No. 11-3637

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONSOLIDATION COAL COMPANY

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and GEORGE R. BAILEY,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Cases **Page**

Statutes **Page**

Regulatory Materials **Page**

Regulatory Materials **Page**

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION[1]

This case arises from Respondent George R. Bailey's claim for benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C.

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[1] The jurisdictional statement in Consolidation's brief is complete and correct. This section is included for the reader's convenience.

§§ 901-944, as amended by the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). On October 14, 2010, Administrative Law Judge Paul C. Johnson awarded Bailey's claim. Appellant's Appendix (A) 2-23. Consolidation Coal Company, the liable employer, timely appealed to the Benefits Review Board on October 25, 2010. Record (R) 89-91; *see* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions).[2]

On October 27, 2011, the Board issued a final order affirming the ALJ's decision. A 24-36. Consolidation timely petitioned this Court to review the Board's order on November 23, 2011. DE 1; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions).

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[2] This brief employs the following citation conventions for record materials not in the Appendix. "Docket Entry" (DE) refers to documents found in this case's Seventh Circuit appellate docket. "Record" (R) refers to documents listed in the Board's consecutively paginated index. *See* DE 4. Director's Exhibit (DX) refers to indexed, but separately paginated exhibits that were submitted to the ALJ by the Director. *See id.* Employer's Exhibit (EX) refers to indexed, but separately paginated exhibits that were submitted to the ALJ by Consolidation. *See id.* "Transcript" (TR) refers to the indexed, but separately paginated transcript of the ALJ hearing. *See id.*

This Court has jurisdiction over Consolidation's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) – Bailey's exposure to coal dust – occurred in Illinois, within the jurisdictional boundaries of this Court. *See Peabody Coal Co. v. Helms*, 859 F.2d 486, 489 n.3 (7th Cir. 1988); *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989).

STATEMENT OF THE ISSUES

Bailey filed unsuccessful claims for federal black lung benefits in 2000 and 2003. Consequently, to succeed on this claim he is required to demonstrate that his condition has changed by proving, with evidence developed after 2003, that he now satisfies one of the elements of entitlement previously decided against him. The ALJ found that the new evidence proved two elements of entitlement previously decided against Bailey. He also found, based on all the evidence, that Bailey is entitled to BLBA benefits. Both findings were based, in part, on a rebuttable statutory presumption that totally disabled miners who worked for more than 15 years are totally disabled by pneumoconiosis. This presumption was restored

by Congress in 2010, and was therefore not available to Bailey in his previous claims. The questions presented are:

1. Did the ALJ permissibly apply the 15-year presumption to determine that Bailey had established the requisite change in condition?

2. Are the ALJ's findings that Bailey's condition had changed and that Bailey is entitled BLBA benefits on the merits supported by substantial evidence and in accordance with law?

STATEMENT OF THE CASE

George Bailey filed this subsequent claim in 2007. DX 3. While it was pending before the ALJ, Congress enacted the ACA, which revived the 15-year presumption for certain pending claims, including Bailey's. Pub. L. No. 111-148, § 1556 (2010). Relying, in part, on the 15-year presumption, the ALJ found that Bailey had established (1) that his condition had changed since his previous claim was denied, and (2) that he is now totally disabled by legal pneumoconiosis, and therefore entitled to federal black lung benefits. A 12-13, 18, 21-22. Consolidation appealed to the Board, which affirmed. R 89-91; A 35. This appeal followed. DE 1.

STATEMENT OF THE FACTS

A. Statutory and regulatory background.

1. Elements of entitlement and the 15-year presumption.

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as "black lung disease." 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201; *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 725 (7th Cir. 2008). "Clinical pneumoconiosis" refers to a collection of diseases "recognized by the medical community as pneumoconiosis[.]" 20 C.F.R. § 718.201(a)(1). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is "significantly related to, or substantially aggravated by" exposure to coal mine dust is legal pneumoconiosis; dust need not be the disease's sole or even primary cause. 20 C.F.R. § 718.201(b).

A coal miner seeking federal black lung benefits must prove (1) that he suffers from pneumoconiosis; (2) that his pneumoconiosis

was caused by coal mine employment; (3) that he is totally disabled by a pulmonary or respiratory impairment; and (4) that impairment is caused, in part, by pneumoconiosis. 20 C.F.R. § 725.202(d); *see Keene v. Consolidation Coal Co.*, 645 F.3d 844, 848 (7th Cir. 2011).

These four elements can be established in two basic ways. The first is through medical evidence.[3] The total-disability element, for example, can be proved by, *inter alia*, pulmonary function or arterial blood-gas test results meeting the qualifying values prescribed by regulation.[4] 20 C.F.R. § 718.204(b)(2)(i)-(ii). Total

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[3] Medical evidence can include chest roentgenograms (x-rays), autopsies, biopsies, medical opinion reports, arterial blood gas studies, pulmonary function tests and other medical evidence. *See* 20 C.F.R. §§ 718.102-718.107.

[4] "Pulmonary function tests measure the degree to which breathing is obstructed." *Yauk v. Director, OWCP*, 912 F.2d 192, 196 n.2 (8th Cir. 1989). A pulmonary function test "qualifies" to establish total disability if certain measured values fall at or below minimum values based on the miner's age, sex, and height. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B.

Arterial blood-gas studies measure the efficiency of gas exchanges in the lungs. The Merck Manual of Diagnosis and Therapy at 528 (17th ed. 1999). An arterial blood-gas study qualifies to establish total disability if the measured values fall at or below the figures specified in 20 C.F.R. Part 718 Appendix C. *See* 20 C.F.R. § 718.204(b)(2)(ii);.

disability can also be established by a physician's "reasoned medical judgment" that a miner is incapable of performing his most recent coal-mine work due to a respiratory or pulmonary impairment. 20 C.F.R. § 718.204(b)(2)(iv).

The elements can also be established by presumption. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act . . . prescribes several 'presumptions' for use in determining compensable disability."). One such presumption is 30 U.S.C. § 921(c)(4)'s "15-year presumption." The 15-year presumption is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from "a totally disabling respiratory or pulmonary impairment[.]"[5] 30 U.S.C. § 921(c)(4).[6] If those criteria

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[5] 30 U.S.C. § 921(c)(4) also requires that at least some of the x-ray evidence not show complicated pneumoconiosis – a particularly advanced form of clinical pneumoconiosis. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 478-79 (7th Cir. 2001) (To invoke the 15-year presumption, a claimant must show that the "x-ray evidence is inconclusive[.]"). If the x-ray evidence conclusively demonstrates complicated pneumoconiosis, the claimant is entitled to an irrebuttable presumption of entitlement. 30 U.S.C. § 411(c)(3); 20 C.F.R. § 718.304. The rebuttable 15-year

are met, there is a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis[.]" *Id.* An employer may rebut the 15-year presumption by demonstrating that the miner "does not, or did not, have pneumoconiosis" or that "his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id.*

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presumption would therefore be irrelevant. Because none of Bailey's x-rays were read as showing complicated pneumoconiosis, this element of the presumption is not at issue.

[6] 30 U.S.C. § 921(c)(4) provides in relevant part:

> [I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with the miner's . . . claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. . . . The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

When Bailey's previous claims were denied, the 15-year presumption was not available because it applied only to claims filed before January 1, 1982. *See* 30 U.S.C. § 921(a), (c)(4) (2000); 20 C.F.R. § 718.305(a), (e). In 2010, while Bailey's claim was being considered by the ALJ, Congress revived the 15-year presumption in Section 1556 of the ACA. The presumption now applies to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, the enactment date of the ACA. Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010); *see also Keene,* 645 F.3d at 847.[7] There is no dispute that the presumption applies to this claim, which was filed in September 2007, and remains pending. DX 3.

2. Subsequent claims.

A miner's medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a latent and progressive disease that may first become detectable – or disabling –

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[7] In *Keene*, this Court affirmed the constitutionality of Congress's retroactive restoration of the 15-year presumption. *Keene*, 645 F.3d at 849. Although it unsuccessfully raised the issue before the Board, A 29-30, Consolidation does not attack the presumption's constitutionality on appeal.

after a claimant stops mining. 20 C.F.R. § 718.201(c). For this reason, miners who unsuccessfully pursued benefits in the past are permitted to file "subsequent claims," arguing that they now satisfy the elements of entitlement. 20 C.F.R. § 725.309.

A subsequent claim is not, however, an opportunity to relitigate the original claim. To ensure that the previous denial's finality is respected, a subsequent claimant must prove that his condition has changed. *See, e.g., RAG Am. Coal Co. v. OWCP*, 576 F.3d 418, 423 (7th Cir. 2009) (traditional principles of res judicata do not bar subsequent claims because the claimant is required to demonstrate a change in condition). The method of proving such a change is prescribed by regulation: the miner must establish, with "new evidence" – i.e., evidence post-dating the denial of his previous claim – that he now satisfies one of the elements of entitlement that was decided against him in the earlier claim. 20 C.F.R. § 725.309(d)(3) ("the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement."). If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(d).

If the new evidence establishes a condition of entitlement previously decided against the miner, the subsequent claim is allowed and the ALJ goes on to consider all the evidence, old and new, to determine whether the miner satisfies all four elements of entitlement. 20 C.F.R. § 725.309(d)(4) ("If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim [other than those established by waiver or stipulation] shall be binding on any party in the adjudication of the subsequent claim."). Even if the claimant ultimately prevails in the subsequent claim, the prior denial remains effective in the sense that he cannot be awarded benefits for any period prior to that denial. 20 C.F.R. § 725.309(d)(5).

B. Factual and procedural history.[8]

1. Bailey's work and smoking histories.

Bailey worked at Consolidation's Burning Star No. 2, a surface mine in Illinois, for 26 years, from 1969 through 1995. DX 4-6; TR 17-18, 30, 38. He primarily operated bulldozers and backhoes to load coal and, after 1992, to reclaim the mine site. DX 1-6; TR 18-19. He testified that he was exposed to coal dust throughout his career, and that conditions at the mine did not change between 1969 and 1992. TR 19. As a backhoe operator, "you're loading into trucks, you get all the dust that – not only that you're digging, but that comes back out of the truck after dumping the coal." TR 17-18. "And as a dozer operator . . . the coal was always coming up on the cars, which was within about, oh, 2 or 3 feet of me. And there's no way that you could get away from the dust on this, because the fan just kept blowing it right back in your face." TR 18. Bailey explained that "three to four times a day" a water truck would drive

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[8] This factual history does not include medical evidence that is irrelevant on appeal. For example, x-ray evidence is primarily used to diagnose clinical pneumoconiosis. 20 C.F.R. §§ 718.102, 718.201(a)(1). Because the ALJ's finding that Bailey does not suffer from clinical pneumoconiosis is not challenged on appeal, the x-ray evidence is not summarized in this section.

by in attempt to control the dust. TR 20. But the truck was "pretty well insufficient to take care of any dust" and would work for only "[a]bout five minutes." *Id.*

Bailey also testified that his last job with Consolidation required him to manually shovel "heavy mud" from the bulldozer's crawlers twice per day. TR 25. He estimated that he would remove 60-80 shovelfuls of mud, each weighing 40-50 pounds, during these cleanings. TR 25-26. He stopped working in 1995 at the age of 53 after injuring his back, and formally retired from Consolidation in 1997. DX 3; TR 21-22, 30. Aside from this testimony, no evidence was submitted addressing either Bailey's exposure to coal dust during his career with Consolidation or the physical requirements of his last job with the company.

The various smoking histories taken in the course of Bailey's medical evaluations will be noted in describing those evaluations below. At the hearing, Bailey testified to smoking three to four cigarettes per day beginning in his twenties and continuing until 1999. TR 20-21, 33-35. The ALJ ultimately credited that testimony. A 4.

2. The first claim.

In 2000, Bailey filed his initial claim for BLBA benefits. DX 1 at 41. Bailey was examined by Dr. Rhody Eisenstein in March 2000.[9] *Id.* at 15-18. Dr. Eisenstein diagnosed Bailey with chronic obstructive pulmonary disease (COPD) in the form of asthmatic bronchitis and chronic obstructive bronchitis.[10] *Id.* at 18. Dr. Eisenstein attributed Bailey's COPD to "inherited factors" and

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[9] Under Section 413(b) of the Act, each miner who files a claim must "be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b). Section 413(b) exams are provided by the Department of Labor at no cost to the miner, and include a physical examination, doctor's report, chest x-ray, pulmonary function test, and an arterial blood gas study. 20 C.F.R. § 725.406(a). As was the case in all of Bailey's claims, the information resulting from the 413(b) exam is often the only medical evidence available to the miner.

[10] COPD is a lung disease characterized by "airway dysfunction" often resulting in "[a]irflow limitation and shortness of breath[.]" Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000). COPD "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma." *Id.* The medical experts variously described or categorized Bailey's COPD as "COPD" (DX 11, DX 20), "chronic bronchitis" (DX 1; DX 11; DX 20), "emphysema" (DX 20, EX 5), and "asthma" (DX 1; EX 5). For the reader's convenience, this brief generally replaces these various terms, which have no independent legal significance in this case, with the umbrella category, COPD.

"mining exposure." *Id.* He opined that Bailey had "progressive limitation over 20 years[,]" but that his disability was only "mild[.]" *Id.* He attributed 75% of Bailey's disability to COPD, and the remainder to arthritis. *Id.* Dr. Eisenstein reported Bailey as having a smoking history of 1/2 pack of cigarettes per day from 1961 to 1965. *Id.* at 16.

The arterial blood gas study taken as part of Bailey's 413(b) exam did not show values qualifying for total disability under the Act. *Id.* at 19; 20 C.F.R. § 718.204(b)(2)(ii); 20 C.F.R. Part 718 Appendix C. Bailey's pulmonary function study qualified to establish total disability under the BLBA regulations at a recorded height of 71" both before and after administration of a bronchodilator.[11] DX 1 at 24; 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B. Consolidation submitted no evidence.

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[11] A bronchodilator is an agent that causes "expansion of the lumina [channels] of the air passages of the lung." Dorland's Illustrated Medical Dictionary 253 (30th ed. 2003).

Bailey's claim was denied by the district director on May 5, 2000.[12] *Id.* at 8-10. The district director concluded that the evidence did not show "the presence of pneumoconiosis"; "that the disease was caused at least in part by coal mine work"; or that Bailey was "totally disabled by the disease." DX 1 at 8. The denial became final when no party requested a formal hearing. *See* 20 C.F.R. § 725.419.

3. The second claim.

Bailey filed a second claim for benefits in 2003. DX 2 at 98. This time Bailey's 413(b) exam was conducted by Dr. Sanjabi who diagnosed Bailey as having "COPD" and possibly "CWP" or coal workers' pneumoconiosis.[13] *Id.* at 41. Dr. Sanjabi attributed Bailey's pulmonary disease to "smoking" and "exposure." *Id.* Regarding disability and etiology of disability, Dr. Sanjabi stated

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[12] Black lung claims are initially heard by district directors or their designees (typically OWCP claims examiners). *See generally* 20 C.F.R. §§ 725.350-725.351, 725.418-725.421. After the district director issues a proposed decision and order awarding or denying benefits, any party may request that the case be transferred to an ALJ for a de novo hearing. 20 C.F.R. §§ 725.450-725.451.

[13] Coal workers' pneumoconiosis is one type of clinical pneumoconiosis. 20 C.F.R. § 718.201(a)(1).

only, "some limitation is expected due to COPD[.]" *Id.* Dr. Sanjabi reported Bailey as having a smoking history of 5 cigarettes per day from 1983 to 1998. *Id.*

Bailey's arterial blood gas study did not show values qualifying for total disability under the Act. *Id.* at 44; 20 C.F.R. § 718.204(b)(2)(ii); 20 C.F.R. Part 718 Appendix C. Bailey's pulmonary function study qualified to establish total disability under the BLBA regulations at a recorded height of 70.5" before administration of a bronchodilator, but not after administration of a bronchodilator. DX 2 at 58; 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B.

On July 24, 2003, the district director issued a schedule for submission of additional evidence to the parties. DX 2 at 15-25. The schedule was accompanied by a preliminary analysis of the evidence stating that Bailey had failed to establish any of the four elements of entitlement: (1) the "claimant does not have pneumoconiosis;" (2) the "claimant's pneumoconiosis was not caused by exposure to coal mine dust;" (3) the "claimant does not have a totally disabling respiratory or pulmonary impairment;" and (4) the "claimant's totally disabling impairment was not caused at

least in part by pneumoconiosis." *Id.* at 18. The schedule then gave Bailey until September 22, 2003 to submit additional evidence in support of his claim and until October 22, 2003 to respond to any evidence submitted by Consolidation. *Id.* at 16.

Neither party submitted evidence in response to the schedule for submission of additional evidence. On October 13, 2003, Bailey sent the district director a letter requesting thirty additional days to obtain and submit more medical evidence in support of his claim. *Id.* at 12. The district director denied Bailey's request because it was not received by the September 22 deadline. *Id.* at 11.

On November 3, 2003, the district director issued a proposed decision and order denying Bailey's claim. *Id.* at 5-11. Instead of making findings separately regarding all four conditions of entitlement, the district director found simply that the evidence (1) "[d]oes not show the miner has pneumoconiosis"; (2) "[d]oes not show the disease was caused, at least in part, by the miner's coal mine work"; and (3) "[d]oes not show that the miner is totally disabled by the disease." *Id.* at 7. The proposed decision and order indicated that it would become final unless a response was received within thirty days. *Id.* at 7-8; *see* 20 C.F.R. § 725.419(d). On

December 3, 2003, Bailey sent a letter attempting to withdraw his claim. DX 2 at 3. The request was denied because it was not received by the district director within 30 days of the November 3 proposed decision and order, which had accordingly became final. *Id.* at 2; *see* 20 C.F.R. § 725.419(d).

4. The current claim.[14]

Bailey filed the current claim in September 2007. DX 3. The district director issued a proposed decision and order awarding benefits. DX 21. Consolidation requested a hearing before an ALJ. DX 22; *see* 20 C.F.R. § 725.451. After the hearing, Congress revived the 15-year presumption.

a. The medical evidence.

i. Medical opinions.

Dr. William Houser conducted Bailey's Department of Labor sponsored pulmonary evaluation in November 2007. DX 11; *see* 30 U.S.C. § 923(b); 20 C.F.R. § 725.406. Dr. Peter Tuteur examined Bailey at Consolidation's behest in May 2008. DX 20. Dr. B.T. Westerfield did not examine Bailey, but reviewed his medical

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[14] In 2006, Bailey initiated a third claim but later withdrew it. TR 31; A 3. It is therefore deemed "not to have been filed." 20 C.F.R. § 725.306(b).

records, also at Consolidation's behest. EX 5. All three doctors agreed Bailey was totally disabled by COPD. Their opinions are detailed below.

Dr. Houser found that Bailey had chronic obstructive pulmonary disease (COPD) "[s]econdary to the inhalation of coal and rock dust arising from coal mine employment and former cigarette smoking." DX 11 at 6. He also found that Bailey had moderately severe airway obstruction collectively caused by COPD and heart disease. *Id.* Although the heart disease had not been fully evaluated, Dr. Houser felt that the COPD was "a more significant factor overall causing [Bailey's] impairment[.]" *Id.* Dr. Houser reported that Bailey smoked 1/3 to 1/2 a pack of cigarettes per day from 1968 through 1999. DX 11 at 3.

Dr. Tuteur found that Bailey had advanced and severe COPD of uncertain etiology. DX 20 at 3-4. He found that Bailey's smoking was "not likely to be responsible for this degree of severity of [COPD]." *Id.* at 3. Although Dr. Tuteur conceded "coal mine dust exposure may produce [COPD]," he found that it was unlikely to have caused the COPD in Bailey's case. *Id.* at 4. Dr. Tuteur also found that there was no evidence of coal workers' pneumoconiosis.

Id. Dr. Tuteur reported that Bailey worked in coal mine employment for 26 years and smoked 3 to 4 cigarettes per day from 1972 to 2000. DX 20 at 2.

In a supplemental report written in February 2009, Dr. Tuteur reaffirmed his belief that Bailey is totally disabled by COPD of uncertain causation. EX 6 at 14-15. His supplemental report added, however, that if Bailey's "cigarette smoking history in fact was greater than one-half pack per day" for 28 years, smoking would became the more likely cause of Bailey's COPD. *Id.* at 14. Dr. Tuteur also considered and definitively rejected diagnoses of alpha-1 antitrypsin deficiency and allergic asthma as potential causes of Bailey's pulmonary disability. *Id.* at 14-15.

In a deposition taken in February 2009, Dr. Tuteur reiterated his opinion that Bailey is totally disabled by COPD of uncertain etiology. EX 8 at 21. He again rejected alpha-1 antitrypsin deficiency and inhalation of coal mine dust as the causes of Bailey's COPD. *Id.* at 20.

Dr. Westerfield reported that Bailey does not have coal workers' pneumoconiosis, but does have totally disabling COPD. EX 5 at 9-11. Dr. Westerfield opined that Bailey's COPD is

emphysema caused by cigarette smoking or alpha-1 antitrypsin deficiency and asthma, a disease of the general population. *Id*. at 11. Dr. Westerfield stated he did not believe that Bailey's COPD or total disability were caused by coal dust exposure. *Id*. at 10-12.

In a deposition taken in December 2008, Dr. Westerfield stated that Bailey has asthma "probably of an allergic basis" and emphysema "due to cigarette smoking." EX 7 at 13, 15. He also stated that if Bailey had, in fact, smoked only five cigarettes per day, or had a total smoking history of less than 10 pack years, there would probably be "little harm" to Bailey from smoking. *Id*. at 17.

ii. Pulmonary function tests.

Bailey and Consolidation submitted four new pulmonary function tests.[15] All relevant values recorded for the new pulmonary function studies are contained in the chart below. All four tests conducted before administration of a bronchodilator

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[15] Although submitted by Consolidation as new evidence, one of the pulmonary function studies contained in EX 10 was administered by Dr. Furry in December 2002. EX 10 at 22. Because this test predated the denial of Bailey's second claim, it is not new evidence for purposes of 20 C.F.R. § 725.309.

qualified to establish total disability under the BLBA regulations at Bailey's recorded height. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B. The two most recent tests conducted after administration of a bronchodilator qualified to establish total disability under the BLBA regulations at Bailey's recorded height. *See id*. With the exception of the test administered on February 27, 2008, all qualifying tests also qualified to establish total disability under the BLBA regulations for any height from 68" to 71".

Date & Exhibit No.	Recorded height	Age	FEV1 pre-bronchodilator & FEV1 post-bronchodilator	FVC pre-bronchodilator & FVC post-bronchodilator	Percentage FEV1 /FVC pre-bronchodilator & percentage FEV1 /FVC post-bronchodilator	Establishes total disability at the recorded height pre- and post-bronchodilator	Would establish total disability for the following heights between 68" and 71"
01/17/05	68"	62	1.58	3.49	45	yes	all
EX 11			2.00	4.53	44	no	all but 68"– 69.3"
11/19/07	69"	65	1.68	3.26	51	yes	all
DX 11			1.96	3.77	52	no	all but 68"-69"
2/27/08	71"	65	1.87	4.42	42	yes	all but 68"
EX 10			1.90	4.62	41	yes	all but 68"
05/23/08	69"	66	1.38	4.03	34	yes	all
DX20			1.56	4.41	35	yes	all

iii. Other relevant medical evidence.

None of the arterial blood-gas studies in evidence qualified to show total disability. *See* 20 C.F.R. § 718.204(b)(2)(ii); 20 C.F.R. Part 718 Appendix C. Various hospitalization and treatment

records were admitted including treatment notes from Dr. Son Le, Bailey's cardiologist, and Dr. Raymond Pineda, who acted as Bailey's physician for almost two years. EX 9; EX 10; EX 11; EX 12; *see* 20 C.F.R. § 718.107. In one of his notes, Dr. Le recorded Bailey as smoking 1.5 packs of cigarettes per day for 35-40 years. EX 9 at 7. In a similar note, Dr. Pineda recorded a smoking history of three packs of cigarettes per week ending in 2000. EX 11 at 26.

b. The ALJ's decision.

The ALJ allowed the subsequent claim, finding that Bailey's condition had changed since the previous claims were denied. A 13. He went on to award the claim on the merits. A 21. Both the ALJ's subsequent claim analysis and his merits analysis relied on the 15-year presumption. A 12-13, 18.

The ALJ credited Bailey with 28 years of coal mine employment. A 5.[16] Based on Bailey's testimony about his work for

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[16] The district director and ALJ credited Bailey with 28 years of coal mine employment, a finding Consolidation did not challenge below. A 5. As Consolidation points out in its brief, the 28-year figure includes two years after Bailey stopped working at the mine (1995) and before his retirement (1997). Pet. Br. 26 n.2. For at least a portion of this two-year period, Bailey was apparently receiving workers' compensation benefits. *Id.*; TR 30. The difference between

Consolidation, the ALJ found "that even if Claimant's employment was not at an underground mine, the conditions were substantially similar to conditions in an underground mine." A 5.

The ALJ went on to consider the new evidence (i.e., evidence post-dating the denial of Bailey's most recent unsuccessful claim) of total disability. After summarizing this medical evidence in detail, A 6–12, the ALJ concluded the new pulmonary function tests and medical opinions established total disability, A 12. The ALJ recognized that Bailey's height, as reported in the pulmonary function tests, varied from 68" to 71". A 12. He found it unnecessary to resolve the discrepancy, however, because "almost every" test resulted in values qualifying to show total disability "at any recorded height[.]" *Id.* As for the medical opinion evidence, the ALJ concluded that "[i]n light of the unanimity of valid medical opinions, I find that total disability is established under Section 728.204(b)(2)(iv)." *Id.*

Having found that the new evidence established total pulmonary disability and 15 years of work in conditions

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26 and 28 years of coal mine work is immaterial to the outcome of this appeal.

substantially similar to an underground mine, the ALJ concluded that Bailey was entitled to a presumption of total disability due to pneumoconiosis. A 13. Because Bailey's "previous claim was denied on the two grounds, including failure to show he was totally disabled from pneumoconiosis[,]" the ALJ found Bailey showed a change in a condition of entitlement previously found against him. A 13. The ALJ did not consider whether Consolidation had rebutted the presumption in his change in condition analysis.

After concluding that Bailey's condition had changed, the ALJ went on to review all additional evidence in the record to assess the claim on its merits. A 13-17. Referring to his earlier discussion, and adding discussion of the additional evidence, the ALJ again found that Bailey was totally disabled and therefore entitled to the rebuttable presumption of total disability due to pneumoconiosis. A 18.

The ALJ then turned to the rebuttal evidence. The ALJ agreed that Consolidation had shown that Bailey did not suffer from clinical pneumoconiosis. A 20. But he rejected Consolidation's argument that Bailey did not suffer from legal pneumoconiosis. A 21. The ALJ explained that all of the testifying physicians agreed

that Bailey suffered from COPD. *Id.* Drs. Houser, Sanjabi and Eisenstein all believed that Bailey's COPD was caused at least in part by coal mine employment. *Id.* Dr. Tuteur candidly admitted to not knowing the cause of Bailey's COPD. *Id.* Only Dr. Westerfield believed Bailey's COPD was due to cigarette smoking. *Id.* Because the ALJ credited Bailey's testimony that he had smoked 1/4 pack of cigarettes per day for 35 years (8.75 pack years), the ALJ found Dr. Westerfield's opinion undermined by the doctor's own admission that Bailey's COPD was unlikely to be smoking induced if Bailey had smoked for less than 10 pack years. A 4, A 21. The ALJ concluded that the 15-year presumption had not been rebutted, and accordingly awarded Bailey benefits. A 21.

c. The Board's decision.

The Board affirmed the ALJ's award of benefits. On the subsequent claim issue, the Board concluded that Bailey's previous claims "were finally denied because claimant failed to establish any of the elements of entitlement." A 25 n.1. It therefore did not address the propriety of invoking the 15-year presumption to prove a change in condition; the ALJ's finding that the new evidence proved total disability was sufficient. A 27 n.4, 29.

The Board rejected Consolidation's various challenges to the ALJ's ruling. It held that Consolidation did not "demonstrate how the administrative law judge's failure to make a determination regarding the miner's height calls into question his ultimate determination that the new medical evidence established total disability pursuant to 20 C.F.R. § 718.204(b)(2)." A 28. The Board affirmed the award, concluding that the ALJ's findings that (1) Bailey's working conditions were substantially similar to conditions in underground coal mines, (2) Bailey was totally disabled, (3) Consolidation did not rebut the 15-year presumption; and (4) Bailey smoked 8.75 pack years to be supported by substantial evidence. A 30-35.

SUMMARY OF THE ARGUMENT

The ALJ permissibly found that Bailey had established elements of entitlement decided against him in his previous claims. This finding was properly based on the ALJ's weighing of the newly-submitted evidence in light of the law in effect at the time of the decision, which includes the 15-year presumption. As a matter of law, it proves that Bailey's condition has changed since his previous claims were denied, allowing this subsequent claim to proceed.

Consolidation claims that the 15-year presumption cannot be applied to prove a change in condition. But this argument is contrary to the plain language of the BLBA's implementing regulations. Consolidation then argues that the 15-year presumption was not properly invoked in this case, because Bailey did not prove that he worked for more than 15 years in conditions substantially similar to an underground coal mine or that he is now totally disabled. But the ALJ's contrary findings on both points are legally correct and amply supported by the record. Finally, Consolidation launches a series of attacks on the ALJ's reasoning and weighing of the evidence, none of which come close to establishing reversible error. The ALJ's award should be affirmed.

ARGUMENT

A. Standard of review.

This Court reviews the ALJ's decision, despite the fact that the appeal comes from the Benefits Review Board. *Keene*, 645 F.3d at 848. The Court cannot overturn the ALJ's decision if it is "rational, supported by substantial evidence, and consistent with governing law." *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a particular conclusion."

Zeigler Coal Co. v. OWCP [Griskell], 490 F.3d 609, 614 (7th Cir. 2007) (internal citations omitted).

"The ALJ's finding of a [] change in condition is a factual determination [] review[ed] only for substantial evidence." *RAG Am. Coal Co.*, 576 F.3d at 423. The Court reviews legal issues *de novo*, *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005) (citation omitted), but the Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 901 (7th Cir. 2003) (*en banc*); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997).

B. The ALJ properly applied the 15-year presumption in ruling that Bailey's condition has changed.

Because this is a subsequent claim, the ALJ's first task was to determine whether Bailey's condition had changed since his previous claims were denied. The method of proving such a change is prescribed by regulation. An ALJ must consider only the "new evidence" – i.e., evidence post-dating the denial of the miner's previous claim – and determine whether that evidence establishes

at least one of the elements of entitlement previously decided against the miner. 20 C.F.R. § 725.309(d)(3).

The ALJ did just that. He properly applied the law in effect at the time of his decision, which includes the 15-year presumption. He then permissibly weighed the new evidence to determine that Bailey had successfully invoked the 15-year presumption. Applying the presumption, the ALJ determined that Bailey suffers from pneumoconiosis and that his total disability is caused, in part, by that disease. Because those two elements had been decided against Bailey in his previous claims, the ALJ properly found that Bailey's condition had changed.

1. The ALJ correctly recognized that the 15-year presumption can be invoked to establish elements of entitlement previously decided against a miner

Consolidation's primary argument is that the 15-year presumption cannot be used to establish an element of entitlement for purposes of demonstrating a change in condition. Pet. Br. 15-25. As support, Consolidation points out that "[t]here is no language included in [30 U.S.C. § 921(c)(4)] that would allow its use to determine a change in condition of entitlement under Section 725.309(d)." Pet. Br. 18. This is true, but unsurprising. It would

be odd, in this context, for a statutory amendment to refer to a regulation: the Department of Labor's regulations implement the BLBA, not the other way around.

In any event, the BLBA's implementing regulations allow claimants to invoke the Act's various presumptions – including the 15-year presumption – in proving a change in condition. This is because presumptions, an integral part of how the various elements of entitlement are established in BLBA claims, are incorporated into the regulatory definitions of those elements. And changes in condition are proved by establishing those same elements of entitlement.

A subsequent claimant must show that "one of the applicable conditions of entitlement (see § 725.202(d) (miner) . . .) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). Section 725.202(d) lists the familiar elements of a miner's claim, including that the claimant "[h]as pneumoconiosis (*see 718.202*)" and that "[t]he pneumoconiosis contributes to the [miner's] total disability (*see § 718.204(c)*)[.]" 20 C.F.R. § 725.202(d)(2)(i), (iv) (emphasis added).

The referenced subsections, in turn, state that the elements of pneumoconiosis and disability causation, respectively, can be established by the 15-year presumption, implemented at 20 C.F.R. § 718.305. *See* 20 C.F.R. §§ 718.202(a)(3) ("If the presumption[] described in § . . . 718.305. . . [is] applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis."); 718.204(c)(2) ("Except as provided in § 718.305 . . . proof that the miner suffers . . . from a totally disabling respiratory pulmonary impairment . . . shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.").[17]

Under the plain language of these regulations, subsequent claimants may invoke the 15-year presumption to prove a change in condition. Even if their text is susceptible to other readings, the Director's interpretation of them is unquestionably reasonable and entitled to deference. *Spese*, 117 F.3d at 1007 (Director's

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[17] Because the BLBA regulations have not yet been amended to account for the ACA amendments, 20 C.F.R. § 718.305(e) facially limits the 15-year presumption to claims filed before 1982. This does not, of course, render the presumption inapplicable to claims filed after 2005, and the Department of Labor has proposed regulations to accurately reflect the 2010 amendment to 30 U.S.C. § 921(c)(4). *See infra* at note 24.

reasonable interpretation of BLBA regulations is entitled to deference) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984)); *see generally Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary of Labor's construction of his own regulations is "controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks and citations omitted).

Consolidation does not address the interplay of these regulations. Instead, arguing that Bailey must prove a "substantial worsening" in his condition, it invites this Court to compare (carefully selected portions of) the medical evidence underlying the previous denials with the new evidence in this claim. Pet. Br. at 20-22. It is not clear what Consolidation hopes to gain by this endeavor, as the expert testimony across Bailey's three claims suggests that his condition has declined substantially.[18]

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[18] *Compare* DX 1 at 18 (Dr. Eisenstein's 2000 description of Bailey's pulmonary disability as "mild") and DX 2 at 41 (Dr. Sanjabi's statement regarding disability that "some limitation is expected due to COPD") *with* DX 11 at 6 (Dr. Houser's 2007 diagnosis of "moderately severe airway obstruction"), EX 6 at 14-15 (Dr. Tuteur's description of Bailey's severe and disabling COPD), and EX 5 at 9-11 (Dr. Westerfield's 2008 diagnosis of totally disabling COPD).

In any event, this inquiry is forbidden by 20 C.F.R. § 725.309, which was enacted in 2001 to "effectuate[] the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) [(en banc)]." 65 Fed. Reg. at 79968. *Lisa Lee Mines* squarely holds that "plenary review of the evidence behind the [previous] claim" violates principles of res judicata. 86 F.3d at 1363.

Rather than comparing evidence in a previous claim against evidence in the subsequent claim, 20 C.F.R. § 725.309 obligates the ALJ to accept the legal conclusions in the previous, finally-denied claim as true. *Id.* Those conclusions are then compared to the new evidence. If the new evidence demonstrates an element of entitlement that was denied in that earlier claim, the claimant has necessarily established a change in condition. *Lisa Lee Mines*, 86 F.3d at 1362-63; *accord U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986-89 (11th Cir. 2004) (same, explaining that this

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Consolidation's claim that Bailey's physical condition has actually improved is entirely based on comparing a single pulmonary function test administered in 2000 to a single pulmonary function test administered in 2007, ignoring the expert testimony and the multitude of other qualifying tests. Pet. Br. 21-22, 33.

approach "respects the finality of the decision rendered on the first claim, shielding that decision from the second guessing that hindsight inevitably invites"). The authorities Consolidation relies on are not to the contrary because they either interpret the pre-2001 version of the regulation, which required subsequent claimants to prove a "material change in condition[,]" 20 C.F.R. § 725.309(d) (1999), or do not discuss the issue. Pet. Br. 20-23.[19]

What makes this case unusual is the fact that the 15-year presumption is now available to Bailey, but was not in his earlier

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[19] Even under the pre-2001 version of Section 725.309, most circuits agreed with the Director's "one-element" test, which forbids ALJs from comparing evidence in a subsequent claim with evidence underlying a finally denied prior claim. *See, e.g., Lisa Lee Mines*, 86 F.3d at 1364-65; *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318 (3d Cir. 1995); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 454 n.7 (8th Cir. 1997). As Consolidation's brief highlights, this Court's precedents are not entirely clear on the issue. *Sahara Coal Co. v. OWCP*, 946 F.2d 554 (7th Cir. 1991) suggested that the old regulation required an ALJ to examine the evidence underlying the prior decision. 946 F.2d at 556. The later en banc decision in *Peabody Coal Company v. Spese,* however, explains that *Sahara Coal* had been "misunderstood in some quarters." 117 F.3d at 1003. While *Spese* adopts the one-element test, it does not explicitly discuss the propriety of reviewing the medical evidence underlying finally denied claims. 117 F.3d at 1003, 1008-09. The precise meaning of *Spese* on this point is irrelevant, however, because this claim is governed by the current version of 20 C.F.R. § 725.309.

claims. But this is only a consequence of the well-established principle that adjudicators must apply the law in effect at the time of a decision. *See Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). The rule is particularly applicable here, because Congress affirmatively expressed its intent to reinstate the 15-year presumption retroactively to claims filed after January 1, 2005. *Keene*, 645 F.3d at 849; *see also* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd) (revival of the 15-year presumption "will apply to all claims that will be filed henceforth, including many claims filed by miners whose prior claims were denied").

While the change in law benefitted the claimant in this case, this Court's precedents teach that the reverse can also be true. In *Spese*, the claimant's initial, unsuccessful claim was governed by the "claimant favorable" interim regulations, 20 C.F.R. Part 727. 117 F.3d at 1003. When he filed a subsequent claim in 1981, the Part 727 regulations had been restricted to claims filed before March 31, 1980. *Id.* As a result, this Court ruled that Spese's subsequent claim was governed by the stricter, then-new 20 C.F.R. Part 718 regulations, including the original subsequent claim

provision, 20 C.F.R. § 718.309 (1981). *Id.* at 1004. The lesson – that subsequent claims are governed by current law, not the law in effect during the original claim – applies equally here.

2. The ALJ's finding that Bailey invoked the 15-year presumption is supported by substantial evidence.

Consolidation next argues that Bailey failed to establish either of the 15-year presumption's prerequisites: 15 years of employment in conditions comparable to an underground mine and a totally disabling respiratory or pulmonary impairment. Pet. Br. 25-31; *see* U.S.C. § 921(c)(4).

a. Comparable employment.

Bailey, a surface miner, bears the burden of establishing "that the conditions under which [he] worked exposed him to coal dust." *Director, OWCP v. Midland Coal Company [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). But he is not required to present evidence of conditions in underground coal mines. *Id.* To the contrary, a miner can "establish similarity simply by proffering sufficient evidence of the surface mining conditions in which he worked." *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001) (internal quotation marks and citations omitted). It is up to the ALJ

based on his expertise "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Leachman*, 855 F.2d at 512.

The ALJ accurately summarized the only evidence presented on this issue, Bailey's uncontradicted testimony. A 5. For example, while working as a bulldozer operator, Bailey "was exposed to coal dust coming up to him on coal cars, which were within 2-3 feet of him and the fan on which 'kept blowing it right back in [my] face.'" A 5 (quoting TR 18, alterations in original). And he described the mine's dust-control efforts "as consisting of a single water truck . . . [that] was 'pretty well insufficient to take care of any dust[.]'" A 5 (quoting TR 20).

Based on this and other testimony, the ALJ concluded that Bailey's working "conditions were substantially similar to conditions in an underground mine." A 5. This finding is perfectly in line with the Court's precedents, and should be affirmed as supported by substantial evidence. *See, e.g., Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995) (affirming ALJ's finding of substantial similarity because he specifically found miner had been exposed to coal dust and that his employment took place in conditions

substantially similar to underground coal mine employment); *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 690 (7th Cir. 1987) (affirming ALJ's finding of comparability based, in part, on claimant's testimony "that the roads over which Luker drove were dusty enough to require the services of two water trucks to water down the dust.").

b. Total disability.

Consolidation's attack on the ALJ's total-disability finding focuses entirely on his analysis of the pulmonary function test results. Pet. Br. 28-31. The four new tests variously recorded Bailey's height as 68", 69", or 71".[20] DX 11, DX 20, EX 10, EX 11. The ALJ acknowledged this discrepancy, but found it unnecessary to resolve because, with one exception, all the tests that qualified to establish total disability would have qualified at any height from 68" to 71". A 12. Observing that the "more recent tests consistently qualify," the ALJ found that "at any recorded height," the "totality of

[20] A patient's height is one factor, in addition to age and sex, that determines which test results are qualifying, i.e., which tests establish total disability. *See* 20 C.F.R. § 718.204(b)(2)(i); 20 C.F.R. Part 718 Appendix B; *supra* note 4.

the pulmonary function testing" established total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i). A 12.

Citing *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 114 (4th Cir. 1995), Consolidation argues that the ALJ's failure to make a finding on Bailey's height is reversible error. Pet. Br. 28. But *Toler* is readily distinguishable. First, the height discrepancy in *Toler* had an enormous impact on the pulmonary function evidence: at one height, none of the three tests qualifies, at the other, two of the three did. *Toler*, 43 F.3d at 114. Second, the *Toler* ALJ was "simply oblivious to the fact that he could not determine whether the pulmonary function results were qualifying without first resolving the conflict regarding Toler's height." *Id.* In this case, by contrast, the height discrepancy had little potential impact on the overall pulmonary evidence and the ALJ explicitly addressed the height discrepancies, explaining that he need not resolve the issue because it would not change his evaluation of the pulmonary function evidence as a whole.[21] A 12.

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[21] The same is true of *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 892-95 (7th Cir. 1990) (decision reversed and remanded where ALJ did not ascertain miner's correct height or recognize the

Moreover, the ALJ's finding that Bailey is totally disabled was not based solely on pulmonary function tests. Total disability can also be established by medical opinion evidence. A 12; *see* 20 C.F.R. § 718.204(b)(2)(iv). And all of the physicians who evaluated Bailey in connection with his subsequent claim – including Consolidation's own experts, Drs. Tuteur and Westerfield – reported that he was totally disabled. DX 11; DX 20; EX 5; EX 7; EX 8; EX 13. Accordingly the ALJ found that in "light of the unanimity of valid medical opinions . . . total disability is established under Section 728.204(b)(2)(iv)." A 12. As the Board explained, Consolidation simply cannot "demonstrate how the administrative law judge's failure to make a determination regarding the miner's height calls into question his ultimate determination that the new medical evidence established total disability." A 28. This Court should agree.

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height discrepancy's potential impact on his evaluation of the pulmonary function studies and finding of total disability).

3. The ALJ's failure to consider whether Consolidation had rebutted the 15-year presumption in his subsequent claim analysis was harmless error.

Consolidation correctly points out that the ALJ erred in not considering whether the 15-year presumption had been rebutted as part of his subsequent-claim analysis. Pet. Br. 19-20. This error, however, was harmless. The ALJ fairly and thoroughly addressed the issue when he considered whether Consolidation had established rebuttal on the merits. A 19-21; *see infra* at Argument Section C.

The ALJ's conclusion – that Consolidation had not disproved the link between Bailey's totally disabling COPD and his coal mine employment – is well-supported. Dr. Teuter's testimony, that the cause of Bailey's COPD is unknown, is insufficient as a matter of law to establish rebuttal. DX 20 at 3-4; EX 6 at 14-15; 20 C.F.R. § 718.305(d) ("in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin"). While Dr. Westerfield did attribute Bailey's COPD to smoking, the ALJ permissibly discounted that diagnosis in light of the doctor's own testimony that a smoking history of less

than 10 pack years would cause "little harmful effect." A 21; EX 7 at 17. The fact that the ALJ did not repeat this analysis in the subsequent claim section of his opinion is not reversible error.

The ALJ correctly determined that the 15-year presumption applies to this claim, including the subsequent claim inquiry. Applying that presumption to the new evidence, the ALJ determined that Bailey now suffers from pneumoconiosis and that his total disability is caused, in part, by the disease. Because these elements had been decided against Bailey in his previous claims, they established a change in condition, allowing this subsequent claim to proceed.[22]

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[22] Below, the Director argued – and the Board held – that Bailey had shown a change in condition on the total-disability issue. A 26-27. If so, the ALJ's invocation of the 15-year presumption in his subsequent claim analysis would be irrelevant. This argument rests on the premise that total disability was one of the elements decided against Bailey in his 2003 claim. Some portions of that claim's record support this interpretation: the claims examiner's July 24, 2003, preliminary analysis of the evidence in the Schedule for Submission of Additional Evidence squarely states that Bailey "does not have a totally disabling respiratory or pulmonary impairment"; no additional medical evidence was submitted after that date; and the district director's narrative analysis of the evidence on "disability and relationship of disability to black lung disease" in the summary accompanying the ultimate proposed decision and order is identical to the summary accompanying the

C. The ALJ's award properly applied governing law and is supported by substantial evidence.

Consolidation raises a host of additional arguments attacking the ALJ's award on various legal and factual grounds. The legal arguments are uniformly undermined by the regulations and relevant case law, and the factual challenges fail to show anything approaching reversible error.

1. The ALJ satisfied the Administrative Procedure Act's duty of explanation.

Consolidation argues that the ALJ failed to "review all of the evidence and provide a rational basis for [his] decision" as required by the Administrative Procedure Act. Pet. Br. 32; *see* Pet. Br. 31-34. A party challenging an ALJ's decision on this ground bears a heavy burden. While the APA obligates ALJs to state their "findings and conclusions, and the reasons or basis therefore," 5 U.S.C. §

July 24 analysis. DX 2 at 18. The proposed decision and order itself, however, did not address the disability and disability-causation elements separately, concluding only that the evidence "[d]oes not show that the miner is totally disabled by the disease." DX 2 at 9. The order is therefore arguably ambiguous, and the district director's evaluation of the conflicting medical evidence on total disability does little to clarify it. After further reflection on the issue, the Director has elected not to pursue this argument on appeal.

557(c)(3)(A), it does not demand perfection or require an ALJ to recite the entire record. *See, e.g., Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327 (7th Cir. 1983) ("we will uphold an agency's decision of less than ideal clarity if the agency's path may reasonably be discerned or if failure to explain every step in the reasoning process could have made no difference in the outcome"). As the Fourth Circuit succinctly explained, "[i]f we understand what the ALJ did and why he did it, we, and the APA, are satisfied." *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998).

Contrary to Consolidation's suggestion, the ALJ summarized the evidence developed in Bailey's prior claims as well as the newly-submitted evidence. A 13-17. He explained that the earlier medical opinions, which diagnosed "at most a mild disability," did not conflict with the newer opinions, which unanimously found total disability. A 18. Instead, they "reflect[ed] a deterioration in Claimant's health since his first two claims . . . consistent with pneumoconiosis being a progressive disease." *Id.* The ALJ's reasoning is readily apparent from the opinion, which is all the APA requires. And, given the progressive nature of pneumoconiosis, it was rational for the ALJ to credit the more recent evidence showing

total disability over the earlier evidence that did not. *See, e.g.*, 20 C.F.R. § 718.201(c); *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 973 (7th Cir. 1984) (holding it rational for an ALJ to give more weight to recent medical evidence showing worse physical condition in light of the progressive nature of pneumoconiosis).[23]

Ultimately, Consolidation's APA argument boils down to a series of disagreements with the ALJ's findings of fact. But those findings are the ALJ's to make. "Even if another finder of fact might have made the opposite choice," the ALJ's conclusion that the new evidence established total disability "was supported by substantial

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[23] Consolidation suggests that the ALJ's reference to pneumoconiosis's latent and progressive character is tantamount to a finding that Bailey suffered from the disease in 2000 or 2003. Pet. Br. 34. This, the argument goes, is "essentially . . . a finding that the earlier denials were wrong," which is "not permissible under the well established principles of res judicata." *Id.* But Consolidation's conclusion does not follow. Because pneumoconiosis was only one of at least three elements of entitlement decided against Bailey in his earlier claims, a finding implying that he suffered from the disease all along would not implicate principles of finality. *See Spese,* 117 F.3d at 1008; *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 493 (7th Cir. 2004) (principles of res judicata were not violated in subsequent claim case where ALJ made a finding intimating that the miner "had some degree of pneumoconiosis all along").

evidence that a rational mind might accept as adequate." *Shores*, 358 F.3d at 492-93.

2. To rebut the 15-year presumption, an employer must prove that the miner does not suffer from either clinical or legal pneumoconiosis.

Consolidation argues that the 15-year presumption cannot create a rebuttable presumption of legal pneumoconiosis, Pet. Br. 34-38, and that the presumption is entirely rebutted if an employer proves the absence of clinical pneumoconiosis, Pet. Br. 38-39. This is belied by the plain language of the statute, which defines pneumoconiosis broadly to include, inter alia, any "chronic dust disease of the lung," 30 U.S.C. § 902(b), and its implementing regulations, which define pneumoconiosis to include "both medical or 'clinical' pneumoconiosis and statutory or 'legal' pneumoconiosis[,]" 20 C.F.R. § 718.201(a).

In addition to contradicting the plain language of the BLBA and the BLBA's implementing regulations, this argument is undermined by the case law. *See, e.g., Summers*, 272 F.3d at 482 (7th Cir. 2001) (affirming ALJ's conclusion that employer did not rebut 15-year presumption, recognizing that employer's rebuttal burden includes disproving legal pneumoconiosis); *Barber v.*

Director, OWCP, 43 F.3d 899, 901 (4th Cir. 1995) (reversing ALJ's finding of rebuttal because the employer's evidence addressed only clinical pneumoconiosis).

Anderson v. Director, OWCP, 455 F.3d 1102 (10th Cir. 2006) is not to the contrary. As Consolidation points out, Pet. Br. at 35, *Anderson* held that the rebuttable presumption of 30 U.S.C. § 921(c)(1) does not apply to miners with legal pneumoconiosis, 455 F.3d at 1105-06. But this holding was based on that particular provision, which provides "a miner who is suffering or suffered from pneumoconiosis [and] was employed for ten years or more in one or more coal mines" with a rebuttable presumption that "his pneumoconiosis arose out of such employment." 30 U.S.C. § 921(c)(1). It makes no sense to apply this presumption to a miner claiming legal pneumoconiosis. In order to prove legal pneumoconiosis, a miner must prove that his pulmonary disease arose out of his employment, 20 C.F.R. § 718.201(a)(2), which would render the presumption that his pneumoconiosis arose out of his employment, 30 U.S.C. § 921(c)(1), "meaningless, redundant, [and] superfluous." *Anderson*, 455 F.3d at 1106.

3. The fact that the BLBA's implementing regulations have not been updated to incorporate the 15-year presumption does not render the statutory 15-year presumption inapplicable.

Consolidation also attacks the ALJ's findings as inconsistent with two regulations that have not yet been updated to reflect the 2010 statutory amendment restoring the 15-year presumption. Pet. Br. 42-43. In particular, 20 C.F.R. § 718.305, which implements the 15-year presumption, applies only to claims filed "on or after January 1, 1982" and 20 C.F.R. § 718.204(c)(2) provides that evidence of total disability is not sufficient evidence of disability causation "[e]xcept as provided in § 781.305[.]" The Department has recently proposed amended regulations that reflect the 2010 amendments.[24] In any event, an act of Congress surely trumps inconsistent portions of a statute's implementing regulations. *See, e.g., Cumberland v. Dep't of Agric. of U.S.*, 537 F.2d 959, 961 (7th

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[24] *See* Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 77 Fed. Reg. 19456, 19475 (Mar. 30, 2012) (proposing to amend the BLBA regulations to reflect 20 C.F.R. § 718.305's application to claims filed after January 1, 2005, and pending on or after March 23, 2010).

Cir. 1976) (a new conflicting statute supersedes inconsistent regulation).

4. Bailey's back injury is irrelevant to his entitlement to federal black lung benefits.

Consolidation argues that Bailey is ineligible for BLBA benefits because he is totally disabled by a back injury. Pet. Br. 40-44. This theory is specifically prohibited by 20 C.F.R. § 718.204(a), which states that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. § 718.204(a).[25]

This regulatory prohibition against considering nonpulmonary conditions when evaluating disability causation applies "to the

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[25] Consolidation's references to *Blakeley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992), and *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990) do not further its argument that Bailey's back injury is relevant to analyzing the etiology of Bailey's total disability. Pet. Br. 40-42. These cases stand merely for the noncontroversial truism that Consolidation can rebut the 15-year presumption by proving "that coal dust exposure was not a contributing cause of [Bailey's] disabling pulmonary impairment." *Blakely*, 54 F.3d at 1320.

adjudication of all claims filed after January 19, 2001." 20 C.F.R. § 718.2. Consolidation's argument is based on this Court's decisions in cases that were not governed by the amended regulation, which indeed disallowed BLBA benefits where a miner was totally disabled by a nonpulmonary condition. *See Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 1394-95 (7th Cir. 1994); *Gulley v. Director, OWCP*, 397 F.3d 535, 538-39 (7th Cir. 2005). But, as the Court recognized in *Gulley*, the new regulation overturns this case law. 397 F.3d at 538-39; *see also* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3344-45 (Jan. 22, 1997) (making clear that the amendment to 20 C.F.R. § 718.204(a) represents a departure from *Vigna* for claims filed after January 19, 2001).[26]

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[26] Consolidation correctly observes that the Seventh Circuit continues to apply the *Vigna* rebuttal standard in cases filed under the Part 727 regulations despite 20 C.F.R. § 718.204(a). Pet. Br. 42. This is because the Part 727 regulations apply only to claims filed between July 1, 1973, and April 1, 1980. The relevant portion of 20 C.F.R. § 718.204(a), in contrast, applies only to claims filed after January 19, 2001. 20 C.F.R. § 718.2.

5. The ALJ's decision regarding Bailey's smoking history is supported by substantial evidence.

Finally, Consolidation attacks the ALJ's finding that Bailey smoked a quarter of a pack of cigarettes per day for 35 years, a total smoking history of 8.75 pack years. Pet. Br. 44-48; A 4.[27] A number of smoking histories are reported by the medical evidence of record, most of which range from 5 through 15 pack years. *See* A 4, 7, 14-16. Medical records from Drs. Le and Pineda, however, recorded substantially higher histories. EX 9 at 3, 7; EX 11 at 26. According to Consolidation, the ALJ erred by not considering whether these records were entitled to increased weight under 20 C.F.R. § 718.104(d), which requires an ALJ to consider a miner's relationship with a treating physician when weighing that doctor's opinion as to "whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis[.]"

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[27] A claimant who smokes a pack of twenty cigarettes every day for one year has a smoking history of one "pack year."

The point is irrelevant. The ALJ's finding that Bailey had an 8.75 pack-year smoking history was not based on his analysis of the opinions submitted by the various medical experts. It was based on Bailey's hearing testimony. After acknowledging the conflicting evidence on the issue, the ALJ stated: "I credit Claimant's trial testimony. It was taken under oath, and his demeanor persuades me of his credibility." A 4.

Evaluating a witness's credibility is "within the sole province of the ALJ." *Griskell*, 490 F.3d at 614 (internal quotation marks and citations omitted); *accord Canteen Corp. v. NLRB*, 103 F.3d 1355, 1363 (7th Cir. 1997) ("The ALJ's finding, based on his observations of the witnesses' demeanor and his expressed or implied credibility determinations concerning their testimony, is entitled to considerable deference and may be overturned on review only in extraordinary circumstances."). The ALJ's decision to credit Bailey's testimony was well within his discretion and supported by other evidence in the record. It should therefore be affirmed. [28]

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[28] Moreover, the regulation only applies to the ALJ's evaluation of a treating physician's "medical report." 20 C.F.R. § 718.104(a), (d). A "medical report" in this context is a term of art under the

In sum, Consolidation has not pointed to any defect in the ALJ's award warranting a reversal. The ALJ properly identified the governing law, including the 15-year presumption, and correctly applied that law to find that Bailey's condition had changed and that the miner is now entitled to BLBA benefits. The factual findings underlying his decision are amply supported by substantial evidence in the record, and the resulting award should be affirmed.

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regulations. The Le and Pineda treatment records are not medical reports, but rather "[o]ther medical evidence" as defined in 20 C.F.R. § 718.107.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the award of benefits to Mr. Bailey.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 10,122 words, and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2003.

2) On May 2, 2012, the Director's brief was filed electronically with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system

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