No. 11-3500

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CUMBERLAND RIVER COAL COMPANY,

Petitioner

v.

BILLIE BANKS, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

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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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Cumberland River Coal Company (Cumberland) seeks review of a final order of the Department of Labor's Benefits Review Board, which affirmed an administrative law judge's decision awarding federal black lung benefits to respondent Billie Banks. This Court has jurisdiction over Cumberland River's petition under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act (the Act or the BLBA), 30 U.S.C. § 932(a). The injury contemplated by section 21(c) – Banks's exposure to coal mine dust – occurred in Kentucky, within the jurisdictional boundaries of this Court. Joint Appendix (JA) 80. The petition is also timely. The Board issued its final order on March 31, 2011. JA 6. Cumberland River petitioned this Court for review on May 11, 2011, within the statutorily mandated sixty-day period. JA 20; 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUES

1. 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 the earlier claim was denied, that the miner has established an element of entitlement decided against him in the previous claim. 20 C.F.R. § 725.309(d). The ALJ allowed this subsequent claim after concluding that new evidence established an element of entitlement previously decided against Banks.

The first issue presented is: Did the ALJ commit reversible error by not going beyond the regulatory test and comparing the evidence underlying Banks's earlier, unsuccessful claims against the new evidence, as arguably required by precedents interpreting an earlier version of the subsequent claim regulation?

2. In finding that the new evidence demonstrated that Banks suffers from pneumoconiosis, the ALJ credited three expert reports submitted by the claimant and gave little weight to the contrary testimony of Cumberland's expert. One of the three reports in Banks's favor was authored in 2001.

Because Banks's most recent unsuccessful claim was finally denied in 2002, the ALJ should not have considered the 2001 report in his subsequent claim analysis.

The second issue presented is: Was the ALJ's error harmless?[1]

STATEMENT OF THE CASE

Banks's first claim for BLBA benefits: Banks filed his first application for black lung benefits on February 3, 1992. Director's Exhibit (DX) 1 at 815. The claim was not resolved voluntarily before an OWCP district director, a DOL official responsible for the initial processing of benefits claims, and was referred to the Office of Administrative Law Judges for a formal hearing. An ALJ denied the claim on July 23, 1993. DX 1-495. The Board affirmed the denial, DX 1 at 436, but this Court reversed, remanding the case for further consideration of the medical evidence. *Banks v. Cumberland River Coal Co.*, No. 94-3877, 1995 WL 111497 (6th Cir. March 15, 1995). On remand, the ALJ again denied the claim, finding that

[1] The appeal also presents a third issue: whether the ALJ's weighing of the competing medical evidence in determining that Banks is entitled to federal black lung benefits is supported by substantial evidence. *See* Pet. Br. at 30, 41. Because the Director believes this issue will be adequately addressed by the private parties, this brief addresses only Cumberland's challenge to the ALJ's interpretation and application of the subsequent change regulation.

Banks had failed to prove that he suffered from pneumoconiosis. DX 1-379. The decision was not appealed to the Board, and consequently became final.

Banks's second claim for BLBA benefit: Banks filed a subsequent claim for benefits in December 1999. On July 3, 2000, the district director recommended denying the claim. DX 2 at 49. Banks's requests seeking further action were treated as two requests for reconsideration by the district director. After considering additional evidence submitted by Banks, the district director denied both requests for reconsideration, in February 2001, and May 2002, respectively. DX 2 at 43, 7. Banks took no further action on this denied claim, which became final.

The claim on appeal: Banks filed the instant claim on July 11, 2003. DX 4. After the district director recommended an award, Cumberland requested a formal hearing. DX 33 at 7, 35 at 1. ALJ Thomas Phalen awarded the claim in May 2007, but the Board vacated and remanded for further consideration. JA 68, 64. On remand, the case was reassigned to ALJ Larry Merck (hereinafter, "the ALJ"), who awarded benefits in an opinion dated March 5, 2010. JA 37. The Board affirmed the award on March 31, 2011. JA 17. This appeal followed.

STATEMENT OF FACTS

Because the Director only addresses Cumberland's arguments that the ALJ improperly applied the subsequent claim regulation, 20 C.F.R. § 725.309, this summary is limited only to the legal background, decisions, and evidence relevant to ALJ Merck's finding, in his May 2010 award, that Banks had established a change in his physical condition allowing this subsequent claim to proceed.

A. Legal Background

1. Elements of entitlement

The BLBA provides for 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 he (1) suffers from pneumoconiosis (2) arising out of coal mine employment that (3) contributes to the miner's (4) total pulmonary or respiratory disability. 20 C.F.R. § 725.202(d). This appeal primarily centers on the first element.

Pneumoconiosis, commonly referred to as "black lung disease," 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. "Clinical pneumoconiosis" refers to a collection of diseases "recognized by the medical community as pneumoconioses[.]" 20 C.F.R. § 718.201(a)(1); *Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999). "Legal pneumoconiosis" is a broader category, including "any chronic lung disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(1); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576 (6th Cir. 2000). Any chronic lung disease that is "significantly related to, or substantially aggravated by" exposure to coal dust is legal pneumoconiosis; dust need not be the disease's sole or even primary cause. 20 C.F.R. § 718.201(b).

2. Subsequent claims

A miner's medical condition can change over the course of a miner's 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); *see Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 482 (6th Cir. 2009). For this reason, miners who unsuccessfully pursue benefits are permitted to file "subsequent claims" in the future, arguing that they now satisfy the elements of entitlement. 20 C.F.R. § 725.309; *see generally Lisa Lee Mines v. Director, OWCP*, 86 F.3d

1358, 1362 (4th Cir. 1996) (en banc) ("A new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same. The health of a human being is not susceptible to once-in-a-lifetime adjudication.").

The right to file subsequent claims is not unlimited. To ensure that the previous denial's finality is respected, a subsequent claimant must prove that his condition has changed. The method of proving such a change is prescribed by regulation: the miner must establish, with "new evidence" (*i.e.*, evidence post-dating the denial of his previous claim) that he now satisfies one of the elements of entitlement that was decided against him in the earlier claim. 20 C.F.R. § 725.309(d)(3) ("the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.").[2] If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(d).

[2] 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 still 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) (1999).

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

B. Relevant facts and proceedings prior to the present claim

Banks was born in 1948 and worked underground as a coal miner for seventeen years, most recently for Cumberland in 1991. JA 79. He has not worked since. *Id.* He also has a substantial cigarette smoking history: 38 pack-years as of 2004 and a half-pack a day thereafter, at least through May 2007. JA 90 (Judge Phalen's 2008 award), as incorporated by the ALJ at JA 40.

Banks's initial claim for federal black lung benefits was ultimately denied in 1999 by ALJ Malamphy, who found that Banks had failed to

establish that he suffered from pneumoconiosis, legal or clinical. JA 109-115. His second claim was denied in May 2002. DX 2 at 7. Because this claim was not referred to an ALJ for a hearing, it is not perfectly clear from the record why the claim was denied. *See* DX 2 at 7, 43, 49. As the Board later pointed out, this denial was likely also grounded on a failure to establish the existence of pneumoconiosis (or that pneumoconiosis contributed to a totally disabling impairment), because the evidence before the district director overwhelmingly indicated that Banks was totally disabled by a respiratory impairment. JA 69-70 and n.6.[3]

C. Proceedings below relevant to the subsequent claim issue

1. ALJ Phelan's 2007 award and the Board's 2008 remand

Banks filed this claim on July 11, 2003. DX 4. After a formal hearing, ALJ Phalen awarded benefits in May 2007. JA 68. On the subsequent claim issue, ALJ Phalen determined that Banks's second claim had been denied for failure to establish any element of entitlement. JA 92.

[3] In 2010, Congress revived 30 U.S.C. § 921(c)(4), which provides a rebuttable presumption of entitlement to miners who worked at least 15 years in underground coal mines and suffer from a totally disabling respiratory or pulmonary impairment. This revival, effected through Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), applies only to claims filed after January 1, 2005, and pending on or after March 23, 2010. *See Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847 (7th Cir. 2011). It therefore does not apply to this claim, which was filed in 2003. DX 4.

He allowed the subsequent claim to proceed, finding that new evidence established that Banks was totally disabled by a pulmonary impairment. JA 94.[4] The Board vacated the award on appeal, ruling that the ALJ had not properly applied the subsequent claim regulation. JA 73. As described in the proceeding section, the Board held that Banks's second claim, like his first, had been denied for failure to prove that he suffered from pneumoconiosis. JA 69-70 and n.6. The Board accordingly remanded the case for a determination of whether evidence after the denial of Banks's second claim established the existence of the disease. JA 70, 75.[5]

2. ALJ Merck's March 5, 2010, award

On remand, the case was reassigned to ALJ Larry Merck, who awarded benefits in an opinion dated March 5, 2010. JA 37. The ALJ allowed the subsequent claim, ruling that Banks had established a change in condition because the new evidence established that he suffers from legal

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[4] In addition to the subsequent claim issue and the merits of the case, ALJ Phelan addressed Cumberland's argument that Banks's present claim was barred by the BLBA's statute of limitations. JA 80-82. As ALJ Merck pointed out, this question was later resolved in Banks's favor by *Arch of Kentucky*, 556 F.3d at 483. JA 38. Cumberland has since conceded that this claim was timely filed. JA 9 n.6.

[5] The Board also asked the ALJ, on remand, to give further consideration to the timeliness issue and to certain pieces of medical evidence relevant to the merits of the claim. JA 9 n.6, 68, 70-74.

pneumoconiosis.[6] JA 53. This decision was based on the ALJ's analysis of four medical opinions. *See* 20 C.F.R. § 718.202(a)(4) (determination that a miner suffers from pneumoconiosis may be based on a "reasoned medical opinion" by a physician "exercising sound medical judgment"). Three of these opinions – two reports by Dr. Rasmussen written in 2001 and 2004, and one 2003 report by Dr. Forehand, concluded that Banks's occupational exposure to coal mine dust had contributed, along with cigarette smoking, to his totally disabling respiratory impairment. JA 142, 215, 146. The fourth opinion, a collection of reports and deposition testimony by Dr. Jarboe, conceded that Banks was totally disabled by a respiratory impairment, but attributed the impairment entirely to smoking. JA 150. The ALJ found Drs. Rasmussen and Forehand to be more credible than Dr. Jarboe on this question. JA 53. Turning from the subsequent claim issue, the ALJ found Banks's medical evidence to be more persuasive than Cumberland's on the merits as well, and consequently awarded the claim. JA 59.

3. The Board's March 31, 2011, decision affirming the award

Cumberland appealed, arguing, as it does here, that the ALJ improperly applied 20 C.F.R. § 725.309, by not "comparing the evidence in the prior claim to the new evidence to ensure that there was an 'actual

[6] The ALJ rejected Banks's argument that the new evidence also established clinical pneumoconiosis, an issue not before the Court. JA 44.

difference between the old evidence and the new.'" JA 19 (quoting Cumberland's brief to the Board). The Board rejected this additional requirement, pointing out that the cases on which Cumberland relied construed the prior version of Section 725.309. *Id.* Under the revised version of that regulation, which governs this claim, a "claimant no longer has the burden of proving a 'material change in conditions'" but instead need only "show that one of the applicable conditions of entitlement has changed . . . by submitting new evidence . . . that establishes an element of entitlement upon which the prior claim was based." *Id.*

The Board agreed with Cumberland that ALJ Merck should not have considered Dr. Rasmussen's 2001 report – written before Banks's second claim was finally denied in 2002 – as part of his subsequent claim analysis, but found that error to be harmless. JA 13. The Board also rejected Cumberland's challenges to the ALJ's weighing of Drs. Rasmussen's, Forehand's, and Jarboe's competing testimony on the etiology of Banks's impairment, finding that ALJ Merck had properly exercised his discretion as factfinder. JA 10-13. Similarly rejecting Cumberland's objections to the ALJ's weighing of the evidence on the merits, the Board affirmed the award. JA 14-18.

SUMMARY OF ARGUMENT

The ALJ and Board properly interpreted 20 C.F.R. § 725.309, which allows Banks, a previously unsuccessful BLBA applicant, to bring a subsequent claim for benefits if evidence generated after the most recent denial establishes one of the elements of entitlement previously decided against him, thereby demonstrating that his condition has changed. Cumberland argues that the regulation imposes an additional test, obligating the ALJ to evaluate the evidence underlying the previously denied claim and compare it with the new evidence to determine whether Banks's physical condition had changed in the interim. This proposed addition is 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 relevant regulation's text and the Director's interpretation of it.

In considering whether Banks suffers from pneumoconiosis, an issue decided against him in his previous claims, the ALJ erred in considering a medical opinion that had been written before Banks's second claim had been finally denied. This error, however, was harmless. The improperly considered report was only one of three expert opinions diagnosing Banks with legal pneumoconiosis, all of which were credited by the ALJ. In contrast, the ALJ gave little weight to the contrary diagnosis proffered by

Cumberland's medical expert. Excluding the one improperly considered report would not change the outcome.

ARGUMENT

A. Standard of review

The issues addressed in this brief present questions of law concerning the meaning and application of 20 C.F.R. § 725.309. While the Court exercises plenary review over legal issues, *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998), the Director's reasonable interpretation of the Act, and particularly of its implementing regulations, is entitled to substantial deference. *Gray v. SLI Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999) ("The Director's interpretation of regulations that he is responsible for administering is entitled to substantial deference unless it is plainly erroneous or inconsistent with the statute."); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991) .[7]

[7] Cumberland's various challenges to the ALJ's weighing of the evidence are reviewed under the substantial evidence standard. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 489 (6th Cir. 2003) ("As long as the ALJ's conclusion is supported by the evidence, [the Court] will not reverse even if the facts permit an alternative conclusion.") (internal quotation marks omitted). To the extent that Cumberland challenges the ALJ's interpretation of its expert's opinions as contrary to the BLBA or its regulations, Pet Br. at 30, 41, those interpretations are subject to this highly-deferential standard of review. *See Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 492 (7th Cir. 2004).

B. The ALJ and Board properly interpreted 20 C.F.R. § 725.309(d), under which a miner who establishes, with new evidence, an element decided against him in an earlier claim has necessarily demonstrated a change in his physical condition since the previous denial

A miner's physical condition – and hence his right to BLBA benefits – can change over time, even after he leaves the mines. *See supra* at 6-7. A final administrative or judicial decision that a particular miner does not currently suffer from pneumoconiosis, or is not totally disabled by the disease, is not a finding that the miner will never contract the disease or become disabled by it. An unsuccessful federal black lung claimant is consequently permitted to file "subsequent claims" if his physical condition changes in some relevant respect. The method of proving such a change is prescribed by regulation: the miner must establish, with "new evidence" (*i.e.*, evidence post-dating the denial of his previous claim) that he now satisfies one of the elements of entitlement that was decided against him in the earlier claim. 20 C.F.R. § 725.309(d)(3). If he fails to do so, the subsequent claim will be denied. 20 C.F.R. § 725.309(d). If he succeeds, the subsequent claim is allowed, and the ALJ goes on to consider the merits of the new claim, evaluating both the old and new evidence to determine whether the miner satisfies all the necessary elements of entitlement. 20 C.F.R. § 725.309(d)(4).

With one harmless-error exception, this procedure was properly followed in this case.[8] Banks's first and second claims for federal black lung benefits were denied because he failed to prove that he suffered from pneumoconiosis. DX 1-379, DX 2-4, 49. Evaluating the new evidence on the issue, ALJ Merck found Drs. Rasmussen's and Forehand's diagnoses of legal pneumoconiosis to be more credible than the contrary opinion offered by Dr. Jarboe. JA 53-54. He therefore found that Banks now suffers from pneumoconiosis, establishing a change in condition under the regulatory test. *Id.*

Cumberland's primary argument is that the regulation required the ALJ to do more. According to Cumberland, after the ALJ evaluated the new evidence and determined that Banks now suffers from pneumoconiosis, he should have gone on to compare the new evidence with the medical evidence underlying the previous denials to determine whether Banks's condition had changed. Pet. Br. at 22-26. But this is simply not what the regulation provides. The cases Cumberland relies upon – *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 2001) and *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2004) – are inapposite because they interpreted an earlier version of the subsequent claim regulation that does not apply to

[8] *See* infra at 20-22.

this claim. Even if those cases stand for the proposition that, under the old regulation, ALJs were required to compare medical evidence submitted in an earlier, finally-denied claim with evidence in the present claim, the present regulation plainly dispenses with that requirement.

Prior to 2001, miners bringing subsequent claims were required to prove "that there has been a material change in condition[.]" 20 C.F.R. § 725.309(d) (1999). This requirement led to substantial litigation. The Director argued that the old regulation adopted a "one-element" test – the same test that is enshrined in the current regulation – under which a miner could demonstrate a change in condition by proving, with new evidence, that he now satisfied an element of entitlement decided against him in the earlier claim. The Third, Fourth, Seventh, Eighth, and Eleventh Circuits accepted the Director's one-element test even under the old regulation. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1009 (7th Cir. 1999) (en banc)[9]; *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997); *U.S. Steel Mining Co., LLC v.*

[9] Before its *Peabody Coal* decision, the Seventh Circuit appeared to require both a comparison of new and old evidence and a showing of change on every element of entitlement previously decided against the miner. *See Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554 (7th Cir. 1991).

Director, OWCP, 386 F.3d 977, 986-7 (11th Cir. 2004).[10] As these decisions explain, the one-element test assumes that the first denial is correct and then compares the new evidence of the miner's physical condition, not against the *evidence* underlying the previous denial, but "with the *conclusions* reached in the prior claim." *U.S. Steel*, 306 F.3d 977, 989. In this way, the Director's interpretation "respects the finality of the decision rendered on the first claim, shielding that decision from second guessing that hindsight inevitably invites." *Id.; accord, e.g., Lisa Lee Mines*, 86 F.3d at 1363-64 (allowing ALJ to engage in "plenary review of the evidence behind the first claim" would "make mincemeat of res judicata") (quotation omitted).

This Court addressed the meaning of the old subsequent-claim regulation in *Sharondale*. The *Sharondale* court claimed to adopt the Director's one-element standard. 42 F.3d at 998-999. But, on the last page of the opinion, it went on to remand the case and apparently directed the ALJ to compare the evidence developed in the earlier claim with the newly

[10] The Tenth Circuit took a different view that required an ALJ to compare evidence submitted in the new claim with evidence in the previously denied claim. *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996). That court has subsequently 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 F.3d 1211, 1223 (10th Cir. 2009).

submitted evidence, an order at odds with the Director's one-element test. *Id.* at 999; *accord Kirk*, 264 F.3d at 609-610.

This last section of *Sharondale* has been rejected by other courts of appeals adopting the one-element test. *See Lisa Lee Mines*, 86 F.3d at 1363 n.11; *Lovilia Coal*, 109 F.3d at 454 n.7; *U.S. Steel Mining Co.*, 386 F.3d at 988 n.12. Even within this Circuit, there has been some dispute over the meaning of this passage. *Compare Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480 (6th Cir. 2004) (to consider a subsequent claim under *Sharondale*, an ALJ must find that the miner has proven one element previously decided against him by new evidence and find sum of new evidence "sufficiently more supportive" based on a comparison with evidence submitted in earlier denial) *with id.* at 490 (Moore, J., concurring) ("[D]espite the fact that the ambiguous language of *Sharondale* leaves the meaning of the last paragraph open to multiple interpretations, the rest of the decision *does* acknowledge the principle that it is inappropriate to compare the evidence in a new claim with the evidence submitted in connection with a previously denied claim in assessing whether a 'material change' has been established.").

Because the amended version of 20 C.F.R. § 725.309 applies to this case, the precise meaning of *Sharondale* and its progeny is irrelevant. Current section 725.309 contains no "material change" requirement and, as

explained above, does not authorize, much less compel, an ALJ to compare new evidence with old evidence as part of the change in conditions analysis.[11] Cumberland does not even attempt to argue that promulgating the current section 725.309 was not a permissible exercise of the Secretary's authority to administer the BLBA, *see* 30 U.S.C. §§ 921(b), 936(a), or that the Director's interpretation of it is "plainly erroneous or inconsistent with the statute." *Gray*, 176 F.3d at 386-87 (6th Cir. 1999). Instead, it simply ignores the regulatory amendment in favor of precedents that have been overturned by it. This will not suffice as a ground to reverse the award.

C. The ALJ's consideration of Dr. Rasmussen's 2001 report in his evaluation of new evidence was harmless error

Banks's most recent previous claim was denied in May 2002 because he failed to prove that he suffered from pneumoconiosis. DX 2 at 49. Under 20 C.F.R. § 725.309, the present claim must be denied unless the evidence generated after May 2002 establishes that Banks now suffers from the disease. In assessing the subsequent claim issue, the ALJ considered three reports by two doctors who testified that Banks's respiratory impairment had been caused, in part, by his exposure to coal mine dust – 2001 and 2004

[11] Any doubt on this score is erased by the preamble to amended section 725.309, which explains that the regulation adopts the view articulated by the Fourth Circuit in *Lisa Lee*, explicitly forbidding the comparison of old and new evidence in this manner. 65 Fed. Reg. 79968 (Dec. 20, 2000); *see* 86 F.3d at 1363-64.

reports by Dr. Rasmussen and a 2003 report by Dr. Forehand. JA 142, 215, 146. He also considered deposition testimony and several written reports by Dr. Jarboe, who opined that Banks's disabling impairment had been caused solely by smoking. JA 150. Finding Drs. Rasmussen and Forehand to be more persuasive than Dr. Jarboe, the ALJ found that Banks had established, with new evidence, that he suffers from legal pneumoconiosis, which is defined as "any chronic lung disease or impairment . . . arising out of coal mine employment." JA 53; 20 C.F.R. § 718.210(a)(2).

The ALJ should not have considered Dr. Rasmussen's 2001 report in considering whether Banks's condition had changed, because it was written before Banks's second claim was denied in 2002. But this error was harmless. While the ALJ gave both of Dr. Rasmussen's reports "full probative weight," he appears to have credited the later report even more heavily. *Compare* JA 47 (describing 2001 report as "adequately reasoned and documented") *with id.* at 48 (describing 2004 report as "well-reasoned and well documented" and commenting on latter report's consistency with regulatory preamble). He also gave Dr. Forehand's 2003 report "full probative weight on the issue of legal pneumoconiosis." JA 46.

In contrast, the ALJ described Dr. Jarboe's testimony as "inadequately reasoned on the issue of legal pneumoconiosis[,]" explaining that it was,

inter alia, "unsound on the issue of whether coal dust exposure played a contributing or aggravating role in [Banks's] disabling lung disease." JA 53. It is simply not reasonable to suggest that the ALJ would have credited Dr. Jarboe's "inadequately reasoned" testimony if it had been placed on a scale against only Dr. Forehand's 2003 and Dr. Rasmussen's 2004 reports. There is no need for a remand where the result is foreordained. *See Newell v. Director, OWCP*, 933 F.2d 510, 512 (7th Cir. 1991) ("While the [BLBA] regulations do not specifically provide us with grounds to hold an ALJ's error harmless, we have not been reluctant to rely on harmless error when a remand would be futile.") (citations omitted).[12]

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[12] On Cumberland's reading, the Board found this error to be harmless because Dr. Rasmussen's 2001 and 2004 reports expressed the "same opinion[,]" from which it argues that the 2004 opinion cannot support the ALJ's finding of a change in condition. Pet. Br. at 24. This invitation to examine the evidence underlying the previous denial should be declined. *See Lisa Lee Mines*, 86 F.3d at 1363-64. In any event, the 2001 and 2004 reports were not the same. The 2004 report's discussion of the etiology of Banks's disabling illness is more detailed than the 2001 report's and, unlike its predecessor, supported by citations to relevant medical authorities. *Compare* JA 215 *with* JA 142. A comparison of the reports further reveals that Banks's actual physical condition had worsened in the interim. *Id.* (indicating, *e.g.*, that from 2001-2004, Banks's obstructive impairment increased from "moderate" to "severe"; his maximum speed on a treadmill study decreased from 2.2 to 1.8 mph; and the number of times per night he woke from breathing problems increased from 2-3 to 7-8). The Board's error in this regard, if any, is irrelevant. It is clear that the ALJ would have reached the same conclusion in the absence of Dr. Rasmussen's 2001 report, and this Court is free to affirm the Board's decision on that alternate ground. *See Arch of Kentucky*, 556 F.3d at 480.

CONCLUSION

For all the aforementioned reasons, Cumberland's arguments that the ALJ and Board improperly construed or applied 20 C.F.R. § 725.309 should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief is uses a proportionally spaced font, 14-point Times New Roman, and contains 4,422 words as counted by Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, a copy of the foregoing Brief for the Federal Respondent was filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Docket Activity to the following:

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