TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

MULLINS COAL COMPANY, INC., OF VIRGINIA, ET AL.,	)	
Petitioners,	)	
v.	)	No. 86-327
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM, UNITED STATES DEPARTMENT OF LABOR, ET AL.	)	

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MULLINS COAL COMPANY, INC., OF :

4 VIRGINIA, ET AL., :

5 Petitioners, . :

6 v. : No. 86-327

7 DIRECTOR, OFFICE OF WORKERS' :

8 COMPENSATION PROGRAM, UNITED :

9 STATES DEPARTMENT OF LABOR, :

10 ET AL. :

11 - - - - - - - - - - - - - - - - - -x

12 Washington, D.C.

13 Wednesday, October 14, 1987

14 The above-entitled matter came on for oral argument

15 before the Supreme Court of the United States at 11:50

16 o'clock a.m.

17 APPEARANCES:

18 MARK E. SOLOMONS, ESQ., Washington, D.C.; on behalf of the

19 petitioners.

20 MICHAEL K. KELLOGG, ESQ., Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf of the

22 federal respondent in support of the petitioners.

23 C. RANDALL LOWE, ESQ., Abingdon, Virginia; on behalf of the

24 respondents.

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CONTENTS

ORAL ARGUMENT OF	PAGE
MARK E. SOLOMONS, ESQ., on behalf of the petitioners	3
MICHAEL K. KELLOGG, ESQ., for federal respondent in support of petitioners	18
C. RANDALL LOWE, ESQ., on behalf of the respondents	25
MARK E. SOLOMONS, ESQ., on behalf of the petitioners - rebuttal	36

1 P R O C E E D I N G S

2 (11:50 a.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Solomons, you may pro-

4 ceed whenever you are ready.

5 ORAL ARGUMENT BY MARK E. SOLOMONS, ESQ.

6 ON BEHALF OF THE PETITIONERS

7 MR. SOLOMONS: Mr. Chief Justice, and may it please

8 the Court, the Black Lung Benefits Act is a federally based

9 workers compensation program which provides benefits on account

10 of total disability or death of a coalminer due to black lung

11 disease. Hundreds of thousands of claimants have been awarded

12 billions of dollars in benefits in this program by proving

13 their entitlement to these benefits under a regulation which

14 is called the interim presumption.

15 Since its inception 15 years ago, the two agencies

16 which promulgated and have administered this presumption, the

17 Social Security Administration, and after them the Department

18 of Labor, have required proof of an indication of fact by a

19 preponderance of the relevant evidence.

20 The Fourth Circuit in its divided opinion below

21 strikes down the preponderance rule for invocation of this

22 presumption and replaces it with a new rule which requires

23 invocation on virtually any evidence at all in isolation

24 from the record and whether or not that evidence is reliable

25 and accurate.

1 The Fourth Circuit's rule is, we think, unprecedented
2 in the context presented. It effectively strips claim defen-
3 dants of the right to answer critical evidence where it is most
4 significant in the analysis of the case. We think it stands
5 for the proposition that one party's proof in an important point
6 in the case is simply better than another's.
7 The question that is presented here for this Court
8 is whether in the invocation of this presumption the claimant
9 must establish invocation by a preponderance of the evidence.
10 We think that he must, and we think so for two reasons. First,
11 because the Secretary of Labor has consistently and over a
12 long period of time required claimants through the Secretary's
13 interpretation of its regulation to establish indication by
14 a preponderance of the evidence, and secondly, and perhaps
15 more importantly, because we think Congress has spoken on this
16 issue as well through the Administrative Procedure Act,and
17 through the Administrative Procedure Act has compelled a
18 holding that the invocation of a presumption of this sort can
19 only be established in an APA proceeding by a preponderance of
20 the evidence.
21 QUESTION: Mr. Solomons, I am a little unclear how
22 this argument you are making squares with what the SG tells us
23 is the true doubt rule that is applied in these cases, and I
24 would like you to tell me whether you are suggesting in effect
25 or implicitly asking us to say there isn't any such thing as

1 a true doubt. Or would that be the effect of agreeing on this
2 burden of proof question, which seems to me a little different
3 from the question of what the trier of fact should consider
4 in the way of evidence. Aren't you going beyond that?

5 MR. SOLOMONS: Well, I think we are going just a
6 little bit beyond the true doubt rule. I think it is impor-
7 tant for the Court to recognize that the true doubt rule is a
8 rule which is very rarely applied in these cases. It has been
9 applied, and I think largely without contest, in a case where
10 there -- in the invocation analysis there are two absolutely
11 equal pieces of evidence, and the Administrative Law Judge at
12 that point has been permitted in the past to say, I will
13 resolve these doubts in favor of the claimant.

14 The precise meaning of the true doubt rule, and that
15 is not a troubling rule, we do not think that the rule is pre-
16 cisely in accord with the Administraive Procedure Act, because
17 we think under the Administrative Procedure Act the claimant
18 is required to prove, at least in the invocation analysis, that
19 invocation of this presumption is a very easy task, that his
20 evidence is just a tiny bit better, and establish --

21 QUESTION: Well, do we even have to decide in this
22 case whether there is such a thing as a true doubt rule and
23 the burden of persuasion issue that you are discussing?

24 MR. SOLOMONS: Well, I don't think the Court has to
25 decide whether there is a true doubt rule. This was not --

1 the true doubt rule was not presented in any of these three
2 cases. It was not argued in the Fourth Circuit. It was not
3 argued before an Administrative Law Judge. It just doesn't
4 arise here. Now, I think it would be well for me to suggest
5 that what you hold may not affect it, but it is not, I think,
6 something which is here. It is a different question. The
7 true doubt --

8 QUESTION: Well, you can't have it both ways. You
9 don't want us to judge the reasonableness of your opinion
10 then, as the government has argued in its brief on this point,
11 by the fact that after all when all else fails you have the
12 true doubt rule. You don't urge us to consider that residual
13 benefit to the claimant as being a part of the whole scheme
14 which we approve.

15 MR. SOLOMONS: No, I don't think you have to do
16 that. I think that there are arguments pro and con on the
17 true doubt rule as they may be applied to revise the effect of
18 the Administrative Procedure Act in these cases. These argu-
19 ments have not been made to the Court except in footnotes.

20 I am not prepared to say that the true doubt rule
21 is absolutely wrong.

22 I think it is important in understanding how this
23 presumption works to look at its mechanics just briefly. An
24 award of benefits under this program requires the presence of
25 three statutory elements. First, the claimant must have

1 pneumoconiosis. Pneumoconiosis is a statutory term which is
2 defined somewhat more broadly than the medical term is defined.
3 This pneumoconiosis or this disease must be occupationally
4 caused. And the disease must in addition to that result in the
5 total disability or death of the coalminer.

6 Now, when you take this in the context of the interim
7 presumption, what we find is that the invocation of the pre-
8 sumption presumes that all three of the statutory elements are
9 present, but invocation facts generally do not prove that any
10 one of the basic elements of entitlement are present.

11 Now, there is one exception to that where an invo-
12 cation fact may prove but one element but there is no invoca-
13 fact that proves two.

14 The plain language of the regulation, looking both
15 at the invocation and rebuttal provisions, I think clearly
16 demonstrates that there is a mismatch between the invocation
17 facts and rebuttal facts. They are simply not the same.
18 Evidence of the type which is required to establish invocation
19 of the presumption typically and generally cannot prove
20 rebuttal, but even more important, invocation facts are not
21 rebuttal facts.

22 The claimant could establish invocation in the sorts
23 of cases that are presented here by proving but one of several
24 simple medical facts, that he has an x-ray, a biopsy which is
25 indicative of some clinical lung disease, or that he has

1 ventilatory studies or arterial blood gas test data which when
2 looking simply at the raw data is indicative of a chronic
3 impairment of respiratory function, or that there is physician
4 opinion evidence that the individual is totally disabled by a
5 respiratory or pulmonary impairment.

6 Looking at these three, these four presumption
7 invocation facts, it should be clear that perhaps with the
8 possible exception of the x-ray fact, which could be estab-
9 lished, that we are not talking about the basic fundamental
10 elements of entitlement. Those are what is presumed. The
11 invocation facts are different. This is not a bursting bubble
12 presumption. We cannot within the terms of the presumption
13 come back in the rebuttal phase and say that claimant's invo-
14 cation evidence, his blood gas evidence or his ventilatory
15 study evidence is completely false or invalid because it proves
16 nothing.

17 It does not prove, as we are required to do,
18 negative of one of the three basic elements of entitlement in
19 the case. After invocation on rebuttal we are looking at
20 entirely new facts. Invocation facts are left behind us and
21 the focus changes to the presumed facts, and again here we are
22 required to prove the negative of those presumed facts.

23 Facts are decided only once. You decide invocation
24 facts in the invocation phase. You decide rebuttal facts in
25 the rebuttal phase. There is very little interplay between

1 the two. But all we are looking for here, and what we have
2 had for 15 years prior to the Fourth Circuit's decision is
3 the right to participate in the whole case. We would like to
4 have the opportunity to cross examine and litigate, not only
5 with respect to the rebuttal, but with respect to the invoca-
6 tion of the presumption as well. We think it is only fair.
7 What the Fourth Circuit's rule overlooks is this
8 fundamental mismatch between the invocation and rebuttal
9 facts. And in so doing it permits evidence which we can prove
10 to be undeniably false to in many cases to control the outcome
11 of the case.
12 QUESTION: It is not a total mismatch, at least as
13 to (a)1. It seems to me you would be able to rebut the (a)1 --
14 MR. SOLOMONS: Well, Your Honor --
15 QUESTION: -- the evidence for the (a)1 presumption.
16 MR. SOLOMONS: Justice Scalia, we might be able to
17 in one circuit. The (a)1 presumption that is invoked by x-ray
18 evidence in one circuit has been found rebuttable on the basis
19 of x-ray evidence. In other circuits -- that is the Seventh
20 Circuit, in a case called Kuehner versus Siegler Coal Company,
21 which is cited in the brief, I believe. But in other circuits,
22 the Third Circuit, in a case called Pavasi, we can't do that,
23 because we have to prove not only that the claimant doesn't
24 have clinical black lung disease. We have got to prove that
25 he does not have a statutory disease, statutory black lung

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1 disease.

2 QUESTION: Well, I thought that the rule -- maybe

3 you are arguing from a different rule, for a different rule

4 than the government, but I thought that the only evidence you

5 were going to allow to come in under (a) is evidence of the

6 same sort, but you want all evidence.

7 MR. SOLOMONS: No --

8 QUESTION: Well, if you only allow evidence of the

9 same sort to come in, then you still face to some degree --

10 CHIEF JUSTICE REHNQUIST: Justice Scalia will finish

11 his question at 1:00 o'clock.

12 (Whereupon, at 12:00 p.m., the Court was recessed

13 to reconvene at 12:59 p.m. of the same day.)

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1 AFTERNOON SESSION

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: When we rose, Mr.

4 Solomons, I believe Justice Scalia was in the process of

5 putting a question to you.

6 QUESTION: You were making the point that we had to

7 adopt the position you were urging because otherwise you would

8 have an opportunity to rebut the data under Subsection (a).

9 But it occurs to me that even if we adopt the position that

10 you espouse, which is essentially the position that the

11 government takes following the agency's interpretation of its

12 rule, you won't necessarily have a chance to rebut all the

13 evidence that is brought forward under (a).

14 For example, under (a)2 the presumption is estab-

15 lished if ventilatory studies establish the presence of a

16 chronic respiratory or pulmonary disease. As I understand

17 the way the agency applies the statute it will allow as

18 rebuttal under (a) only studies of the same sort, so only

19 ventilatory studies that refute the presence of a chronic

20 respiratory or pulmonary disease would be allowed in. Not

21 an autopsy, for example, under (a)2. You would never be able

22 to get in under (b) that autopsy which shows that the

23 ventilatory study was wrong, the way I understand the

24 agency's position. Now, am I wrong about their position?

25 If I am right about their position, then your

1 position does not create the nice logic that you would have
2 us believe.

3 ORAL ARGUMENT BY MARK E. SOLOMONS, ESQ.
4 ON BEHALF OF THE PETITIONERS - RESUMED

5 MR. SOLOMONS: Well, you are right about their posi-
6 tion, I am relatively sure, and we agree with it completely.
7 All we are asking for in connection with the invocation
8 inquiry is the opportunity to have like kind evidence, whether
9 it is x-rays or ventilatory studies, considered with other
10 x-rays and ventilatory studies.

11 QUESTION: Okay, but then you are bound to acknow-
12 ledge that even under your position the statute doesn't make
13 a whole lot of sense, that there is some evidence that you
14 are never going to be able to use to refute other evidence,
15 right?

16 MR. SOLOMONS: Well, our position is that once you
17 get to the rebuttal inquiry, the evidence that we could be --
18 that is properly considered in the invocation inquiry doesn't
19 have much of a place once you finally get to rebuttal. It
20 doesn't have much meaning. It is not totally insignificant
21 or irrelevant, but it certainly does not assist in proving a
22 rebuttal fact.

23 And I think what is most important here is to look
24 at the recent Fourth Circuit decisions in their efforts to
25 apply their own rule. In those decisions, which we have cited

1 in our reply brief, it is perfectly clear that the Fourth
2 Circuit is simply not considering ventilatory studies or blood
3 gas studies or, for that matter, even physician opinion
4 evidence relating to the individual's respiratory or pulmonary
5 disease in the context of the rebuttal inquiry. They refuse
6 to do it. And so under the Fourth Circuit's rule as they have
7 applied it today there is simply no place in which contradic-
8 tory evidence has a place to be considered.

9 QUESTION: Under your rule it is just a lesser
10 amount of contradictory evidence that has no place, but you
11 will have to admit that there is some contradictory evidence
12 that will have no place, even under your rule. An autopsy that
13 shows contrary to a ventilatory study, that there is no
14 respiratory or pulmonary disease, where do you get that in
15 under your position?

16 MR. SOLOMONS: Well, the autopsy is considered in
17 part of the invocation analysis where you determine whether
18 the autopsy by itself or the autopsy in conjunction with other
19 autopsy reports invokes the presumption. It doesn't have any
20 place in consideration of whether ventilatory studies --

21 QUESTION: You cannot use it to refute a ventilatory
22 study.

23 MR. SOLOMONS: No, you cannot.

24 QUESTION: Anywhere, neither under (a) nor (b).

25 MR. SOLOMONS: Right.

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1 QUESTION: Well, why is that? That makes no sense.

2 MR. SOLOMONS: What you can do with an autopsy

3 study arguably is use it in the first instance to determine

4 under the first section of the invocation provision whether

5 the individual has coalworkers' pneumoconiosis. That is the

6 place where that kind of evidence is listed and where that

7 kind of evidence ought to be considered. It is a logical and

8 orderly pattern where like kind evidence is considered with

9 other like kind evidence in a reasonably logical fashion under

10 the government's rule and under the rule that we are espousing

11 here.

12 We are not suggesting that evidence which is in mis-

13 match ought to be considered together. What we are suggesting

14 is, and the original argument, I think, where this line of

15 questioning began is that the invocation facts which have to

16 be proven by the claimant and the rebuttal facts which we are

17 required to prove create an essential mismatch, and since there

18 is no bursting bubble, once we get past the invocation phase

19 and this logical and orderly consideration of the facts which

20 need to be proven in a burden-shifting presumption, that we

21 reach the point where the evidence makes sense, or the consi-

22 deration of the evidence makes sense.

23 The preponderance standard for consideration of

24 invocation evidence that has been adopted by the government

25 is the traditional rule for application in a burden-shifting

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1 presumption. It is logical and it is fair. It has worked
2 well for many years and there has been no reason to change it.
3 Indeed, we think the Fourth Circuit had no reason to change
4 it. Congress has had the opportunity to look at it twice, and
5 has found no reason to comment on the agency's approach.

6 The rule simply gives all parties their day in
7 court on the whole case, not just a part of it. It does not
8 deny benefits to deserving claimants. It simply requires valid
9 proof of a single fact. We think that the preferable methodo-
10 logy for the resolution of the questions that are presented
11 here is the Administrative Procedure Act.

12 I say that because it is in the Administrative Pro-
13 cedure Act that Congress has spoken on the issue that is
14 presented in this case. I also say that because we have had
15 a terrible problem in this program with uncertainty in the
16 rules and standards of proof that have applied -- that have
17 been applied.

18 There are virtually no two circuits that agree on
19 anything in the application of either the rebuttal or invoca-
20 tion provisions of this presumption or the standards of proof
21 that apply. We think that this is an appropriate place for
22 the Administrative Procedure Act to come in, and indeed the
23 Administrative Procedure Act does apply.

24 Looking specifically at the invocation provisions,
25 in Steadman versus the Securities and Exchange Commission,

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1 this Court held after a comprehensive review of the legisla-
2 tive history of the APA that the proponent of a sanction is
3 required to prove the facts necessary to support it by sub-
4 stantial, that is, by a preponderance of the evidence. Evi-
5 dence pro and con, similarly, evidence which is relevant to
6 other evidence of the same sort must be weighed. So says the
7 legislative history.

8 Steadman also holds that where the quantum of proof
9 required to prove a fact is not specified in the underlying
10 statutes, that is where the Administrative Procedure Act
11 steps in in a program in which it is applicable to supply the
12 preponderance standard.

13 This holding in Steadman with no great leap of logic
14 reasonably and naturally extends to invocation of a burden-
15 shifting presumption like the interim presumption. Invocation
16 and rebuttal under the interim presumption are separate and
17 distinct fact inquiries. Some party bears some burden by
18 some quantity of evidence to prove invocation of this presump-
19 tion, but it is not specified in the statute.

20 What the statute does specify is that the APA
21 applies, and we think, as in Steadman, that the APA supplies
22 the preponderance rule for invocation as well as for rebuttal
23 of this presumption.

24 QUESTION: What do you do about what the government
25 points out in Footnote 30 of its brief, which is that the APA

1 is excluded in cases where it is otherwise provided by regula-
2 tions of the secretary?
3 MR. SOLOMONS: Well, the reliance placed there is
4 on Section 422(a) of the Black Lung Act. Section 422(a)
5 authorized the Secretary to write regulations which deviate
6 from the Longshore Act. I do not think that the Secretary's
7 claim -- and it has been rejected by every circuit, and it
8 has been rejected by Congress. When they really need an
9 exemption from the APA in the Black Lung Program they have
10 gone to Congress to get it. And so obviously I wonder how
11 strongly they believe that in fact Section 422(a) provides
12 them with the exemption that they request.
13 QUESTION: It does say that, except as otherwise
14 provided by regulations, et cetera.
15 MR. SOLOMONS: It says the Longshore Act applies
16 except as otherwise provided by regulations of the Secretary.
17 I don't know that that necessarily would give the Secretary
18 the carte blanche to pick and choose from among the APA rules
19 that he would like to apply and those which he would not
20 like to apply.
21 Looking at the decisions of this Court, I think
22 that that claim for supersedure would go far beyond any holding
23 that this Court or, for that matter, the circuits have ever
24 reached. It is just too broad.
25 I would like to reserve the remainder of my time

1 for rebuttal.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Solomons.

3 We will hear now from you, Mr. Kellogg.

4 ORAL ARGUMENT BY MICHAEL K. KELLOGG, ESQ.

5 FOR FEDERAL RESPONDENT IN SUPPORT OF THE PETITIONERS

6 MR. KELLOGG: Mr. Chief Justice, and may it please

7 the Court, under the regulations at issue here, a miner with

8 ten or more years of coal mine experience need only establish

9 one of four basic facts in order to create a presumption of

10 compensable disability.

11 For example, he can prove the existence of pneumo-

12 coniosis by virtue of certain x-ray, biopsy, or autopsy evi-

13 dence, or he can prove a disabling pulmonary impairment by

14 virtue of certain test evidence. Once he establishes the

15 basic fact in question, the burden then shifts to the mine

16 owner or the director to rebut the presumption of compensable

17 disability.

18 The regulations only permit the mine owner to rebut

19 the presumption by establishing either that the miner is not

20 disabled or that he does not suffer from pneumoconiosis or

21 that his condition is not caused by coal mine employment.

22 The word "establish" in the rebuttal provisions has

23 been universally interpreted at the director's urging to mean

24 proved by a preponderance of the evidence.

25 The question presented here is what the burden of

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1 proof is on the miner at the initial invocation stage. The
2 regulations there also state that he must establish the basic
3 fact in question, and the director has interepreted the word
4 "established" there to mean the same thing it means in the
5 rebuttal portion of the regulations. That is, he must prove
6 the fact in question by a preponderance of the evidence.
7 The regulations on this point are not ambiguous, but
8 what I hope to show is that only the director's interpretation
9 can ultimately be squared with the language of the regulations.
10 I would like to deal straightaway with what appears
11 to be the greatest problem for the director's interepretation,
12 and that is the first invocation category, which permits the
13 presumption to be invoked upon proof that a chest x-ray,
14 biopsy or autopsy establishes the existence of pneumoconiosis.
15 Viewed in isolation, the singular there, the reference
16 to a chest x-ray might seem to support the Court of Appeals'
17 view of the regulations. In fact, seen in context, the language
18 strongly supports the director's interpretation. The language
19 of that invocation category is taken directly verbatim from
20 the 1972 regulations of the Social Security Administration
21 dealing with black lung claims filed prior to July of 1973.
22 The consistent interpretation of that exact same
23 language is that the miner must prove the facts in question
24 by a preponderance of all the evidence in that category. The
25 reason for that is that the regulation requires that the

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1 claimant establish the fact in question, and requires that he
2 establish the existence of pneumoconiosis, and that suggests
3 a process of weighing the evidence, of weighing all the like
4 kind evidence and evaluating it.

5 The regulation may be inartfully drafted to make that
6 point, but with six years of consistent interpretation requir-
7 ing proof by a preponderance of the evidence, the reincorpora-
8 tion of precisely the same language in the new regulations
9 should have the same effect as that language in the old regu-
10 lations.

11 The reference to a chest x-ray --

12 QUESTION: It also is hard to say it more accurately,
13 isn't it? If you use the plural, the implication would be
14 that even if you showed it by a preponderance, that prepon-
15 derance would have to consist of more than one chest x-ray.

16 MR. KELLOGG: That's correct, Justice Scalia. The
17 use of the singular makes clear that a chest x-ray may be
18 sufficient to invoke the presumption, but not that it must be
19 in the face of countervailing more persuasive evidence of the
20 same kind.

21 QUESTION: NOw, does the agency interpret the plural
22 when it is used in the other sections, such as studies, venti-
23 latory studies, does the preponderance there have to be a
24 preponderance that is composed of more than one study?

25 MR. KELLOGG: No. A single study will suffice to

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1 invoke the presumption if --

2 QUESTION: That is very unfortunate, because that

3 is just not consistent with what you have just been saying.

4 MR. KELLOGG: Well, it is consistent insofar as the

5 reference to studies clearly indicates that all existing

6 studies are to be considered and weighed in the process of

7 determining whether, for example, under Category (b)2 the

8 person has established the existence of a pulmonary impair-

9 ment, or under category (b)3 whether the studies have demon-

10 strated a respiratory disease, and the reference there clearly

11 indicates that there is to be a weighing process, and that more

12 than one study can be relevant, but it has been the consistent

13 interpretation of the director that a single study will

14 suffice in the absence of countervailing studies proving the

15 contrary.

16 QUESTION: Mr. Kellogg, does the true doubt rule

17 that you refer to in the brief apply at the interim presump-

18 tion stage?

19 MR. KELLOGG: It would apply only at the interim

20 presumption stage. That's correct, Justice O'Connor.

21 QUESTION: And not at the rebuttal stage?

22 MR. KELLOGG: No, not at the rebuttal stage. At

23 the rebuttal stage the burden is -- the proof is already on

24 the mine owner to rebut the presumption. The true doubt rule

25 only comes into play when the burden is on the miner and the

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1 evidence is in equipoise. If the burden is on the min
2 owner --
3 QUESTION: Well, how can you say in one breath that
4 there is a burden of persuasion by a preponderance and yet have
5 the true doubt rule?
6 MR. KELLOGG: Well, the true doubt rule --
7 QUESTION: And where do we find the true doubt rule?
8 MR. KELLOGG: The true doubt rule is published in
9 the Federal Register accompanying the interim regulations in
10 a discussion of the rebuttal provisions. It is an attempt by
11 the director to implement Congress's intent to make benefits
12 liberally available, to recognize that there are certain
13 difficulties in proving pneumoconiosis through medical evidence,
14 and Congress made it fairly clear that they wanted the benefit
15 of the doubt to be given to the miners, and the true doubt
16 rule is an attempt to implement that.
17 However, I would stress that no issues are foreclosed
18 by that. It merely allows the burden to shift to the mine
19 owner on rebuttal, and all issues are open on rebuttal.
20 Justice Scalia asked earlier how the rebuttal mechanism
21 works, whether it, for example, by showing the ventilatory
22 studies established the existence of impairment, then autopsy
23 evidence would be admissible on rebuttal.
24 It would indeed be admissible on rebuttal under the
25 (b)4 category, which allows the mine owner to prove the miner

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1 does not have pneumoconiosis.

2 QUESTION: Well, I see. But not prove that he -- you

3 can't use it to prove he doesn't have a respiratory or pul-

4 monary disease?

5 MR. KELLOGG: You cannot prove that by virtue of the

6 same sort of evidence.

7 QUESTION: But that being one category of respiratory

8 disease, it comes to the same, you are saying.

9 MR. KELLOGG: That's correct. Pneumoconiosis and

10 a respiratory disease are not one and the same thing, and they

11 are kept distinct for purposes of the rebuttal categories.

12 QUESTION: Let me just be sure I understand that.

13 You are saying the rebuttal could be used to prove he did not

14 have pneumoconiosis, the black lung disease itself. It could

15 not be used to refute the conclusion that there was some

16 chronic respiratory and pulmonary disease? Is that what you

17 are saying?

18 MR. KELLOGG: It would depend on which invocation

19 category we used.

20 QUESTION: Well, Number 2.

21 MR. KELLOGG: In Number 2 --

22 QUESTION: Ventilatory studies establish the pre-

23 sence of a chronic respiratory or pulmonary disease. That has

24 been established, and the presumption therefore is triggered.

25 Is that right?

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1 MR. KELLOGG: That's correct.

2 QUESTION: Now, having triggered the presumption,
3 may they offer evidence that tends to disprove that narrow
4 fact, that there was the presence of such a disease?

5 MR. KELLOGG: Yes. They can't. They cannot offer
6 more pulmonary studies to show that he doesn't. In other
7 words, all the pulmonary studies will have had to have been
8 considered and weighed at the invocation stage, but all
9 evidence relevant to whether the person has a pulmonary impair-
10 ment, for example, the opinions of a doctor who has examined
11 the miner, as well as blood gas studies, would be admissible
12 to show --

13 QUESTION: Why wouldn't the doctor's opinion be
14 admissible at the preliminary stage to show that the studies
15 do not in fact establish the conclusion because doctors don't
16 interpret them that way, just as in reading x-rays the distinc-
17 tion between the x-ray and the intepretation of the x-ray.
18 The x-ray doesn't establish it unless the sum opinion of all
19 those wholook ed at it, at least the preponderance of that
20 view, supports that conclusion.

21 MR. KELLOGG: Well, because the (a)2 invocation
22 category relies on specific values. The tests are given
23 specific values, and if a miner meets those values in a
24 reliable test, then the category is invoked provided there
25 are not other tests of the same sort which preclude

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1 invocation under that category.

2 If the Court has no further questions.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kellogg.

4 We will hear now from you, Mr. Lowe.

5 ORAL ARGUMENT OF C. RANDALL LOWE, ESQ.

6 ON BEHALF OF THE RESPONDENTS

7 MR. LOWE: Thank you, Mr. Chief Justice, and may

8 it please the Court, the petitioner asserts that the

9 administrative agency's interpretation of the invocation

10 provision at 203 is reasonable and entitled to substantial

11 deference. The controlling rule in this matter of whether

12 the administrative interpretation be given substantial

13 deference is whether it is plainly erroneous or inconsistent

14 with the regulation or clearly frustrates the statutory

15 mandate.

16 The Fourth Circuit in reviewing the director's

17 interpretation of the regulation found that the agency's inter-

18 pretation renders the regulation internally inconsistent, and

19 it is plainly erroneous. The Fourth Circuit gave a clear

20 and common sense ruling to 203(a), finding that a coal miner

21 who shows that he has been employed in coal mining employment

22 for ten years will have the benefit of the presumption that

23 he suffers from pneumoconiosis and is permanently disabled

24 from that disease if he shows a chest x-ray and a recent

25 medical opinion under (a)1 and (a)4.

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1 They found that the clear reading of that regulation
2 shows that you have to produce only one single piece of
3 evidence. As to (a)2 and (a)3 on ventilatory studies and
4 blood gas studies, they found that studies, for example,
5 in ventilatory studies you have to produce three different
6 tests before the quality standards applied in the statute
7 will allow that to be a valid test. So they also found that
8 you only had to produce one breathing study.
9 The petitioner argues that that construction by
10 the Fourth Circuit violates the black lung benefits section at
11 413(b) and that all relevant evidence is not considered at
12 the invocation stage. They state that the legislative
13 history does not say that all relevant evidence must be
14 considered only at the rebuttal stage, and we would argue
15 that the legislative history is silent on that. It doesn't
16 say which stage all relevant evidence is to be considered, but
17 the regulations themselves at 203(b) states that all relevant
18 evidence shall be considered at (b).
19 QUESTION: Does the presumption that is established
20 in (a) amount to any more than saying that a tie goes to the
21 claimant?
22 What do you need to overcome the presumption, any
23 more than a showing by a mere preponderance that the presump-
24 tion is not correct? Is that all that it takes?
25 MR. LOWE: Well, Justice, we are saying that, for

1 example, x-ray evidence, if --

2 QUESTION: Just answer that question. You have

3 gone through stage (a). The presumption has been established.

4 What does it take under (b) to upset it in your view, just a

5 preponderance of all of the medical evidence?

6 MR. LOWE: Yes, we -- the burden --

7 QUESTION: If that is the case then, isn't this all

8 a tempest in a teapot, because the agency is saying anyway

9 that the tie goes to the claimant. What is the name of the

10 rule that --

11 QUESTION: True doubt.

12 QUESTION: The true doubt rule. So what -- you

13 know, what is all this about?

14 MR. LOWE: The problem is, they speak of the true

15 doubt rule. I have heard of it. I have never seen it applied.

16 The true doubt rule is when everything is exactly equal,

17 then the doubt goes to the claimant.

18 QUESTION: Which amounts to saying there is a pre-

19 sumption that the claimant wins. So you have what you are

20 seeking if you have the true doubt rule, no matter how you

21 come out on this quibble between (a) and (b).

22 MR. LOWE: The problem is, who carries the burden.

23 The problem that we are finding at the Administrative Law

24 Judge level is a coal miner is treated by his treating

25 physician, who might have ordered one or two x-rays,

1 determined that he has a disease, and does not continue
2 granting or ordering x-rays. It is not necessary. But at
3 the time of the hearing the coal operator will come in and
4 have sent that x-ray to ten or twelve different doctors and
5 have ten or twelve negative readings.
6 So at that time when they are looking to see
7 under (a)1 who wins, it does not become who has the best
8 evidence, who has the quality of evidence, it becomes a
9 numbers game, and claimants' attorneys have begun to call it
10 a numbers game. We believe that by invoking just one piece
11 of evidence then takes the burden off of the coal miner to
12 produce all this substantial amount of evidence. It then puts
13 the burden upon the coal operator or the director to rebut
14 those presumptions, and at that point, as the Fourth Circuit
15 had ruled in reviewing all the relevant evidence, then the
16 Court looks at everything that the coal company has put in,
17 and using the director's position, where they say that all
18 like kind evidence will be looked at at (a)1 in the invocation
19 stage, but then when you go to rebuttal it cannot be used
20 again, it clearly shows what the Fourth Circuit says. Under
21 their interpretation the rebuttal stage is superfluous.
22 Take, for example, the x-rays. If you weigh all
23 the x-rays and the administrative Law Judge finds that the
24 invocation is invoked at (a)1, then there is no way that they
25 can rebut that the person suffers from pneumoconiosis because -

1 and under their definition in (b) they cannot reweigh the
2 x-ray reports. Even a doctor's opinion cannot reweigh the
3 x-ray reports. So it shows that the Fourth Circuit is right
4 in that the rebuttal was superfluous. It conflicts or it
5 violates 203(b) in that 203(b) directly says that all relevant
6 evidence shall be considered.
7 And I would also suggest that in that case it makes
8 the presumption irrebuttable. Now, the basic reason that
9 the Fourth Circuit believed that it is correct is because
10 of the legislative history. I don't believe it is a conflict
11 that this is an unusual piece of legislation. Congress has
12 singled out victims of one industry to develop a program that
13 would benefit them from a disease that they derive from that
14 industry.
15 Congress intended the program to be extremely
16 liberal. They intended that, for the most part, that the
17 burden be upon the code operator or the director, and under
18 the Circuit Courts' construction of this regulation the miner
19 could raise the presumption of totally disabling pneumoconiosis
20 with a minimum of evidence. Then the burden of persuasion
21 is shifted to the director or the code operator to go forward
22 and produce the evidence where they are in a better position
23 to do that.
24 The procedure avoids placing on the miner, who can
25 least afford it, the burden of responding, at least

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1 initially, to a plethora of medical evidence more easily
2 generated by the operator, and again, that is in what we call
3 the numbers game, the code operator has the ability by going
4 out and contacting doctors, in report after report, to com-
5 pletely overwhelm the coal miner, and the director's interpre-
6 tation of this regulation allows that to happen. It completely
7 wipes out the remedial intention of the legislation of the
8 Congress.
9 As far as the APA Act applying, we find it interest-
10 ing that on one hand the petitioner would ask that you follow
11 the director's interpretation of the regulations, but he does
12 not accept the director's interpretation does not apply, but
13 at any rate, I believe that the section which incorporates the
14 APA and the Black Lung Act, 30 USC 932(a), specifically states
15 that it may be excluded by regulations of the Secretary.
16 QUESTION: Which regulations exclude it?
17 MR. LOWE: Sir?
18 QUESTION: Which regulations exclude it?
19 MR. LOWE: We would state that under (a), that the
20 (a) and (b) show what you have to produce for the persuasion
21 to be shifted to the code operator or the director, and then
22 under (b), with all relevant evidence to be considered, it
23 sets forth a showing that all evidence or the preponderance
24 of the evidence rule will then be applied, so before any
25 decision or final deicsion is made by an arbitrator, in this

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1 case Administrative Law Judge, the preponderance evidence is
2 applied. The federal respondent cites this Court's case of
3 NLRB versus Transportation Management for that proposition
4 that under Section 7(c) of the Administrative Procedures Act
5 the question is that before an agency's decision is made,
6 that the preponderance of the evidence be weighed, and here
7 that does not necessarily mean that it has to be at the invo-
8 cation stage.

9 The invocation stage is to determine who will carry
10 the burden of proof. If it is shifted, then the evidence is --
11 all the evidence is weighed under the preponderance of the
12 evidence standard, but that burden is upon the code operator
13 or the director.

14 QUESTION: Is your position that a biopsy, (a)1
15 means just a single biopsy, what about (a)2? Does ventilatory
16 studies mean more than one?

17 MR. LOWE: It means one study, Justice, but--

18 QUESTION: I thought you were urging -- it seems to
19 me that the foundation of your argument is the literal
20 language of the statute that says a chest roentgenogram
21 leaves a, simply one, you are saying, but (a)2 says ventila-
22 tory studies.

23 Now, if you are going to be literal, ventilatory
24 studies means more than one.

25 MR. LOWE: Well, but under the context of the

1 regulation it takes three studies to make one. You have to --
2 it is a complicated process. Apparently they put them through
3 three tests and you have to submit the results of the three
4 tests and the tracings from the three tests or it will not be
5 accepted. That is one ventilatory study.
6 So the Fourth Circuit, and I would agree, saying
7 studies just means that you have three studies but that only --
8 that only makes up one ventilatory studies under the regula-
9 tions. The same thing for blood gas studies. If you have
10 ever seen a blood gas study, it just has -- it has values and
11 numbers, just probably 15 or 20 that all combine to make up
12 that one blood gas study that you apply under the charts under
13 (a)2 and (a)3 to see if you invoke the presumption.
14 In conclusion --
15 QUESTION: If the claimant fails to invoke the pre-
16 sumption, he still -- he isn't through, is he? All he means
17 is -- he still has got a claim if he wants to proceed under
18 the statute, I suppose.
19 MR. LOWE: Well, no, Justice, I would disagree.
20 That is the basic threshold. If they cannot produce enough
21 evidence to invoke the presumption, then therefore you would
22 not go any further. Basically, if you could not produce one
23 single x-ray that would show you suffer from pneumoconiosis,
24 then apparently you don't have any x-rays.
25 What I am saying is, what the Fourth Circuit's

1 interpretation that the minimal amount of evidence you would
2 have to prove is so low that I believe if you could not even
3 prove that that your claim would not go any further, because
4 you would not have any evidence at all.

5 QUESTION: Well, isn't there any other way to prove
6 you have got the disease?

7 MR. LOWE: Not under 203(a). You can -- x-ray --

8 QUESTION: Well, that just goes to whether the
9 presumption is invoked.

10 MR. LOWE: But under 203 those are the only things
11 that you can offer to prove that you suffer from pneumoconio-
12 sis and that you are disabled.

13 QUESTION: I was just reading the government's
14 Footnote 3. "If a claimant is unable to invoke the presumption
15 or the presumption is invoked and rebutted, the claimant may
16 nonetheless attempted to establish eligibility in either of
17 two other ways." Then it goes on to tell what it is.

18 But you suggest that really this is the whole ball
19 game.

20 MR. LOWE: There are other regulations you can turn
21 to, but if you cant' get it here I don't think in reality you
22 are going to get it at all. Usually the last paragraph of
23 the Administrative Law Judges' opinions say, we have considered
24 the evidence under such and such a section and such and such
25 section, but if you can't -- if you can't produce enough under

1 the Fourth Circuit's interpretation to invoke the presumptions
2 under Section (a), I do not believe that you are going to
3 qualify for any of the other regulatory provisions.
4 In conclusion, I would ask that you adopt the inter-
5 pretation of the Fourth Circuit, in that the Fourth Circuit
6 has givena co mmon sense reading to 20 CFR 727.203(a) and (b),
7 and they have reviewed the legislation and interpreted that
8 legislative history to give the coal miner the remedial nature
9 of the act that they intended.
10 QUESTION: Before you sit down, may I ask you to
11 comment? One of your opponents emphasized the word
12 "establish" in the regulation. A chest x-ray or biopsy
13 establishes the existence of pneumoconiosis. Do you take the
14 word "establish" to mean constitutes some evidence tending
15 to prove? That is what it is.
16 MR. LOWE: I would take that to mean that the x-ray,
17 based upon the standard that the x-ray has to be in, which is,
18 1/0 is the first step to show that you have pneumoconiosis,
19 I would take that to mean that that x-ray shows or proves that
20 you have pneumoconiosis, that it is not negative.
21 QUESTION: Even if there are ten other x-rays that
22 support the contrary conclusion?
23 MR. LOWE: Supports the contrary, it is our
24 position that your presumption is invoked and then, unlike
25 the director in not being able to look at any other x-ray, we

1 believe that under (b) we look at all of the evidence then
2 and determine if those, if in the Administrative Law Judge's
3 opinion those other nine x-rays show that you do not have
4 pneumoconiosis.
5 QUESTION: I thought I understood this before. You
6 are saying that the one isolated piece of evidence establishes
7 a presumption that there is the disease.
8 MR. LOWE: Yes.
9 QUESTION: And in addition establishes the presumption
10 of causal connection and total disability and all the rest.
11 MR. LOWE: Yes, sir.
12 QUESTION: So that it performs two functions under
13 your view. Under their view it performs only the second
14 function, because you have proved the fact in order to be
15 entitled to the presumption.
16 MR. LOWE: That's correct.
17 QUESTION: Yes. And you think the word "establish"
18 bears your reading. I have difficulty with that. I am just
19 looking at the language. That is all I am doing right now.
20 MR. LOWE: I would think "establish" means "prove,"
21 and does not set forth a burden of proof of preponderance of
22 the evidence as the director thinks it established.
23 QUESTION: But do you agree with your opponent's
24 reading of the word "establish" when you are talking about
25 rebuttal?

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1 MR. LOWE: No, I do not agree. I think it means
2 the same thing in rebuttal, but in the rebuttal phase --
3 QUESTION: You mean they win with just some
4 evidence then?
5 MR. LOWE: 203(b) says in adjudicating a claim
6 under this subpart, all relevant evidence shall be considered,
7 and I think under (b) that is where the preponderance of the
8 evidence is established in the head of that subpart. It tells
9 you, at this point you are now to consider all the relevant
10 evidence in the record. And I don't think it has anything
11 to do with the word "establish."
12 Thank you.
13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lowe.
14 Mr. Solomons, you have one minute remaining.
15 ORAL ARGUMENT BY MARK E. SOLOMONS, ESQ.
16 ON BEHALF OF THE PETITIONERS - REBUTTAL
17 MR. SOLOMONS: Although it is not terribly relevant
18 to the case, I would like to clear up one misconception about
19 mine operators overwhelming the record with evidence in these
20 cases.
21 In order to generate evidence you have to produce
22 the claimant. The claimant simply does not have to come and
23 take as many examinations or chest x-rays or tests as we want
24 him to. The claimant is not required to do that, and the
25 Administrative Law Judges can certainly protect them from

1 that, and they do.

2 QUESTION: There could be eight or ten different

3 doctors.

4 MR. SOLOMONS: Yes, that's right. They can do that.

5 QUESTION: Without the claimant's consent.

6 MR. SOLOMONS: The claimant can do the same thing,

7 and the Labor Department will pay for it, or if the claimant

8 wins, then we pay for it.

9 I think that the -- with respect to the discussion

10 of the singular and plural usages in the invocation portion

11 of the interim presumption, that may not be really where the

12 critical question lies. I think the critical question lies

13 in connection with the rest of what it says.

14 For example, the reference to an x-ray is not an

15 inaccurate reference if that x-ray is the most credible and

16 reliable piece of evidence or x-ray evidence in the record.

17 That certainly can establish if the claimant has pneumoconiosis.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Solomons.

19 The case is submitted.

20 (Whereupon, at 1:38 o'clock p.m., the case in the

21 above-entitled matter was submitted.)

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2 REPORTER'S CERTIFICATE

3 DOCKET NUMBER: 86-327

4 CASE TITLE: Mullins Coal Company, Inc., of Virginia, et al., v
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5 HEARING DATE: United States Department of Labor, et al.
October 14, 1987
6 LOCATION:
The United States Supreme Court
7
I hereby certify that the proceedings and evidence
8
are contained fully and accurately on the tapes and notes
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10
Supreme Court of the United States.
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