No. 11-4304

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BUCK CREEK COAL COMPANY, and OLD REPUBLIC INSURANCE CO.,

Petitioners

v.

FRABLE SEXTON
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

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

Buck Creek Coal Company, and its insurance carrier, Old Republic Insurance Company, (collectively Buck Creek) petition this Court for review of a Benefits Review Board decision affirming an administrative law judge's award of Frable Sexton's claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, as amended by the Patient Protection and Affordable Care Act,

Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010). On November 4, 2009, the ALJ awarded Mr. Sexton federal black lung benefits. Appendix (App.) 35. Buck Creek timely appealed to the Benefits Review Board on November 17, 2009. R. 163-166.[1] *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). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C § 932(a).

On February 11, 2011, the Board issued a final order affirming the ALJ's award of benefits. App. 8 - 34. Buck Creek timely sought en banc reconsideration of the Board's order on March 10, 2011. R. 9-20. *See* 20 C.F.R. § 802.407 (providing a thirty day period to request reconsideration of a final Board order). The Board denied Buck Creek's motion for reconsideration on September 30, 2011. R. 1-3. App 6.

On November 28, 2011, Buck Creek timely petitioned this Court to review the Board's order and reconsideration order. App 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); 20 C.F.R. § 802.406 (a timely motion for reconsideration to the Board tolls the sixty-day period for a party to seek appellate review in the appropriate federal court).

[1] "R" refers to record materials not in the Petitioner's Appendix, but listed in the Board's consecutively paginated index.

This Court has jurisdiction over Buck Creek'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) - Sexton's exposure to coal dust - occurred in the Commonwealth of Kentucky, within the jurisdictional boundaries of this Court. *See Danko v. Director, OWCP,* 846 F.2d 366, 368 (6th Cir. 1988).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Buck Creek has requested oral argument. The Director agrees that the case involves an important legal issue and oral argument may assist the Court in resolving the case. *See* Fed. R. App. P. 34(a)(2)(C); Sixth Circuit Rule 34(a).

STATEMENT OF THE ISSUE

Given the latent and progressive nature of pneumoconiosis, whether res judicata, collateral estoppel, or due process bar a subsequent claim for black lung benefits where the miner establishes, with new evidence, a change in his condition since the prior denial of benefits.

STATEMENT OF THE CASE

Sexton's first claim for benefits: Mr. Sexton filed his first claim for benefits on July 11, 1973, App. 149, and the Board finally denied it 26 years later on February 3, 1999. App. 81 - 85. During this time, the claim was subject to five ALJ and five Board decisions. When concluded, Mr. Sexton had established the existence of simple, clinical pneumoconiosis arising out of twenty-five years of

coal mine employment and a totally disabling respiratory impairment that was due entirely to cigarette smoking and unrelated to coal mine employment. App. 81-85.

The claim on appeal:[2] Mr. Sexton filed the current claim on April 12, 2001. App. 153. After the district director recommended an award, Buck Creek requested a formal hearing. Mr. Sexton died, however, before the case was set for hearing, and Mrs. Sexton filed her own claim for survivor's benefits on April 29, 2004. Director's Exhibit 43. The two claims were consolidated for hearing, and ALJ Thomas F. Phalen awarded benefits on both on November 4, 2009. App. 35-79. The Board affirmed the award of benefits in Mr. Sexton's claim but remanded the survivor's claim to the ALJ for further proceedings (where it is now pending). App. 2-27. Buck Creek moved for reconsideration of the Board decision, which was denied on September 30, 2011. App. 6. This appeal followed.

STATEMENT OF THE FACTS

Because the Director addresses only Buck Creek's legal arguments challenging the validity of the Department's subsequent claim regulation, 20 C.F.R. § 725.309, this summary is limited to the legal background, decisions, and evidence related to the ALJ's finding that Mr. Sexton established one of the

[2] Mr. Sexton filed another claim for benefits on May 8, 2000, which was withdrawn at his request on April 9, 2001. Section 725.306(b), 20 C.F.R. § 306(b), provides that a withdrawn claim is treated as if it had never been filed.

elements of entitlement previously decided against him, allowing this subsequent claim to proceed.

A. Legal Background

1. Elements of entitlement

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 ("disability causation"). 20 C.F.R. §725.202(d).

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. "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). Clinical pneumoconiosis is generally diagnosed by chest x-ray,

biopsy or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1) - (2); *Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999).

"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); *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 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).

2. Subsequent claims[3]

A miner's medical condition can change over the course of a lifetime, particularly because pneumoconiosis is a latent and progressive disease. 20 C.F.R. § 718.201(c); *see Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.2d 472, 482 (6th Cir. 2009). For this reason, miners who unsuccessfully pursue black-lung benefits are permitted to file "subsequent claims," arguing that they now satisfy the

[3] A subsequent claim is one filed by a claimant more than one year after the effective date of a final order denying the claimant's previously-filed claim. 20 C.F.R. 725.309(d).

elements of entitlement. 20 C.F.R. §725.309; *see generally Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994) (affording a miner a second chance to establish entitlement "implicitly recognizes that the doctrine of res judicata is not implicated by the claimant's physical condition or the extent of his disability at two different times"); *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 a once-in-a-lifetime adjudication.")

Consideration of a subsequent claim involves two steps. To ensure that the previous denial's finality is respected, a claimant filing a subsequent claim must first 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 the 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)(4) ("the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable element of entitlement."). If the miner fails to establish the required change, the subsequent claim will be denied. 20 C.F.R. § 725.309(d).[4]

[4] 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

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 of the evidence, old and new, to determine whether the miner satisfies the remaining 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. Relevant facts

Mr. Sexton worked as an underground miner for 25 years, most recently for Buck Creek. App. 39-40. He left coal mine employment on December 1, 1975. App. 153. DX 3. Mr. Sexton also had a substantial smoking history: two packs per day for thirty years, ending sometime in the 1990s. App. 58; *see also* App. 93 (ALJ finding in prior claim that Mr. Sexton quit smoking in 1995).

C. Proceedings relevant to the subsequent claim issue

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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).

1. Mr. Sexton's prior claim

When the Board denied this claim on February 3, 1999, three elements of entitlement had been established: the existence of pneumoconiosis; that it arose out of coal mine employment; and total respiratory disability. App. 81-85. The claim faltered on the fourth element, disability causation. The Board upheld the ALJ's determination that Mr. Sexton's total disability was not due to pneumoconiosis. *Id*.

2. ALJ Phalen's Award of Benefits

Mr. Sexton filed the current claim on April 12, 2001, more than one year following the prior denial, making it a subsequent claim. 20 C.F.R. § 725.309(d); App. 153. ALJ Phalen accordingly recognized that Mr. Sexton was required to "establish by a preponderance of the newly submitted evidence that Miner's [*sic*] total disability was due, in part, to pneumoconiosis…to avoid having this subsequent claim denied on the basis of the prior denial." App. 60.

The ALJ considered four newly developed narrative medical opinions bearing on the issue of disability causation: (1) Dr. Hussain, who diagnosed severe chronic obstructive pulmonary disease (COPD),[5] clinical pneumoconiosis and legal pneumoconiosis, and total respiratory disability that was 60% due to COPD and 40% due to pneumoconiosis; (2) Dr. Alam, the miner's treating physician, who

[5] Chronic airway obstruction includes emphysema and chronic bronchitis. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1298 (30th ed. 2003)

diagnosed COPD and coal workers' pneumoconiosis and apportioned their responsibility for Mr. Sexton's respiratory disability as 40% and 60% respectively; (3) Dr. Breeding, a second treating physician, who diagnosed cor pulmonale, COPD, and coal workers' pneumoconiosis; and (4) Dr. Jarboe, who diagnosed severe emphysema that was due solely to smoking. DX 63 - 66.

In assessing their relative persasiveness,[6] the ALJ accorded little weight to the opinions of Drs. Hussain, Breeding, and Jarboe. Dr. Hussain's opinion was discounted because the doctor failed to provide the clinical bases for his diagnosis of legal pneumoconiosis and relied on an inaccurate (diminished) smoking history. App. 63; 74. Similarly, the ALJ found Dr. Breeding's report and later deposition testimony inconsistent and his opinion insufficiently reasoned because it failed to relate the miner's smoking and work histories to his COPD. App. 66. Last, the ALJ faulted Dr. Jarboe for inordinately focusing on the lack of positive chest X-ray evidence of clinical pneumoconiosis and failing to sufficiently explain why Mr. Sexton's twenty-five year history of coal mine employment played no role whatsoever in Mr. Sexton's emphysema. App. 66; 75.

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[6] The ALJ evaluated the credibility of the doctors' opinions when considering both the existence of legal pneumoconiosis and disability causation. App. 63 – 67; App. 73 – 75. His more thorough analysis understandably occurred the first time through, *i.e.*, regarding the existence of legal pneumoconiosis. He then largely adopted/reiterated those findings when considering disability causation. App. 73 – 75. Thus, we cite both discussions.

By contrast, the ALJ accorded full probative weight to Dr. Alam's opinion. App. 65; 74. The ALJ observed that Dr. Alam regularly evaluated and treated Mr. Sexton for pulmonary problems for three years prior to Mr. Sexton's admission to a nursing home, and the ALJ further determined that the doctor's opinion was "internally consistent," "credible," and supported by the underlying documentation, namely the treatment records. App. 64 – 65; 74. He therefore accorded it "controlling weight [as a treating physician opinion] when considered against reports of more distantly-related physicians." App. 64; *see also* App. 74.[7] Having found disability causation established based on the new evidence, the ALJ found the requirements of section 725.309(d) satisfied. App. 75.

Regarding the remaining elements of entitlement, the ALJ declined to review the evidence from the prior claim because it was outdated – the "most recent" was more than 10 years old. App. 57. He therefore considered only the evidence submitted with the current claim. Legal pneumoconiosis was established by medical report (as described above) and clinical pneumoconiosis by autopsy evidence; App. 63 n. 54, 67; it arose out of coal mine employment based on twenty-five years of mining and application of the section 718.203 presumption (rebuttable presumption that pneumoconiosis arose out of 10 or more years coal

[7] A treating physician's opinion may be given controlling weight after the fact finder considers the nature and duration of the doctor/patient relationship, the frequency and extent of the treatment, and the credibility of the doctor's opinion in light of its reasoning and documentation. 20 C.F.R. § 718.104(d).

mine employment); App. 71; and total respiratory disability was not seriously at issue (it was variously described as "severe," "very severe," and "totally disabling"). App. 73.[8]

Finding all elements of entitlement established, the ALJ accordingly awarded benefits on the living miner's claim. App. 79.

3. The Board affirmance

Buck Creek appealed to the Board, arguing, as it does here, that the ALJ was precluded from finding that a "material change" in the miner's condition had occurred since the prior denial. Buck Creek argued that subsequent claims are barred under the principles of res judicata. App. 10.

The Board disagreed that the subsequent claim regulation, 20 C.F.R. § 725.309, contravenes the principles of res judicata. App. 13. The Board held that because the regulation requires a claimant to prove a change in an applicable condition of entitlement with new evidence before proceeding with a subsequent claim, it ensures that the claimant cannot simply seek reconsideration of the prior, finally denied claim. Further, the Board noted that the doctrine of res judicata does

[8] Buck Creek has not challenged the ALJ's factual findings, despite taking an occasional potshot at his weighing of the medical evidence. Pet. Br. 8 ("appeal presents only questions of law"). It therefore has waived any error regarding those factual findings. *See United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006) (citing *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (deeming arguments that are not raised in the appellant's main brief, or raised merely in a perfunctory manner, as waived).

not preclude a subsequent claim because the issue is the claimant's physical condition at an entirely different time. *Id.*

In considering the merits of entitlement, the Board rejected Buck Creek's contention that the ALJ impermissibly credited Dr. Alam's opinion over that of Dr. Jarboe. The Board found that the ALJ "rationally determined that Dr. Alam's opinion was 'internally consistent, credible, and capable of controlling weight,'" based on his treatment notes that included numerous x-rays, pulmonary function tests, arterial blood gas tests, Mr. Sexton's history of coal mine employment, and a treatment plan for a severe and finally fatal disease that the doctor understood was triggered by both smoking and coal mine employment. App. 17. The Board further determined that the ALJ had permissibly accorded full probative weight to Dr. Alam's opinion based on his status as Mr. Sexton's treating physician, which satisfied the criteria of section 718.104(d). App. 18. Likewise, the Board rejected Buck Creek's contention that the ALJ should have credited Dr. Jarboe's opinion, ruling this argument amounted to an impermissible request to re-weigh the evidence. App. 19. The Board affirmed the ALJ's weighing of the medical opinions and Mr. Sexton's award of benefits.[9] App. 19 - 20.

[9] Although Buck Creek raises no substantial evidence issues, *see* n. 7 *supra*, the Board rightfully deferred to the ALJ's fact findings. Dr. Alam was the miner's treating physician, and his opinion attributing Mr. Sexton's respiratory disability to coal dust exposure and cigarette smoking was sufficiently explained, internally consistent, and supported by the underlying documentation, thus warranting "full

SUMMARY OF THE ARGUMENT

Contrary to Buck Creek's contention, awarding benefits on a subsequent claim is not barred by the principles of res judicata. Various courts of appeals have conclusively resolved this issue. There is no res judicata bar because the subsequent claim is a different cause of action (addressing whether Mr. Sexton is now totally disabled due to pneumoconiosis) as opposed to that presented by Mr. Sexton's prior claim (whether Mr. Sexton was totally disabled due to pneumoconiosis at the time of the prior claim). Likewise, collateral estoppel did not preclude the ALJ in the subsequent claim from finding disability causation because whether Mr. Sexton's pneumoconiosis now contributes to his total respiratory disability was not at issue in his prior claim.

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probative weight," as the ALJ found. JA 63 - 65. *See* 20 C.F.R. 718.104(d) (5) (ALJ may give controlling weight to treating physician opinion when various factors met); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 355 (6th Cir. 2007) ("[W]hether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact.") (internal quotation marks omitted). By contrast, the ALJ permissibly determined that Dr. Jarboe's opinion was insufficiently explained and unduly reliant on negative x-ray. JA 66. *See Crockett*, 478 F.3d at 356 (observing that a claimant may establish legal pneumoconiosis notwithstanding a negative X-ray); *Bentley v. Peabody Coal Co.*, 124 F.3d 196, 1997 WL 560057, at *2 (6th Cir. 1997) (unpublished) ("Under 718.202(a)(4), negative x-ray evidence cannot be determinative of the question whether a claimant has legal pneumoconiosis"). Lastly, the ALJ reasonably declined to consider evidence from the prior claim because it was outdated by the time he decided the case – from twelve to more than twenty years old. App. 57; *accord Crace v. Kentland-Elkhorne Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997).

Buck Creek also 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 Mr. Sexton's physical condition had changed in the interim. This argument is supported only by cases interpreting a prior version of the subsequent claim regulation, which does not apply to this case. It is flatly contrary to the relevant regulation's text and the Director's interpretation of it.

Finally, Buck Creek's "due process" argument is simply a reprise of its res judicata argument in a different guise. The Court should affirm the decisions below.

ARGUMENT

MR. SEXTON'S SUBSEQUENT CLAIM IS NOT BARRED BY RES JUDICATA, COLLATERAL ESTOPPEL, OR DUE PROCESS, AND THE AWARD OF HIS CLAIM COMPORTS WITH 20 C.F.R. § 725.309

A. Standard of Review

Buck Creek raises only questions of law concerning the validity, meaning, and application of 20 C.F.R. § 725.309 in its opening brief. Pet. Br. 8 ("appeal presents only questions of law.").[10] While the Court exercises plenary review with

[10] To the extent this Court believes Buck Creek has challenged the ALJ's weighing of the evidence (notwithstanding its concession otherwise), those findings 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

respect to questions of law, *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). In addition, the Court must generally "keep in mind that the Black Lung Benefits Act is remedial in nature and must be liberally construed to include the largest number of miners as benefits recipients." *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997)

B. Argument

1. Neither res judicata nor collateral estoppel precludes a subsequent black lung claim.

Buck Creek asserts that Mr. Sexton's subsequent claim is barred by res judicata and collateral estoppel: res judicata because the Board finally denied his earlier claim for black lung benefits;[11] and collateral estoppel because the original

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supported by the evidence, [the Court] will not reverse even if the facts permit an alternative conclusion.") (internal quotation marks omitted).

[11] Res judicata bars a cause of action where there is (1) a final judgment on the merits in a prior suit involving (2) the same parties and (3) a subsequent suit on the same cause of action. *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529 (6th Cir. 2006).

claim finally determined that Mr. Sexton's pneumoconiosis was not totally disabling.[12] These arguments are meritless.

This Court has already rejected the argument that subsequent claims under the BLBA violate res judicata. *Sharondale Corp, v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994) ("the doctrine of res judicata is not implicated by the claimant's physical condition or the extent of his disability at two different times"). And the other six circuit courts to consider the issue have reached the same result. *See U.S. Steel Min. Co., LLC, v. Director, OWCP*, 386 F.3d 977, 990 (11th Cir. 2004) (permitting subsequent claim where miner establishes change in condition "respects the principles of res judicata"); *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004) ("traditional principle of res judicata does *not* bar a subsequent application for… benefits where a miner demonstrates a material change in at least one of the conditions of entitlement") (emphasis in original; citation omitted); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450 (8th Cir. 1997)

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[12] Collateral estoppel bars relitigation of an issue conclusively determined in a prior cause of action. In *Kosinski v. C.I.R.*, 541 F.3d 671 (6th Cir. 2008), this Court identified the following four factors necessary to establish collateral estoppel:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 675 (quoting *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583 (6th Cir. 2003)).

(where miner establishes entitlement based on change in condition, "res judicata does not bar his claim"); *Wyoming Fuel Co. v. Director, OWCP*, 90 F.2d 1502, 1510 (10th Cir. 1996) ("[r]es judicata is not implicated when a miner brings a duplicate claim so long as [he] demonstrates that his… physical condition… has changed"); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc) ("[a] new…claim is not barred, as a matter of ordinary res judicata, by an earlier denial, because the claims are not the same"); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 313 - 16 (3d Cir. 1995).

The reason res judicata does not bar a subsequent claim is simple—the later claim is a separate cause of action. "The denial of [a prior] claim… established only that [the miner] was not *then* totally disabled due to pneumoconiosis." *LaBelle Processing*, 72 F.3d at 314 (emphasis in original; citations omitted). In contrast, a subsequent claim is an "asserti[on] that [the miner] is *now* totally disabled due to… pneumoconiosis and that his disability occurred subsequent to the prior adjudication." *Id.* (emphasis in original; citation omitted). As stated by Professor Larson, "[i]t is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, *particularly in the case of occupational diseases."* 8 A. Larson, *Larson's Workers' Compensation Law* § 127.07[7] (2007) (emphasis added); *Lisa Lee Mines*, 86 F.3d at 1362 (quoting *Larson's*).

This principle is particularly apposite in BLBA claims. Contrary to Buck Creek's assertions (Pet. Br. 20 - 21), it is well-settled that pneumoconiosis is a latent and progressive disease. 20 C.F.R. § 718.201(c); 65 Fed. Reg. 79920, 79968 - 79972 (December 20, 2000) (discussing overwhelming scientific evidence and legal authorities establishing latency and progressivity of pneumoconiosis).[13] And this Court has likewise consistently rejected arguments that pneumoconiosis cannot arise or progress in the absence of continued dust exposure. *See Arch of Kentucky, Inc. v. Director, Office of Workers Compensation Programs*, 556 F.3d 472, 482 (6th Cir. 2009); *Peabody v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003); *Sharondale*, 42 F.3d at 996; *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 205 (6th Cir.1989); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986). Thus, a miner may establish that he developed pneumoconiosis subsequent to the denial of his prior claim or that he has become totally disabled due to pneumoconiosis since the prior denial, either of which is sufficient to establish a change in condition. *RAG American Coal Co. v. OWCP*, 576 F.3d 418, 423 (7th Cir. 2009) (citations

[13] Because of this overwhelming authority, the Department rejected Buck Creek's assertion, Pet. Br. 20, that Mr. Sexton was required specifically to prove in this case "the latent and progressive nature of pneumoconiosis." *See* 65 Fed. Reg. 79992 ("[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.")

omitted); *cf. Island Creek Coal Co. v. Calloway*, 460 Fed. Appx. 504, 512 (6th Cir. 2012) (extent to which smoking causes a miner's disability may be subject to change).

Buck Creek's collateral estoppel argument is similarly flawed—the issue on which Buck Creek now seeks to preclude Mr. Sexton's claim is not the same as was decided in the prior claim. The issue decided against Mr. Sexton in the prior claim was whether his pneumoconiosis substantially contributed to his respiratory disability at the time the prior claim was denied. The issue on which he established a change in condition in this subsequent claim is whether his pneumoconiosis substantially contributed to his total disability *subsequent to the prior denial*. Buck Creek, therefore, is unable to establish even the initial element of a collateral-estoppel defense - that, "*the identical issue* was previously adjudicated." *Pfeil v. State Street Bank and Trust Co.,* 671 F.3d 585 (6th Cir. 2012); *Kosinski v. Comm'r,* 541 F.3d 671, 675 (6th Cir.2008); *see generally Peabody Coal Co. v. Spese,* 117 F.3d 1001, 1008-09 (7th Cir. 1997) (discussing inapplicability of collateral estoppel where a claimant establishes a change in condition).

This Court in *Sharondale, supra,* recognized that a miner's physical condition changes over time; that the presence/absence of disease at one point in time in no way precludes future proof that the disease has become present, or has

become so severe as to become totally disabling. Based on the precedent of *Sharondale*, this Court should reject Buck Creek's arguments.

2. Under 20 C.F.R. § 725.309(d), 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, thereby allowing his subsequent claim to be adjudicated on the merits.

As explained above, an unsuccessful black lung claimant is permitted to file a "subsequent claim" 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 the new evidence to determine whether the miner satisfies the remaining elements of entitlement. 20 C.F.R. § 725.309(d)(4).

The ALJ properly followed this procedure here. Sexton's first claim for federal black lung benefits was denied because he failed to prove disability causation, namely, that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. App. 85. Evaluating the new evidence on the issue, ALJ Phalen credited Dr. Alam's diagnosis that coal

dust exposure and cigarette smoking together caused Sexton's respiratory disability over Dr. Jarboe's contrary opinion that smoking was the sole cause. JA 63 - 67. The ALJ accordingly found disability causation established, and consequently the change in condition required under the regulatory test. *Id.*

Buck Creek complains that the regulation required the ALJ to do more. According to Buck Creek, after the ALJ evaluated the new evidence and determined that Sexton's pneumoconiosis now contributes to his respiratory disability, he should have gone on to compare the new evidence with the medical evidence underlying the previous denials to determine whether Sexton's condition had changed. Pet. Br. at 22 - 26. But this is simply not what the regulation provides. The cases Buck Creek relies upon – *Sharondale Corp.*, 42 F.3d 993, *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2004), and *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 477 - 78 (6th Cir. 2003) – are inapposite because they interpreted an earlier version of the subsequent claim regulation, a regulation that does not apply to this claim. *E.g.*, *Grundy Mining*, 353 F.3d at 476 n.3 (recognizing that earlier version of regulation applied and noting differences in language between two versions). 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 in order to determine whether a change had occurred, 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.,* 72 F.3d 308; *Lisa Lee Mines,* 86 F.3d 1358; *Peabody Coal Co. v. Spese,* 117 F.3d 1009;[14] *Lovilia Coal Co.,* 109 F.3d 445; *U.S. Steel Mining Co.*, 386 F.3d 986.[15] As these decisions explain, the one-element test assumes that the first denial is correct and then compares the new evidence of the

[14] 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, 558 (7th Cir. 1991).

[15] 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 Min. Co. v. Oliver,* 555 F.3d 1211, 1223 (10th Cir. 2009).

miner's physical condition, not against the *evidence* underlying the previous denial, but "with the *conclusions* reached in the prior claim." *U.S. Steel Min. Co.*, 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 in closing, incongruously remanded the case, apparently for a comparison of the evidence developed in the earlier claim with the newly 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 Min. Co.*, 386 F.3d at 988 n.12. Even within this Circuit, there has been some dispute over the meaning of the 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 the 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.[16] Nor is a comparison of old and new evidence required to satisfy res juducata, as the *Lisa Lee Mines, Lovilia Coal, U.S. Steel Min. Co.* courts have explained. Thus, while the new version of the regulation at section 725.309 clearly does away with such a comparison, the overarching holding of *Sharondale,* that "the doctrine of res judicata is not

[16] 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; *see* 86 F.3d at 1363-64. *See also Grundy Min. Co.*, 353 F.3d at 479 n.6 (observing that *Lisa Lee* declined to endorse *Sharondale* language calling for a comparison of old and new evidence).

implicated by the claimant's physical condition or the extent of his disability at two different times," 42 F.3d at 998, continues to govern.

3. Buck Creek's due process rights have been met.

Finally, Buck Creek asserts that its due process rights have been violated by the award of Mr. Sexton's claim. (Pet. Br. At 24-29). Like the others, this argument is also without merit.

In the black lung context, due process for coal mine operators requires two things: 1) that the operator receive notice of a claim; and 2) that it have the opportunity to mount a meaningful defense. *Energy West Min. Co. v. Oliver,* 555 F.3d 1211, 1219 (10th Cir. 2009); *see C&K Coal Co., v. Taylor,* 165 F.3d 254, 258-59 (3d Cir. 1999). There is no question that Buck Creek received notice of Mr. Sexton's subsequent claim, and was afforded (and took advantage of) the opportunity to contest it. As succinctly put by the Fourth Circuit, "[d]ue process requires nothing more." *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 504 (4th Cir. 1999).

Buck Creek's "due process" argument is merely a reprise of its res judicata argument in another guise. *Cf. RAG American Coal,* 576 F.3d at 428 n.6 (rejecting similar "due process" argument as "nothing more than a variation of the operator's res judicata argument"). While impressively cited, Buck Creek's assertion that finality is an important principle is not open to question. However, it is the

Director's view that section 725.309 and the case law of this Court and other circuits construing that regulation are more pertinent authorities. As set forth above, these authorities establish beyond question that awards on subsequent claims are not barred by res judicata or other principles of finality.

Contrary to the Employer's assertions, Buck Creek has received the full protection of finality. Because Mr. Sexton's previous claim was finally denied, he is forever barred from receiving benefits for any period of time covered by that claim—even if it were possible to provide incontrovertible proof that he was totally disabled due to pneumoconiosis at the time he filed it. *See* 20 C.F.R. §725.309(d)(5). The fact that Mr. Sexton did not prevail on his earlier cause of action does not bar relief here.

CONCLUSION

The Director respectfully requests that the Court affirm the decisions of the ALJ and the Board awarding Mr. Sexton's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally-spaced, using Times New Roman 14-point typeface, and contains 7,076 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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