

No. 17-1335

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*

REPLY BRIEF FOR PETITIONER

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**PETITIONER'S REPLY TO
RESPONDENTS' OPPOSITION BRIEFS**

Petitioner files this Reply Brief to address legal arguments in Respondents' Briefs in Opposition to Petitioner's Petition for a Writ of *Certiorari* to this Court.

I. The Term Pneumoconiosis is Ambiguous.

Both Claimant and Solicitor contend that the word "pneumoconiosis" is not ambiguous and the case can be decided solely by the principles of statutory interpretation. (Claimant at 7-11; Solicitor at 10-11). In support, Solicitor states that its regulatory inclusion of "legal pneumoconiosis" in 2000 "merely conformed the regulatory definition to the act and to the 'distinction already adopted by the circuit courts of appeals.'" (Solicitor at 11). Such statement ignores the fact that when the Secretary originally addressed "codifying" the legal pneumoconiosis in 1999, the Secretary claimed the agency was "simply filling a gap left, implicitly or explicitly, by Congress" pursuant to *Chevron*. 64 Fed. Reg. 54966, 54971 (Oct. 8, 1999). If, as contended by Solicitor and Claimant, the statutory definition of pneumoconiosis was "unambiguous," no regulatory gap would be left to fill.

Further evidence revealing ambiguity in the term "pneumoconiosis" is evidenced by the fact that legal and clinical pneumoconiosis are two distinct diseases. *See*, 20 C.F.R. §718.201(a)(1); *see also*, 65 Fed. Reg. 79920, 79937 (Dec. 20, 2000). While the Fourth Circuit found that "[t]he legal definition of 'pneumoconiosis' is incorporated into every instance the word is used in the statute and regulations," *Barber v. Director, Office of*

Workers' Compensation Programs, 43 F.3d 899, 901 (4th Cir. 1995), the Tenth Circuit found that "Congress' use of the generic term 'pneumoconiosis' in the presumption provision can be harmonized with the statutory scheme if construed to refer only to clinical pneumoconiosis." *Andersen v. Dir., OWCP*, 455 F.3d 1102, 1106 (10th Cir. 2005). The change from *Barber* to *Andersen* stemmed from the codification of "legal pneumoconiosis"; even Solicitor's brief in *Andersen* conceded the word "pneumoconiosis" was ambiguous. (Pet. App. 300-302). The term pneumoconiosis is ambiguous.

II. Respondents Fail to Provide Any Rational Connection Between COPD and Coal Dust That Would Support A Presumption of Legal Pneumoconiosis.

In addition to causing ambiguity, the Secretary's codification of "legal pneumoconiosis" resulted in the DOL positing two conflicting positions about the "presumptiveness" of legal pneumoconiosis. In response to initial comments concerned that the change would render "all obstructive lung disorders compensable" or "require responsible operators to compensate miners for non-occupationally related disease," the Secretary stated that "the language of the proposed regulation makes plain that only 'obstructive pulmonary disease arising out of coal mine employment' falls within the definition of pneumoconiosis." 65 Fed. Reg. 79920, 79938 (Dec. 20, 2000); *see also*, 65 Fed. Reg. 79920, 79944 ("It is not the Department's intent to create a "presumption" with the proposed revisions to the definition."). The Secretary's position was strengthened by *Andersen* which

confirmed a miner could not presume that his COPD was related to coal dust under the 10-year presumption at 30 U.S.C. §921(c)(1). *Andersen*, 455 F.3d at 1107.

Contrary to the Solicitor and Claimant's arguments (Solicitor at 12-13; Claimant at 10-11), *Andersen* is relevant to the current issue of whether legal pneumoconiosis should be presumed. When this Court decided *Usery*, the Court referenced the "the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' employment in the mines." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29-31 (1976). The footnotes cited the legislative hearings held before Congress addressing a miner's probability of developing clinical pneumoconiosis. *Id.*, fn 28 and 30. Based on the evidence, this Court found that both the 10-year and 15-year presumptions related to pneumoconiosis (which was limited solely to clinical pneumoconiosis) were rational. Nearly 30 years later, *Andersen* continued to recognize the necessary link for presumptions by noting the "strong" link between clinical pneumoconiosis and coal dust "[u]like COPD, which is a disease of the general population with an overwhelming majority of cases being caused by cigarette smoking." *Andersen*, 455 F.3d at 1106. This conclusion comported with the Solicitor's position that it was "far less rational, if rational at all," to presume that a miner's COPD arose out of his coal mine employment when compared with evidence supporting the link between clinical pneumoconiosis and coal dust. (Pet. App. 306-307).

Presumptions arising in civil statutes involving matters of economic regulation require "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.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) citing *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). The Court found that, “The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.” *Usery*, 428 at 28 citing *United States v. Gainey*, 380 U.S. 63, 67 (1965).

Unlike the voluminous Congressional record from 1969 to 1977,¹ the 2010 Congress held no hearings and provided no scientific research supporting the required nexus for a presumption between COPD and coal dust exposure. In 2010, the only document that ascribed COPD to coal dust was the Secretary of Labor’s Preamble in the Federal Register which “codified” legal pneumoconiosis. 65 Fed. Reg. 79920, 79937-79945 (Dec. 20, 2000). This document fails to provide a rational connection between COPD and coal dust as the occurrences ranged between 7.7% for non-smokers and 14.2% for smoking miners and the document conceded that only a minority of miners would have significant decrements in pulmonary function; the majority would

¹ The 918-page Congressional history is found on the Social Security Administration website: <https://www.ssa.gov/history/pdf/Downey%20PDFs/Black%20Lung%20Amendments%201969-1977%20Vol%202.pdf>

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

While Claimant attempts to utilize a higher percentage (23.9%) of impaired miners (Claimant at 13, fn 11), the claimed value is not associated with severe obstruction that meets the requirements for total disability under the BLBA. Therefore, this percentage is not relevant to the 15-year presumption that requires total disability. See, 30 U.S.C. §921(c)(4) and Part 718 Appendix of Disability Guidelines. Neither the Solicitor, nor Claimant, provide statistics or any medical or scientific literature that would indicate a greater likelihood of a coal miner developing a severe obstructive condition than the values listed above from the Federal Register. 65 Fed. Reg. at 79940.

Instead Claimant and Solicitor contend that since the presumption is only for the benefit of totally disabled miners, the values are sufficient to support the presumption. (Claimant at 14; Solicitor at 17). The Solicitor contends nothing further is necessary because the study “reflects the incidence of impairment among *all* miners, healthy or unhealthy.” (Solicitor at 17). The Solicitor’s argument is undermined by the fact that the ALFORD study, addressing the 15-year presumption for clinical pneumoconiosis, was also a study of *all* miners and concluded that 88% of miners who worked underground for 15 years had clinical pneumoconiosis. Conversely, the Secretary’s data for legal pneumoconiosis showed that 85.8% of miners would *not* develop 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). The Secretary's data fails to support a rational presumption between COPD and coal dust and, with values revealing that 85% of miners will not develop the condition, supports the contrary premise, i.e., that a miner's COPD is *not* related to coal dust.

III. Petitioner's Writ Should Be Granted Because *Chevron* Deference Does Not Vanquish the Constitutional Guarantee of Due Process.

The Solicitor and Claimant argue that Petitioner's Writ should not be granted because there is no dispute within the Federal circuits and this is not a question of exceptional importance. (Solicitor at 20; Claimant at 11-12). These arguments ignore the method of approval by the circuit courts and due process violations stemming therefrom. The cases cited in Solicitor's brief reveal that the Federal circuit consensus stems solely from *Chevron* deference (or its progeny) to the Solicitor's position. (Solicitor at 20). *See, Consolidation Coal Company v. Director, OWCP and Noyes*, 864 F.3d 1142, 1146 (10th Cir. 2017); *Helen Mining Co. v. Director, OWCP and Elliot*, 859 F.3d 226, 234-239 (3rd Cir. 2017); *West Virginia CWP Fund v. Director, OWCP and Bender*, 782 F.3d 129, 137-138 (4th Cir. 2015); *National Mining Association v. Department of Labor*, 292 F.3d at 849 (D.C. Cir. 2002); *Elm Grove Coal Co. v. Director, OWCP and Blake*, 480 F.3d 278, 288 (4th Cir. 2007).

While deference to an agency is typically expected, deference is not always warranted especially when an agency's policy is abruptly changed. *Encino Motorcars*,

LLC v. Navarro, 136 S. Ct. 2117, 2125-2126 (2016).
Encino Motorcars is instructive:

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, e.g., *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005); *Chevron*, 467 U.S., at 863-864, 104 S. Ct. 2778, 81 L. Ed. 2d 694. When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). But the agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” *Ibid.*; see also *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations, supra*, at 515-516, 129 S. Ct. 1800, 173 L. Ed. 2d 738. It follows that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and

capricious change from agency practice.” *Brand X*, *supra*, at 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. *See Mead Corp.*, *supra*, at 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-2126 (2016).

The only explanation for the Secretary’s changed position was the Congressional revival of the 15-year presumption pursuant to Section 1556 of the PPACA and Sen. Byrd’s post-enactment statement that the revived presumption would “relax the often insurmountable burden of proving eligibility” for miners. 78 Fed. Reg. 59101, 59106 (Sept. 25, 2013). There was no Congressional directive explicitly stating that legal pneumoconiosis should be included. Given the Secretary’s adamant position against presuming legal pneumoconiosis, it is just as likely that Congress did not intend for the condition to be included. However, even if Congress did intend to include legal pneumoconiosis within the 15-year presumption, an Act of Congress does not change an irrational presumption into a rational presumption, especially when no rational basis for the presumption and no explanation for the changed policy is provided.

Mobile allows for presumptions when there is a rational connection between the fact proved and the fact presumed and the opposite party is not precluded from presenting his evidence to the contrary. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). As shown above, there is no rational basis for presuming that a miner’s COPD was caused by coal

dust and this alone is sufficient to find the presumption arbitrary. However, the Secretary's amended regulations further undermine the validity of a presumption by thwarting a responsible operator's defenses.

First, the amended regulations require the responsible operator to "rule out" any connection between the miner's legal pneumoconiosis and his total disability to rebut the presumption despite only requiring a miner to show that his legal pneumoconiosis was a substantially contributing cause of the total disability to award benefits. *Compare*, 20 C.F.R. §718.305(d) and 20 C.F.R. §718.204(c).

Second, the amended regulations expand the 15-year presumption to include all miners who worked 15 years in the mine in contravention of the statutory language. The statute limits the 15-year presumption to miners with 15-years of underground coal mine dust exposure or miners with exposure that is "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The amended regulations now define "substantially similar" to include all miners who were "regularly exposed to coal-mine dust" and eliminate the required statutory comparison. See, 20 C.F.R. §718.305(b)(2). The amended regulation results in opening the presumption to all miners with 15-years of employment - regardless of the location - because the definitions of "miner" and "responsible operator" reveal that every miner is presumed to have been "regularly and continuously exposed to coal mine dust during the course of employment." See, 20 C.F.R. §§725.491(d) and 725.202(a) and (b).

Third, the amended regulations state that “pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.” 20 C.F.R. §718.201(c). On its face, this would not seem controversial. However, the Secretary’s supporting research for the amendment was based solely on evidence related to clinical pneumoconiosis and contained no evidence revealing that legal pneumoconiosis was either latent or progressive. 20 C.F.R. §718.201(c); 62 Fed. Reg. 3338, 3343-3344 (Jan. 22, 1997). Despite having no evidence that legal pneumoconiosis is latent or progressive, the Solicitor advocates for the use of Section 718.201(c) to discredit a physician’s opinion addressing legal pneumoconiosis. *See, Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739 (6th Cir. 2014) (“it is the interpretation of the Director of the Office of Workers’ Compensation Programs, as expressed in his brief in this case, that the “latent and progressive” provision applies to “legal” pneumoconiosis”); *see also, Gunderson v. United States Dep’t of Labor*, 601 F.3d 1013, 1024 (2010); *Midland Coal Co. v. Dir., Office of Workers’ Comp. Programs*, 358 F.3d 486, 490 (7th Cir. 2004). Requiring ALJs and reviewing courts to disregard medical opinions based on a legal fallacy due to unwarranted *Chevron* deference violates due process.

The lack of diversity in the Federal circuit decisions is based solely on *Chevron* deference. However, *Chevron* deference is not warranted when the outcome results in (1) due process violations created by a presumption with no rational basis between the fact proven and the fact presumed or (2) due process violations stemming from amended regulations that

ignore statutory requirements, provide heightened rebuttal standards and promote legal fallacies designed to undermine a responsible operator's rebuttal of the presumption. The court should grant Petitioner's writ because this case involves both presumptive concerns enunciated in *Mobile*.

Given the contrary positions posited by the Secretary of Labor, little, if any, deference should be afforded to the Agency's position. The Solicitor's comment that a rebuttal rate of 3.3% of the cases "demonstrates that it *is* possible to rebut the 15-year presumption (Solicitor at 18) is further evidence of the Solicitor's cavalier disregard for the underlying purpose of the Act, which is to award benefits to miners who develop totally disabling respiratory conditions from exposure to coal mine dust. 30 U.S.C. §901. Including legal pneumoconiosis in the 15-year presumption and promulgating regulations that result in the presumption rarely, if ever, being rebutted, undermine the purpose of the Act and violate due process. As stated by Judge Posner, "The Black Lung Benefits Act is generous, but not that generous. It is not a welfare program for cigarette smokers." *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990).

CONCLUSION

For the reasons set forth above, Consolidation Coal Company respectfully requests this Court grant its writ of certiorari to review the judgment and opinion of the Tenth Circuit Court of Appeals to determine (1) if the term "pneumoconiosis" is ambiguous, (2) if there is a rational nexus between COPD and coal dust to include "legal pneumoconiosis" in the 15-year presumption and (3) if unwarranted *Chevron* deference has resulted in

undermining the Congressional purpose of the Black Lung Benefits Act.

Respectfully submitted,

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