No. 24-784

In the Supreme Court of the United States

ARCH RESOURCES, INC., FKA ARCH COAL, ET AL.,
PETITIONERS

v.

DOUGLAS PENNINGTON, ACTING DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), bars a court of appeals from affirming a decision of the Department of Labor Benefits Review Board on grounds other than those articulated by the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 112 F.4th 343. The decision and order of the Benefits Review Board (Pet. App. 126a-161a) is reported at 25 Black Lung Rep. (MB) 1-301 (2022). The decision and order of the administrative law judge (Pet. App. 49a-125a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2024. A petition for rehearing was denied on October 15, 2024 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on January 10, 2025. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides benefits to coal miners who are totally disabled by pneumoconiosis. 30 U.S.C. 901(a), 922(a)(1), 932(c). An individual coal mine operator is primarily liable for benefits to miners who become disabled, at least in part, because of their employment with the operator. 30 U.S.C. 932(c). If there is "no operator who is liable for the payment of such benefits" in a particular case, liability is assumed by the Black Lung Disability Trust Fund (Trust Fund). 26 U.S.C. 9501(d)(1)(B).

The Act requires coal mine operators to secure their liability by either purchasing commercial insurance or obtaining permission from the Department of Labor (DOL) to self-insure. 30 U.S.C. 932(b), 933(a). To obtain permission to self-insure, operators must agree to pay BLBA benefits to entitled miners and their survivors and must post security in an amount determined by DOL's Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 726.110(a). Applications for self-insurance "may be filed by any parent or subsidiary corporation, partner or partnership, party to a joint venture or joint venture, individual, or other business entity which may be determined liable for the payment of black lung benefits." 20 C.F.R. 726.102(c).

The Act empowers DOL to issue regulations "establish[ing] standards for apportioning liability for benefits * * * among more than one operator, where such apportionment is appropriate." 30 U.S.C. 932(h); see 30 U.S.C. 936(a). Pursuant to that authority, DOL has issued regulations addressing liability in cases where a miner has worked for multiple employers, or for a single

employer covered by different insurers. Those regulations generally assign liability to the parties who were responsible for covering the miner's risk when that miner was last exposed to coal-mine dust—an application of the last-exposure rule that governs many workers' compensation programs. See *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955) (addressing the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*).

Specifically, the regulations assign direct liability (subject to applicable statutory conditions) to the mine operator "that most recently employed the miner." 20 C.F.R. 725.495(a)(1). Similarly, the regulations generally make commercial insurers liable for claims based on "the last day of the [miner's] last exposure" to coal-mine dust that occurs while "in the employment of the insured" and "during the policy period." 20 C.F.R. 726.203(a). And while no separate regulation explicitly adopts the last-exposure rule for self-insurers, 20 C.F.R. 726.103 provides that the regulations governing commercial insurance are "binding upon" self-insurers "[a]s appropriate."

b. A person may file a claim for compensation under the BLBA with a district director at OWCP. 33 U.S.C. 919(a); see 30 U.S.C. 932(a). Upon the filing of such a claim, the district director notifies all interested parties, investigates the claim, and issues a proposed decision. 33 U.S.C. 919(c); see 20 C.F.R. 725.350(b). Any party can then request a de novo hearing before an administrative law judge (ALJ). 33 U.S.C. 919(d); see 20 C.F.R. 725.419(a), 725.455(a). Any party aggrieved by an ALJ's decision may appeal to DOL's Benefits Review Board. 33 U.S.C. 921(b). And any party aggrieved by a Board decision may obtain judicial review of that

decision in the "court of appeals for the circuit in which the injury occurred." 33 U.S.C. 921(c).

Under the governing regulations, a party that contests its identification as a potentially liable mine operator must submit any evidence in support of its position to the district director. See 20 C.F.R. 725.408(b)(1). No evidence pertaining to liability "may be admitted in any further proceedings," including before the ALJ. 20 C.F.R. 725.408(b)(2); see 20 C.F.R. 725.456(b)(1), 725.457(c)(1). That is because the district director's proposed decision is OWCP's last opportunity to designate the liable party; if the ALJ, Board, or court of appeals determines that OWCP designated the incorrect party, then the Trust Fund would be liable for any benefits awarded. See Pet. App. 4a; 20 C.F.R. 725.407(d), 725.418(d).

2. David Howard worked as a miner for 17 years, before retiring from petitioner Apogee Coal in 1997. Pet. App. 5a. At the time of Howard's retirement, Apogee was self-insured through its owner, petitioner Arch Resources. *Ibid.* In 2005, Arch sold Apogee and its BLBA liabilities to a different company, and those interests were then acquired by Patriot Coal Company in 2008. *Ibid.*

Howard filed a claim for BLBA benefits in 2014. Pet. App. 5a. The district director notified Apogee, self-insured through Patriot, of its potential liability. *Id.* at 162a-166a. But before the district director issued a proposed decision, Patriot and most of its subsidiaries, including Apogee, were dissolved in bankruptcy. *Id.* at 5a.

Following Patriot's bankruptcy, OWCP issued a bulletin instructing that Arch should be the liable insurer for pending claims against Patriot that originally fell

under Arch's self-insurance. Pet. App. 6a. The bulletin applied to Howard's claim because Arch was Apogee's self-insurer when Howard retired from Apogee. *Ibid.* Thus, the district director notified Arch that it was now liable for Howard's claim. *Ibid.*; see *id.* at 191a-204a.

Arch contested its liability but failed to submit any evidence on the liability issue. Pet. App. 6a. The district director accordingly issued a proposed decision ordering Arch to pay Howard's benefits. *Ibid.* Arch then requested a hearing before an ALJ. *Id.* at 50a.

The ALJ also ordered Arch to pay Howard's benefits. Pet. App. 49a-125a. The ALJ explained that Apogee, self-insured through Arch, meets the "regulatory requirements of a potentially liable operator." *Id.* at 115a; see *id.* at 115a-116 (applying 20 C.F.R. 725.494(a)-(e)). The ALJ found "no basis in the regulations to relieve Arch of liability under the circumstances of this claim." *Id.* at 122a. And the ALJ emphasized that Arch had been "properly notified of its liability in this claim as Apogee's self-insurer and yet failed to timely offer or seek through discovery any evidence that it is not liable." *Id.* at 120a.

The Board affirmed. Pet. App. 126a-161a. The Board agreed with the ALJ that "[b]ecause Apogee was the last potentially liable operator to employ [Howard]," Apogee was "the responsible operator" and Arch was "the responsible carrier." *Id.* at 146a. The Board further observed that Arch "did not present any evidence that [it] is unable to assume liability if [Howard] is found eligible for benefits." *Ibid.* And the Board identified "no regulatory authority to support [Arch's] argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment." *Id.* at 149a.

3. The court of appeals affirmed. Pet. App. 1a-23a. As a threshold matter, the court denied petitioners' request "to 'expand' the record." *Id.* at 9a. The court explained that Arch "failed to submit evidence [concerning its liability] to the District Director and the ALJ denied its request to submit evidence late because Arch did not meet its burden to show extraordinary circumstances." *Id.* at 8a-9a. The court found that Arch had "ample notice" and should not be permitted to "end-run around ordinary discovery procedures." *Id.* at 10a.

On the merits, the court of appeals rejected petitioners' argument "that [Arch's] sale of Apogee's liabilities completely severed the two businesses and insulated it from future Apogee-originated claims." Pet. App. 17a. That argument "ignores the plain language of the regulations," the court explained, because those regulations "expressly contemplate[]" "[t]ransfers of business interests and self-insurance." *Ibid.*; see *id.* at 16a-17a (citing 20 C.F.R. 726.110(a)(1) and 726.4(b)). The court emphasized that Arch's "identity as a self-insurer, rather than a corporate insurer, does not alter the statutory requirements for paying claims owed by an operator." *Id.* at 17a.

The court of appeals also rejected petitioners' argument that "holding [Arch] accountable for Apogee's liabilities constitutes impermissible 'veil piercing.'" Pet. App. 17a n.5. The court reasoned that because Arch "was identified as the self-insurer on the claim," and Arch "self-insured Apogee during Howard's employment," "veil piercing is irrelevant to Arch's duty to perform its insurance promise." *Ibid.*

Nor was the court of appeals persuaded by petitioners' attempt to distinguish "commercial insurance," which "uses an 'occurrence trigger,'" from "self-insurance,"

which "uses a 'claim trigger.'" Pet. App. 17a n.6. The court determined that petitioners' attempted distinction "lacks support in the rules or the regulations." *Ibid.*

The court of appeals observed that, after receiving notice of Howard's claim, "it was up to Arch to show that it was not the liable party." Pet. App. 18a. And the court emphasized that "Arch failed to take any action in this claim to prove as much within the procedural requirements of the BLBA and accompanying regulations." *Ibid.*

4. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 24a-25a.

ARGUMENT

Petitioners contend (Pet. 21-24) that the court of appeals affirmed the Board's decision on a ground distinct from the one articulated by the Board and thus violated the principle established in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). But sound reasons counsel against applying the *Chenery* principle in this unique context—as most courts of appeals have concluded. Although two circuits have applied *Chenery* to Board decisions, those circuits may reconsider their current positions. And in any event, this case is an unsuitable vehicle in which to resolve the question presented because it is debatable whether the court of appeals would have violated *Chenery* even if the principle applied. The petition should be denied.

1. The *Chenery* principle does not apply to court of appeals review of a Benefits Review Board decision. Under *Chenery*, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. at 95. That doctrine rests

on the premise that agency orders involve "a determination of policy or judgment which the agency alone is authorized to make." *Id.* at 88.

That premise is inapplicable to Benefits Review Board orders. Before Congress created the Board in 1972, DOL's benefits determinations were subject to review in district court and then the court of appeals. See *Kalaris* v. *Donovan*, 697 F.2d 376, 386-387 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). The Board later "replaced the District Court in the new claims procedure scheme." *Id.* at 387. It therefore "exercises the appellate review authority formerly exercised by the United States District Courts." *Crockett Colleries, Inc.* v. *Barrett*, 478 F.3d 350, 358 (6th Cir. 2007) (Rogers, J., concurring). That review authority is narrowly circumscribed: "findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). And on a petition for judicial review, a court of appeals likewise "reviews the ALJ's factual conclusion for substantial evidence and legal determinations de novo." *Crockett Colleries*, 478 F.3d at 358. Accordingly, "the standards of review for the Benefits Review Board and th[e] [court of appeals] are the same." *Welch* v. *Benefits Review Bd.*, 808 F.2d 443, 445 (6th Cir. 1986).

"In this context, the ordinary *Chenery* concerns melt away." *Crockett Colleries*, 478 F.3d at 358. Unlike most agencies, the Benefits Review Board lacks independent policymaking authority. Instead, the Board is a "quasi-judicial" body designed to function like the district courts it replaced. 20 C.F.R. 801.103. The *Chenery* Court expressly distinguished the rule authorizing appellate courts to affirm district court decisions that

"'relied upon a wrong ground or gave a wrong reason,'" emphasizing that remanding "would be wasteful" in that circumstance. 318 U.S. at 88 (citation omitted). The same logic applies here.

Petitioners' contrary arguments disregard the unique function of the Benefits Review Board. Petitioners analogize (Pet. 21-22) to the facts of *Chenery* and *Michigan* v. *EPA*, 576 U.S. 743 (2015). But both of those cases involved agencies (the Securities and Exchange Commission and Environmental Protection Agency) that exercise substantial policymaking authorities. Indeed, as petitioners acknowledge (Pet. 21), the Commission in *Chenery* had "invoked its broad authority to evaluate the fairness of insider transactions." The Board possesses no comparable authority—so judicial review of a Board decision does not present *Chenery*'s concern that the "appellate court" might "intrude" upon the agency's policymaking "domain." 318 U.S. at 88.

2. a. The majority of circuits to have addressed the question presented hold that *Chenery* does not prevent a court of appeals from affirming a Benefits Review Board decision on a ground not articulated by the Board. See *Arch of Kentucky, Inc.* v. *Director, OWCP*, 556 F.3d 472, 480 (6th Cir. 2009) (explaining that it can "affirm the ultimate ruling of the [Board] * * * based on a ground other than the one actually relied upon by the [B]oard"); *Lauderdale on behalf of Lauderdale* v. *Director, OWCP*, 940 F.2d 618, 622 (11th Cir. 1991) ("We can affirm a decision of the Board for a legal reason not advanced by the Board."); *J.M. Martinac Shipbuilding* v. *Director, OWCP*, 900 F.2d 180, 183 (9th Cir. 1990) ("We may affirm an order of the Benefits Review Board on a different ground or principle than that relied on by the Board."); *Consolidation Coal Co.* v. *Smith*,

837 F.2d 321, 323 (8th Cir. 1988) (agreeing with the Board on an alternative ground); *United Brands Co.* v. *Melson*, 594 F.2d 1068, 1072 n.10 (5th Cir. 1979) ("We do not think the statute requires us to affirm for the reasons given by the Board. When the Board's order can be affirmed on a question of law, we think we are fully empowered to do so.").

Although the Fourth and Seventh Circuits have reached the opposite conclusion, see Pet. 15-20, the circuit conflict does not warrant the Court's review at this juncture. In *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (2006), the Fourth Circuit determined that "[a]ffirming the Board's [decision] * * * on an alternative ground not actually relied upon by the Board is prohibited under the *Chenery* doctrine." *Id.* at 426; see *Gulf & W. Indus.* v. *Ling*, 176 F.3d 226, 230 (4th Cir. 1990) ("[O]ur review of this matter is confined to the grounds actually invoked by the [Board] in support of its decision."). But recently, a Fourth Circuit panel questioned whether "application of *Chenery* makes sense" in this context because "the Board essentially stands in the place of a district court when it reviews an ALJ's factual findings for substantial evidence and legal conclusions de novo." *American Energy, LLC* v. *Director, OWCP*, 106 F.4th 319, 335-336 (2024). In light of that recent decision, this Court should afford the Fourth Circuit the opportunity to reconsider its precedent.

In *Apogee Coal Co.* v. *OWCP*, 113 F.4th 751 (2024), the Seventh Circuit determined that "the *Chenery* doctrine applies with full force in black lung appeals." *Id.* at 759. But it did so without party briefing on that issue and thus never grappled with the arguments against *Chenery*'s application to Benefits Review Board decisions. The Seventh Circuit has recognized that "an

opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the court considered the ground now urged as a basis for overruling." *United States* v. *Hill*, 48 F.3d 228, 232 (1995). Accordingly, this Court should afford the Seventh Circuit an opportunity to consider whether it would adhere to *Apogee Coal* even when presented with the sound arguments against applying *Chenery* to Benefits Review Board decisions.

b. Petitioner also asserts (Pet. 24-27) a conflict between the Sixth and Seventh Circuits over whether Arch may be held liable in the circumstances here.[*] But the question presented concerns only *Chenery*'s application to Benefits Review Board decisions. Pet. i. Petitioners failed to include a second question presented about liability, and that issue is not fairly included within the *Chenery* question. The alleged conflict over the liability issue therefore should not factor into the Court's certiorari calculus. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) ("[T]he fact that [petitioner] discussed [an] issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.").

In any event, the alleged conflict over Arch's liability does not warrant this Court's review. Although the Seventh Circuit found it "hard to see" how the regulations

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[*] Like the Sixth Circuit, the Fourth Circuit has affirmed a Board decision holding Arch liable under the circumstances here. See *Hobet Mining Co.* v. *Workman*, No. 23-1126, 2024 WL 3633574, at *3 (Aug. 2, 2024) (per curiam) ("Arch's procedural and substantive challenges to the Board's liability decision are meritless.").

upon which the Sixth Circuit relied "could support a finding of liability" against Arch "on the facts before [it]," the court also emphasized "the limited scope of [its] holding." *Apogee Coal*, 113 F.4th at 761-762. Specifically, the Seventh Circuit made clear that just because (in its view) DOL "has yet to articulate a basis for liability in cases like this one[,] does not mean that no such basis exists." *Id.* at 762. "In future black lung cases," the court observed, DOL "can press additional arguments for the rule it advocates," and "with the benefit of those proceedings, courts will come closer to a final answer about what the regulations do and do not authorize." *Ibid.* Thus, the court expressly acknowledged that whatever tension currently exists between the Sixth and Seventh Circuits over the liability issue could well disappear in the future.

3. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle for considering that question.

a. To begin, even assuming that the *Chenery* principle applies to Benefits Review Board decisions, it is questionable whether the court of appeals' decision runs afoul of that principle. Unlike in prior decisions, see *Arch of Kentucky*, 556 F.3d at 480, the Sixth Circuit here never suggested that it was departing from the Board's reasoning or affirming the Board's decision on an alternative ground. And the court's analysis tracks that of the Board in many respects. Indeed, both the court and Board reasoned that "principles of 'corporate separateness' found elsewhere in the law do not change the statutory obligations at play here"; "veil piercing is irrelevant to Arch's duty to perform its insurance promise"; and petitioners' attempt to "distinguish" between "commercial insurance" and "self-insurance" "lacks

support in the rules or regulations." Pet. App. 17a & nn.5-6; accord *id.* at 149a (Board stating that "there is no regulatory authority to support [petitioners'] argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment"); *id.* at 148a n.19 (Board rejecting petitioners' argument that "the district director improperly 'pierce[d] Arch's corporate veil'") (citation omitted; brackets in original).

Petitioners' claim of inconsistency (Pet. 16-17) turns solely on the court of appeals' citation of 20 C.F.R. 726.110(a)(1) and 726.4(b) when rejecting petitioners' reliance on "principles of 'corporate separateness.'" Pet. App. 17a. Section 726.110(a)(1) requires self-insurers "[t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners." 20 C.F.R. 726.110(a)(1). But the Board likewise cited Section 726.110(a)(1) when rejecting petitioners' "argument that Patriot Coal should have been held liable for this claim." Pet. App. 150a n.20. So both the court and Board expressly invoked that provision.

Nor was the court of appeals' citation of Section 726.4(b) inconsistent with the Board's reasoning. Section 726.4(b) provides that "[c]omprehensive standards have been promulgated in subpart G of part 725" to "determin[e] which operator shall be liable"; and it further specifies that "pursuant to these standards any parent or subsidiary corporation" and "any transferee or transferor of a corporation" that has "a substantial and reasonably direct interest in the operation of a coal mine may be determined liable." 20 C.F.R. 726.4(b). While the Board did not rely on Section 726.4(b) directly, it did rely on the subpart G rules that Section

726.4(b) summarizes and cross-references. See, *e.g.*, Pet. App. 147a (citing 20 C.F.R. 725.494(a)-(e) and 725.495(b)); *id.* at 148a (citing 20 C.F.R. 725.494(e) and 725.495(c)); *id.* at 152a (citing 20 C.F.R. 725.494 and 725.495). The court's decision to cite Section 726.4(b) rather than the individual provisions in subpart G of Section 725 does not suggest any meaningful distinction in analysis.

b. This case is also an unsuitable vehicle for resolving the question presented because Arch "failed to submit evidence to the District Director and the ALJ" addressing its liability. Pet. App. 8a. The ALJ, Board, and court of appeals each emphasized that failure when finding Arch liable. See *id.* at 18a, 120a, 146a. So regardless of whether *Chenery* applies to Benefits Review Board decisions, Arch's failure to offer evidence would likely be fatal to its case here.

The question presented therefore lacks significance in the context of this case. To the extent the Court might wish to consider the question presented at some point, it should do so in a case where the petitioner timely submitted evidence in support of its position. One such case is pending in the Fourth Circuit and has been fully briefed and argued. See *Hobet Mining, Inc.* v. *Director, OWCP*, No. 23-2157 (argued Mar. 18, 2025).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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