

No. 17-1335

**In The
Supreme Court of the United States**

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, DEPARTMENT
OF LABOR and ROBERT THOMPSON,

Respondents.

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

BRIEF IN OPPOSITION

EVAN BARRET SMITH
Counsel of Record
APPALACHIAN CITIZENS'
LAW CENTER, INC.
317 Main St.
Whitesburg, KY 41858
(606) 633-3929
evan@aclc.org

Counsel for Respondent Robert Thompson

QUESTION PRESENTED

The Black Lung Benefits Act contains a provision at 30 U.S.C. § 921(c)(4) providing career coal miners who suffer from a respiratory disability with a rebuttable presumption that their disability is due to black lung (known in the statute as “pneumoconiosis,” *see* 30 U.S.C. § 902(b)).

The question presented is:

When the Black Lung Benefits Act presumes that a disabled coal miner has pneumoconiosis, is it constitutional to apply the definition of “pneumoconiosis” from 20 C.F.R. § 718.201 that has been in the notice-and-comment regulations since 2001?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	5
REASONS TO DENY CERTIORARI	7
I. The Tenth Circuit Correctly Held that In- voking the Fifteen-Year Presumption for a Claim of Legal Pneumoconiosis Is Appropri- ate by Applying Established Principles of Statutory Construction.....	7
II. The Issue Presented Lacks Any Disagree- ment Among the Courts of Appeals and the Petition Presents No Question of Excep- tional Importance.....	11
III. Application of the Fifteen-Year Presump- tion to Cases of Legal Pneumoconiosis Is Constitutional Because Congress and the Secretary of Labor Had a Rational Basis for Presuming a Connection Between Coal-Mine Employment and Respiratory Disability	12
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
CASES	
<i>Andersen v. Director, OWCP</i> , 455 F.3d 1102 (10th Cir. 2006)	3, 8, 10, 11
<i>Antelope Coal Co./Rio Tinto Energy Am. v. Goodin</i> , 743 F.3d 1331 (10th Cir. 2014)	11
<i>Barber v. Director, OWCP</i> , 43 F.3d 899 (4th Cir. 1995)	12
<i>Big Branch Res., Inc. v. Ogle</i> , 737 F.3d 1063 (6th Cir. 2013)	11
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998)	9
<i>Consolidation Coal Co. v. Director, OWCP [Bailey]</i> , 721 F.3d 789 (7th Cir. 2013)	12
<i>Consolidation Coal Co. v. Director, OWCP [Noyes]</i> , 864 F.3d 1142 (10th Cir. 2017)	7, 10, 14
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1980)	1, 2
<i>Freeman United Coal Mining Co. v. OWCP [Shelton]</i> , 957 F.2d 302 (7th Cir. 1992)	3
<i>Lopez v. S. Stevedores</i> , 23 B.R.B.S. 295 (Benefits Review Bd. 1990)	18
<i>Navistar, Inc. v. Forester</i> , 767 F.3d 638 (6th Cir. 2014)	20
<i>NLRB v. Bell Aerospace</i> , 416 U.S. 267 (1974)	9
<i>Pauley v. BethEnergy Mines, Inc.</i> , 501 U.S. 680 (1991)	2
<i>United States v. Bailey</i> , 9 Pet. 238 (1835)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1 (1976).....	2, 13
<i>Vision Processing, LLC v. Groves</i> , 705 F.3d 551 (6th Cir. 2013).....	21

STATUTES

Black Lung Benefits Act	
30 U.S.C. § 901(a)	16
30 U.S.C. § 902(b)	2
30 U.S.C. § 921(b)	2
30 U.S.C. § 921(c)(1)	7, 10
30 U.S.C. § 921(c)(4)	<i>passim</i>
30 U.S.C. § 932(a)	2, 17
30 U.S.C. § 932(h)	2
30 U.S.C. § 936(a)	2
Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 202(b)(1), 95 Stat. 1635	
8	
The Longshore and Harbor Compensation Act	
33 U.S.C. § 921.....	17
The Administrative Procedure Act	
5 U.S.C. § 556(d)	21
Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 <i>et seq.</i>	
1	
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 <i>et seq.</i>	
1	
The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(a), 124 Stat. 119 (2010).....	
8	

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

20 C.F.R. § 718.201(a)	<i>passim</i>
20 C.F.R. § 718.201(c)	17
20 C.F.R. § 725.202(d)(2).....	5
20 C.F.R. § 725.309(c)	17
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 322 (2012).....	9
Final Rule, <i>Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended</i> , 65 Fed. Reg. 79,920 (Dec. 20, 2000)	<i>passim</i>
Supreme Ct. R. 10.....	11
U.S. Dep’t of Labor, Div. of Coal Mine Workers’ Comp., <i>Black Lung Benefits Rates for 2018</i>	1
U.S. Dep’t of Labor, Div. of Coal Mine Workers’ Comp., <i>Black Lung Program Statistics: Black Lung PDO Claim Decisions at the District Director Level FY 2006–2017</i>	17
U.S. Gov’t Accountability Office, GAO-10-7, <i>Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners’ Ability to Pursue Claims</i> (2009)	16, 17

STATEMENT OF THE CASE

1. Robert Thompson is a seventy-eight-year-old disabled coal miner from Utah who suffers from chronic obstructive pulmonary disease (“COPD”)¹—even though he never smoked. Pet. App. 214–17, 258–59. This case concerns Consolidation Coal Co.’s challenge to Mr. Thompson’s award of black lung benefits arising from his 2008 claim. Although a decade has passed since Mr. Thompson filed his claim and Mr. Thompson has been awarded benefits every time the merits of his claim have been adjudicated, Consolidation Coal still challenges Mr. Thompson’s claim and refuses to pay the \$990.10 per month that Mr. Thompson is entitled to.²

2. Mining provides great value to the Nation’s economy, but it is also “among the most hazardous of the Nation’s industries.” *Donovan v. Dewey*, 452 U.S. 594, 602 n.7 (1980). To address the inherent health and safety risks, mining operations are heavily regulated. *E.g.*, Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.*; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.*; *see also*

¹ COPD includes emphysema, chronic bronchitis, and asthma. *See* Final Rule, *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (defining COPD).

² U.S. Dep’t of Labor, Div. of Coal Mine Workers’ Comp., *Black Lung Benefits Rates for 2018* <https://www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm> (last visited June 18, 2018) (summarizing monthly benefits amounts for beneficiaries).

Donovan, 452 U.S. at 600 (holding warrantless mine inspections constitutional).

The Black Lung Benefits Act (“Act”) is part and parcel of the regulatory scheme. The Act provides for the payment of benefits to miners who suffer total disability from black lung disease, a “severe, and frequently crippling, chronic respiratory impairment.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976). Like typical workers’ compensation programs, the Act “spread[s] the costs of the employees’ disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.” *Id.* at 18.

Congress (repeatedly) delegated to the Secretary of Labor broad rulemaking authority to implement the black lung benefits program. See 30 U.S.C. §§ 921(b), 932(a), 932(h), 936(a). Exercising this delegated rulemaking authority, the Secretary of Labor has created a specialized administrative process for adjudicating black lung benefits claims. This case concerns a coal miner’s benefits awarded through this process.

3. The Black Lung Benefits Act uses the word “pneumoconiosis” to define compensable black lung disease. The statutory definition is very broad. Pneumoconiosis is “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 30 U.S.C. § 902(b). See *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 688 (1991) (providing statutory history of definition and noting its expansion by the inclusion of

“sequelae”). By the plain language of this definition, any chronic breathing problem that can be credibly linked to coal-mine-dust exposure can be “pneumoconiosis” under the Act. As a result, courts have long recognized that “statutory” pneumoconiosis was a more expansive concept than what the medical community might define as “pneumoconiosis.” *See, e.g., Freeman United Coal Mining Co. v. OWCP [Shelton]*, 957 F.2d 302, 303 (7th Cir. 1992) (Posner, J.); *see also Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 n.2 (10th Cir. 2006) (collecting cases).

In the late 1990s, the Department of Labor used its rulemaking power to codify the understanding that the statutory definition of pneumoconiosis is broader than the medical definition. After nearly four years of notice-and-comment stakeholder engagement,³ the Department of Labor codified a definition of “pneumoconiosis” that includes “statutory or ‘legal’ pneumoconiosis.” 20 C.F.R. § 718.201(a).

This rule also recognized that coal-mine dust causes chronic obstructive pulmonary disease, including emphysema, chronic bronchitis, and asthma. *See* 65 Fed. Reg. at 79,939 (defining COPD). Accordingly, the definition of legal pneumoconiosis expressly includes, “any chronic . . . *obstructive* pulmonary disease arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2).

³ *See* Final Rule, *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79,920, 79,920 (Dec. 20, 2000) (describing history of rule).

4. After Mr. Thompson's long career as a coal miner ended, he was diagnosed with COPD even though he is a lifelong nonsmoker. Mr. Thompson filed a claim for black lung benefits in February 2008. Pet. App. at 212.

Black lung benefits litigation is adversarial. Consolidation Coal challenged Mr. Thompson's claim and had him examined by an expert pulmonologist of its choosing, but the Department of Labor's initial adjudicator awarded benefits to Mr. Thompson in October 2008. *Id.* at 212. Consolidation Coal then sought a formal hearing before a Department of Labor administrative law judge ("ALJ"). Over the next eight years, Mr. Thompson's claim was extensively litigated before the agency. Even so, in every decision where the merits of his claim were considered, Mr. Thompson was awarded benefits.

In 2011, 2012, and 2014, the ALJs awarded Mr. Thompson benefits. In doing so, the ALJs applied a statutory presumption called the "fifteen-year presumption." This presumption at 30 U.S.C. § 921(c)(4) applies when a coal miner proves that he worked at least fifteen years in dusty mines and subsequently suffers from a respiratory disability. It shifts the coal miner's burden of proving that his disability is due to black lung to the opposing party to *disprove* the existence of pneumoconiosis causing the miner's respiratory disability.⁴

⁴ To be entitled to black lung benefits, a coal miner must establish the following four elements: (1) the existence of pneumoconiosis; (2) the pneumoconiosis arose out of coal-mine employment

The ALJs' awards were first vacated and remanded by the Benefits Review Board (an appellate tribunal within the Department of Labor) for evidentiary issues, vacated and remanded a second time because of an ALJ's insufficient explanation of how the evidence was weighed, and finally, in 2016, affirmed after Consolidation Coal's third appeal. Though this case has outlasted major disruptions to the proceedings,⁵ the essential findings remain unchanged. In 2017, a unanimous panel of the U.S. Court of Appeals for the Tenth Circuit affirmed Mr. Thompson's award via an unpublished opinion. Pet. App. 1.



SUMMARY OF THE ARGUMENT

Mr. Thompson's award of black lung benefits is proper. Using the definition of "pneumoconiosis" from the Department of Labor's notice-and-comment regulations to determine whether Mr. Thompson "does not . . .

(disease causation); (3) total disability from a respiratory or pulmonary condition; and (4) pneumoconiosis contributes to the miner's disability (disability causation). 20 C.F.R. § 725.202(d)(2). Element #3 must be proven to invoke the fifteen-year presumption and the statute then shifts the burden to the opponent to disprove one of the other three elements.

⁵ During the course of the proceedings, ALJ Malamphy, who originally heard Mr. Thompson's case, retired, and the case was heard for the third time in the Office of Administrative Law Judges by ALJ Bergstrom. Pet. App. 131. In addition, Mr. Thompson's primary counsel passed away in 2017 while Mr. Thompson's award was on appeal.

have pneumoconiosis” is as unremarkable as it sounds. 30 U.S.C. § 921(c)(4).

As the Courts of Appeals have uniformly held, when a career coal miner proves that he is disabled due to COPD, then the statutory fifteen-year presumption shifts the burden to the opposing party to disprove a link between the miner’s coal-mine-dust exposure and his COPD.

This statutory presumption is rational because even nonsmoking coal miners suffer from COPD at more than twice the rate of nonsmokers who did not mine coal. Although Consolidation Coal was thrice given an opportunity to rebut the presumption in Mr. Thompson’s claim, the ALJs found the company’s doctors not to be credible. Consolidation Coal’s constitutional challenges to the statute are fundamentally no more than policy disagreements with Congress’s revival of the fifteen-year presumption in 2010.

The Court should deny Consolidation Coal’s petition for certiorari.



REASONS TO DENY CERTIORARI

I. The Tenth Circuit Correctly Held that Invoking the Fifteen-Year Presumption for a Claim of Legal Pneumoconiosis Is Appropriate by Applying Established Principles of Statutory Construction.

The Tenth Circuit based its holding on the legal issues in the present case on a related case decided the same year, *Consolidation Coal Co. v. Director, OWCP [Noyes]*,⁶ 864 F.3d 1142 (10th Cir. 2017). Applying the fifteen-year presumption to claims involving legal pneumoconiosis is a matter of statutory construction, and *Noyes* used sound methods to determine the proper interpretation of the relevant language in the Act.

In 1972, Congress created a rebuttable presumption that when a coal miner who worked at least fifteen years in the mines had a disabling lung condition, the disability was due to pneumoconiosis. 30 U.S.C. § 921(c)(4) (1976). This rebuttable presumption is known as the “fifteen-year presumption” to distinguish it from other presumptions in the Act, such as the ten-year presumption at 30 U.S.C. § 921(c)(1).

In 1981, Congress amended the Act and in doing so, removed the fifteen-year presumption. *See* Black

⁶ Black lung cases are regularly referred to by the last name of the coal miner and cited in the format of *Coal Company Name v. Director, OWCP [Claimant’s Last Name]* because many cases are brought by the same coal companies, making the companies’ names confusing for a short citation.

Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 202(b)(1), 95 Stat. 1635, 1643. Adjudication of benefits claims continued without the fifteen-year presumption, placing a somewhat greater burden on coal miners to prove that their disabling lung condition arose out of their coal-mine employment.

In the 1980s and into the 1990s, courts recognized that obstructive lung diseases like COPD could be “pneumoconiosis” under the Act—miners just had to prove the causal link. *See Andersen*, 455 F.3d at 1103 n.2 (collecting cases).

In 2000, with the broad rulemaking authority that Congress delegated to the Secretary of Labor, DOL regulations clarified that the definition of pneumoconiosis “includes both medical, or ‘clinical’, pneumoconiosis and statutory, or ‘legal’, pneumoconiosis.” 20 C.F.R. § 718.201(a).⁷ A decade later, in 2010, Congress revived the fifteen-year presumption through the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, § 1556(a), 124 Stat. 119, 260 (2010).

When Congress reintroduced the fifteen-year presumption, it did so by referring to the original language of the Black Lung Benefits Act. *See id.* By this point, claims under the Act had been adjudicated for years using the definition of “pneumoconiosis”

⁷ *See* Final Rule, *Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended*, 65 Fed. Reg. 79,920, 80,048 (Dec. 20, 2000).

provided by the DOL regulation, which expressly includes legal pneumoconiosis.

Consolidation Coal argues even after Congress reenacted the fifteen-year presumption in 2010, that the Act’s plain references to “pneumoconiosis” must not use the established regulatory definition.

The prior-construction canon requires interpreting the fifteen-year presumption to include the regulation’s definition of pneumoconiosis. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974) (holding that prior interpretations by agency adjudicators are intended by a legislature that reenacts a law without pertinent change); *United States v. Bailey*, 9 Pet. 238, 256 (1835) (Story, J.) (“Congress must be presumed to have legislated under this known state of the laws. . . .”); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (“The clearest application of the prior-construction canon occurs with reenactments. If a word or phrase has been . . . given a uniform interpretation by . . . the responsible agency, a later version of the act perpetuating the wording is presumed to carry forward that interpretation.”).

It would have been simple enough for Congress to include a sentence in the Affordable Care Act disclaiming application of the fifteen-year presumption to claims involving legal pneumoconiosis. Congress did not do so. The statute plainly requires an adjudicator to apply the fifteen-year presumption to disabled coal miners suffering from pneumoconiosis under the Act—including legal pneumoconiosis. Therefore, the Tenth Circuit in *Noyes* correctly reasoned that when Congress uses the word “pneumoconiosis,” it means pneumoconiosis as Congress defined it and delegated it to be further refined. Pet. App. 275. This straightforward application of the statute is routinely practiced among the circuits. *Id.* (collecting cases).

Consolidation Coal argues instead that Congress meant only *clinical* pneumoconiosis when it created the fifteen-year presumption. Pet. at 7–10. To support this, it cites *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006), a Tenth Circuit case that addressed a different provision of the Act that shares some surface similarity, but is squarely distinct. In *Andersen*, the Tenth Circuit considered the ten-year presumption providing that if a coal miner *with pneumoconiosis* worked in coal mines for ten years, the statute presumes this pneumoconiosis “arose out of such employment.” 30 U.S.C. § 921(c)(1).⁸ There, the Tenth Circuit held that applying the ten-year presumption to legal

⁸ To phrase it in terms of the claim elements discussed at *supra* n.4, the ten-year presumption only affects disease causation, while the fifteen-year presumption affects disease, disease causation, *and* disability causation.

pneumoconiosis would render the language absurd because it mixed up the presumption’s predicate facts (that the claimant must prove) with what the statute then presumes.⁹ *See Andersen*, 455 F.3d at 1106.

In the present case, Consolidation Coal has offered no compelling reason to bend the obvious meaning of the statute by limiting application of the presumption in § 921(c)(4) to clinical pneumoconiosis. The Tenth Circuit held correctly by employing a definition of pneumoconiosis that includes legal pneumoconiosis.

II. The Issue Presented Lacks Any Disagreement Among the Courts of Appeals and the Petition Presents No Question of Exceptional Importance.

The petition should be denied because there is no “compelling reason[]” to grant certiorari in this case. Supreme Ct. R. 10. As mentioned above, there is no disagreement among the circuits that the fifteen-year presumption applies in cases of legal pneumoconiosis.¹⁰ The Tenth Circuit has not “departed from the

⁹ By definition, to be legal pneumoconiosis a respiratory disease must be “arising out of coal mine employment.” 20 C.F.R. § 718.201(a)(2). The causation standard is thus nested within the definition of the disease for legal pneumoconiosis. Once a miner has proven that he has legal pneumoconiosis, then he has no need for the ten-year presumption—he has affirmatively proven the causal link that the presumption would only shift the burden for. Practically, the ten-year presumption only has effect in clinical pneumoconiosis claims.

¹⁰ *See, e.g., Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331 (10th Cir. 2014); *Big Branch Res., Inc. v. Ogle*, 737

accepted and usual course of judicial proceedings.” It has applied the law in a routine manner consistent with its other decisions and those of every other court.

Consolidation Coal’s petition presents no question of exceptional importance. The issue is a simple matter of statutory construction. The language of the Black Lung Benefits Act and the regulations clearly show that application of the fifteen-year presumption to Mr. Thompson’s case is warranted. There is no indication that the national interest would be served by redetermining an interpretation consistent with the statute and shared by the agency’s notice-and-comment regulations and all courts’ consideration.

Because Consolidation Coal does not sufficiently demonstrate compelling reasons for which the Court may grant certiorari, the petition should be denied.

III. Application of the Fifteen-Year Presumption to Cases of Legal Pneumoconiosis Is Constitutional Because Congress and the Secretary of Labor Had a Rational Basis for Presuming a Connection Between Coal-Mine Employment and Respiratory Disability

This Court has held (in the black lung context no less) that “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden

F.3d 1063, 1074 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [Bailey], 721 F.3d 789, 795–96 (7th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 900–01 (4th Cir. 1995).

is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Consolidation Coal fails to meet this burden because Congress acted rationally in using the broad definition of pneumoconiosis in the fifteen-year presumption.

To refute the established fact that coal-mine dust is related to respiratory disability, Consolidation Coal cites research contained in the Federal Register that nonsmoking miners with a “high exposure” to coal-mine dust have a 7.7% likelihood of developing legal pneumoconiosis. Pet. 14 (citing 65 Fed. Reg. at 79,940). Consolidation Coal uses this data to support its argument that creating a presumption of legal pneumoconiosis for miners with fifteen years of dusty mine work is irrational because it lacks an evidentiary basis. Pet. 17. However, this research does not support Consolidation Coal’s contention. Even assuming *arguendo* that it is accurate to say that 7.7% of all nonsmoking coal miners will develop legal pneumoconiosis,¹¹ the

¹¹ For two reasons, the 7.7% figure underrepresents the number of miners who will develop legal pneumoconiosis. *First*, the study says that 7.7% of nonsmoking miners will develop an impairment reducing their lung function to less than 65% predicted. But it also says that 23.9% of nonsmoking miners will have their lung function reduced below 80% predicted (i.e., the lower limit of normal). *See* 65 Fed. Reg. at 79,940. This latter, higher figure—one in four nonsmoking miners—is the more relevant figure for legal pneumoconiosis. *Second*, the study shows only those miners who had respiratory impairments based on one measure of breathing output (FEV₁). Many miners, including Mr. Thompson,

fifteen-year presumption does not apply to all miners. It applies only to career miners who have shown that they have “a totally disabling respiratory or pulmonary impairment.” 30 U.S.C. § 921(c)(4). As the Tenth Circuit noted in *Noyes*, “miners who successfully invoke the presumption have already shown that they fall within the class of miners with significant pulmonary dysfunction.” Pet. App. 276 n.2. The likelihood that an average miner will develop a disabling breathing disease is inapposite; the miners making claims under the fifteen-year presumption *have* developed such conditions. Consolidation Coal does not—and cannot—cite any evidence to show that *disabled* coal miners like Mr. Thompson are so unlikely to have been affected by coal-mine dust that the presumption is irrational.

It is far more relevant to point out that, comparing Consolidation Coal’s understated figure of 7.7% with the same study’s rate of major lung problems for nonminers, a nonsmoking coal miner is *more than twice as likely* to develop COPD than a nonsmoker in the general population (3.2%). *See* 65 Fed. Reg. at 79,940. Consolidation Coal’s treatment of the 7.7% figure as demonstrative of a lack of connection between COPD and coal mining is unpersuasive given the stark difference in incidence of COPD for miners and nonminers.

have developed totally disabling respiratory diseases that are accurately diagnosed by measuring the amount of oxygen in the blood rather than breathing output. *See* Pet. App. 92–109 (ALJ finding total disability using blood gas tests rather than pulmonary function tests).

While some nonminers develop disabling respiratory and pulmonary diseases, there is a well-established link between coal-mine-dust exposure and potentially disabling obstructive impairments. *See* 65 Fed. Reg. at 79,939–43 (summarizing scientific consensus). It was rational for Congress to create a presumption of legal pneumoconiosis for coal miners who had worked for over fifteen years and subsequently became totally disabled by a respiratory impairment.

Consolidation Coal also claims that it is deprived of a full and fair hearing because of the low percentage of successful rebuttals of the fifteen-year presumption. Pet. 18–19. It insists that because the standard only “allows for rebuttal in 3.3% of the cases,” due process is violated because the standard for rebuttal “eliminates the possibility of actually rebutting the presumption.” *Id.* at 19.

Consolidation Coal is correct that in claims qualifying for the fifteen-year presumption, it is usually un rebutted. However, rebuttal is allowed in 100% of cases. The presumption applied to a miner’s claim can be rebutted “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). If, as Consolidation Coal claims, “there is no rational connection between fifteen years of coal mine employment and total disability,” Pet. 10, then rebuttal would be an easy standard to meet. The relatively low percentage of cases where those opposing an award of benefits can show that the miner’s

disability is not connected to his employment further demonstrates that it is rational to conclude that there almost always *is* in fact a connection between coal mining and respiratory disability. The presumption serves Congress’s purpose of providing benefits for that special class of miners disabled due to black lung. *See* 30 U.S.C. § 901(a).

Opposition to awards of benefits is adjudicated on a case-by-case basis. Consolidation Coal’s contention that the possibility of rebuttal is eliminated because ALJs rarely find the presumption rebutted is incorrect. When the facts support the opponent’s view that the miner did not have pneumoconiosis or was disabled wholly by another cause, then an opponent can successfully rebut the presumption.

The 3.3% figure that Consolidation Coal generated to demonstrate the unfairness of the fifteen-year presumption is based only on cases decided by the Department of Labor’s appellate body, the Benefits Review Board. *See* Pet. App. 314. However, these claims are not like most claims arising under the Black Lung Benefits Act. Most claims do not go to the Board—the last publicly available statistics say that only 43% of ALJ decisions do.¹² Most claims don’t even make it to the ALJ level. From 2011 to 2017, the DOL’s initial

¹² U.S. Gov’t Accountability Office, GAO-10-7, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners’ Ability to Pursue Claims* 14–15 (2009), available at <https://www.gao.gov/assets/300/297807.pdf>.

adjudicators *denied* 85% of the 40,261 claims.¹³ And denied claimants only seek ALJ hearings 15% of the time while employers seek ALJ hearings for initial awards 80% of the time.¹⁴

Black lung cases before the Benefits Review Board are predominantly brought by employers contesting awards. Even though the Board rarely overturns ALJ decisions,¹⁵ as long as an employer’s appeal is pending, the employer does not have to pay the miner’s benefits. On the other hand, miners rarely contest ALJs’ denials of their claims for benefits by appealing to the Board, because accepting the denial and later on filing a new claim based on new evidence tends to be more expedient.¹⁶ Because of this, black lung cases that come before the Board are not representative of most cases arising under the Act; they are most often coal companies

¹³ See U.S. Dep’t of Labor, Div. of Coal Mine Workers’ Compensation, *Black Lung Program Statistics: Black Lung PDO Claim Decisions at the District Director Level FY 2006–2017*, <https://www.dol.gov/owcp/dcmwc/statistics/PartCClaimsDecisions.htm> (last visited June 17, 2018).

¹⁴ GAO Report, *supra* n.12, at 15.

¹⁵ The Benefits Review Board uses the same deferential “substantial evidence” standard as Article III courts when reviewing ALJ decisions. See 33 U.S.C. § 921, *as incorporated by* 30 U.S.C. § 932(a).

¹⁶ *Res judicata* does not prevent subsequent black lung claims because the disease is “latent and progressive.” 20 C.F.R. § 718.201(c). Thus, a miner’s health can worsen over time due to black lung and once a year has passed since a denial, a new claim can be filed. See 20 C.F.R. § 725.309(c).

appealing the minority of claims that have been found to be meritorious.

Additionally, Consolidation Coal, in assembling a list of Board cases to generate the 3.3% figure, inexplicably used only *unpublished* decisions of the Benefits Review Board. *See* Pet. App. 315. While their reason for doing so is not given, the figure is even less compelling when precedential, *published* decisions are examined.¹⁷ Of the eleven published Board decisions between 2011 and 2017 that involved the fifteen-year presumption, the Board affirmed the ALJ’s award in *only one*.¹⁸ In the other ten, the Board vacated the award because the employer successfully rebutted the presumption, for evidentiary reasons, or because the presumption was found to have been invoked improperly.¹⁹ Employers were successful in 90.9% of the

¹⁷ The Benefits Review Board’s “published” black lung decisions are published in the *Black Lung Reporter* and available at: <https://www.dol.gov/brb/decisions.htm>. The Board’s unpublished decisions do not form precedent. *See, e.g., Lopez v. S. Stevedores*, 23 B.R.B.S. 295, 300 n.2 (Benefits Review Bd. 1990) (“The Board regards its unpublished Decision and Orders as lacking precedential value. Therefore, unpublished Board decisions generally should not be cited or relied upon by parties in presenting their cases.”).

¹⁸ *See Owens v. Mingo Logan Coal Co.*, 11-0154 BLA (Oct. 28, 2011).

¹⁹ *See Boyd v. Island Creek Coal Co.*, 16-0524 BLA (July 28, 2017); *Griffith v. Terry Eagle Coal Co.*, 16-0587 BLA (Sept. 6, 2017); *Spatafore v. Consolidation Coal Co.*, 15-0265 BLA (Aug. 12, 2016); *Osborne v. Eagle Coal Co.*, 15-0275 BLA (Oct. 5, 2016); *Minich v. Keystone Coal Mining Corp.*, 13-0544 BLA (April 21, 2015); *Sword v. G&E Coal Co.*, 13-0235 BLA (Jan. 27, 2014); *Styka v. Jeddo-Highland Coal Co.*, 11-0150 BLA (Feb. 27, 2012); *Copley v.*

Board’s precedential decisions involving the fifteen-year presumption since it was revived.

The complete irrelevance of the 3.3% figure is even more evident when, upon cursory examination of the cases used to calculate it, it was noted that at least a few are incorrectly categorized or otherwise do not support Consolidation Coal’s point.

In *Noble v. Lawson Trucking Co.*, which Consolidation Coal counts as a “Presumption Upheld” case, see Pet. App. 338, the employer did not even challenge the ALJ’s decision that it failed to rebut the fifteen-year presumption. 16-0113 BLA (Oct. 28, 2016) (“Further, because employer does not challenge the administrative law judge’s finding that it failed to rebut the Section 411(c)(4) presumption that the miner’s [disability] was due to pneumoconiosis, this finding is also affirmed.”).

In *Adams v. A & E Coal Co.*, which Consolidation Coal categorizes as a “Presumption Upheld” case, see Pet. App. 315, although the award of benefits was affirmed, the presumption was not invoked at all because the case was decided before the fifteen-year presumption was revived by the Affordable Care Act. 10-0264 BLA (Feb. 23, 2011).

In *Forester v. Navistar*, 12-0442 BLA (June 27, 2013), which Consolidation Coal counted as a “Presumption

Buffalo Mining Co., 11-0713 BLA (July 31, 2012); *Harris v. Cannelton Indus.*, 10-0420 BLA (April 29, 2011); *Owens v. Mingo Logan Coal Co.*, 11-0154 BLA (Oct. 28, 2011); *Muncy v. Elkay Mining Co.*, 11-0187 BLA (Nov. 30, 2011).

Upheld” case, *see* Pet. App. 325, not only were the merits of the miner’s claim uncontested at the Board level, the employer ultimately did not pay benefits because the award was later vacated by the Sixth Circuit—which held that the presumption was not properly invoked. *See Navistar, Inc. v. Forester*, 767 F.3d 638 (6th Cir. 2014).

These three cases—*Noble*, *Adams*, and *Forester*—were all cases in which Appalachian Citizens’ Law Center, a small nonprofit law firm (which happens to represent Mr. Thompson here), represented the claimant and were therefore well-known to the staff. While in-depth examination was not undertaken to verify that the other cases in Consolidation Coal’s lists were assigned to the correct categories, it is likely that the trend toward incorrectly categorizing cases runs throughout the set.

For example, in *Peters v. David Stanley Consultants*, which Consolidation Coal counts as a “Presumption Rebutted” case, *see* Pet. App. 334, the presumption was *not* rebutted. 16-0170 BLA (Dec. 22, 2016). The Board vacated Mr. Peters’s award because the ALJ made legal errors. On remand, Mr. Peters’s benefits were re-awarded using the presumption. *See Peters v. David Stanley Consultants*, No. 2014-BLA-5063 (OALJ June 8, 2017).²⁰

²⁰ [https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/PETERS_THOMAS_H_v_DAVID_STANLEY_CONSUL_2014BLA05063_\(JUN_08_2017\)_103843_CADEC_SD.PDF](https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/PETERS_THOMAS_H_v_DAVID_STANLEY_CONSUL_2014BLA05063_(JUN_08_2017)_103843_CADEC_SD.PDF).

These examples illustrate the imprecision that results from attempting to place the nuanced and case-specific results of Board decisions into binary categories. The figure generated by such inquiry should not be used by employers to assess the likelihood that they will prevail when defending a given claim that invokes the presumption, nor should they be used by this Court to determine the fairness of a statutory presumption.

Consolidation Coal also cites the Administrative Procedure Act (“APA”) provision at 5 U.S.C. § 556(d) that states: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof” to argue that fifteen-year presumption’s burden shifting is improper. *See* Pet. 19–20. But the first phrase explains why § 556(d) does not apply: “*Except as otherwise provided by statute. . .*” Congress provided otherwise for the burden of proof in fifteen-year presumption cases via 30 U.S.C. § 921(c)(4).

Consolidation Coal’s takings and separation-of-powers arguments are not properly before the Court. Consolidation Coal did not raise these issues below and thus waived these arguments.²¹ And regardless, they are completely lacking in merit. As Judge Sutton has explained, “All that the legislation does is alter the methods of proof for miner and survivor claims, something Congress has done periodically for the last forty-four years, and something that has favored companies on some occasions and miners on others.” *Vision*

²¹ *See* Brief of Appellant, Consolidation Coal Co. (10th Cir. Oct. 21, 2016).

Processing, LLC v. Groves, 705 F.3d 551, 553 (6th Cir. 2013).

Application of the fifteen-year presumption to Mr. Thompson's claim of legal pneumoconiosis is appropriate because it is a sound application of a constitutionally valid statutory provision furthering Congress's legitimate purpose of providing benefits to miners who are totally disabled from their coal-mine employment.

◆

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

EVAN BARRET SMITH

Counsel of Record

APPALACHIAN CITIZENS'

LAW CENTER, INC.

317 Main St.

Whitesburg, KY 41858

(606) 633-3929

evan@aclc.org

Date: June 22, 2018