No. 01-1490

In the Supreme Court of the United States

WESTMORELAND COAL COMPANY, PETITIONER

v.

JAMES R. RAMSEY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS

1. Whether 20 C.F.R. 725.503(b), which requires payment of benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, beginning with the month the claim was filed if the evidence fails to establish the month of onset of disability, conflicts with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d).

2. Whether the court of appeals acted contrary to its decision in *Island Creek Coal Co.* v. *Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000), and infringed petitioner's rights under the Fifth Amendment by failing to remand for a reweighing of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unpublished, but is available at 28 Fed. Appx. 173. The decisions and orders of the Benefits Review Board (Pet. App. B1-B14) and the administrative law judge (Pet. App. C1-C17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2001. A petition for rehearing was denied on January 8, 2002 (Pet. App. D1). The petition for a writ of certiorari was filed on April 5, 2002. The

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

STATEMENT

1. This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, filed by respondent James R. Ramsey. Ramsey worked as a coal miner for 21 years, the last 12 of which were as a hydraulic mechanic for petitioner Westmoreland Coal Company. Pet. App. A3. Ramsey retired in 1985, and filed his first claim for benefits in 1987. *Ibid.* An administrative law judge (ALJ) denied the claim, and the Benefits Review Board (the Board) affirmed. *Ibid.*

Ramsey filed another claim for benefits on August 31, 1993, Pet App. B2 n.1, pursuant to the Secretary's regulation permitting the filing of a subsequent claim when there has been a material change in conditions, see 20 C.F.R. 725.309. The ALJ denied benefits, concluding that, although Ramsey had established a material change in conditions because he now suffered from pneumoconiosis, he had failed to establish total disability due to pneumoconiosis.[1] Pet. App. B2. The Board reversed and remanded for further consideration of the evidence. *Id.* at B3.

On remand, the case was transferred to a second ALJ, who awarded benefits upon finding that Ramsey suffered from pneumoconiosis arising out of his coal mine employment and that he was totally disabled due to pneumoconiosis. Pet. App. B3. The Board again reversed and remanded. *Id.* at B3-B4.

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[1] To establish an entitlement to benefits, a claimant must show that (1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; and (3) the pneumoconiosis rendered him totally disabled. 20 C.F.R. 718.202-718.204.

2. a. On the second remand, the ALJ again awarded benefits. Pet. App. C16. The ALJ explained that, "[a]fter consideration of all the evidence of record," she had found that Ramsey suffered from pneumoconiosis and that his condition resulted in part from his occupational exposure to coal dust. *Id.* at C8. She reached that conclusion in reliance on the opinion of Dr. Rasmussen, rejecting the contrary opinions of other physicians. *Id.* at C8-C10. In her view, Dr. Rasmussen's opinion was "better reasoned, better supported by clinical and epidemiological evidence, and more persuasive." *Id.* at C16. The ALJ also determined that Ramsey's condition contributed to his total disability, a point on which a number of physicians agreed. *Id.* at C14-C16 & n.8. Finally, because the date of the onset of Ramsey's total disability was not established by the evidence, the ALJ ordered the payment of benefits from August 1993, the month in which Ramsey filed his claim. *Id.* at C16; see 20 C.F.R. 725.503(b) (providing that benefits generally are payable "beginning with the month of onset of total disability due to pneumoconiosis," but that benefits are payable "beginning with the month during which the claim was filed" if "the evidence does not establish the month of onset").

b. The Board affirmed. Pet. App. B1-B14. The Board rejected petitioner's challenge to the ALJ's determination that Ramsey had established the existence of pneumoconiosis, explaining that the ALJ properly gave controlling weight to the opinion of Dr. Rasmussen "because she found Dr. Rasmussen's opinion to be better reasoned." *Id.* at B5-B6. The Board also affirmed the ALJ's finding of total disability due to pneumoconiosis, concluding that petitioner had not challenged that finding. *Id.* at B4 n.2.

Finally, the Board rejected petitioner's contention that the ALJ erred in ordering the payment of benefits from the date the claim was filed. The Board explained that the "'evidence is not entirely clear as to the date of onset of the disability due to pneumoconiosis,'" and that, under 20 C.F.R. 725.503(b), benefits therefore were payable from the date the claim was filed. Pet. App. B12 (quoting 1996 decision of ALJ). The Board found no merit in petitioner's argument that the regulations, in providing for payment of benefits from the month of filing where the evidence fails to establish the date of onset, conflict with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d). Pet. App. B13. The Board explained that the APA's rules for conducting hearings are inapplicable where the black lung regulations provide a different rule, and that 20 C.F.R. 725.503(b) supplies the governing rule when determining the starting date for payment of benefits. *Ibid.*

3. a. The Fourth Circuit affirmed in an unpublished per curiam opinion. Pet. App. A1-A9. "After consideration of the briefs, record, and oral argument," the court reached the "opinion that no reversible error exists in this case" and "affirm[ed] the decision of the Board for the reasons expressed in its opinion." *Id.* at A7. Observing that petitioner's various objections to the ALJ's reliance on Dr. Rasmussen's opinion over the opinions of other physicians "primarily concern the weight of evidence and the credibility of witnesses," the court "decline[d] to revisit those assessments and [found] that substantial evidence in the record supports the ALJ's conclusions." *Ibid.* Next addressing petitioner's contention that the ALJ erred in ordering the payment of benefits from the date that Ramsey filed his claim (along with two other issues not raised here), the

court stated, without further comment, that it found "no errors of law or fact" in the Board's determinations. *Ibid.* Finally, the court affirmed the Board's conclusion that petitioner had not challenged the ALJ's finding of total disability due to pneumoconiosis, and added that the ALJ's finding was supported by the record. *Id.* at A7-A8.

b. Petitioner filed a petition for rehearing and rehearing en banc, which was denied. Pet. App. D1.

ARGUMENT

The unpublished opinion of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review therefore is not warranted.

1. The Secretary of Labor's regulation establishing the starting date for payment of Black Lung benefits provides in pertinent part:

> Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed. * * *

20 C.F.R. 725.503(b).[2] Petitioner asserts (Pet. 7-17) that the regulation, by presuming in certain circumstances that the date of onset coincides with the filing date, violates the requirement in Section 7(c) of the APA that, "[e]xcept as otherwise provided by statute,

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[2] The Secretary has recently promulgated new regulations applicable to pending cases, but the relevant text has not changed from the version applied in this case. See 65 Fed. Reg. 79,920 (2000).

the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). Petitioner relies on *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), in which this Court found that the "true doubt" rule—under which Black Lung adjudications were resolved in favor of the claimant if the evidence was evenly balanced—conflicted with the allocation of the burden of proof in Section 7(c) of the APA. Pet. 9. Petitioner argues that the date-of-onset regulation likewise improperly "shifts the burden of proving the date of onset." *Ibid.*

a. The Board was correct in determining that the date-of-onset regulation does not contravene Section 7(c) of the APA. The BLBA, 30 U.S.C. 932(a), incorporates a number of provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), including the requirement in Section 19(d) of the LHWCA, 33 U.S.C. 919(d), that hearings be conducted in accordance with the APA. But the BLBA incorporates the LHWCA only to the extent not "otherwise provided * * * by regulations of the Secretary." 30 U.S.C. 932(a); see 20 C.F.R. 725.452(a) ("Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 *et seq.*"); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1273-1274 (4th Cir. 1977) (describing "congressional intention to empower the Secretary to depart from specific requirements of the Longshoremen's Act in order to administer the black lung compensation program properly").

Because the Secretary "otherwise provided" in the date-of-onset regulation that a miner is entitled to payment of benefits beginning with the month he filed his claim if the evidence fails to establish the date of onset, that regulation, and not the APA, controls. 30

U.S.C. 932(a). In those circumstances, the APA's allocation of the burden of proof is inapplicable by its own terms. 5 U.S.C. 556(d) ("[*e*]*xcept as otherwise provided by statute*, the proponent of a rule or order has the burden of proof") (emphasis added).[3]

b. Even if Section 7(c) of the APA were applicable, the date-of-onset regulation is consistent with Section 7(c) because the presumption established by the regulation only shifts the burden of production, not the burden of persuasion. This Court held in *Greenwich Collieries* that Section 7(c)'s assignment of the "burden of proof" speaks to the burden of persuasion rather than the burden of production. See 512 U.S. at 272-281. The Court specifically presumed that a regulatory presumption that "eases" the burden of persuasion without reallocating it, such as by shifting only the burden of production, is consistent with the APA. See *id.* at 280. The presumption established by the date-of-onset regulation fits in that category.

The date-of-onset regulation assumes significance only after a claimant has demonstrated that he is totally disabled from pneumoconiosis and thus is entitled to benefits. If the claimant establishes an entitlement to benefits but cannot prove the precise date that he became totally disabled, the date-of-onset regulation raises a rebuttable presumption that he was totally disabled on the date he filed his claim. If the responsible operator carries its burden of production by coming forward with credible evidence that the miner was not totally disabled for a period of time after filing

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[3] In *Greenwich Collieries*, this Court assumed without deciding that the Secretary has authority under the BLBA, 30 U.S.C. 932(a), to promulgate regulations displacing the APA's allocation of the burden of proof. See 512 U.S. at 271.

his claim, the claimant then must show by a preponderance of the evidence that he was totally disabled when he filed his claim. Otherwise, benefits may be awarded only for the time that the miner was disabled according to the available evidence. Throughout, the claimant bears the burden of persuasion in establishing the date of onset. See 65 Fed. Reg. 80,012 (2000) (describing allocation of burdens in date-of-onset regulation).

The Secretary has explained the basis for the rebuttable presumption as follows:

> This approach was adopted in view of the great difficulty encountered in establishing a date certain on which pneumoconiosis, often a latent, progressive and insidious disease, progressed to total disability. The filing date was thought to be fair since proof of onset, which was usually obtained after filing, would likely fix the date of total disability at the time at which the medical tests were administered. The filing date, on the other hand, was likely to be a more accurate measure of onset since it would be the date, or close to the date, on which the claimant felt the need to file for benefits, presumably because disability had become total.

43 Fed. Reg. 36,828-36,829 (1978). In view of the often lengthy latency period for pneumoconiosis, which is both a progressive and irreversible disease, see *Lane Hollow Coal Co.* v. *Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998), treating the filing date as the default starting point for payment of benefits strikes an appropriate and reasonable balance between overcompensation and undercompensation. Here, for instance, Ramsey filed his claim on August 31, 1993 (Pet. App. C6), and underwent his initial examination by Dr.

Rasmussen on October 25, 1993, C.A. App. 108. Petitioner's challenge to the presumption thus concerns only the two-month period separating the filing date and the medical evaluation relied on to establish Ramsey's total disability. Indeed, in the absence of evidence establishing the precise date of onset, it is possible that Ramsey in fact became disabled *before* he filed his claim and that the presumption therefore worked in petitioner's favor. See Pet. App. B12 (noting the ALJ's statement that "[a]lthough the Claimant stopped working in 1985, the evidence is not entirely clear as to the date of onset of the disability").

In shifting only the burden of production, the presumption in the date-of-onset regulation mirrors other presumptions in the administration of Black Lung benefits that have been correctly upheld by the courts of appeals as consistent with *Greenwich Collieries* and the APA. See *Gulf & Western Indus.* v. *Ling*, 176 F.3d 226, 233 (4th Cir. 1999) (upholding presumption that disabled miner's medical bill is covered if related to treatment of pulmonary disorder because it merely reallocates burden of production while leaving intact claimant's burden of persuasion); *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445, 452-453 (8th Cir. 1997) (upholding presumption under *Greenwich Collieries* that only "ease[s] a black lung claimant's burden of production, but do[es] not shift the burden of persuasion"), cert. denied, 523 U.S. 1059 (1998); see also *Conoco, Inc.* v. *Director, OWCP*, 194 F.3d 684, 691 (5th Cir. 1999) (holding that regulatory presumption under LHWCA that only shifts burden of production is not inconsistent with *Greenwich Collieries*).

Accordingly, there is no merit to petitioner's contention (Pet. 9-13) that this case implicates a conflict among the courts of appeals. No court has held that the

date-of-onset regulation violates Section 7(c) of the APA, and there is no disagreement among the courts of appeals more generally on the validity of regulatory presumptions that shift only the burden of production. See *Garvey* v. *National Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999) ("every Circuit that has considered the issue * * * has concluded that a presumption that shifts only the burden of production does not shift the 'burden of proof' as that phrase is used in the APA"). The decisions cited by petitioner do not suggest otherwise.

Petitioner relies principally on *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977), but that case did not raise any questions concerning Section 7(c) of the APA. And while the court observed in dicta that the Secretary does not have "unfettered discretion to supercede [sic] the formal requirements of the APA," the court upheld the Secretary's regulation authorizing the appointment of hearing examiners in black lung cases. *Id.* at 341-342. In *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F.2d 264, 272-275 (5th Cir. 1979), the court noted that the Secretary's black lung regulations must comply with the incorporated provisions of Section 19 of the LHWCA except where a deviation is authorized by statute, but upheld a regulation permitting delayed notice of a claim for benefits as within the Secretary's statutory authority. Finally, *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977), upheld the same regulation that was upheld by the Seventh Circuit in *Peabody*.[4]

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[4] Petitioner also relies on *Gladysz* v. *Donovan*, 595 F. Supp. 50 (N.D. Ill. 1984), but that case raised no questions concerning the Secretary's authority under the BLBA to shift the burden of production in black lung adjudications. Instead, it involved an en-

2. Petitioner also contends (Pet. 17-19) that the court of appeals failed to follow its own precedent by declining to remand the case for the ALJ to weigh all the relevant evidence in determining the existence of pneumoconiosis, and that the court's failure to remand violated petitioner's due process and equal protection rights. Although petitioner asserts the existence of an intra-circuit conflict on the issue, the court of appeals, which is in the best position to assess that claim, denied the petition for rehearing en banc. There is no occasion for this Court to resolve an asserted intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

In any event, petitioner's fact-bound contention is without merit. Petitioner points to the Fourth Circuit's decision in *Island Creek Coal Co.* v. *Compton*, 211 F.3d 203, 208-209 (2000), which held that an ALJ must determine the existence of pneumoconiosis by weighing all of the relevant evidence together instead of by separately evaluating the various types of evidence enumerated in the regulations. See 20 C.F.R. 718.202(a)(1)-(4). In this case, however, the ALJ specifically stated that she determined the existence of pneumoconiosis by considering "all of the probative medical evidence of his condition." Pet. App. C6; see *id.* at C8 ("[a]fter consideration of all the evidence of record, I found that Claimant established the existence of pneumoconiosis"); *id.* at C13 (finding that claimant "has pneumoconiosis as defined by the regulations, based upon a review of the newly submitted evidence and based upon a review of

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tirely different statute and program, and addressed whether the Secretary can limit judicial review of the denial of an employer's application for alien labor certification under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* See 595 F. Supp. at 52-54.

all of the evidence of record"). As a result, this case, unlike the unpublished decisions cited by petitioner (Pet. 19), presented no basis for the Fourth Circuit to remand for a reweighing of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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