No. 12-1330

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WOKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JAMES BURRIS,

Respondents.

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

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BRIEF FOR THE FEDERAL RESPONDENT

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JAMES BURRIS
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On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION[1]

This case arises from Respondent James Burris's claim for benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C. §§ 901-944, as amended by the Patient Protection

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

and Affordable Care Act (ACA), Pub. L. No. 111-148, §§ 1556, 124 Stat. 119, 260 (2010). Administrative Law Judge Paul C. Johnson Jr. awarded the claim on January 6, 2011. Appellant's Appendix (A) 2-24. Consolidation Coal Company, the liable employer, timely appealed the award to the Benefits Review Board on January 19, 2011. Record (R) 124-126; *see* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions).[2]

On January 31, 2012, the Board issued a final award affirming the ALJ's decision. A 25-35. Consolidation timely petitioned this Court to review the Board's order on February 14, 2012. DE 1; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions).

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[2] This brief employs the following citation conventions for record materials not in the Appendix. "Docket Entry" (DE) refers to documents found in this case's Seventh Circuit appellate docket. "Record" (R) refers to documents listed in the Board's consecutively paginated certified index. *See* DE 8. "Director's Exhibit" (DX), "Employer's Exhibit" (EX), and "Claimant's Exhibit" (CX) refer to indexed, but separately paginated exhibits that were submitted to the ALJ by the Director, Consolidation, and Mr. Burris respectively. *See id.* "Transcript" (TR) refers to the indexed, but separately paginated transcript of the ALJ hearing. *See id.*

This Court has jurisdiction over Consolidation's petition for review under 33 U.S.C. § 921 (c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) – Mr. Burris's exposure to coal mine dust – occurred in Illinois, within the jurisdictional boundaries of this Court. *See Peabody Coal Co. v. Helms*, 859 F.2d 486, 489 n.3 (7th Cir. 1988); *Kopp v. Director, OWCP,* 877 F.2d 307, 308 (4th Cir. 1989).

STATEMENT OF THE ISSUE

Coal miners who are totally disabled by pneumoconiosis are entitled to federal black lung benefits. Because a miner's physical condition can change over time, a previously-unsuccessful claimant is permitted to bring a subsequent claim if he establishes that his condition has changed. The method of proving a change in condition is provided by regulation: the ALJ must conclude, based on evidence developed after denial of the earlier claim, that the miner has established an element of entitlement decided against him in a previous claim. 20 C.F.R. § 725.309(d). The ALJ allowed this subsequent claim based on undisputed new evidence

establishing total disability and Consolidation's concession of total disability, an element of entitlement previously decided against Mr. Burris.

The sole issue the Director will address on appeal is: Before allowing the claim to go forward, was the ALJ required to consider whether Mr. Burris's condition had substantially worsened since the denial of his prior claim?

STATEMENT OF THE CASE

Mr. Burris filed an initial claim for BLBA benefits on April 16, 2001. DX 1 at 31-34. No medical evidence was submitted, and Mr. Burris failed to provide the requisite background information and authorizations. The Director therefore deemed Mr. Burris's claim abandoned and denied it on that basis in November 2001. DX 1 at 1-3.

Mr. Burris then filed this subsequent claim in February 2006. DX 3. The district director issued a proposed decision and order awarding benefits, DX 19, and Consolidation requested a hearing before an ALJ. DX 20. The ALJ found that Mr. Burris had established that his condition had changed since the previous denial on the ground that he is

now totally disabled. A 5, 13-14. The ALJ then found, based on the 15-year presumption (discussed immediately below) that his disability is due to pneumoconiosis and awarded benefits. A 15-22. Consolidation appealed to the Board, R 124-125, which affirmed. A 25-35. This appeal ensued. DE 1.

STATEMENT OF THE FACTS

Because the Director is addressing only Consolidation's argument that the ALJ improperly applied the subsequent claim regulation, 20 C.F.R. § 725.309, this summary is limited to the legal background, decisions, and evidence relevant to the ALJ's finding that Mr. Burris established one of the elements of entitlement previously decided against him, allowing this subsequent claim to proceed.

A. Statutory and regulatory background

1. Elements of entitlement and the 15-year presumption

The BLBA provides for the award of disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to

as "black lung disease." 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. A coal miner seeking federal black lung benefits must prove that (1) he suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) he is totally disabled by a respiratory or pulmonary impairment; and (4) the pneumoconiosis contributes to the total respiratory disability. 20 C.F.R. § 725.202(d); *see Keene v. Consolidation Coal Co.,* 645 F.3d 844, 848 (7th Cir. 2011).

Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201; *Consolidation Coal Co. v. Director, OWCP,* 521 F.3d 723, 725 (7th Cir. 2008). "Clinical pneumoconiosis" refers to a collection of diseases "recognized by the medical community as pneumoconioses" that are characterized by fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1).

"Legal pneumoconiosis" is a broader category, including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). Any chronic lung disease that is "significantly related to, or substantially aggravated by" exposure to coal mine dust arises out of coal mine employment and therefore is legal pneumoconiosis; coal mine dust need not be the disease's sole or even primary cause. 20 C.F.R. § 718.201(b). Pneumoconiosis (both types) is "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).

The four elements of entitlement can be established in two basic ways. The first is through medical evidence.[3] Clinical pneumoconiosis, for instance, is generally diagnosed by chest x-ray, biopsy or autopsy, 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). The total-disability element can be proved by, *inter alia,* pulmonary function or arterial blood-gas

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

test results meeting the qualifying values prescribed by regulation, 20 C.F.R. § 718.204(b)(2)(i)-(ii),[4] or by a physician's "reasoned medical judgment" that a miner is incapable of performing his most recent coal-mine work due to a respiratory or pulmonary impairment. 20 C.F.R. § 718.204(b)(2)(iv).

The elements of entitlement can also be established by presumption. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976) ("The Act . . . prescribes several "presumptions" for use in determining compensable disability."). One such presumption is 30 U.S.C. § 921(c)(4)'s

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

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

"15-year presumption," which the ALJ applied here.[5] The 15-

[5] When Mr. Burris's prior claim was denied, the 15-year presumption was not available because it applied only to claims filed before January 1, 1982. *See* 30 U.S.C. § 921(a), (c)(4) (2000). In 2010, while Mr. Burris's subsequent claim was being considered by the ALJ, Congress revived the 15-year presumption for certain pending claims, including Mr. Burris's, as part of its enactment of the ACA. Pub. L. No. 111-148, § 1556 (2010). In *Keene,* 645 F.3d at 849, this Court affirmed the constitutionality of Congress's retroactive restoration of the 15-year presumption.

In its opening brief, Consolidation argued, *inter alia,* that if the Supreme Court found the individual mandate provision unconstitutional and unseverable from the rest of the ACA, then Mr. Burris's award, which is based on section 1556 of the ACA, must be vacated. Pet. Br. at 6. That argument is now moot. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (June 28, 2012), the Supreme Court concluded that the Secretary of Health and Human Services could not "apply" a pre-existing provision of the Medicaid Act to "withdraw existing Medical funds for failure to comply with the requirements set out in the [ACA's] expansion" of Medicaid. Slip op. 56 (plurality op.); *see id.* at 60-61 (Ginsburg, J. concurring in part, concurring in the judgment in part, and dissenting in part). The Court further concluded that an order prohibiting such application "fully remedies the constitutional violation we have identified." *Id.* at 56 (plurality op.); *see id.* at 60-61 (Ginsburg, J. concurring in part, concurring in the judgment in part, and dissenting in part). Explaining that "[w]e are confident that Congress would have wanted to preserve the rest of the Act[,]" the Court held "that the rest of the Act need not fall in light of our constitutional holding." *Id.* at 57, 59; *accord id.* at 40, 61 *see id.* at 60-61 (Ginsburg, J. concurring in part, concurring in the judgment in part, and dissenting in part). The Court has thus already rejected

year presumption is invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines with conditions "substantially similar to conditions in an underground mine" and (2) suffers from a "totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4).[6] If those criteria are met, there is a rebuttable presumption that the miner "is totally disabled due

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arguments, like Consolidation's, that other provisions of the ACA should be invalidated on severability grounds.

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

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

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

2. Subsequent claims

A miner's medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a latent and progressive disease that may first become detectable – or disabling – after a claimant stops mining. 20 C.F.R. § 718.201(c). For this reason, miners who unsuccessfully pursued benefits in the past are permitted to file "subsequent claims" arguing that they now satisfy the elements of entitlement. 20 C.F.R. § 725.309.

A subsequent claim is not, however, an opportunity to relitigate the original claim. To ensure that the previous denial's finality is respected, a miner in a subsequent claim must prove that his condition has changed. *See, e.g., RAG Am. Coal Co. v. OWCP,* 576 F.3d 418, 423 (7th Cir. 2009) (traditional principals of res judicata do not bar subsequent

claims because the claimant is required to demonstrate a change in condition). The method of proving such a change is prescribed by regulation: the miner must establish, with "new evidence" – *i.e.,* evidence addressing the miner's condition after the denial of his previous claim – that he now satisfies one of the elements of entitlement that was decided against him in the earlier claim. 20 C.F.R. § 725.309(d)(3) ("the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.") If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(d).[7]

If the new evidence establishes a condition of entitlement previously decided against the miner, the subsequent claim is allowed and the ALJ goes on to consider all the evidence, old

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[7] The current subsequent change regulation became effective on January 19, 2001, and applies only to claims, such as this one, filed after that date. 20 C.F.R. § 725.2. Earlier-filed claims are governed by the previous regulation, which does not explicitly provide that a change in condition can be shown by establishing, with new evidence, an element of entitlement decided against the miner in the earlier claim. *Compare* 20 C.F.R. § 725.309(d) (2011) *with* 20 C.F.R. § 725.309(d) (1999). The old regulation allows a subsequent claim to proceed if "there has been a material change in condition[.]" 20 C.F.R. § 725.309(d).

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

B. Factual and procedural history

1. Mr. Burris's work history

Mr. Burris was employed by Consolidation between 1974 and 1991, working as an operator of a pan or scraper machine (an earth mover used in reclamation), welder, and driller at two of Consolidation's surface mines – Burning Star No. 2 and Burning Star No. 3. A 13; TR at 12-14. Mr. Burris's employment with Consolidation was not continuous; he was laid off twice and worked for various coal construction companies intermittently, including Bollmeir Construction,

H&H Construction, and McNally Wellman. A 13; TR at 19-28; DX 6. Prior to his employment with Consolidation, Mr. Burris was employed from 1966 until 1970 by Bollmeir Construction, and employed by H&H Construction in 1972 and 1973. A 13; TR at 19-28; DX 6.

2. The first claim

Mr. Burris filed an initial claim for benefits under the BLBA in April 2001. DX 1 at 31-34. No medical evidence was submitted in connection with this claim, and Mr. Burris did not respond to the district director's repeated requests that he provide certain evidence and authorize medical testing and the release of medical information. DX 1 at 7-11. On October 15, 2011, the district director issued an order to show cause why Mr. Burris's claim should not be denied by reason of abandonment. DX 1 at 4-5. Mr. Burris failed to respond to the order. The district director thus considered the claim abandoned and dismissed it on November 26, 2001. DX 1 at 1-3. *See* 20 C.F.R. § 725.409(a) (claim may be denied by district director if claimant fails "to submit evidence sufficient to make a determination of the claim" or "to pursue the claim

with reasonable diligence"). Because the claim was denied on the basis of abandonment, Mr. Burris was deemed not to have satisfied any of the elements of entitlement under the BLBA. *See* 20 C.F.R. § 725.409 (c) ("for purposes of § 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement").

3. The current claim.

Mr. Burris filed his current claim on February 10, 2006. DX 3. The district director issued an award of benefits on January 29, 2007. DX 19. Consolidation requested a hearing before an ALJ, DX 20, which was held on October 6, 2009.

a. Consolidation's Concession that Mr. Burris proved a change in condition

In its post-hearing brief to the ALJ, Consolidation acknowledged that Mr. Burris's first claim was denied due to abandonment, and conceded that

> [i]n the case at bar, all of the physicians agreed that Mr. Burris was totally disabled. Accordingly, Mr. Burris has proven a material change in condition from the denial of his first claim in November 2001.

Consolidation's Post-Hearing Brief to the ALJ at 27; A 27 n.3.

b. The medical evidence

i. Medical opinions

Mr. Burris underwent four medical examinations: one by Dr. Anthony Vacca at the Department's request, DX 10;[8] two by Dr. Peter Tuteur at Consolidation's request, EX 3, 4, 9; and one by the claimant's treating physician, Dr. Suhail Istanbouly, at Mr. Burris's request. CX 5. In addition, Drs. B.T. Westerfield and William Houser reviewed Mr. Burris's medical records and submitted medical reports on behalf of Consolidation and Mr. Burris respectively. EX 10, 11; CX 6.

All five physicians agreed that Mr. Burris suffers from a totally disabling respiratory impairment, but they disagreed on the etiology of the lung disease. Drs. Tuteur and Westerfield opined that cigarette smoking is the sole cause of the disability, whereas Drs. Vacca, Istanbouly, and Houser believed the disability is due to both smoking and coal mine dust exposure.

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[8] The Department provided this examination in order to fulfill its statutory duty to give the claimant-miner "an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. § 923(b); *see also* 20 C.F.R. § 725.406.

The medical opinions briefly touch upon the question whether Mr. Burris's respiratory impairment changed over the years: Dr. Tuteur testified, based on his review of two pulmonary function studies, that Mr. Burris was no more disabled in 2007 than he was in 2001. EX 9 at 22. Dr. Houser, however, after considering *all of Mr. Burris's medical records*, opined that Mr. Burris had lost approximately 20% of his lung function over this period, indicating a progression of the disease. CX 6 at 3.

ii. Pulmonary function tests

The ALJ considered fourteen pulmonary function tests. Four of these were performed in conjunction with Drs. Vacca, Tuteur, and Istanbouly's examinations of Mr. Burris. The rest were contained in Mr. Burris's treatment records from Logan Primary Care and Southern Illinois Respiratory Disease Clinic. EX 5, 7, 14. All relevant values recorded for the pulmonary function studies are set forth in the chart below. To summarize, however, eleven studies produced values that qualified to establish total disability under the BLBA

regulations and three tests did not. A 6-7. *See* 20 C.F.R. § 718.204(b)(2)(ii); 20 C.F.R. § 718 Appendix B.

Date/ Physician/ Exhibit	Age/ Height	FEV1	FVC	MVV	FEV1/ FVC	Qualifying?
1/27/93 Sanjabi EX 7 at 43-46	53 68"	1.32 1.72	4.22 3.03	125 101	31% 57%	Yes No
10/30/97[9] Sanjabi EX 5 at 180-81	58 69"	1.07	2.16		50%	Yes
1/21/99 Sanjabi EX 7 at 33-34	59 62"	1.18 1.24	2.32 2.32		51% 53%	Yes Yes
5/30/00 Sanjabi EX 7 at 30-31	60 69"	1.08 1.08	2.25 2.25		48% 48%	Yes Yes
5/3/01 Sanjabi EX 7 at 27-28	61 69"	1.07 1.07	1.88 1.94		57% 55.1%	Yes Yes
8/10/01 Tuteur EX 3	62 68.7"	0.93 1.33	1.72 2.39	51	54% 56%	Yes Yes
9/30/02 Sanjabi EX 7 at 24-25	63 62"	0.76 1.0	1.58 1.9		48% 53%	Yes Yes

[9] Although the ALJ included this study in his list of pulmonary function studies, A 6, he appears to have later invalidated it and not considered it along with several other studies (that did not make it onto his list). A 8.

7/21/04 Istanbouly EX 7 at 19-20	65 68"	0.97	1.63		60%	Yes
5/23/05 Saum EX 6 at 37	65 70"	0.80 1.16	1.29 2.08		62% 55.7%	Yes Yes
7/27/06 Vacca DX 10	67 69"	0.83 0.86	2.08 2.02		40% 43%	Yes Yes
1/17/07 Tuteur EX 3	67 68"	0.89 1.12	1.67 1.86	47	53% 60%	Yes Yes
12/23/08 Istanbouly EX 14 at 9-10	69 67.2"	1.42	2.44		58%	No No
3/16/09 Istanbouly EX 14 at 3-4	69 67"	1.50	2.71		55.3%	No
8/9/09 Istanbouly CX 5 at 1	70 67"	1.24	2.25		55.1%	No

iii. Other evidence

As noted above, Mr. Burris's treatment records from Logan Primary Care and Southern Illinois Respiratory Disease Clinic were admitted into the record. EX 5, 7, 14. *See* 20 C.F.R. § 718.107. Those records included physicians' progress notes and various test results, including arterial blood gas

studies, none of which qualified to show total disability. *See* 20 C.F.R. § 718.204(b)(2); 20 C.F.R. Part 718 Appendix C.

Mr. Burris testified that he was exposed to coal mine and rock dust while repairing the coal hopper, tipple, loader, belt and drag lines, and coal drills. He further stated he was exposed to coal mine dust 50% of time during coal mine construction. TR 15-16, 21.

5. The ALJ's award

The ALJ found Mr. Burris totally disabled based on the "overwhelming majority" of pulmonary function studies, unanimous medical opinion evidence, and Consolidation's concession of total disability. A 5, 13-15. Accordingly, he concluded that Mr. Burris established "a material change of condition from the first claim." A 5. The ALJ further found that Mr. Burris had been employed in surface coal mining for Consolidation for seventeen years and in coal mine construction for Bollmeier for five years for a total of twenty-two years.[10] A 13. Based on Mr. Burris's testimony that he

[10] Coal mine construction is a covered activity to the extent the miner is exposed to coal mine dust. 30 U.S.C. § 902(d).

was frequently exposed to coal mine dust while performing repair jobs at, *inter alia*, the tipple and hopper, the ALJ determined that Mr. Burris had been exposed to conditions substantially similar to underground mining. A 13. Having found a totally disabling respiratory impairment and more than 15 years of coal mine employment, the ALJ invoked the 15-year rebuttable presumption that Mr. Burris's total disabling pulmonary impairment is due to pneumoconiosis. A 13-15. *See* 30 U.S.C. § 921(c)(4).

The ALJ then determined that Consolidation had failed to rebut the presumption by showing either that Mr. Burris does not suffer from pneumoconiosis or that pneumoconiosis does not contribute to his total pulmonary disability. A 15-22. Regarding the existence of pneumoconiosis, the ALJ found the x-ray and CT scan readings in equipoise (and thus insufficient to sustain Consolidation's burden of proof on rebuttal), A 17, 19-20, and accorded more weight to Dr. Istanbouly's dual causation diagnosis (cigarette and coal mine dust exposure)

Mr. Burris testified he was exposed to coal mine dust approximately 50% of the time while working for Bollmeier. A 13; TR 20-21.

because he was Mr. Burris's treating physician. A 19. The ALJ also found the preponderance of medical opinions (three to two) favored a finding of legal pneumoconiosis. A 19. He rejected the opinions from Consolidation's experts that smoking is the sole cause of Mr. Burris's disability because they failed to diagnose pneumoconiosis in the first instance, unduly relied on statistical analyses (without making an individualized assessment), and underestimated Mr. Burris's exposure to coal mine dust. A 22. Having found the presumption unrebutted, the ALJ awarded benefits.

6. The Board's affirmance

The Board affirmed the ALJ's determination that the requirements of section 725.309 had been met. A 27–A 28. Observing that stipulations are binding upon the parties for the duration of the litigation, A 28, it held Consolidation to its prior concession that Mr. Burris had established total disability and had "proven a material change in conditions from the denial of his first claim in November 2011." A 27 n.3, A 28. In addition, the Board rejected Consolidation's argument that the ALJ was required to analyze whether Mr.

Burris's condition had substantially worsened since the prior denial as contrary to the plain language of the section 725.309(d), which requires only that a claimant submit new evidence establishing one of the elements of entitlement that was decided against him in the prior claim. A 28.

The Board also upheld the ALJ's invocation of the 15-year presumption that Mr. Burris's total pulmonary disability is due to pneumoconiosis, A 28-30, and his finding that Consolidation failed to rebut it. A 31-34.

SUMMARY OF THE ARGUMENT

The ALJ and Board properly interpreted and applied 20 C.F.R. § 725.309. Section 725.309 allows Mr. Burris, a previously unsuccessful BLBA applicant, to bring a subsequent claim for benefits if evidence of his condition post-dating the most recent denial establishes one of the elements of entitlement previously decided against him, thereby demonstrating that his condition has changed. Before the ALJ, Consolidation conceded that Mr. Burris is totally disabled and had "proven a material change in conditions from the denial of his first claim." The ALJ accepted, and the Board

found binding, Consolidation's concession. This Court should do so as well.

Notwithstanding its concession of the issue, Consolidation argues that the ALJ erred by failing to evaluate whether the evidence showed a "substantial worsening" of Mr. Burris's condition following the denial of his 2001 claim. This proposed addition is, at most, arguably supported only by cases interpreting a prior version of the subsequent claim regulation, which does not apply to this case. It should be rejected as flatly contrary to the current, governing regulation's text and the Director's reasonable interpretation of it. Finally, the cases supporting a "substantial worsening" inquiry do not apply here because the first claim was denied on the procedural ground of abandonment and not on the merits. *Crowe v. Director, OWCP*, 226 F.3d 609, 613 (7th Cir. 2000).

ARGUMENT

A. Standard of review

This Court reviews the ALJ's decision, despite the fact that the appeal comes from the Benefits Review Board. *Keene,*

645 F.3d at 848. The Court cannot overturn the ALJ's decision if it is "rational, supported by substantial evidence, and consistent with governing law." *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a particular conclusion." *Zeigler Coal Co. v. Director, OWCP [Griskell],* 490 F.3d 609, 614 (7th Cir. 2007) (internal citations omitted).

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

B. The ALJ properly found the claim could proceed because Mr. Burris demonstrated a change in a condition of entitlement occurred after his 2001 claim was denied.

Because this is a subsequent claim, the ALJ's first task was to determine whether Mr. Burris's condition had changed since the denial of his earlier claim. In its post-hearing brief to the ALJ, Consolidation conceded this very point:

> [i]n the case at bar, all of the physicians agreed that Mr. Burris was totally disabled. Accordingly, Mr. Burris has proven a material change in condition from the denial of his first claim in November 2001.

Consolidation's Post-Hearing Brief to the ALJ at 27; A 27 n.3. Having voluntarily conceded before the ALJ that Mr. Burris's condition had "materially changed," Consolidation cannot now argue otherwise. It is bound by its concession, *River v. Commercial Life Ins. Co.,* 160 F.3d 1164, 1173 (7th Cir. 1998); *Richardson v. Director, OWCP,* 94 F.3d 164, 167 (4th Cir. 1996) (same), and Consolidation has waived any argument against the change of condition finding. *Spese*, 117 F.3d at 1009 (court found waived and refused to consider argument that was not made before ALJ).

Regardless, the ALJ properly interpreted and applied the subsequent claim regulation, 20 C.F.R. § 725.309. Section 725.309 requires an ALJ to consider only the "new evidence" – *i.e.,* evidence addressing the miner's condition after the denial of a miner's previous claim – and determine whether that evidence establishes at least one of the elements of entitlement previously decided against the miner. 20 C.F.R. § 725.309(d)(3). The ALJ did just that. He found, based not only on Consolidation's concession, but also the pulmonary function tests and unanimous medical opinions, that Mr. Burris suffers from a totally disabling pulmonary impairment. Because this element had been decided against Mr. Burris in his previous claim, the ALJ correctly ruled that Mr. Burris's condition had changed.

Consolidation's primary argument is that Burris must additionally prove a "substantial worsening" in his condition and invites this Court to engage in a freewheeling comparison of old and new medical evidence to decide the issue. Pet. Br. at 11-14. It is not clear what Consolidation hopes to gain by this endeavor, as the expert testimony largely does not address

the issue, and to the extent it does, it is inconclusive or indicates Burris's condition declined substantially.[11]

[11] Only two of the five medical opinions address whether claimant's condition had worsened and those opinions are inconsistent. Dr. Tuteur testified that Mr. Burris was no more disabled in 2007 than he was in 2001, but his opinion was based only on the two pulmonary function studies he conducted. EX 9 at 22-23. Dr. Houser, by contrast, reviewed *all the medical records* and opined that Mr. Burris had lost approximately 20% of his lung function over this period, indicating a progression of the disease. CX 6 at 1, 3. Although undeveloped, Consolidation's claim that Burris's physical condition has actually improved, Pet. Br. at 12, seems to be entirely based on comparing three pulmonary function tests administered in 2008 and 2009 with the *eleven* previous tests that produced lower values. In the absence of expert assistance or guidance, it is not clear whether a *factfinder* (not this Court) can, or would be willing to, make the independent interpretation of the raw medical data that Consolidation is calling for. *Wetherill v. Director, OWCP,* 812 F.2d 376, 382 (7th 1987) (ALJ may not substitute his expertise for a physician's) *overruled on other grounds* by *Freeman United Coal Min. Co. v. Ben. Rev. Bd.,* 912 F.2d 164, 171 (1990); *Assoc. Elec. Coop., Inc. v. Hudson,* 73 F.3d 845, 849 (8th Cir. 1996) (medical experts, not the ALJ, should interpret medical data); *Kertesz v. Crescent Hills Coal Co.,* 788 F.2d 158, 163 (3d Cir. 1986) ("By independently reviewing and interpreting lab reports, the ALJ impermissibly substitutes his own judgment for that of a physician.") But more importantly, Consolidation's argument that Mr. Burris's condition actually improved overstates the case: a sufferer of pneumoconiosis, like anyone with a chronic condition, has up and down days, and the 2008 and 2009 test data may not be indicative of Mr. Burris's true health. *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (1991). In the absence of any support from a medical expert to buttress its claim,

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

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

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Consolidation's assertion that Mr. Burris's respiratory condition actually improved is sheer speculation.

claim, shielding that decision from the second guessing that hindsight inevitably invites"). *Accord Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318 (3d Cir. 1995) (accepting under pre-2001 version of section 725.309, Director's one-element test, which forbids ALJs from comparing evidence in a subsequent claim with evidence underlying a finally denied prior claim); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 454 n.7 (8th Cir. 1997) (same).

The Sixth Circuit recently deferred to and adopted the Director's interpretation of current section 725.309, finding it neither "plainly erroneous nor inconsistent with the language of the regulation itself." *Cumberland River Coal Co. v. Banks,* --- F.3d --- 2012 WL 3194224, *6 (6th Cir. 2012). It agreed that the term "change" in the regulation should be construed as "disproof of the continuing validity" of the denial of the original claim, rather than "the actual difference between the bodies of evidence presented at different times." *Id.* at *6, (internal citations omitted). The court accordingly concluded that "under this definition, the ALJ need not compare the old and new evidence to determine a change in condition; rather,

he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present." *Id.* The court thus cast aside as no longer applicable its interpretation of the pre-2001 version of the regulation requiring subsequent claimants to prove a "material change in condition[,]" 20 C.F.R. § 725.309(d) (1999) through a comparison of old and new evidence.[12]

As the coal company did in *Banks*, Consolidation relies on authorities that interpret the pre-2001 version of the regulation, do not discuss the issue, or are not entirely clear.[13]

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[12] The Tenth Circuit has recognized that the 2001 regulation adopts the one-element test, but has not been called upon to apply it. *Energy West Mining Co. v. Oliver,* 555 3d 1211, 1223 (10th Cir. 2009).

[13] The D.C. Circuit's decision in *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), did not reach the issue of what is required to show a change of condition under the regulation. That case involved a question whether the post-2001 version of 20 C.F.R. § 725.309 was impermissibly retroactive as applied to pending claims. The court found that the new regulation was not impermissibly retroactive, concluding that under both the pre-2001 and post-2001 versions of the regulation, a claimant who had been denied benefits could reapply when "relevant conditions changed," and that the "new rule does not allow anything more." *Id.* at 864. The court further observed that under both versions of the regulation, a miner was still required to prove that he

Pet. Br. 8-11. This Court in *Sahara Coal Co. v. OWCP*, 946 F.2d 554 (7th Cir. 1991) suggested that the old regulation required an ALJ to examine the evidence underlying the prior decision. 946 F.2d at 556. The later en banc decision in *Spese,* however, explains that *Sahara Coal* had been "misunderstood in some quarters." 117 F.3d at 1003. While *Spese* adopts the one-element test, it does not explicitly discuss the propriety of reviewing the medical evidence underlying finally denied claims. 117 F.3d at 1003, 1008-09. The precise meaning of *Spese* on this point is irrelevant, however, because this claim is governed by the current version of 20 C.F.R. § 725.309, and as the *Banks* decision makes clear, current section 725.309 forbids any comparison between old and new evidence.

Finally, even if the authorities from this Court interpreting the prior version of section 725.309 were relevant, this Court has rejected their application here, where the prior claim was denied on the ground of abandonment and therefore

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suffers from pneumoconiosis and that his disease is due to coal mine employment to be awarded benefits. *Id.* at 863.

no findings on the merits were reached. *Crowe v. Director, OWCP*, 226 F.3d 609, 613 (7th Cir. 2000). In so holding, the *Crowe* court looked to the underlying basis for the substantial worsening inquiry, explaining that such proof was needed to prevent relitigation of issues that had been actually litigated and decided in the prior claim. 226 F.3d at 613. But any concern over *relitigation* was unfounded, the court stated, when the prior claim had been abandoned "without any discussion of or much less any ruling on the merits of [the miner's] health condition." Thus, the Court ruled that a case denied on abandonment grounds simply "does not fit within the parameters of *Sahara Coal*." *Id.*

Here, Mr. Burris's first claim was abandoned before the submission of any medical evidence, and no findings on the merits were made. DX 1, 1-3.[14] As such, his subsequent claim squarely falls within the *Crowe* exception to *Sahara Coal*

[14] Although no findings on the merits were issued, Mr. Burris was deemed not to have satisfied any of the elements of entitlement under the BLBA by virtue of 20 C.F.R. § 725.409 (c) ("for purposes of § 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement").

and its progeny. Consolidation's reliance on those cases is therefore entirely misplaced.

In sum, because Mr. Burris was deemed not to have established any element of entitlement in his 2001 claim, the only issue regarding his subsequent claim was whether the new evidence showed that a condition of entitlement had been established. Consolidation's concession of total disability and the medical opinion evidence and pulmonary function studies indisputably establish the total respiratory disability element of entitlement. The ALJ therefore properly allowed Mr. Burris's subsequent claim to proceed.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the ALJ's finding that Mr. Burris has established a change in condition of entitlement that allows his subsequent claim to go forward.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 6,541 words, and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2003.

2) On September 10, 2012, the Director's brief was filed electronically with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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