Chapter 24

Subsequent Claims Under 20 C.F.R. § 725.309

I. Generally

A subsequent claim is defined as a claim that is filed more than one year after a prior denial of benefits. Unlike petitions for modification, only a claimant may file a subsequent claim under 20 C.F.R. § 725.309 (2000) and (2008).

For a discussion regarding application of the statute of limitations to subsequent claims, *see* Chapter 11. For application of evidentiary limitations in the amended regulations, *see* Chapter 4.

A. Re-filing more than one year after prior denial

A claimant filing a claim *more than one year* after a prior denial may submit new evidence in an attempt to establish entitlement to benefits. The provisions of 20 C.F.R. § 725.309 apply to such claims and are intended to provide the claimant, whose condition has worsened as a result of coal workers' pneumoconiosis, relief from the ordinary principles of *res judicata*. *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990).

An opportunity to submit recent evidence of a progressive occupational disease, such as black lung, must be weighed against the interests of administrative finality and the effective administration of claims. The provisions at 20 C.F.R. § 725.309 (2000) and (2008) attempt to strike a balance between these competing interests by permitting the miner to file subsequent claims (also referred to as "multiple" or "subsequent" claims), but directing that such claims must be denied on the same grounds as the previously denied claim unless the claimant can demonstrate an element of entitlement previously adjudicated against him or her.

In its comments to the new regulations, the Department states that "[a]dditional or subsequent claims must be allowed in light of the latent, progressive nature of pneumoconiosis. Thus, the additional claim is a different case, with different facts (if the claimant is correct that his condition has progressed)." 65 Fed. Reg. 79,974 (Dec. 20, 2000).

For claim that is filed within one year of the last denial or payment of benefits, *see* Chapter 23.

1. Progressive and irreversible

The basic premise underlying 20 C.F.R. § 725.309 (2000) and (2008) is that pneumoconiosis is a progressive and irreversible disease. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997); *LaBelle Processing v. Swarrow*, 72 F.2d 308 (3rd Cir. 1996); *Lane Hollow Coal Co. v. Lockhart*, 137 F.3d 799, 803 (4th Cir. 1992); *Barnes v. Mathews*, 562 F.2d 278, 279 (4th Cir. 1977) ("pneumoconiosis is a slow, progressive disease often difficult to diagnose at early stages"); *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003) (pneumoconiosis is a progressive and latent disease that "can arise and progress even in the absence of continued exposure to coal dust"); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986); *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000) (en banc) (case arising in the Sixth Circuit); *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990). *See also Old Ben Coal Co. v. Scott*, 144 F.3d 1045 (7th Cir. 1998) (the Department of Labor's view that the disease is progressive "may be upset only by medical evidence of the kind that would invalidate a regulation"; "[m]ine operators must put up or shut up on this issue").

2. Latency

LaBelle Processing v. Swarrow, 72 F.2d 308 (3rd Cir. 1996) (pneumoconiosis is a latent dust disease, which may develop even in the absence of continued exposure to coal dust); *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003) (pneumoconiosis is a progressive and latent disease that "can arise and progress even in the absence of continued exposure to coal dust"); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997) (pneumoconiosis is progressive and irreversible such that it may not develop in the miner until after he has ceased working in the mines).

Prior to promulgation of the amended regulations, in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(en banc), the Seventh Circuit held that the question of whether pneumoconiosis can progress in the absence of further exposure to coal dust is a question of legislative fact. However, the court further held that, under the facts of *Spese*, Employer did not create a proper record and "[w]ithout such a record, we are left with Mr. Spese's evidence of the delayed appearance of the disease and the agency's general acceptance of the general theory of progressivity, which was enough" to find that the disease had progressed in the absence of continued coal dust exposure.

3. Amended regulations, progressive and latent codified

Under the amended regulations, 20 C.F.R. § 718.201(c) provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c) (2008).

Subsequently, in *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the Seventh Circuit upheld application of the amended definition of "pneumoconiosis," *i.e.* that it is a latent and progressive disease. The court noted that the issue of "[w]hether pneumoconiosis . . . is a disease that can be latent and progressive is a scientific question," but the "Department of Labor's regulation reflects the agency's conclusion on that point" and the agency's regulation is entitled to deference. The court found that the regulation is designed to "prevent operators from claiming that pneumoconiosis is *never* latent and progressive." As a result, the court declined to require that Claimant present medical evidence that the miner's pneumoconiosis was "one of the particular kinds of pneumoconiosis that are likely to manifest latent and progressive forms."

B. Survivors

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

Although 20 C.F.R. § 725.309 allows a miner to file a subsequent claim where s/he can establish a material change in his or her condition, survivors are barred from filing more than one claim. 20 C.F.R. § 725.309(d) (2000). Specifically, the provisions at subsections 725.309(c) and (d) provide that, if an earlier survivor's claim has been denied, then any subsequent claim shall also be denied unless the later claim is a request for modification that (1) is based only upon an allegation of a "mistake in a determination of fact" and (2) meets the one-year time requirements of 20 C.F.R. § 725.310 (2000). *Watts v. Peabody Coal Co.*, 17 B.L.R. 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 B.L.R. 1-197 (1989); *Clark v. Director, OWCP*, 9 B.L.R. 1-205 (1986), *rev'd on other grounds*, 838 F.2d 2197 (6th Cir. 1988). Multiple claims by a survivor are generally barred because there can be no "change" in a deceased miner's condition.

2. After applicability of 20 C.F.R. Part 725 (2008)

a. Generally

The bright-line prohibition of multiple survivors' claims at 20 C.F.R. § 725.309(d) (2000) has been changed under the amended regulations. The new language at § 725.309(d)(3) provides, in part, the following:

> A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

20 C.F.R. § 725.309(d)(3) (2008). In its comments to this amendment, the Department states the following:

> . . . the Department restored a provision requiring the denial of an additional survivor's claim, but limited the circumstances in which such a denial was appropriate. The Department proposed the automatic denial of an additional survivor's claim in cases in which the denial of the previous claim was based solely on a finding or findings that were not subject to change. For example, if the earlier claim was denied solely because the miner did not die due to pneumoconiosis, the regulations would require the denial of any additional claim as well.

65 Fed. Reg. 79,968 (Dec. 20, 2000).

b. Constitutionality upheld

In *Wilce v. Director, OWCP*, Case No. 04-3998 (3rd Cir. July 8, 2005) (unpub.), the court upheld constitutionality of the limitations on subsequent survivor claims over a widow's challenge that the subsequent claims provisions at 20 C.F.R. § 725.309 were "discriminatory against women in violation of the equal protection guarantee applicable to the federal government through the Fifth Amendment." The widow argued that § 725.309 "allows a miner to file a duplicate claim where he or she can establish a material change in his or her condition, but bars a survivor claim unless it is a request for modification . . .." She posits that since most "survivors" are women, the regulation is discriminatory.

The court determined that, although more women file survivors' claims than men, the regulation was "facially neutral." Given that pneumoconiosis is

a latent and progressive disease, the provisions at § 725.309 properly reflect that a miner should be able to file a subsequent claim based on a change in his or her condition. On the other hand, the "relevant conditions of entitlement" are not subject to change in a survivor's claim since the miner is deceased.

See also e.g., Coleman v. Director, OWCP, 345 F.3d 861 (11th Cir. 2003), *cert. denied*, 543 U.S. 838 (2004).

3. Attempt to re-litigate cause of death, subsequent claim dismissed

In *Boden v. G.M. & W. Coal Co.*, 23 B.L.R. 1-38 (2004), the Board held that a multiple survivor's claim was properly denied. The Board noted that "[b]ecause the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of death, *i.e.*, whether the miner's death was due to pneumoconiosis, the administrative law judge properly found that entitlement was precluded."

4. Attempt to re-litigate "dependency" at time of death, subsequent claim dismissed

In *Tucker v. Director, OWCP*, 23 B.L.R. 1-42 (2004), the Board vacated an award of benefits and denied a multiple divorced survivor's claim under 20 C.F.R. § 725.309(d) (2001) where "Claimant's prior claim was denied solely because the evidence did not show that she was dependent on the miner at the time of the miner's death." The Board noted that "dependency" is determined based on the "factual situation prior to the miner's death" such that "there is no opportunity for the dependency relationship to change after the miner dies." As a result, the Board concluded that the survivor's multiple claim must be denied.

C. Filing requirements are formal

Unlike petitions for modification discussed in Chapter 23 (where nearly any informal communication is suffice), initiation of a subsequent claim under 20 C.F.R. § 725.309 (2000) and (2008) requires that the claim form satisfy the requirements of 20 C.F.R. § 725.305 (2000) and (2008). Essentially, the claimant must file a CM-911 more than one year after denial of his/her last claim in order to initiate a subsequent claim under § 725.309 of the regulations.

In *Stacy v. Cheyenne Coal Co.*, 21 B.L.R. 111 (1999), the Board upheld a finding that Claimant failed to file a timely petition for modification. Although the record contained a November 1996 letter from Claimant requesting that the district director respond to his December 1994 modification petition, the administrative law judge concluded that "the DOL had no record of the

document until a copy" was attached to the November 1996 correspondence and, without any corroboration that the petition was received in December 1994, the administrative law judge properly found that it was untimely. However, the Board then held that the administrative law judge erred in adjudicating the claim under 20 C.F.R. § 725.309 (2000). In so holding, the Board reasoned that Claimant's letter to the district director did not satisfy the requirements of 20 C.F.R. § 725.305(b) and (d) (2000), which mandate that subsequent claims be filed on a "prescribed form" and such claims are not "perfected" until such a form is filed. Because Claimant's request was not filed on the "prescribed form," the Board concluded that "there was no claim before the administrative law judge to adjudicate."

D. Lack of continued exposure to coal dust does not preclude filing a multiple claim

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

By unpublished decision in *Daniel v. Jeffco Mining*, BRB No. 97-1267 BLA (June 11, 1998) (unpub.), the Board held that the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S. Ct. 1953 (1997) does not preclude the filing of a multiple claim on grounds that the miner "has had no coal dust exposure since the previous denial." The Board stated the following:

> We reject employer's preliminary contention on appeal that the Supreme Court's decision in *Rambo II* bars the filing of the instant duplicate claim. *Rambo II*, a case on modification, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether, and under what circumstances, a longshore worker who was experiencing no present post-injury reduction in wage-earning capacity could nonetheless be entitled to nominal benefits so as to toll the one-year time limitation of filing for modification. The Supreme Court in *Rambo II* did not indicate that its holding had any bearing whatsoever on duplicate black lung claims.

Slip op. at 3-4.

2. After applicability of 20 C.F.R. Part 725 (2008)

In its comments to the December 2000 regulatory amendments, the Department noted objections to 20 C.F.R. § 725.309 (2008) on grounds that the record "lacked adequate justification of the latency and progressivity of pneumoconiosis." 65 Fed. Reg. 79,969 (Dec. 20, 2000). Citing to numerous

circuit court decisions, physicians' opinions, and articles on the subject, the Department stated the following:

> To the extent that the commenter would require each miner to submit scientific evidence establishing that the change in his specific condition represents latent, progressive pneumoconiosis, the Department disagrees and has therefore not imposed such an evidentiary burden on claimants. Rather, the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by two statutory presumptions, 30 U.S.C. § 921(c)(2) and (c)(3). The revised regulations continue to afford coal mine operators an opportunity to introduce contrary evidence weighing against entitlement.

65 Fed. Reg. 79,972 (Dec. 20, 2000). Under 20 C.F.R. § 718.201(c) of the amended regulations, "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c) (2008).

II. Providing a complete pulmonary evaluation by DOL

An administrative law judge may require that the district director provide a complete pulmonary evaluation to the miner who files a subsequent claim. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990).

III. Entitlement to a hearing

A. Miner's claim, claimant entitled to hearing

Prior to the Board's decision in *Lukman v. Director*, OWCP, 10 B.L.R. 1-71 (1988)(*Lukman II*), there was no clear authority on the issue of where jurisdiction lay to review the district director's finding concerning material change under § 725.309. In *Lukman II*, the Board held that a district director's findings under § 725.309 were not reviewable by an administrative law judge. Instead, an aggrieved party could appeal directly to the Board which was empowered to conduct a substantial evidence review of the district director's findings.

The Tenth Circuit Court of Appeals rejected this approach in *Lukman v. Director*, 896 F.2d 1248 (10th Cir. 1990). The court held that, based on the plain language of Section 22 and historical practice under the Longshore and Harbor Workers' Compensation Act as well as the plain language of the black lung regulations and underlying purpose of § 725.309, claimants are entitled to a hearing by the administrative law judge on the issue of "material change of condition."

Subsequently, in *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990)(*en banc*), the Board adopted the Tenth Circuit's holding in *Lukman* and concluded that it would be applied in all judicial circuits.

B. Subsequent survivor's claim, no entitlement to a hearing

1. Prior to applicablity of 20 C.F.R. Part 725 (2008)

In *Kilbourne v. Director, OWCP*, BRB No. 98-0788 BLA (Mar. 5, 1999)(unpub.), the Board held that the administrative law judge properly canceled the hearing in a duplicate survivor's claim which was automatically denied pursuant to 20 C.F.R. § 725.309(c) (2000). The Board held that "[c]onducting a hearing would have served no meaningful purpose . . . as resolution of the issue was accomplished solely by examination of the record." The Board further held that the administrative law judge was not required to separately consider the widow's petition for modification of the district director's denial of her multiple claim.

2. After applicability of 20 C.F.R. Part 725 (2008)

The amended regulations provide that a subsequent survivor's claim shall be denied "unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. § 725.309(d)(3) (2008). Under these circumstances, the survivor is not entitled to a hearing.

IV. Proper review of the record

A. Prior to applicability of 20 C.F.R. Part 725 (2008), "material change in conditions"

1. Generally

In assessing whether the miner has demonstrated a "material change in conditions," the inquiry is directed to changes in the miner's physical condition. However, extent of the "change" required has been the point at which the circuit courts and Board have issued slightly disparate standards for weighing medical evidence. In any jurisdiction, if a "material change" is established based on newly submitted evidence, then the entire record must be reviewed *de novo* to determine whether the claimant is entitled to benefits. If, however, no "material change" is demonstrated through newly submitted evidence, the claim is denied under 20 C.F.R. § 725.309 (2000).

2. Threshold determination must be made before *de novo* review of record

Prior to issuance of the cases listed below, an administrative law judge may have dispensed with the threshold consideration of whether a "material change in conditions" occurred and, s/he would consider all of the evidence of record to determine whether the miner was entitled to benefits. Logically, any finding regarding "material change in conditions" would be subsumed in the overall findings on entitlement. However, considering the more restrictive threshold standards applied by the circuit courts in determining whether a "material change in conditions" has occurred, coupled with the premise set forth by these courts that a subsequent claim cannot be granted upon a mere showing that the miner was denied benefits in an earlier claim and is now entitled to such benefits, a separate and specific finding of a "material change in conditions" must be made before a *de novo* review of the record may be undertaken. This threshold finding cannot be subsumed in overall findings of entitlement from the record.

The following listing of case summaries sets forth the somewhat differing standards of the Board and circuit courts in determining whether a "material change in conditions" has occurred since the denial of the miner's prior claim:

a. Benefits Review Board

The Benefits Review Board set forth its definition of "material change of conditions" under 20 C.F.R. § 725.309(d) (2000) in *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). In *Allen*, the Board overruled its holding in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992) and adopted the Director's position for establishing a material change in conditions under § 725.309, *to wit*: a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him or her. As a result, where the administrative law judge concluded that the newly submitted evidence did not establish the presence of pneumoconiosis, but failed to address the issue of whether the evidence supported a finding that the miner was totally disabled, a ground upon which the prior claim was denied, the administrative law judge's decision was vacated. On remand, the administrative law judge was directed to analyze the newly submitted evidence to determine whether the claimant was totally disabled under § 718.204(c) before finding "no material change in conditions."

Must be based on element previously denied

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.), the Board held that a "material change in conditions" must be established based on an element of entitlement that was specifically adjudicated against the claimant in prior litigation. Specifically, in *Caudill,* the original administrative law judge concluded that the miner did not suffer from coal workers' pneumoconiosis. However, the judge did not address the issue of total disability. As a result, the Board held that the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions . . .." In so holding, it adopted the arguments of the Director and Employer to state that the "material change" standard "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." The Board further stated that, unless an element has been previously adjudicated against the claimant, "new evidence cannot establish that the miner's condition has changed with respect to that element."

Lay testimony insufficient to establish "material change"

Lay testimony alone is insufficient to establish a "material change in conditions." In *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999), the Board concluded that it was proper for the administrative law judge to deny the miner's second claim for benefits on grounds that he did not establish a "material change in conditions." On appeal, the miner argued that he testified as to his worsened physical condition at the hearing which would support a finding of "material change." The Board disagreed to state that lay testimony, standing alone, is insufficient to establish a material change in the absence of corroborating medical evidence.

Must consider evidence after prior denial

In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), the Board held that, in reviewing the evidence to determine whether a "material change in condition" is established, it was proper for the administrative law judge to refuse to consider evidence "in existence at the time the first claim was decided on grounds that such evidence 'is not applicable in determining whether there has been a change in condition since the denial.'"

b. Third Circuit

In *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995), the Third Circuit held that if a "material change in conditions" is "asserted and established," the claim is not barred by § 725.309 because it involves a new cause of action:

> Of course, new factual allegations supporting a previously denied claim will not create a new cause of action for the same injury previously adjudicated. (citation omitted). In contrast, new facts . . . may give rise to a new claim, which is not precluded by the earlier judgment.

The court noted that pneumoconiosis is a "latent dust disease" that "may not become manifest until long after exposure to the causative agent . . .." *Id.* at 314. In this vein, the court rejected Employer's argument that a miner's "simple" pneumoconiosis cannot be progressive without continued exposure to coal dust, stating that such a finding was not supported by the record and that "[l]egal pneumoconiosis (*i.e.* pneumoconiosis within the meaning of the BLBA) is defined more broadly than the medical (clinical) definition of pneumoconiosis." *Id.* at 315. Thus, the court adopted the Director's position and followed the Sixth Circuit's *Sharondale* standard for demonstrating a "material change in conditions" under 20 C.F.R. § 725.309. Thus, the administrative law judge must determine whether, after consideration of all of the newly generated medical evidence, the miner has proven at least one element of entitlement previously adjudicated against him. *Id.* at 317.[1]

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[1] In *Troup v. Reading Anthracite Coal Co.*, 22 B.L.R. 1-11 (1999) (en banc), the Board rejected Employer's argument that the Third Circuit's standard in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) for establishing a "material change in conditions" violated the Supreme Court's holdings in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121 (1997) and *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994).

Employer maintained that the "material change" standard set forth in *Swarrow* impermissibly provided Claimant with an irrebuttable presumption of "material change" in violation of Section 7(c) of the Administrative Procedure Act, which requires that Claimant establish a material change by a preponderance of the evidence. The Board held to the contrary and noted that the one-element standard does not create an irrebuttable presumption; rather, if a claimant establishes one element of entitlement previously adjudicated against him or her, then the administrative law judge *may* find that the standard has been met. The Board further held that the Court's decision in *Rambo II* was inapplicable as it did not address the proper standard to be applied in a subsequent black lung claim filed under 20 C.F.R. § 725.309. In addition, the Board concluded that the Supreme Court's decision in *Onderko* was not applicable because, while the standard set forth in *Swarrow* increases the burden imposed on a claimant, neither the employer's evidentiary burden, nor the type of evidence relevant to the issue, changed.

c. Fourth Circuit

In *Lisa Lee Mines v. Director, OWCP*, 57 F.3d 402 (1995), *aff'd.*, 86 F.3d 1358 (4th Cir. 1996)(en banc), *cert. denied*, 117 S. Ct. 763 (1997), the Fourth Circuit determined that "[t]he purpose of section 725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather only to show that his condition has materially changed since the earlier denial." *Id.* at 406. The court, sitting *en banc*, concluded that it would apply the standard set forth by the Sixth Circuit's position in *Sharondale* for establishing a "material change in conditions," which requires that the judge consider all of the newly generated medical evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. The Fourth Circuit declined, however, to adopt the Sixth Circuit's additional requirement that the judge examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted.

d. Sixth Circuit

In *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Sixth Circuit adopted a hybrid approach proposed by the Director to hold that:

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Id. at 997-998.

In addition, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted." The court reasoned that such an approach "[a]ffords a miner a second chance to show entitlement to benefits provided his condition has worsened." The court wrote that "entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits but after a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted." *Id.* at 998.

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir.

2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale* requires that the administrative law judge resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." Once a "material change" is found, then the judge must review the entire record *de novo* to determine ultimate entitlement to benefits.

In *Flynn*, the administrative law judge properly held that the miner demonstrated a "material change in conditions" based on a comparison of the restrictions listed in Dr. Martin Fitzhand's 1980 and 1984 medical reports. In the 1980 report, which was submitted with the first claim, Dr. Fitzhand determined that the miner could perform "mild activity at best"; whereas by 1984, in the second claim, Dr. Fitzhand opined that the miner could do "no more than sedentary activity." The judge reasonably noted that the miner's last coal mining job, although light-duty work, required more than sedentary activity. The court stated that this "downgraded assessment" was further supported by underlying objective testing, including physical examinations, pulmonary function studies, and blood gas studies. As a result, it upheld the judge's finding of "material change in conditions." *See also Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001).

e. Seventh Circuit

Must demonstrate condition "substantially worsened"

The Seventh Circuit Court of Appeals, in *Sahara Coal v. Director, OWCP [McNew]*, 946 F.2d 554 (7th Cir. 1991), held that a claimant must establish with newly submitted evidence that s/he "is now entitled to benefits" under 20 C.F.R. § 725.309 (2000). To demonstrate a "material change of conditions," the court determined that it is not enough to introduce new evidence of disease or disability as this might only show that the first denial was wrong and would thereby be an impermissible collateral attack on the first denial. Rather, a claimant must introduce evidence that demonstrates that his condition has "substantially worsened" since the time of the prior denial to the point that he would now be entitled to benefits. For a thorough discussion regarding application of the "substantially worse" standard in *McNew, see* Judge Sheldon R. Lipson's decision on remand in the case, *McNew v. Sahara Coal Co.*, 18 B.L.R. 3-524 (1993). Judge Lipson's decision was subsequently affirmed by the Benefits Review Board, *McNew v. Sahara Coal Co.*, BRB No. 93-

2189 BLA (Aug. 31, 1994)(unpublished) (modifying only the onset month from October to November).

In *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(en banc), the Seventh Circuit held that the "one-element" standard enunciated by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) was not contrary to its holding in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554 (7th Cir. 1991). Specifically, the court examined the standard proposed by the Director and stated the following:

> If . . . the Director means that at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the 'one-element' test is the correct one. If the Director means something more expansive, his position would go beyond the principles of res judicata that are reflected in § 725.309(c) and that we endorsed in *Sahara Coal*.

See also Midland Coal Co. v. Director, OWCP [Shores], 358 F.3d 486 (7th Cir. 2004) (Claimant established that he was totally disabled in the fourth claim, which was sufficient to find a "material change in conditions" since denial of his third claim).

First claim denied on procedural grounds

The Seventh Circuit declined to apply its "material change" standard under the particular circumstances presented in *Crowe v. Director, OWCP*, 226 F.3d 609 (7th Cir. 2000). In this case, the court held that *McNew* did not apply where the miner's first claim was denied on purely procedural grounds such that his second filing was "merely (an attempt) to relitigate his original claim." The court reasoned that, when the miner's "illiteracy is considered in conjunction with his lack of representation and the misinformation provided by the representative from the social security office, we are of the opinion that it would be unfair and improper to hold that the procedural denial of the petitioner's initial claim is sufficient to deprive him of an opportunity with the assistance of counsel to advance his 1990 claim on the merits of his health condition."

f. Eighth Circuit

In *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997), the court held that pneumoconiosis is a progressive and irreversible disease such that it may develop in a miner after he has ceased working in the mines. *Id.* at 450. The Eighth Circuit then addressed the "material change in conditions" standard to be applied to subsequent claims under 20 C.F.R. § 725.309 and held that it would apply the "one-element standard" adopted by the Third, Fourth, and

Sixth Circuits. Specifically, the administrative law judge must consider "whether the weight of the new evidence of record . . . ., submitted by all the parties, establishes at least one of the elements of entitlement previously adjudicated against the miner." *Id.* at 451. The court further noted that "'the element must be one capable of change,'" *i.e.* the existence of pneumoconiosis or total disability. *Id.* at 451. In this vein, the court also held the following:

> [T]he Director explains that if a miner was found not to have pneumoconiosis at the time of an earlier denial, and he thereafter establishes that he has the disease, in the absence of evidence showing the denial was a mistake, an inference of 'material change' is not only permitted but 'compelled.' We agree.

Id. at 451.

The court further rejected Employer's arguments that its holding violated the Supreme Court's ruling in *Director, OWCP v. Greenwich Collieries [Onderko]*, 512 U.S. 267 (1994) by improperly shifting the burden of persuasion from the claimant to the coal company. The court held that, in the case before it, "the Director's interpretation is akin to the statutory and regulatory presumptions which ease a black lung claimant's burden of production, but do not shift the burden of persuasion, as that term is used in *Greenwich Collieries.*" *Id.* at 452-53.

g. Tenth Circuit

"Material change" for each element previously denied

In *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the Tenth Circuit held that, in order to establish a "material change in conditions" under § 725.309, a claimant "must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Id.* at 1511. The court further stated as follows:

> In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with res judicata, the claimant need only show that this element has worsened materially since the time of the prior denial. An example of how a claimant might show that a condition has materially worsened, the claimant might offer to compare past and present x-rays reflecting that any conditions suggesting that the claimant has pneumoconiosis have become materially more severe since the last claim was rejected. As another example, the

> claimant might present more extreme blood gas test results obtained since the prior denial to indicate that his or her disability has become materially more severe since the last claim was rejected. However, a new interpretation of an old x-ray that was taken before the prior denial or a further blood gas result identical to results considered in the prior denial does not demonstrate that a miner's conditions has materially changed.

Id. at 1511. In addition, the court held that, if the adjudicator in the first claim did not decide a particular entitlement issue, then there is no issue preclusion and the claimant need not demonstrate a "material change" in this element upon the filing of a subsequent claim under § 725.309. *Id.* at 1511.

Denial of original claim, not modification, relevant

By unpublished decision in *McNally Pittsburgh Manufacturing Co. v. Director, OWCP*, Case No. 03-9508 (10th Cir. Feb. 10, 2004) (unpub.), the court clarified its "material change" standard in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1511 (10th cir. 1996) to state that "in order for an administrative law judge to determine whether a claimant establishes this necessary change in his or her physical condition, the administrative law judge should determine whether evidence obtained after the prior denial demonstrates a material worsening of those elements found against the claimant." In the case before it, the miner filed a petition for modification of the district director's denial of his original claim. The claim was denied on modification and, after more than one year, the miner filed a second claim. The court determined that, when assessing whether a "material change in conditions" is established, the administrative law judge must use the date of denial of the original claim, not the date of denial on modification.

h. Eleventh Circuit

In *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004), the Eleventh Circuit adopted the "one element" standard for establishing a "material change in condition" as set forth by the Third, Fourth, and Eighth Circuit Courts of Appeals. It noted that the "Director's standard gives full credit to the *finality* of the original denial, but plainly recognizes that pneumoconiosis is a latent and progressive disease, and that a miner's condition can change over time." The court further cited to the amended regulatory provisions at 20 C.F.R. § 725.309(d) (2008) with approval.

B. After applicability of 20 C.F.R. Part 725 (2008)

1. Establishing an element of entitlement previously denied

The amended regulations dispense with the "material change in condition" language and contain a threshold standard, generally adopting the position of the Board and several circuit courts, that the claimant must meet before his/her claim may be reviewed *de novo*:

> (d) A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Secs. 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> > (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> >
> > (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> >
> > (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, 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.

. . .

> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in the adjudication with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. § 725.309(d) (2008). It is noted that, pursuant to § 725.409, if a prior claim has been denied by reason of abandonment, then it shall constitute "a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. § 725.409(c) (2008).

a. Causation elements, capable of change

In *M.F. v. Sullivan Brothers Coal Co.*, BRB No. 07-0554 BLA (Mar. 31, 2008) (unpub.), the Board held that disability causation is an element of entitlement that is capable of change under 20 C.F.R. § 725.309. As a result, where the miner's prior claim was denied on grounds that he failed to demonstrate that his totally disabling respiratory impairment was due to pneumoconiosis, it was proper for the administrative law judge to consider whether disability causation was established as a threshold matter in the subsequent claim. *See also e.g., White v. New White Coal Co.*, 23 B.L.R. 1-1 (2004).

b. No "qualitative" analysis required

In a subsequent claim arising in the Sixth Circuit, *J.R. v. Tennessee Coal Co.*, BRB No. 07-0569 BLA (Mar. 31, 2008) (unpub.), the Board rejected Employer's position that the administrative law judge was required to conduct a "qualitative" analysis of the old and new medical evidence, as required by *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), to determine whether the miner's condition had worsened. Rather, the Board adopted the Director's position and held that the claim was governed by the amended regulatory provision at 20 C.F.R. § 725.309(d)(3) (2008), "which requires only that a claimant establish a change in one of the elements of entitlement previously adjudicated against him to proceed with his claim."

c. Failure to establish any element of entitlement in previous claim

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting), a case arising under the amended regulations in the Seventh Circuit, the Board held that, in a subsequent claim, the miner must demonstrate one of the "applicable conditions of entitlement" upon which the prior denial was based. Because Claimant failed to establish any element of entitlement in his initial claim, he "had to submit new evidence establishing at least one of these elements to proceed with his claim." In finding that the miner was now total disabled, the Board held that treatment notes recorded two to four years prior to the hearing were less probative as the miner's condition at the time of the hearing "is the relevant point in time for assessing claimant's ability to perform his usual coal mine employment."

2. Responsible operator designation

In its comments to the amended regulations, the Department states the following with regard to naming a new operator for a claim filed under 20 C.F.R. § 725.309:

> To the extent that a denied claimant files a subsequent claim pursuant to § 725.309, of course, the Department's ability to identify another operator would be limited only by the principles of issue preclusion. For example, where the operator designated as the responsible operator by the district director in a prior claim is no longer financially capable of paying benefits, the district director may designate a different responsible operator. In such a case, where the claimant will have to re-litigate his entitlement anyway, the district director should be permitted to reconsider his designation of the responsible operator liable for the payment of the claimant's benefits.

65 Fed. Reg. 79,990 (Dec. 20, 2000).

> In addition, the Department has deleted subsection (a)(6) (of § 725.414). As proposed, subsection (a)(6) would have required the district director to admit into the record all of the evidence submitted while the case was pending before him. As revised, however, the regulation may require the exclusion of some evidence submitted to the district director. In the more than 90 percent of operator cases in which there is no substantial dispute over the identity of the responsible operator, most of the evidence available to the district director will be the medical and liability

> evidence submitted pursuant to the schedule for the submission of additional evidence, § 725.410. In the remaining cases, however, the district director may alter his designation of the responsible operator after reviewing the liability evidence submitted by the previously designated responsible operator.
>
> . . .
>
> At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the district director will not be able to determine which medical evidence belongs in the records until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(b)(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations. Accordingly, the Department has deleted the requirement in § 725.414(a)(6) that the district director admit into the record all of the medical evidence that the parties submit.

65 Fed. Reg. 79,990-991 (Dec. 20, 2000).

V. Onset date under 20 C.F.R. § 725.309

A. Prior to applicability of 20 C.F.R. Part 725 (2008)

Once a "material change in condition" is demonstrated, the subsequent claim is considered a new and viable claim. Therefore, the filing date of the subsequent claim determines which substantive regulations apply as well as the earliest date from which benefits may be awarded. *Spese v. Peabody Coal Co.*, 11 B.L.R. 1-174, 1-176 (1988), *dismissed with prejudice,* Case No. 88-3309 (7th Cir. Feb. 12, 1989)(unpub.). *See also Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(en banc) (the earliest date of onset in a multiple claim under §725.309 is the date on which that claim is filed; the claim does not merge with earlier claims filed by the miner).

B. After applicability of 20 C.F.R. Part 725 (2008)

The amended regulations also provide that the filing date of the subsequent claim constitutes the earliest date from which benefits are payable as 20 C.F.R. § 725.309(d)(5) (2008) provides that "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d)(5) (2008).