to the Office of Administrative Law Judges for formal hearing. The claim was assigned to the Honorable Judge Paul R. Almanza who held a formal hearing. On February 28, 2017, Judge Almanza issued a *Decision and Order* awarding benefits. *Appx* 78.

Dissatisfied, Employer appealed to the Benefits Review Board and submitted its Petition for Review and Brief on May 4, 2017. Employer's grievances were multiple. It felt that the ALJ erred in denying Employer the right to withdraw its stipulation to being the Responsible Operator, in finding that Mr. Kourianos was totally disabled, in invoking the 15-year presumption and, finally, in holding that Employer failed to rebut legal pneumoconiosis and total disability.

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[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556 (2010) ("PPACA") was signed into law on the 23rd of March, 2010. Section 1556 revives the 15-year presumption found at 30 U.S.C. §921(c)(4), as implemented at 20 C.F.R. §718.305, for a claim that is (1) filed after January 1, 2005, and (2) pending on the 23rd of March, 2010.

[2] Employer submitted an Appendix with its Petition for Writ of Certiorari which contains all relevant documents in this claim.

The Board affirmed the ALJ's findings regarding all his decisions. The Board noted that Judge Almanza's "conclusion that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2)." In addition, because Mr. Kourianos was able to establish more than 15 years of qualifying coal mine employment, the Board "affirm[ed] the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption."

The Board also explained that Employer failed to make any specific arguments regarding why the ALJ's findings were deficient. In affirming, the Board explained that:

> [b]ecause the Board is not empowered to reweigh the evidence, or to engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. See 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis. See 20 C.F.R. §718.305(d)(1)(i).

Appx 75.

Employer's appeal to the Tenth Circuit Court of Appeals followed the Board's decision. Contrary to Employer's arguments, the ALJ properly denied its motion with regard to withdrawal of its stipulation to be the Responsible Operator in this claim. Initially, Employer

argued that Mr. Kourianos's work failed to meet the situs and function requirements. However, as was thoroughly discussed, Mr. Kourianos's employment met both the situs and function test to establish Employer's liability. As the ALJ noted, this information was readily available while the claim was before the District Director and if Employer had a concern about the validity of its liability then Employer should not have stipulated to liability. Moreover, once a stipulation is made it is binding; thus, the award was affirmed.

The Employer's second argument to the Tenth Circuit was that the ALJ's decisions regarding the existence of total disability due to pulmonary impairment, the invocation of the 15-year presumption, and Employer's failure to rebut the 15-year presumption lacked substantial supporting evidence. However, as was fully elucidated by the Board and Circuit Court, Judge Almanza fully explained his decisions and followed the applicable laws. The record shows that Employer's physicians failed to adequately explain Mr. Kourianos's medical condition, and how his coal dust exposure either contributed, or did not contribute, to his impairment. Employer's arguments in these sections were nothing more than a call for the Circuit Court to reweigh the facts of this case and alter Judge Almanza's findings. As substantial evidence supported the ALJ's credibility determinations the Circuit Court affirmed the award of benefits.

Employer has now appealed these decisions to this Honorable Court and Mr. Kourianos submits the following response brief in support of his position that

this Court too should affirm Judge Almanza's *Decision and Order* awarding benefits. Employer requests this Court reweigh the evidence and reach a conclusion contrary to that of the Administrative Law Judge. However, Judge Almanza's *Decision and Order* is rational, supported by substantial evidence, and in accordance with applicable law and this Court should deny the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Employer makes several arguments to this Honorable Court in the Petition for Certiorari. However, in this case, Employer's arguments are without merit and should be rejected. Employer argues the Department of Labor has flouted the requirements under the Administrative Procedure Act ("APA") and imposed requirements on Employers which are both improper and impossible to meet. As this Honorable Court will see, Employer's arguments will fail. Therefore, Mr. Kourianos requests this Court *affirm* the judge's findings.

Employer's first argument is that the Department of Labor's actions violate the Administrative Procedure Act and improperly shift the burden of proof to Employers in claims for black lung benefits. There is no argument that the APA continues to apply to claims for black lung benefits, or that the initial burden must always rest with claimants who file for benefits. Congress, however, was free to adopt presumptions in an effort to assist claimants with meeting their burdens

and then shift the burden to Employers to allow for an opportunity to rebut those presumptions. This is exactly what occurred under the amended regulations and thus the presumptions and associated burdens have been found to comply with the APA.

Employer's second argument is that it was impermissible for the Department of Labor to establish differing timeframes for the parties regarding submission of certain information in black lung claims. It should be noted initially that Employer stipulated to its responsibility for benefits (if awarded) in this claim very early in the process, but later sought to withdraw its stipulation. Their request to withdraw the stipulation was properly denied by the ALJ. Employer then detailed a lengthy argument about why Employer should not be held to be the only party with a limited time to put forward employment information. These arguments also fail for various reasons discussed below, but most importantly because Employer's argument boils down to a request to force claimants to rebut their presumption of responsibility on its behalf. Employer was in the same position as a claimant would be when it comes to producing information regarding job duties, length of employment, physicality of labor performed, and so forth. Had Employer conferred with its counsel it certainly could have produced the same information; or simply requested a deposition or more detail in interrogatory questioning. Instead, Employer agreed to its status and then attempted to change its mind. As the ALJ determined, there was no legitimate reason to allow Employer to do so.

Employer's third argument is that Judge Almanza improperly invoked the 15-year presumption after finding Mr. Kourianos established the presence of a totally disabling respiratory impairment. This Court will see, however, the ALJ's determination was more than well supported by substantial evidence and Employer's argument here also fails. As many courts have determined, substantial evidence is more than providing lip-service to an issue or argument but need not be a lengthy diatribe by the judiciary. Here, Judge Almanza plainly elucidated the reasons for his decisions, and supported them with information in the record. As such, his decisions are undoubtedly well supported and this Court would have no reason to disturb them.

Employer's fourth and final argument is that the rebuttal standard of the 15-year presumption violates the APA. There are several cleverly worded arguments made by Employer here, but in the end Employer's argument is that the burden is too difficult for it to meet and thus nobody could possibly meet it so it must be improper. While interesting, Employer's argument here ultimately fails as well. It is certainly possible in black lung benefit claims for employers to rebut the presumptions involved. It happens many times every year in cases all over the country. However, the presumptions in these claims were created by Congress in an attempt to assist claimants in obtaining benefits after being diagnosed with a terminal illness, and the burden shifting which occurs in these claims was designed to be difficult for employers to overcome. To make the burden of rebuttal easier for coal companies

completely ignores the Congressional intent behind the regulations as they currently stand.

Ultimately, Employer's physicians failed to adequately explain Mr. Kourianos's medical condition and how his coal dust exposure either contributed, or didn't, to his impairment. Employer's arguments in these sections are nothing more than a call for this Court to reweigh the facts of this case and alter Judge Almanza's findings.

Since substantial evidence supports the ALJ's credibility determinations, Mr. Kourianos asks this Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I. The Administrative Procedure Act continues to govern cases under the BLBA, but the Secretary is free to assign burdens of proof as necessary to accomplish the purposes of the BLBA.

Under the current law, the Administrative Procedure Act applies to cases arising under the Black Lung Benefits Act. 30 U.S.C. §§901-944. This appeal arises from the *Decision and Order* issued by the Benefits Review Board, United States Department of Labor, under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended; most commonly known as the BLBA. 30 U.S.C. §§901-944. Section 422(a) of the BLBA, 30 U.S.C. §932(a), incorporates Section 19(d) of the Longshore and Harbor Workers' Compensation Act

("LHWCA"). 33 U.S.C. §§901-950; 33 U.S.C. §919(d). This section of the LHWCA requires that hearings be conducted in accordance with the Administrative Procedure Act ("APA"). 5 U.S.C. §§551-559; 5 U.S.C. §554.

The APA applied to the BLBA. Employer argues that there is ambiguity around whether the APA applies to the entirety of the BLBA and thus leaves parties in limbo. This Court's prior decision in *Greenwich Collieries*, clearly states the APA does apply to cases adjudicated under the BLBA. *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Further, the applicability of the APA is well established in claims under the BLBA and has been continually reiterated by the Circuit Courts. *Harman Min. Co. v. Dir., OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (The Court notes the Administrative Procedure Act "does not impose a 'duty of long-windedness' on an ALJ. . . . To the contrary, '[i]f a reviewing court can discern what the ALJ did and why [s]he did it, the duty of explanation [under the APA] is satisfied'.") (*citing to Lane Hollow Coal Co. v. Dir., OWCP*, 137 F.3d 799, 803 (4th Cir. 1998) and *Piney Mountain Coal Co. v. Mays*, 176 F.3d 762 at n.10 (4th Cir. 1999)).

Employer, in its Petition for Writ of Certiorari, also argued that the Department of Labor is not permitted to assign different burdens of proof to parties in claims processed under its purview. However, as also noted by this Court, the term burden of proof is frequently used to refer to more than one concept.

The Court in *Dir., OWCP v. Greenwich Collieries* held:

> Because the term "burden of proof" is nowhere defined in the APA, our task is to construe it in accord with its ordinary or natural meaning. It is easier to state this task than to accomplish it, for the meaning of words may change over time and many words have several meanings even at a fixed point in time. . . .
>
> For many years the term "burden of proof" was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production – a party's obligation to come forward with evidence to support its claim.

512 U.S. 267, 272 (1994) (internal citations omitted). The Court further noted that "the burden of proving the fact remains where it started, once the party with this burden establishes a prima facie case, the burden to 'produce evidence' shifts." *Id.* Due to the confusion surrounding the term "burden of proof" the Court concluded that this term is synonymous with "the burden of persuasion." *Id.* at 276.

Since, as the Court previously noted, the term burden of proof is not specifically defined in the APA, it

would certainly be appropriate for the Secretary to clarify the burden of proof in claims being processed under the BLBA. Under 5 U.S.C. §556(d), "the proponent of a rule or order has the burden of proof." However, what Employer fails to take into consideration is the preceding section of that sentence which provides that the requirement can be otherwise changed by statute.

This Court clarified in *Greenwich Collieries* that "[i]n part due to Congress's recognition that claims such as those involved here would be difficult to prove, claimants in adjudications under these statutes benefit from certain statutory presumptions easing their burden." 512 U.S. at 280 (*citing* 33 U.S.C. §920; 30 U.S.C. §921(c); *see Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935)). While plainly stating the Department of Labor's true doubt rule went too far and violated the APA, this Court explained that the Department's "solicitude for benefits claimants is reflected in the regulations adopting additional presumptions." *Id*. (*citing* 20 C.F.R. §§718.301-.306 (1993); *see Mullins Coal v. Dir., OWCP*, 484 U.S. 135, 158 (1987)).

Most importantly, however, is this Court's clarification that shifting of the burden can be appropriate in cases such as those under the BLBA. In *Greenwich Collieries*, the government proposed that, under the true doubt rule, if all evidence in a case is evenly balanced then the claimant would win. It was this argument that ultimately failed. As part of the argument the government contended that legislative history, in the forms of committee reports, showed Congress's

agreement with this idea. This Court disagreed and stated:

> The Reports make clear that once the licensee establishes a prima facie case, the burden shifts to the Government to rebut it. This is perfectly compatible with a rule placing the burden of persuasion on the applicant, because when the party with the burden of persuasion establishes a prima facie case supported by "credible and credited evidence," it must either be rebutted or accepted as true.

Greenwich Collieries, 512 U.S. at 280.

There are several marked differences between the Greenwich Collieries case and the one at issue here. Initially, *Greenwich Collieries* dealt with a rule the Department had developed which was not part of the regulations. Here, the burden-shifting proposition at issue is a part of the regulations and is permissible by the Department. Moreover, under this Court's guidance, the APA undoubtedly applies to claims under the BLBA, but the Department remains free to shift burdens so long as the proponent of the law initially meets their prima facie case as supported by credible evidence. *Greenwich Collieries*, 512 U.S. at 280. Under the current regulations Employers have ample opportunity to review and rebut the evidence, if they are able, and have a full and fair hearing on the issues. As such there is no issue here worthy of additional review by this Honorable Court.

II. The Regulations' assignment of timeframes for disputing liability of responsible operators do not violate the APA.

It is permissible under the APA for the Department to create timeframes in which to permit submission of evidence. Employer argues that at the formal hearing, Mr. Kourianos's testimony suggested that Employer was not the correctly named Responsible Operator. At the mere suggestion of an improper party the issue was briefed, and Judge Almanza issued an order denying Employer's motion to withdraw its stipulation. Contrary to Employer's belief, the ALJ's denial was not an erroneous abuse of discretion because the basis of the ALJ's denial is supported by the regulations.

Liability for the potential payment of Federal black lung benefits is assessed against the most recent operator who meets the requirements of 20 C.F.R. §§725.491-.494. An operator is "[a]ny owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine. . . ." 20 C.F.R. §725.491(a). The proper responsible operator is an operator that employed the miner for at least one calendar year where the miner spent at least 125 days working. *The Daniels Co. v. Dir., OWCP* [*Mitchell*], 479 F.3d 321 (4th Cir. 2007). The proper responsible operator must also be financially capable of assuming liability for the payment of a miner's benefits. 20 C.F.R. §725.492(a)(4).

This case is complex as it involves the miner's last calendar year of coal mine employment and the tasks involved in it. Mr. Kourianos clarified the employment issue by saying that claiming he worked for Employer for over a year was really stretching it because he only worked about three and a half months for them in 2007, and then he would go up on contract to train a bunch of guys and would come and go as he pleased. The ALJ's conclusion was that Mr. Kourianos employment information was reasonably ascertainable by Employer and as a result Employer was properly named as the responsible operator. Ultimately, Employer argues that Mr. Kourianos's work for Employer does not fulfill both the situs and function clauses, and the required elements to be considered a potentially liable operator. However, in his Decision and Order Denying Employer's motion to withdraw its stipulation, Judge Almanza held that the information regarding Mr. Kourianos's tenure and tasks with Employer was "reasonably ascertainable" when the case was still at the Department of Labor level and should have been determined at that point and not at the ALJ level. *Appx* 98 n.5.

Stipulations are binding when received into evidence. *Grigg v. Dir., OWCP*, 28 F.3d 416 (4th Cir. 1994). Here, it is the firm position of Mr. Kourianos that he is entitled to an award of benefits in this case regardless of the responsible operator. Should this Court determine Employer is the properly named responsible operator based on its stipulation, Mr. Kourianos believes the evidence admitted before this Court is probative in

establishing all elements of entitlement. In the alternative, however, Mr. Kourianos respectfully requests that if Employer is not the properly named responsible operator, this Court immediately issue a Decision and Order Award of Benefits naming the Black Lung Trust Fund as liable for the payment of Mr. Kourianos's benefits in this case.

Ultimately, the issue is the completeness of the regulations. Under 20 C.F.R. §725.407 the Department of Labor identifies and puts on notice the party determined to be the responsible operator. Under 20 C.F.R. §725.408 the responsible operator is provided various methods to respond or rebut the designation given to it and is given 90 days to submit evidence related to the issue of responsibility. In the event that a mistake is made, or new information comes to light, including about the designation of the responsible operator, a reasonable time may be allowed after a conference to submit new evidence, or *designate and notify a new operator* under 20 C.F.R. §725.417(b).

Employer in this case, as in any other claim for federal black lung benefits, had more than sufficient time to rebut its designation as the responsible operator in this claim. Employer espouses many arguments for its delay; none of them are sufficient to allow Employer to escape liability. Why did Employer not give this information about Mr. Kourianos's employment to its Counsel? Why should Employer be allowed the benefits of escaping liability when it had the information available but hid it from the Court until after a stipulation? Why did Employer not depose Mr. Kourianos if

Counsel was unsure of the claimed scope of employment?

The argument Employer rests upon is the notion that Claimant and Employer are treated differently when they should not be. Employer's theory, however, mischaracterizes the situation the parties find themselves in when proceeding through these cases. The Claimant is not responsible for rebutting Employer's designation as the responsible operator; that is Employer's responsibility if they choose to do so. Employer is correct in one respect: the parties are treated differently. They are treated differently because they *are* different. One is an injured worker while the other is ultimately designated as the party responsible for benefits with all the resources and advantages enjoyed by such a large company. Employer fails to admit that ultimately the argument of time requirements is a bedrock of our justice system. Mr. Kourianos has a timeframe in which he must file his claim or be forever barred. Litigants countrywide must abide by timeframes to file a lawsuit or answer a lawsuit, lest they fall into default and be unable to cure the error. Timeframes are important and necessary elements of our justice system to ensure judicial effectiveness, efficiency, and accessibility. To require such a timeframe for correction from a company with resources that far outweigh that of claimants is hardly unjust or unfair.

Moreover, there is support for treating parties differently depending on the case; including previously in cases related to coal workers' pneumoconiosis claims. In *Durham v. Peabody Coal Co.*, the Kentucky

Supreme Court reviewed three distinct cases at one time. 272 S.W.3d 192 (Ky. 2008). The parties in these cases had their claims dismissed by an Administrative Law Judge because the parties failed to rebut the presence of clinical pneumoconiosis. *Durham*, 272 S.W.3d at 194. The miners argued that treating them differently from workers who sustained traumatic injuries violated their rights to equal protection under the 14th Amendment. *Id.* The court reviewed the claims to determine whether parties who were similarly situated were permitted to be treated differently. The Kentucky Supreme Court acknowledged claimants for black lung benefits were limited to only two medical reports while parties in traumatic injury claims were not limited in such a method, but the court explained that there was "a reasonable basis for treating the conditions differently." *Durham*, 272 S.W.3d at 198. The court explained:

> we perceive a legitimate state interest in treating coal workers' pneumoconiosis differently than traumatic injuries. The existence and category of pneumoconiosis are proven with x-ray evidence, but the evidence necessary to prove the existence and extent of traumatic injury varies with the type of injury. That difference provides a reasonable basis for treating the conditions differently.

Id. Thus, the court affirmed the Court of Appeals' decision that the statute did not deny equal protection to the parties.

The rationale applies consistently in this claim as well. The courts acknowledge that if a rational distinction can be made between how people or groups are being treated that follows the rationale of the law it can be a permissible difference. In this case, Employer is arguing that forcing it to be responsible for providing employment information and then preventing submission of additional information, at a very late date, while not limiting the same submission by other parties is unacceptable. However, it is Employer who would benefit by being permitted to suddenly provide this information at such a late stage, not claimants or the Department of Labor. Under the regulations, if an incorrect employer is named and the claim reaches the Administrative Law Judge, all the employer must do is suddenly submit this hidden evidence to have the case turned over to the Trust Fund for payment. It also prevents the District Office for the Department of Labor from having the opportunity to name a correct employer. The distinction between the parties in these black lung claims is clearly rational to prevent employers from sandbagging both claimants and the Department of Labor at the last minute with employment evidence it had in its possession the whole time to escape liability.

III. ALJ Almanza's findings regarding the presence of a total disability and the invocation of the 15-year presumption were supported by substantial evidence and were appropriate.

As to this portion of Employer's argument, it boils down to a request for this Court to reweigh the evidence in this case and make determinations contrary to those of the administrative law judge. As the decisions made by Judge Almanza were supported by substantial evidence they should be affirmed by this Court. The Circuit Courts have given a clear explanation of what constitutes substantial evidence in federal black lung claims. In *Island Creek Coal Co. v. Dykes*, the Fourth Circuit clarified:

> This court reviews decisions of the Board to determine whether the Board properly found that ALJ's decision supported by substantial evidence and in accordance with law. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 186 (4th Cir. 2002). In making this determination, the court conducts an independent review of the record to decide whether the ALJ's findings are supported by substantial evidence. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193 (4th Cir. 1995). Substantial evidence is more than a scintilla, but only such evidence that a reasonable mind could accept as adequate to support a conclusion. *Land v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). Subject to the substantial evidence requirement, the ALJ has the sole authority to make credibility determinations and resolve

> inconsistencies or conflicts in the evidence. *Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). "As long as substantial evidence supports an ALJ's findings, we must sustain the ALJ's decision, even if we disagree with it." *Harman Mining Co. v. Dir., Office of Workers' Comp. Programs*, 678 F.3d 305, 310 (4th Cir. 2012) (internal quotation marks and brackets omitted).

No. 12-1777, pg. 5 (4th Cir. May 21, 2015). This language is consistently reiterated by various other circuit courts.[3]

Employer states that Judge Almanza substituted his own opinion for that of the physicians in finding a totally disabling respiratory impairment. It points out that there were non-qualifying pulmonary function values and then suggests that the qualifying exercise arterial blood gas values were felt by Drs. Gagon, Zaldivar, and Selby to be normal for Price, Utah. This may well be the case for Drs. Zaldivar and Selby, but not for Dr. Gagon as the Judge pointed out.

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[3] *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1336 (10th Cir. 2014) (*citing Hansen v. Dir., OWCP*, 984 F.2d 364, 368 (10th Cir. 1993) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) ("Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'.")")); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1068 (10th Cir. 2014) (*citing Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 606 (6th Cir. 2001) (*quoting Kolesar v. Youghiogheny & Ohio Coal Co.*, 760 F.2d 728, 729 (6th Cir. 1985) (" 'Substantial evidence' means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ") (*quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971)))).

> Dr. Gagon prepared a supplemental report dated August 24, 2014, in which he responded to Dr. Zaldivar's criticism that the August 23, 2012 arterial blood gas study did not properly take into account the altitude of Price, Utah (*see infra*). (DX 39). In the report, in response to Dr. Zaldivar's statement that Claimant's "blood gas studies appear very low but they are not when taking into consideration the altitude of Price, UT" (*see* EX 2 at 8), Dr. Gagon stated that the blood gas studies did take into account the altitude, and that based on the regulatory tables Claimant met the requirements for disability. (DX 39). Dr. Gagon stated that he "suspect[ed]" that a technician did not properly record the barometric pressure for the blood gas studies, but that an incorrect barometric pressure recording "does not change the results of the test." (DX 39). He stated that the results of the study "indicate hypoxemia with exercise meeting the requirements for disability" at the 3,000-5,999 foot altitude range. (DX 39). He stated that although "[s]moking probably contributes" to Claimant's drop in exercise P02, that exposure to coal dust "is also a significant contributing factor." (DX 39). He stated that he agreed that Claimant "could work as long as the work is sedentary. However, with his significant hypoxemia with exercise, he would be limited with any exertion." (DX 39).

Appx 104. Judge Almanza found further sound reason to afford Dr. Gagon's opinion on disability more weight because that physician was the only one who

addressed the exertional requirements of the miner's work. "His opinion regarding disability is well-documented and well-reasoned, and he was in a better position to determine whether Claimant could exert the physical effort required to perform a fire boss's duties than the other physicians. *See Killman v. Dir., OWCP*, 415 F.3d 716, 722 (7th Cir. 2005)." *Appx* 116. Employer disagreed with this assessment, aggrieved that the ALJ gave more weigh to Drs. Zaldivar and Selby on this issue.

But Judge Almanza fully explained his rational for finding the resting exercise testing qualifying.

> I give little weight to Dr. Zaldivar's and Dr. Selby's findings that Mr. Kourianos is not disabled. Neither doctor's finding was informed by details of Claimant's usual coal mine employment. Furthermore, Dr. Zaldivar and Dr. Selby both stated in their reports and testified at their depositions that the arterial blood gas studies did not properly account for Price, Utah's altitude: because the test was conducted at a relatively high altitude, they stated, and because P02 values could be expected to drop linearly as altitude increased, the low P02 value should not be considered to show disability. Appendix C to 20 C.F.R. Part 718, however, requires that administrative law judges analyze arterial blood gas studies according to three ranges of altitude: from sea level to 2,999 above sea level; from 3,000 to 5,999 above sea level; and over 6,000 feet above sea level. The testing was performed in the second range, from 3,000 to 5,999 feet above sea level.

> The regulations do not contemplate further dividing testing results into narrower ranges, nor am I permitted to do so. Because Dr. Zaldivar's and Dr. Selby's statements are inconsistent with the regulations, I give their opinions regarding Claimant's disability little weight.

Appx 116. Employer further takes issue with the fact that the ALJ never addressed the non-qualifying pulmonary function values and the non-qualifying blood gas testing, declaring that, because of this, the Judge's decision fails to comport with the requirements of the APA. Mr. Kourianos submits that the methods offered by the regulations for discerning a totally disabling respiratory impairment are separated by the conjunction "or," not "and." It is not incumbent upon a claimant to prove them all. Thus, there was no reason for the ALJ to consider the pulmonary function testing when it was evident that this portion of Mr. Kourianos's examinations so obviously did not qualify. This Court must reject Employer's arguments because substantial evidence supports Judge Almanza's determinations on this topic.

IV. The rebuttal standard of the 15-year presumption does not violate the APA by creating an untenable burden on employers.

The regulation which Employer argues is too strenuous a burden is, in fact, a standing regulation which has proven to be useful and applicable in hundreds of previous cases. Since its enactment in 1969,

"Congress has repeatedly tinkered with the claim-filing process, sometimes making it harder for miners and survivors to obtain benefits, sometimes making it easier." *Vision Processing, LLC v. Groves*, 705 F.3d 551, 553 (6th Cir. 2013). Congress's most recent amendments to the BLBA have eased the pathway to obtain benefits for certain miners and survivors by reviving the 15-year rebuttable presumption at 30 U.S.C. §921(c)(4), and derivative entitlement at 30 U.S.C. §932(l). Pub L. No. 111-148, §1556 (2010). However, Courts acknowledge "[i]t is no secret that the 15-year presumption is difficult to rebut." *Consolidation Coal Co. v. Dir., OWCP* [*Bailey*], 721 F.3d 789, 795 (7th Cir. 2013). However, difficult does not mean impossible.

a. The current "rule-out" standard is a heavy burden, but is reachable by employers, and does not violate the APA.

Several courts have discussed the "rule-out" standard and the related language in the regulations.[4] The Seventh Circuit explained the relevant history of the Act in *Consolidation Coal Co. v. Bailey*, 721 F.3d 789 (7th Cir. 2013). In 1972, the original version of the Act included "a rebuttable presumption that coal miners who had worked for at least 15 years in [mines] and who suffered from a totally disabling respiratory or pulmonary impairment were totally disabled due to

[4] 20 C.F.R. §718.305; *Drummond Co. v. Dir., OWCP*, 650 F.App'x 690, 693 (11th Cir. 2016); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1336 (10th Cir. 2014); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134 (4th Cir. 2015).

pneumoconiosis." *Id*. at 791-92. This presumption was removed in 1981 but was subsequently revived by Congress in 2010. *Id*. (*citing Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011); *see* 30 U.S.C. §921(c)(4)). The Fourth Circuit explained that permitting Employers to rebut the presumption by other, far less stringent standards as they have historically requested, would defeat the purpose of the presumption's creation: namely to assist injured workers in their efforts to obtain benefits against Employers. *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 141 (4th Cir. 2015).

The rule-out standard requires Employer to provide proof which "rules out any connection between the claimant's disability and coal mine employment." *Antelope Coal Co. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014) (citations omitted). Generally, the other Circuit Courts have agreed with the standard. *Id*. (*citing Peabody Coal Co. v. Hill*, 123 F.3d 412, 417-18 & n.9 (6th Cir. 1997) and *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980)).

In *Island Creek Coal Co. v. Dykes*, the Fourth Circuit explained that while "Section 921(c)(4) is silent regarding the standard that an operator must meet to rebut the presumption [. . .] the Department of Labor (DOL) possessed the authority to promulgate regulations establishing the applicable standard." No. 12-1777, pg. 3 (4th Cir. May 21, 2015) (*citing Bender*, 782 F.3d at 138). In addition, the Court explained that this "reasonable exercise of the agency's authority" was permissible under, and complied with, this Court's decisions in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S.

1 (1976) and *Chevron v. Nat'l Resources Def. Council*, 467 U.S. 837 (1984). *Id*.

Further, the Tenth Circuit also reviewed the rule-out standard and determined it complied with both the APA and the Black Lung Benefits Act. *Consolidation Coal Co. v. Thompson*, No. 16-9539 (10th Cir. Dec. 20, 2017) (*citing Consolidation Coal Co. v. Dir., OWCP* [*Noyes*], 864 F.3d 1142, 1144 (10th Cir. 2017) (holding the rule-out standard applied to claims for survivor benefits under the BLBA)). The Tenth Circuit also noted that it was "not bound by the DOL's determination that its own regulation is consistent with the BLBA. But we must defer to the DOL's reasonable interpretation of the BLBA." *Spring Creek Coal Co. v. McLean*, (17-9515) (10th Cir. 2018).

Finally, as noted by the Tenth Circuit in *Noyes*, there appears to be a consensus among the Circuit Courts that the rule-out standard is the appropriate standard for rebuttals in black lung claims and that it is within the Department's authority to use.[5] *Noyes*,

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[5] *Consolidation Coal Co. v. Dir., OWCP* [*Noyes*], 864 F.3d 1142, 1144 (10th Cir. 2017) (holding the rule-out standard applied to claims for survivor benefits under the BLBA); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014) (discusses rule-out standard for miner claims); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123-24 (4th Cir. 1984); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984); *Ala. By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 141-43 (4th Cir. 2015); *Helen Mining Co. v. Elliot*, ___ F.3d ___, 2017 WL 2562585 (3d Cir. June 14, 2017).

864 F.3d at ___. It also noted that the rule-out standard was consistent with "Congress' intent in enacting the fifteen-year presumption and the broad remedial purposes of the BLBA." *Id*. (*citing Bridger Coal Co. v. Dir., OWCP*, 669 F.3d 1183, 1190 (10th Cir. 2012)).

b. Employer failed to rebut the presumption under either method available.

Employer insists that Judge Almanza's determination that a finding of legal pneumoconiosis had not been rebutted was irrational, not supported by substantial evidence, and contrary to law. Employer argues that Judge Almanza failed to credit a medical opinion that would have established legal pneumoconiosis so there was no condition for Employer to rebut, and if legal pneumoconiosis was established that both Dr. Zaldivar and Dr. Selby specifically provided opinions as to why Miner did not have legal pneumoconiosis.

Mr. Kourianos submits that, contrary to what Employer avers, Drs. Gagon and Zaldivar diagnosed chronic bronchitis, a disease "arising out of coal mine employment" in accordance with 20 C.F.R. §718.201 and there was a proven impairment as evidenced by the exercise blood gas testing. Hence there was, indeed, a medical condition that called for rebuttal. While he considered the report of Dr. Gagon "conclusory and not well-documented," Judge Almanza considered the impairment explanation of Dr. Zaldivar and found it

chock full of discredited theories, assumptions and generalities that run counter to regulations.

> I also give little weight to Dr. Zaldivar's conclusion that Claimant's respiratory condition was caused solely by smoking, for several reasons. First, Dr. Zaldivar dismissed the notion that Claimant's exposure to coal dust might have led to his arterial blood gas study results because "[c]onsidering that the chest x-ray is normal and that the ventilatory study is normal, the only abnormality that could explain this drop in the P02 would be a low diffusion capacity of a pulmonary fibrosis or a bronchiolitis of a smoker." Dr. Zaldivar's opinion implies that arterial blood gas studies alone could not indicate the presence of coal workers' pneumoconiosis, but that pneumoconiosis *must* be seen via pulmonary function testing or x-rays—a position inconsistent with the regulations. Second, Dr. Zaldivar's assertion that Claimant's breathing problems were caused by smoking and not by exposure to coal dust were based on an analysis of the general population, and not on an analysis specific to the miner: in finding that smoking and not coal dust exposure caused the symptoms of bronchitis he diagnosed, Dr. Zaldivar stated that "it is very important to remember that coal miners are human beings subject to all diseases and conditions of human beings and are affected by habits such as smoking just as the population at large is affected by it." Because his diagnosis is not specifically tied to Mr. Kourianos, I give it little weight. *See*

> *Consolidation Coal v. Director, OWCP* [*Beeler*], 521 F.3d 723 (7th Cir. 2008) (affirming administrative law judge who discredited adoctor because the doctor "did not rely on information particular to [the miner] to conclude that smoking was the only cause of his obstruction").

Appx 119-20. Likewise, with the opinion of Dr. Selby, found by the ALJ to be equally insufficient, as it was based on specious and dangerous arguments regarding asthma. Dr. Selby's opinion speaks for itself in matters of discernment and quality of analysis.

> I also give little weight to Dr. Selby's finding that Mr. Kourianos suffered from asthma, and that his asthma was unrelated to his coal mining and exacerbated by his smoking. First, Dr. Selby is the only physician to have diagnosed asthma, and he provides little basis for this differential diagnosis; his diagnosis of asthma is not well-documented and is inconsistent with the other medical evidence. Second, Dr. Selby's statement that "working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs" is contrary to the central purpose and function of the Act. *See* 30 U.S.C. §901(a); *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999 (7th Cir. 2005) (affirming administrative law judge's discrediting of a doctor who stated that coal mining had a "positive effect on [a miner's] health" because it limited his smoking). For these reasons, I give Dr. Selby's opinion little weight.

Appx 120-21.

Lastly, Employer disagrees that the Judge's finding that the presumption of total disability due to pneumoconiosis had not been rebutted. But the ALJ presented his position in this fashion:

> Employer may also rebut the presumption by establishing that pneumoconiosis did not contribute to Mr. Kourianos's pulmonary disability. Here, however, neither Dr. Zaldivar nor Dr. Selby diagnosed pneumoconiosis, and Employer has pointed to no other evidence to rebut the presumption that Mr. Kourianos's pneumoconiosis caused his total disability. Accordingly, Employer has not rebutted the presumption that Mr. Kourianos's disabling respiratory or pulmonary impairment was caused by pneumoconiosis.

Appx 121. Employer seems irked that it is tasked with the burden of rebuttal but that is the case. Judge Almanza held that it had fallen short of its goal.

> Employer has not offered evidence sufficient to rebut the presumption. Indeed, Employer argues that Mr. Kourianos did not suffer from pneumoconiosis at all, and makes no argument in the alternative that the disease has been caused by another source. Employer has therefore failed to rebut the presumption that Mr. Kourianos's pneumoconiosis was caused by his coal mine employment.

Appx 122. Judge Almanza was simply pointing out that Employer's physicians evaded any sound reasoning as to why coal mine dust had not played any role in Mr. Kourianos's pneumoconiosis.

The determination of the weight of the evidence is within the discretion of the ALJ. In this case, after considering all the x-ray interpretations along with their readers' qualifications and the remaining medical evidence, Judge Almanza determined that the evidence established Mr. Kourianos qualified for benefits. At no point did the judge fail to consider, or improperly consider, evidence when making this determination. Judge Almanza's decision is rational, supported by substantial evidence, and made in accordance with the law and it should be affirmed by the Court.

The Administrative Procedure Act "does not impose a 'duty of long-windedness' on an ALJ. . . . To the contrary, '[i]f a reviewing court can discern what the ALJ did and why [s]he did it, the duty of explanation [under the APA] is satisfied'." *Harman Mining Co. v. Dir., OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (*citing Lane Hollow Coal Co. v. Dir., OWCP*, 137 F.3d 799, 803 (4th Cir. 1998) and *Piney Mountain Coal Co. v. Mays*, 176 F.3d 762 at n.10 (4th Cir. 1999)). Here, the ALJ fully considered all the medical evidence provided when determining if the presence of pneumoconiosis had been established. The Administrative Law Judge is empowered to weigh the medical evidence of record and to draw his or her own inferences there from. *Twin Pines Coal Co. v. U.S. Dep't of Labor*, 854 F.2d 1212, 1218 (10th Cir. 1988).

The Administrative Law Judge is not bound to accept the medical opinion of any physician. *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.3d 1070, 1075 (4th Cir. 1980). A "documented" opinion is

one that sets for the clinical findings, observations, facts, and other data upon which the physician based his or her diagnosis. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). A "reasoned" opinion is an opinion which the Administrative Law Judge finds the physician's conclusions to be supported by documentation and other data. *Id.* Here, it was fully within Judge Almanza's discretion to determine the medical opinions of Drs. Zaldivar and Selby lacked sufficient reasoning to be given as much weight as that of Dr. Gagon since they did not fully discuss the issues pertinent to the case and were not well-reasoned.

Ultimately, the ALJ's weighing of the medical opinions is supported by substantial evidence; the ALJ did fully consider the medical opinions of Drs. Gagon, Zaldivar, and Selby. Acting entirely within his discretion, the judge made credibility determinations and found Mr. Kourianos demonstrated he suffered from pneumoconiosis through both the x-ray evidence and the medical opinion evidence. Substantial evidence supports the ALJ's credibility determinations and this Court must reject Employer's request to reweigh the evidence in this case.

Here, Employer may disagree with the ALJ's reasons and findings that its physicians offered medical opinions which were undocumented and unreasoned. However, Employer has failed to show that the ALJ erred in his findings or show that the findings were impermissible. Even if this Court might have weighed the evidence differently than the ALJ, this Court should nevertheless defer to the factual findings of the

administrative law judge, as his Decision and Order is rational, supported by substantial evidence, and in accordance with applicable law. *See Harman Mining Co. v. Dir., OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012).

The ALJ properly found the evidence was sufficient to prove that Mr. Kourianos did suffer from coal workers' pneumoconiosis, that his totally disabling respiratory impairment was caused by the disease, and that Employer failed to rebut the correctly invoked presumption. Mr. Kourianos firmly maintains that Judge Almanza's *Decision and Order* awarding benefits was rational, supported by substantial evidence, and in accordance with applicable law. As such, Mr. Kourianos respectfully requests this Court to *affirm* the ALJ's decision.

CONCLUSION

Based on the foregoing, Tony N. Kourianos respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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