

No. _____

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR and ROBERT THOMPSON,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Department of Labor's inclusion of legal pneumoconiosis, which includes diseases of the general population like COPD, emphysema and chronic bronchitis, within the 15-year presumption found at 30 U.S.C. §921(c)(4) of the Black Lung Benefits Act violate due process rights stemming from the Fifth Amendment and the Administrative Procedure Act as well as the separation of powers enunciated Articles I, II and II of the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner, Consolidation Coal Company, was the appellant in the Tenth Circuit. Respondents are Director, Office of Workers' Compensation Programs, U.S. Department of Labor and Mr. Robert Thompson.

RULE 29.6 STATEMENT

Consolidation Coal Company's parent company was Consol Energy, Inc. Consolidation Coal Company was sold to Murray Energy but retained its liability with regard to FBL liability.

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PETITION FOR WRIT OF CERTIORARI

Consolidation Coal 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 January 14, 2011. (Pet. App. 210-264). The Benefits Review Board (BRB) vacated the award and remanded the claim on January 20, 2012. (Pet. App. 199-209). The OALJ issued a Decision and Order awarding benefits on remand on March 28, 2013. (Pet. App. 152-198). The BRB vacated the award and remanded the claim on April 23, 2014. (Pet. App. 132-151). The OALJ issued a Decision and Order awarding benefits on second remand on May 28, 2015. (Pet. App. 31-131). The BRB issued a Decision and Order affirming the award on June 30, 2016. (Pet. App. 8-30). The Tenth Circuit issued an unpublished decision affirming the award on December 20, 2017. (Pet. App. 1-7).

JURISDICTION

The Tenth Circuit opinion was filed on December 20, 2017. App. 1 - 9. This Court's jurisdiction is timely invoked under 28 U.S.C. §1254(1).

**RELEVANT CONSTITUTIONAL, STATUTORY
AND REGULATORY PROVISIONS**

**The Fifth Amendment to the United States
Constitution states:**

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**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 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. 310-314).

STATEMENT OF THE CASE

The Black Lung Benefits Act, originally enacted in 1969 as Title IV of the Federal Coal Mine Safety and Health Act, is an occupational disease program established to provide benefits to coal miners who are totally disabled due to pneumoconiosis. Section 402(b), Pub. Law 91-173 (Dec. 30, 1969). The Act was amended in 1972 and 1977 to expand the program to all coal miners, provide presumptions for entitlement and amend the definition of pneumoconiosis. Pub. Law 92-303 (May 19, 1972) and Pub. Law 95-239 (Mar. 1, 1978). Congress amended the Act again in 1981 at which time the 15-year and widow's presumptions were eliminated and claimants were required to use medical evidence to support their claims. Pub. Law 97-119 (Dec. 29, 1981).

Congress unsuccessfully attempted to amend the statute again in 1994 with House Bill 2108. 64 Fed. Reg. 54966, 54971 (Oct. 8, 1999). The bill passed in the House in May 1994. *Id.* The Senate adjourned in September 1994 without passing the bill. *Id.* When the Bill did not pass, the Department of Labor ("DOL") issued regulations that essentially adopted provisions similar to those found in the House bill and further redefined pneumoconiosis. *Id.* The 2000 regulations made numerous changes to the regulations by (1) creating legal pneumoconiosis, (2) adopting a treating physician rule, and (3) limiting the amount of evidence that could be presented at hearing. The regulations were enacted on January 19, 2001 and, for the most part, withstood Constitutional review except for a few changes that could not constitutionally be

retroactive. *Nat'l Mining Ass'n v. DOL*, 292 F.3d 849, 862-63 (D.C. Cir. 2002).

On March 23, 2010, the Patient Protection and Affordable Care Act ("PPACA") was enacted. Pub. Law 111-148 (Mar. 23, 2010). Section 1556 of the PPACA revived the 15-year presumption along with the widow's presumption previously eliminated in 1981. *Id.* In October 2013, the DOL revised its regulations to include legal pneumoconiosis as part of the 15-year presumption and set the rebuttal requirements for the presumption. 78 Fed. Reg. 59102, 59102-59119 (Sept. 25, 2013).

The DOL's regulation interpreting the revival of the 15-year presumption violates both procedural and substantive due process and changes the BLBA from an occupational disease program to a pension program because the regulation provides benefits to miners who are not totally disabled from a coal mine dust induced disease. Mr. Thompson's case is one of many that have been awarded benefits under the current regulatory system. To date, the Federal Circuit Appellate Courts have unanimously allowed the DOL's regulations to stand by providing unwarranted deference to the agency by ignoring the history of the disease, the history of the Act and the differences between the presumptions of clinical and legal pneumoconiosis.

REASONS FOR GRANTING THE PETITION

- I. **CERTIORARI SHOULD BE GRANTED BECAUSE THE DOL'S REGULATORY INCLUSION OF LEGAL PNEUMOCONIOSIS IN THE 15-YEAR PRESUMPTION VIOLATES SUBSTANTIVE DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT BECAUSE THE REGULATION IS NEITHER FAIR NOR REASONABLE AND FAILS TO FURTHER A LEGITIMATE LEGISLATIVE PURPOSE BECAUSE IT PROVIDES BENEFITS TO MINERS WHO ARE NOT TOTALLY DISABLED BY A DISEASE STEMMING FROM COAL DUST EXPOSURE.**

The Black Lung Benefits Act has been classified as a legislative Act adjusting the burdens and benefits of economic life. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This classification comes with a presumption of constitutionality and the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Id.* Substantive due process requires only that economic legislation be 'supported by a legitimate legislative purpose furthered by rational means.' *Davon et al v. Shalala et al*, 75 F.3d 1114, 1121 (7th Cir. 1996) citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

No legitimate legislative purpose was provided or considered by Congress prior to the March 2010 enactment of the PPACA. *U.S. Steel Mining Co., LLC. v. Director, OWCP and Starks*, 719 F.3d 1275, 1283 (11th Cir. 2013) ("Section 1556 of the Affordable Care

Act has no legislative history.”). When the initial 15-year presumption was enacted, what is now known as “clinical” pneumoconiosis was the only condition at issue. Congress held numerous hearings and listed to expert testimony addressing the length of time and exposure necessary to cause clinical pneumoconiosis. (Pet. App. 345-350). Unlike the hearings before the 1972 and 1977 amendments to the BLBA, there were no hearings held, no scientific research reviewed and no testimony provided that would indicate Congress intended legal pneumoconiosis to be included in the presumption. The only rationale provided for the revived presumption was provided after the enactment of the Affordable Care Act and was provided by Senator Byrd who said (in relevant part), “I look forward to working to ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won.” 156 Cong. Rec. at 2083S–84S (daily ed. Mar. 25, 2010) (statement of Sen. Byrd); see also, *B&G Construction Co. v. Director, OWCP*, 662 F.3d 233, 244 (3rd Cir. 2011).

The DOL’s position on legal pneumoconiosis prior to Congress’ revival of the 15-year presumption undermines any belief that Congress, or even Sen. Byrd, intended to include the condition within the 15-year presumption.

A. Legal pneumoconiosis was never intended to be a “presumed” disease.

Based on the DOL’s definitions, “clinical” pneumoconiosis is the disease recognized by the medical community consisting of findings on x-ray, CT scan, biopsy and autopsy. 65 Fed. Reg. 79920, 79937 (Dec. 20, 2000). “Legal” pneumoconiosis is comprised

of COPD, emphysema and chronic bronchitis, as well as restrictive pulmonary impairments, that are “not typically denominated as pneumoconiosis in medical circles.” *Id.*

When the definition for legal pneumoconiosis was first enacted, the DOL stated the condition would not be presumed and “in order to ensure that miners were not compensated for a condition unrelated to coal mine dust, each miner would bear the burden of proving his obstructive condition did in fact arise from his coal mine employment.” 65 Fed. Reg. 79920, 79938. (Dec. 20, 2000). This position was echoed by the D.C. Circuit which reviewed challenges to the 2000 regulations. *Nat’l Mining Ass’n v. DOL*, 292 F.3d 849 (D.C. Cir. 2002). The D.C. Court stated, the new regulation:

does not, as appellants suggest, create a presumption that all or even most obstructive disease is caused by exposure to coal dust. The District Court correctly found that, under both the old and new regulations, ‘each miner bears the burden of proving that *his* obstructive lung disease did in fact arise out of his coal mine employment’. NMA, 160 F. Supp. 2d at 79 (quoting 65 Fed. Reg. at 79,938) (emphasis added by D.C. Court).

Nat’l Mining, 292 F.3d at 862-63.

This position gained further support in the Tenth Circuit when the court addressed a challenge under the

10-year presumption at Section 921(c)(1)¹. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1105 (10th Cir. 2006). The Tenth Circuit noted that COPD was a disease of the general population with an overwhelming majority of cases being caused by cigarette smoking and other lung disease that met the definition of legal pneumoconiosis. *Id.* “Because a claimant suffering from COPD must prove his COPD arose out of coal-mine employment to prove he suffers from legal pneumoconiosis, the rebuttable presumption [30 U.S.C. §921(c)(1) and 20 C.F.R. §718.203] does not extend to cases of COPD.” *Id.* at 1107. “Only after a claimant is able to prove that his obstructive pulmonary disease is “significantly related to, or substantially aggravated by, dust exposure in coal mine employment” does a claimant prove he suffers from legal pneumoconiosis.” *Andersen*, 455 F.3d at 1105 citing 20 C.F.R. §718.201(b) and *Doris Coal Co. v. Director, OWCP*, 938 F.2d 492, 496 (4th Cir. 1991).

After noting that “each miner bear[s] the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment, and not from another source,” [65 Fed. Reg. 79920, 79938 (Dec. 20, 2000)], the Court held, “In light of the regulatory definition of legal pneumoconiosis and the historical evolution of the BLBA, we think Congress used the term “pneumoconiosis” in the presumption provision to refer to clinical pneumoconiosis only.” *Andersen*, 455 F.3d at 1106. “Congress’ use of the general term

¹ If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.” 30 U.S.C. §921(c)(1).

“pneumoconiosis” in the presumption provision can be harmonized with the statutory scheme if construed to refer only to clinical pneumoconiosis.” *Id.*

Andersen was later upheld in *Energy West Mining Company v. Oliver, OWCP*, 555 F.3d 1211 (10th Cir. 2009). “Because COPD is most frequently caused by cigarette smoking and is commonly found among the general population, we have held that a miner whose claim to black lung benefits is based on COPD is not entitled to the ordinary presumption that his or her disease arose out of coal mining employment provided he worked in the mines for at least ten years.” *Energy West Mining Co.*, 555 F.3d at 1215.

Despite this legal precedent and history, when the Secretary promulgated regulations in September 2013 addressing the 15-year presumption, the regulations presumed both legal and clinical pneumoconiosis and required the party opposing benefits to rebut both disease. 20 C.F.R. §718.305(d). While there was history revealing a presumption of clinical pneumoconiosis was rational in 1972, the same cannot be said of any presumption of legal pneumoconiosis.

B. There is no rational connection between 15-years of coal mine employment and total disability to support a presumption for legal pneumoconiosis.

A court has a duty to review agency presumptions for consistency with their governing statutes and for rationality. *Chemical Mfrs. Ass’n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997). A presumption is normally appropriate when “proof of one fact renders the existence of another fact” so probable that it is sensible

and timesaving to assume the truth of the inferred fact . . . until the adversary disproves it. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990) quoting E. CLEARY, MCCORMICK ON EVIDENCE §343 at 969 (3d ed. 1984). Ascribing the law to the case at bar, it must be “so probable that it is sensible” to presume that if a miner worked at least 15 years underground and is totally disabled due to a pulmonary condition, the cause of the pulmonary condition, is legal pneumoconiosis.

Presumptions arising in civil statutes involving matters of economic regulation are tested against the standard articulated in *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). *Mobile* requires “that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.” *Id.* This standard was used in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) to find that the 15-year presumption for what is now known as clinical pneumoconiosis was constitutionally valid. *Usery*, 428 U.S. at 30-31. The finding was based on the Surgeon General’s testimony at the Senate hearings on the 1969 Act revealing the 15-year point marked the beginning of linear increase in the prevalence of the disease with years spent underground. *Id.* at 31. Additional evidence supporting the connection between 15 years of underground coal mine employment and clinical coal workers’ pneumoconiosis was also presented to Congress. See S. Rep. No. 92-743, p. 13 (1972); H.R. Rep. No. 92-460, pp. 8-10 (1971). In fact, numerous hearings were held and much testimony was provided regarding the duration of underground coal

mine employment required to result in clinical pneumoconiosis. (Pet. App. 345-350).

When Congress was addressing amendments to the Act in 1977, additional evidence was provided regarding research on underground coal miners who were exposed to coal dust at levels before enactment of the dust controls. See, H. Rep. 95-151, p. 10 (Mar. 31, 1977). Mr. James Weeks prepared a summary addressing black lung and the effect of coal dust on miners who worked underground. H. Rep. 9-151 at 30. The studies involved miners who worked underground, and included autopsy findings from Appalachian Laboratory for Occupational Respiratory Disease (“ALFORD”) that indicated 64% of the miners who worked underground regardless of the duration had clinical pneumoconiosis, while 88% of the miners who had more than fifteen years underground had clinical pneumoconiosis. H. Rep. 95-151 at 31. Since a presumption must be based on a logical connection between a set of facts and the presumption, the U.S. Supreme Court correctly found that a 15-year presumption, based on evidence revealing 88% of the underground miners developed clinical pneumoconiosis, was reasonable and not arbitrary.

Conversely, while the 2000 Preamble confirmed that a miner could develop COPD or emphysema from coal dust exposure, the likelihood of the occurrence was insufficient to create a presumption of legal pneumoconiosis regardless of the number of years of coal mine employment. The Preamble conceded that “only a minority of miners will have significant decrements in pulmonary function and the majority

would have small or no decline in pulmonary function.” 65 Fed. Reg. 79920, 79941 (Dec. 20, 2000).

Director’s position statement filed in *Andersen*, was equally compelling on this issue:

Similarly, Mr. Andersen’s assertion that because all of the statutory and regulatory provisions defining compensable pneumoconiosis include a requirement that the disease arise out of coal mine employment, there is no basis for treating medically defined pneumoconiosis and COPD differently – i.e., the ten-year presumption should apply to both – does not withstand scrutiny. While all compensable pneumoconiosis must arise out of coal mine employment, there is a rational basis to apply the presumption only to medically defined pneumoconiosis. The presumption rationally applies to medically defined pneumoconiosis because that condition is an occupational disease that is closely linked to dust exposure, especially dust in coal mine employment. *See Usery*, 428 U.S. at 28-29. Indeed, even where a miner had less than ten years of coal mine employment but had no other dust exposure, a fact-finder can infer that his medically defined pneumoconiosis arose out of coal mine employment even in the absence of affirmative evidence. *Wisniewski*, 929 F.2d at 959; *Maxey v. Califano*, 598 F.2d 874, 876 n. 3 (4th Cir. 1979). In contrast, COPD is a disease of the general population, and cigarette smoking is the cause of an overwhelming majority of cases. The more exclusive connection between medically defined pneumoconiosis and coal mine

employment is lacking. Therefore, a presumption linking COPD and coal mine employment would be far less rational, if rational at all.

Director's position statement filed on November 18, 2005 in *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006), (Pet. App. 306-307).

The Director's position in *Andersen* is supported by the research contained in the Federal Register when legal pneumoconiosis was created. Unlike the evidence showing that 88% of the miners with 15-years of underground coal dust exposure developed clinical pneumoconiosis, the Preamble's evidence revealed the likelihood of a miner developing clinically significant legal pneumoconiosis was 14.2% for smoking miners and 7.7% for non-smoking miners with "high exposure" to coal dust over varying lengths of time. 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000). Even if the "high exposure" smoking miners worked in mines for over 15 years, the data would still not be proper for a presumption with only a likelihood of 14.2%.

C. Including legal pneumoconiosis within the 15-year presumption is not a rational means that furthers a legitimate legislative purpose.

No legislative purpose was provided prior to the revival of the 15-year presumption, however, the long-standing purpose of the Act is to provide benefits to miners who are totally disabled due to developing medical conditions caused by coal dust exposure.

Presuming legal pneumoconiosis undermines the purpose of the Act. Because there is insufficient evidence supporting the required link between COPD and coal dust exposure, a presumption of “legal” pneumoconiosis expands the scope of the Act by requiring coal mine operators to pay benefits to miners for conditions of the general population that are unrelated to coal mining. It is rational for Congress to enact legislation that requires compensation for disabilities bred during employment as seen with the Black Lung Benefits Act and the Longshore and Harbor Workers’ Compensation Act. See, 30 U.S.C. §901 *et seq*; 33 U.S.C. 901 *et seq*. However, it is irrational for Congress to require coal mine operators to pay monthly monetary benefits for medical conditions of the general population which the research revealed was not related to employment in 85.8% of the cases. The purpose of the Act is to provide benefits to miners who are totally disabled due to a coal dust-related disease, not to provide benefits to any miner who worked 15-years in the coal mines and is totally disabled for any reason at all. The former is a program for occupational disability; the latter is a pension program.

The DOL produced no additional research after December 2000 that would create a rational link between COPD and coal mine employment to justify inclusion of legal pneumoconiosis in the 15-year presumption. 78 Fed. Reg. 59102, 59102-59119 (Sept. 25, 2013). Nothing in the December 2000 research found “it was more likely than not” that a miner’s obstructive condition would be due to coal dust. In fact, the document conceded that “only a minority of miners will have significant decrements in pulmonary

function and the majority would have small or no decline in pulmonary function. 65 Fed. Reg. at 79941. There was nothing in the Preamble that addressed the length of time required for a miner to develop an obstructive condition due to coal dust exposure, or whether the obstructive condition could progress after the miner left the coal mine.

There must be some logical connection between the proven fact and the presumed conclusion. *Mullins Coal Company v. Director, OWCP*, 484 U.S. 135, 158-159 (1987). The Secretary of Labor is well aware of this requirement. “To the extent that the Department, like any other administrative agency, uses rule-making to establish a presumption, that presumption must be based on a rational nexus between the proven facts and the presumed facts.” 64 Fed. Reg. 54966, 54973 (Oct. 8, 1999). Given the legal precedent, the Secretary’s position regarding the burden of proof for legal pneumoconiosis, and DOL’s position that “only a minority of miners will have significant decrements in pulmonary function and the majority would have small or no decline in pulmonary function” and that a presumption linking COPD and coal mine employment was far less rational, if rational at all, it is unreasonable to believe that Congress intended to include legal pneumoconiosis in the 15-year presumption. Even if Congress did intend to include legal pneumoconiosis in the 15-year presumption, the presumption cannot withstand judicial scrutiny due to the laws of evidence requiring a necessary link between the proven facts and the presumed fact.

There was a strong evidentiary basis for a 15-year presumption and clinical pneumoconiosis because 88% of the miners who worked 15 years underground (before dust controls were implemented) developed clinical pneumoconiosis. H. Rep. 95-151, p. 31 (Mar. 31, 1977). The highest probability of developing COPD from coal dust found in the Federal Register was 7.7% for non-smokers and 14.2% for smokers. 65 Fed. Reg. at 79940. The Federal Register research revealed it was more rational to presume a miner did not develop an obstructive condition from his coal dust exposure because the research revealed that 85.8% of smoking miners did not develop a severe obstructive condition. Including legal pneumoconiosis in the 15-year presumption expands the scope of the Act to provide benefits to all miners who worked 15 years in the mine and developed a totally disabling condition, regardless of whether the condition was caused by coal dust exposure. Because the required nexus between COPD and coal dust exposure is lacking, this Court should grant certiorari and find that the DOL's regulation that included legal pneumoconiosis within the 15-year presumption at 30 U.S.C. §921(c)(4) is inconsistent with the government statute, irrational, arbitrary and capricious.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DOL'S REGULATORY INCLUSION OF LEGAL PNEUMOCONIOSIS IN THE 15-YEAR PRESUMPTION DEPRIVES THE PARTY OPPOSING ENTITLEMENT ITS RIGHT TO A FULL AND FAIR HEARING AND THEREFORE VIOLATES PROCEDURAL DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT AND THE ADMINISTRATIVE PROCEDURE ACT.

The statutory rebuttal language states, "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 Secretary's regulatory rebuttal language requires the party opposing entitlement to establish that the miner does not or did not have legal or clinical pneumoconiosis or rule out that the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d) (2013).

Under the regulation, the presumed fact of legal pneumoconiosis can be rebutted by showing that Miner's COPD did not arise from coal mine employment. With the highest probability of the event at 14.4% for smoking miners and 7.7% for non-smoking miners, one would expect rebuttal of the presumption would not be difficult. However, rebuttal of the pneumoconiosis is rarely met. Of the 729 cases reviewed by the Benefits Review Board from 2011 to 2017 that issued final decision in cases with the 15-

year presumption, the presumption was upheld in 705 cases. The operators only rebutted the presumption in 24 cases. (Pet. App. 315-344). A rebuttable presumption standard that only allows for rebuttal in 3.3% of the cases violates procedural due process as a matter of law because it eliminates the possibility of actually rebutting the presumption in contravention of the statute that provides for presumption rebuttal.

In the initial review of the 15-year presumption, this Court found the statutory language setting forth the Secretary's limitation for rebuttal was inapplicable to operators stating the "Act does not limit the evidence with which an operator may rebut the §411(c)(4) presumption." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35, 36-37 (1976). Although the statute does not place any limits on the operators, the DOL's regulations improperly (1) shifts both the burden of proof and the burden of production to the party opposing entitlement, (2) raises the level of proof for rebuttal for the party opposing entitlement and (3) limits the amount of evidence that can be submitted in the case. See, 20 C.F.R. §718.305(d); 20 C.F.R. §725.414.

A standard that violates due process rights cannot be upheld. *Director v. Greenwich Collieries*, 512 U.S. 267, 280-81 (1994). In *Greenwich*, this Court found the "true doubt" rule, which found in favor of a claimant when the evidence was evenly balanced, allocated the burden of persuasion in a manner that conflicted with the Administrative Procedure Act ("APA"). *Greenwich*, 512 U.S. at 280-81. According to the APA, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). As

shown above, legal pneumoconiosis was never intended to be presumed and by the DOL's own statement, should not be presumed. Only by the DOL *sua sponte*, and not Congress, including legal pneumoconiosis in the 15-year presumption does the burden switch to the party opposing entitlement.

In *Greenwich Collieries*, this Court found the Section 7(c) of the APA applied to claims under the LHWCA and the BLBA. *Greenwich Collieries*, 512 U.S. at 271. Well-established precedent regarding the use of presumptions sets the rebuttal standard as a burden of production; once the burden is reached, the presumption drops out and the evidence is reviewed leaving the burden of proof with the party requesting entitlement. See, *Sprague v. Director*, 688 F.2d 862, 865 (1st Cir. 1982); *Travelers Insurance Co. v. Belair*, 412 F.2d 297, 301 n.6 (1st Cir. 1969); *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 267 (D.C. Cir. 1981); *Walker v. Universal Terminal and Stevedoring Corp.*, 645 F.2d 170, 173 (3rd Cir. 1981); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 341 (1st Cir. 1981) and *Bath Iron Works Corp. v. White*, 584 F.2d 573 (1st Cir. 1978).

Despite this precedent, this Court found in *Mullins*, that the party requesting entitlement had the burden to prove by a preponderance of the evidence, instead of by just one piece of evidence, that invocation of the interim presumption was proper. *Mullins v. Director, OWCP*, 484 U.S. 135, 158 (1987). The decision further noted that "Petitioners agreed that the employer's rebuttal burden is one of proof as well as production."

Mullins, 484 U.S. 135, 144, fn 12 (1987). The *Mullins* court stated:

By requiring miners to show that they suffer from the sort of medical impairment that initially gave rise to congressional concern, and then by requiring employers to shoulder the remainder of the proof burden, the Secretary's reading of the interim presumptions' invocation burden satisfies both the purposes of the statute and the need for a logical connection between the proven fact and the presumed conclusion.

Mullins, 484 U.S. at 158-159.

The medical impairment that initially gave rise to Congress' concern was clinical pneumoconiosis and the presumptions related to that condition were well supported by medical and scientific evidence. Requiring a mine operator to bear both the burden of production and the burden of proof for this presumption was reasonable. However, it was the DOL, not Congress, that created legal pneumoconiosis, as well as the caveat that each miner would have to prove that his obstructive condition arose from coal mine employment. 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). As the connection between COPD and coal dust is not nearly as strong as the connection between clinical pneumoconiosis and coal dust exposure, it violates procedural due process to require the mine operator to rebut a presumption of legal pneumoconiosis bearing both the burden of production and the burden of proof, when similar compensation claims that involve diseases of the general public and presumptions, like those found in Longshore Act hearing loss cases, only require the employer to bear

the burden of production and, if met, cause the presumption drops out. Requiring the mine operator to rebut the presumption, bearing both the burden of production and the burden of proof, for a condition that is not closely linked to coal dust exposure violates procedural due process that guarantees and full and fair hearing.

At no time did the Secretary explain why a higher rebuttal level was required to rebut the presumption. Nor did the Secretary explain why a “rule out” standard would be appropriate when only 14.2% of the smoking miners developed an obstructive condition from coal dust exposure. Neither the 2000 preamble language nor the 2013 language provide support for a “rule out” rebuttal standard for legal pneumoconiosis. While the “rule out” standard may have been proper for clinical pneumoconiosis, which was the only medical condition at issue when the statutory presumption was initially enacted, the same cannot be said for legal pneumoconiosis. A rebuttal standard violates due process where the burden of proof for parties opposing entitlement exceeds the claimant’s burden or proof to obtain entitlement of the same benefits.

No rationale was ever provided for the heightened level of proof required by Secretary except to claim that it was the same standard previously utilized with the prior presumption and it was consistent with the purpose of reenacting the presumption. However, there was no evidence that Congress’ concerns in 1969 or 1972, were apparent in 2010. The only rationale for the revived presumption was provided post-hearing by Sen. Byrd stating, “I look forward to working to ensure that claimants get a fair shake as they try to gain

access to these benefits that have been so hard won.” 156 Cong. Rec. at 2083S–84S (daily ed. Mar. 25, 2010) (statement of Sen. Byrd). However, there was no evidence that claimants were not getting a fair shake under the BLBA by requiring them to use medical evidence to prove their claims. Further, comments issued after legislation has passed is “subsequent legislative history,” not “legislative history” and is entitled to little, if any, weight. *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia concurring in part, “Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”); see also, *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 530 n. 27 (2007) (“[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.”).

The Director’s amended regulation placed both the burden of production and the burden of persuasion on the Employer to rule out that Miner’s presumed pneumoconiosis played no part in his total disability. This burden is actually greater than appears, especially, when as in the case at bar, the finding of “total disability” also presumes the total disability is due to a pulmonary condition. “Total disability” can be established by pulmonary function testings, arterial blood gas testing, cor pulmonale with right sided congestive heart failure or medical opinion evidence. See, 20 C.F.R. §718.204(b)(2)(i), (ii), (iii) and (iv). However, abnormal arterial blood gas values are not solely related to disease stemming from coal dust exposure. Despite this medical fact, an ALJ is forbidden from considering whether the total disability stems from a pulmonary condition or a cardiac

condition when determining if a miner is totally disabled. See, *Ross v. Consolidation Coal Company*, BRB Case No. 15-0007 BLA at 7 (Oct. 20, 2015) (unpub)(It was improper for the ALJ to consider whether the abnormal arterial blood gas tests were due to a cardiac or pulmonary condition prior to invoking the 15-year presumption). This holding is contrary to both the statute and regulation requiring a miner to show that his total disability was due to a pulmonary impairment before invocation of the 15-year presumption. See, 30 U.S.C. §921(c)(4) and 20 C.F.R. §718.305(b)(1)(iii) (“and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment” as well as the fact that there is no presumption that a finding of “total disability” under Section 718.204(b)(2) equates to a finding of “total disability” from a pulmonary impairment.

The DOL’s rebuttal standard is further hampered by the evidentiary limitations at 20 C.F.R. §725.414. In *McClanahan v. Brem Coal, Co.*, 15-0348 BLA (July 7, 2016) (pub), the Board limited Employer to two examinations of Claimant and in *McCormick v. National Coal*, 16-0083 BLA (Nov. 28, 2016)(unpub), the Board affirmed the denial of a Employer’s motion to obtain a CT scan. The statutory language does not limit the amount of evidence a party can submit. See, 30 U.S.C. §921(c)(4). Further, the Administrative Procedure Act allows for the admission of evidence unless it is irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. §556(d). Despite this guidance, the parties are limited by the amount of evidence they can submit at the formal hearing. 20 C.F.R. §725.414. Submissions of evidence in excess of the limitations are granted only for good cause. 20

C.F.R. §725.456(b)(1). The undersigned is aware of no case where the “good cause” requirement was met and additional evidence was allowed.

The statutory language allows for rebuttal. 30 U.S.C. §921(c)(4). The DOL’s regulations violate procedural due process because (1) the Secretary’s regulation more closely resembles an irrebuttable presumption as evidenced by the fact that only 3.3% of the 729 cases before the Board actually rebutted the presumption (2) the standard is higher than what is required for a claimant to receive benefits without the presumption; (3) the standard requires a transfer of both the burden of proof and the burden of production for a condition that is not closely related to coal dust exposure; and (4) the party opposing entitlement is limited in the quantity of evidence that can be presented. A presumption “must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.” *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). The statutory language allows for rebuttal of the 15-year presumption. This Court should grant certiorari and find the DOL’s rebuttal standard at 20 C.F.R. §718.305(d) violates procedural due process.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DOL'S REGULATIONS VIOLATE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS AND VIOLATES THE TAKINGS CLAUSE BY REQUIRING COAL MINE OPERATORS TO PAY MONTHLY BENEFITS FOR CONDITIONS THAT ARE UNRELATED TO COAL MINING.

Including legal pneumoconiosis in the 15-year presumption is also unconstitutional as an unlawful taking of property in violation of the Fifth Amendment's Takings Clause. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V. An overly burdensome regulation can constitute an unconstitutional taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). A regulatory action becomes a compensable taking under the Fifth Amendment if the government interference goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Three factors are considered in the evaluation of a takings claim: (1) the economic impact of the regulation on the regulated entity, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

First, the economic impact of the regulation on coal mines is evident from both the Secretary's own publication as well as news reports regarding the financial instability of coal mines. When "legal

pneumoconiosis” was created in December 2000, the Secretary of Labor anticipated that the new rules would impose costs on mine operators in the form of higher insurance premiums. See 65 Fed. Reg. 79920, 80,030 (Dec. 20, 2000). The Secretary’s initial analysis indicated that, in the long term, the new rules would cause operators’ insurance premiums to go up by about 39.3%, resulting in total annual costs to the industry of approximately \$ 57.56 million. *Id.* The Secretary’s analysis further suggested that the overall approval rate for claims against responsible coal mine operators would increase from 7.33% to no more than 12.18%. 65 Fed. Reg. 79920, 80036 (Dec. 20, 2000). The DOL noted that the change in the 2000 regulations would likely have “significant economic impact on a substantial number of small entities.” 65 Fed. Reg. 79920, 80032 (Dec. 20, 2000). The DOL concluded there was only a significant potential for closures in the very smallest size class of the underground bituminous coal mines that had less than 20 employees. 65 Fed. Reg. 79920, 80033 (Dec. 20, 2000). The DOL believed the approval rate for Trust Fund cases would remain the same and approval rates for the Responsible Operator would rise. 65 Fed. Reg. 79920, 80036 (Dec. 20, 2000). An economic analysis by Milliman & Robertson, Inc., disagreed with the DOL’s numbers and found them too low. 65 Fed. Reg. 79920, 80036-38 (Dec. 20, 2000).

In 2013, after the 15-year presumption was revived and the DOL amended its regulations, the DOL estimated that insurance premiums would increase an additional \$35 million over the next ten years and the annual benefit disbursement in 2010 of \$238 million would increase an additional \$1.3 in 2010 and \$3.5

million in 2011. 78 Fed. Reg. 59102, 59112 (Sept. 25, 2013).

The DOL's financial outlook for both amendments underestimated numerous factors regarding the coal mine industry. While the DOL believed only small coal mines that employed less than 20 employees would be effected by the changes, (the DOL took into consideration the Clean Air Act Amendments and the resulting regulations issued by the Environmental Protection Agency. 65 Fed. Reg. 79920, 80034 (Dec. 20, 2000) the bankruptcy of three of the four largest coal mines in the United States, including Peabody Energy (Case No. 16-42529 E. Dist. Mo.), Arch Coal (16-40120 E. Dist. Mo.), and Alpha Natural Resources (15-33896 E. Dist. Va) reveals the effect was much greater than anticipated with the bankruptcies continuing with Armstrong Energy (17-47541 E. Dist. Mo). These bankruptcies do not include the 42 smaller mines that were more vulnerable that also filed bankruptcy between 2012 and 2015. (Pet. App. 358-360). The DOL also underestimated its own liability caused by the mine closures above resulting in increased liability for the Black Lung Trust Fund as evidenced by FY 2016 Financial Report of the U.S. Government. (Pet. App. 353-357). The 2016 Report revealed that as of September 30, 2016, the total liabilities of the Black Lung Disability Trust Fund exceeded its assets by \$5.6 billion. Due to interest on maturing debt, a projected deficit of \$10.95 billion was expected by September 30, 2040. The Black Lung Disability Trust Fund was \$1.4 billion in debt in 1981, when the presumption were removed. *See*, House Committee on Ways and Means, Subcommittee on Oversight, 97th Cong., 1st Sess. (Comm.Print 1981), citing U.S. Department of Labor

and U.S. Dept. Of Health and Human Services (SSA) and H.R. 5159, Cong. Rec. S 15480 (Dec. 16, 1981). The Fund's increased deficit to \$5.6 billion by 2016 is further evidence of the financial economic impact on both the mines as well as the Trust Fund.

Second, the extent to which the regulation has interfered with distinct investment-backed expectations is equally seen in the bankruptcies of three of the four largest coal mines in the United States that were publicly-held corporations that incurred vastly reduced stock value due to the bankruptcies that were likely not the investment outcomes desired by the investors.

Finally, the character of the governmental action must be considered. In *Usery v. Turner Elkhorn*, this Court found the government's interference for a public program that adjusts the benefits and burdens of economic life to promote the common good did not constitute a taking. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). The common good is providing occupational disease benefits to miners who are totally disabled due to pneumoconiosis. However, providing benefits to miners for diseases of the general public is not part of the common good and, when considered against the bleak financial information above, constitutes a taking. For these reasons, this Court should grant certiorari and find that the DOL's inclusion of legal pneumoconiosis within the 15-year presumption violates the takings clause of the U.S. Constitution.

IV. CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DETERMINE THE APPROPRIATE LEVEL OF DEFERENCE, IF ANY, THAT SHOULD BE AFFORDED TO THE DOL'S POSITION IN LIGHT OF THE AGENCY'S CONTRADICTORY POSITIONS REGARDING THE PRESUMPTIVE NATURE OF LEGAL PNEUMOCONIOSIS.

Congress vested the courts with the power to “interpret . . . statutory provisions” and overturn agency action inconsistent with those interpretations. 5 U.S.C. §706. Rather than address the inconsistencies in the DOL’s position regarding the presumptive nature of legal pneumoconiosis, the Federal Circuit courts have unanimously granted the DOL unquestioned deference despite the fact that the DOL’s pronouncements on the issue of whether legal pneumoconiosis can be presumed are unreconcilable. See, *Consolidation Coal Company v. Director, OWCP and Noyes*, 864 F.3d 1142 (10th Cir. 2017) (Pet. App. 265-287); *Consolidation Coal Company v. Director, OWCP and Thompson*, Case No. 16-9539 (Dec. 20, 2017) (Pet. App. 1-7); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP and Keene*, 721 F.3d 789 (7th Cir. 2013). Total deference, as provided by the Federal Appellate Courts, offends notions of due process leaving the party opposing entitlement with no surety as to the status of the law.

Typically an agency is entitled to deference in interpreting a statute and developing regulations related thereto. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). However, the deference is

not without boundaries. The agency's regulations must stem from proper procedure in order to avoid creating regulations that are arbitrary or capricious. See, *Judulang v. Holder*, 565 U.S. 42 (2011); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016). Courts retain an important role in "ensuring that agencies have engaged in reasoned decision making" in administering their statutes and regulations. *Judulang*, 565 U.S. at 53. The court assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This task involves examining the reasons for agency actions – or, as the case may be, the absence of such reasons. *Id.* citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). When the agency fails to adhere to these requirements, the regulation is arbitrary, capricious and invalid. *State Farm*, 463 U.S. at 42-43.

Under the *Chevron* analysis, the initial requirement is to look to the statute to determine whether the section has a "plain and unambiguous meaning." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). In *Andersen*, the Director stated the two provisions using pneumoconiosis, i.e., the definition of the condition at 30 U.S.C. §902(b) and the presumption at 30 U.S.C. 921(c)(1) "pose[d] an interpretive problem" that led to "an inherent ambiguity in the statute if the broader category of 'pneumoconiosis'" was read into Section 921(c)(1). *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006), (Pet. App. 300-301). Director's position was accepted by the Tenth Circuit which held, "Congress used the term 'pneumoconiosis'

in the presumption provision to refer to clinical pneumoconiosis only.” *Andersen v. Director, OWCP*, 455 F.3d 1102, 1106 (10th Cir. 2006). The Tenth Circuit’s finding was in direct contravention with the Fourth Circuit’s previous findings that the legal definition of pneumoconiosis was incorporated into every instance the work was used in the statute and regulation. *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995).

Further evidence supporting a finding that the statute is ambiguous is seen in the legislative history. When the 15-year presumption was initially enacted in 1972, the only form of pneumoconiosis was clinical pneumoconiosis. Section 402(b), Pub. Law 91-173 (Dec. 30, 1969). If this remained the only form of pneumoconiosis, the statute would not be ambiguous. However, the DOL believed “that it possess[ed] the statutory authority to promulgate a legislative regulation defining the term “pneumoconiosis.” 64 Fed. Reg. 54966, 54979 (Oct. 8, 1999).² Congress never

² Apparently, the DOL also has the power to override the statutory language. For example, the Act states that the 15-year presumption is for miners who worked underground or worked above ground in conditions with a “substantially similar exposure” to underground mines. 30 U.S.C. §921(c)(4). The DOL interpreted this statutory requirement and proclaimed, “The conditions in a mine other than an underground mine will be considered “substantially similar” to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.” 20 C.F.R. §718.305(b)(2). While this may look good on paper, the DOL’s interpretation removed the statutory comparison requirement for exposure because the DOL conceded in 1997 that its regulation “presumes that each employee of a coal mine operator was regularly and

included “legal pneumoconiosis” in the BLBA. It was the DOL’s own action of re-writing the law created the ambiguity.

Finally, even assuming Congress was aware of (1) Section 1556 in the 2010 PPACA³, (2) the Secretary’s 2000 position statement regarding the burden of proof for legal pneumoconiosis, (3) the D.C. Circuit’s 2002 statement that legal pneumoconiosis would not be presumed and (4) the Tenth Circuit 2005 finding that legal pneumoconiosis would not be presumed, Congress would not have any justifiable belief that legal pneumoconiosis would be presumed by revival of the 15-year presumption at 30 U.S.C. §921(c)(4). For these reasons, this Court must find the statute is silent or ambiguous with respect to the issue of legal pneumoconiosis.

Once the Court determines the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. 837, 843 (1984). In determining the answer to

continuously exposed to coal dust during the course of his employment.” 64 Fed. Reg. 54973 (Oct. 8, 1999). Therefore, under the DOL’s amended regulations, the 15-year presumption is open to all coal miners, regardless of exposure or location of employment.

³ Any presumption that Congress considered the BLBA, its regulations or any case law when enacting the PPACA is undermined by the lack of transparency and information included in actual contents of the PPACA, as evidenced by House Minority Leader, Nancy Pelosi’s, statement to her colleagues, “We have to pass the bill so that you can find out what is in it.”

this question, the Court determines whether the regulation is arbitrary, capricious, or manifestly contrary to the statute.⁴ *Id.*; see also, *United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001). The amount of deference provided to the agency's interpretation is a major factor in the determination of the regulation's validity and the deference afforded to the agency interpretation can range from "substantial deference" to near indifference. See, *Mead*, 533 U.S. at 228 citing *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) and *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988). Before the deference spectrum was widened to its current level, the Supreme Court found, "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

With regard to legal pneumoconiosis, Congress provided no insight into whether the agency-created disease should be included in the 15-year presumption. Not even Senator Byrd's post-enactment statement addressed legal pneumoconiosis. Further, the DOL pointed to no research issued since its position statement in *Andersen*, that would now support a presumption that a miner's obstructive condition was caused by coal dust after conceding (1) that only a minority of miners would develop the disease, (2) that

⁴ This is the same standard of review under the Administrative Procedure Act. See, *Judulang*, 565 U.S. at 52, note 7.

cigarette smoking was the cause of the overwhelming majority of COPD cases and (3) a presumption linking COPD and coal mine employment would be far less rational, if rational at all, when compared with the presumption linking clinical pneumoconiosis and coal dust exposure. (Pet. App. 306-307).

The DOL's contradictory positions regarding a Miner's ability to presume legal pneumoconiosis under the Act, reveal a complete lack of consistency in the agency's position leaving its pronouncements unreconcilable. There is no dispute that Congress empowered the DOL to draft regulations to administer the Black Lung Benefits Act. However, the DOL's regulations have moved well beyond the scope of the Congresses' directive by creating new "legal diseases" that are not closely related to coal dust exposure but are presumed for purposes of entitlement as well as eliminating statutory presumptions requirements related to underground and above ground exposures. The DOL has usurped the powers of both the legislative and judicial branches in contravention of Article I and Article III of the U.S. Constitution. The DOL, which is part of the Executive branch, is essentially drafting legislation by enacting "regulations" in 2000 that Congress failed to pass in 1994 despite the fact that Congress is part of the Legislative branch and enacting legislation is an action limited solely to the Legislative branch. U.S. Const. Art. I and II. After the DOL issues its new "regulations" it then requires the reviewing courts to defer to its agency position under *Chevron*, and find its new "regulations" are reasonable. However, the judicial branch responsibilities contained within Article III of the U.S. Constitution, as well as those contained

in Section 706 of the Administrative Procedure Act, do not require the court to provide deference to any party's position but instills the court with the authority to fully review the issues before them. The DOL's "regulations" and subsequent judicial review eliminates the separation of powers delineated in the first three articles of the U.S. Constitution.

For these reasons, this Court should grant certiorari to address whether the DOL's inclusion of the legal pneumoconiosis in the 15-year presumption was an action stemming from reasoned decision making or whether there has been a clear error in judgment resulting in a presumption that is arbitrary, capricious and invalid.

CONCLUSION

For the reasons set forth above, Consolidation Coal Company respectfully requests this Court grant its writ of certiorari and find the DOL's inclusion of legal pneumoconiosis in the 15-year presumption violates Fifth Amendment due process rights as well as the separation of powers guaranteed by the U.S. Constitution.

Respectfully submitted,

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March 20, 2018