

No. 18-3317

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**MAC COLEMAN**  
Petitioner

v.

**CHRISTEN COLEMAN TRUCKING**  
and

**KENTUCKY EMPLOYERS MUTUAL INSURANCE**  
Employer-Carrier

and

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

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**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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**Party-In-Interest/Respondent**

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**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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**STATEMENT OF JURISDICTION**

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Mac Coleman. On

November 21, 2016, Administrative Law Judge Alice Craft (the ALJ) issued a decision awarding benefits. Joint Appendix (JA) 77. Christen Coleman Trucking (Employer), the responsible operator liable for benefits, appealed this decision to the United States Department of Labor (DOL) Benefits Review Board on December 20, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). 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 22, 2018, the Board affirmed the award of benefits, but modified the ALJ's finding regarding the date from which benefits are payable. JA 116. Coleman petitioned this Court for review of that decision on April 10, 2018. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Coleman's exposure to coal mine dust – the injury contemplated by 33 U.S.C. § 921(c) – occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Coleman's petition for review.

### **STATEMENT OF THE ISSUE**

Coleman's entitlement to black lung benefits is undisputed. At issue is when

the payment of benefits should begin. This date is referred to as the entitlement date.

Section 725.503(b) prescribes two alternative means for determining the entitlement date. The adjudicator must first consider whether the medical evidence establishes the month during which the miner became totally disabled due to pneumoconiosis. This is called the onset date. If the evidence is insufficient to identify an onset date, the adjudicator will then resort to the month in which the miner filed the claim. This is called the default date.

This claim, filed in August 2012, is Coleman's second. His first was denied in September 2008. The ALJ here nonetheless determined that March 2008 was the onset date based on Dr. Forehand's February 2008 medical opinion, even though Dr. Forehand's opinion had been submitted and rejected when Coleman's prior claim was denied. Because this onset date preceded the prior claim's denial, the ALJ awarded benefits beginning in November 2008, the first month after Coleman's previously-denied claim became final, as required by 20 C.F.R. § 725.309(c)(6) (“[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.”).

The Benefits Review Board held that the ALJ erred in finding Coleman totally disabled by pneumoconiosis before the denial of his first claim. It

explained that in determining an onset date, the decision in a prior denied claim, and its underlying factual finding that a miner was not totally disabled due to pneumoconiosis, must be respected and given effect as final and correct. Because the ALJ erred in relying on Dr. Forehand's 2008 medical opinion, and no other evidence established that Coleman became totally disabled at any point between the denial of the prior claim and the filing of the current one, the Board adopted the default date (August 1, 2012), as the entitlement date.

The issue here is whether August 1, 2012, is the correct entitlement date.

### **STATEMENT OF THE CASE**

Coleman filed his initial claim in January 2008; the district director issued a proposed decision and order denying the claim in September 2008. JA 7, 11. Coleman did not seek review of the order, and the proposed denial became final. 20 C.F.R. § 725.419.

Coleman filed his current claim in August 2012. JA 15. The ALJ awarded benefits and ultimately set November 2008 as the entitlement date. JA 77, 115. The Board affirmed the award of benefits, but modified the entitlement date to August 1, 2012, the month in which Coleman filed his current claim. JA 126-27. Coleman then timely petitioned this Court for review of the changed entitlement date.

## STATEMENT OF THE FACTS

### A. Statutory and regulatory background

#### 1. Subsequent claims

In order to establish entitlement to benefits, a miner must prove that he or she (1) has pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) is totally disabled from a respiratory impairment, and (4) that pneumoconiosis caused or contributed to the pulmonary disability. 20 C.F.R. § 725.202(d); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012).

A miner's medical condition can change over the course of his or her lifetime, particularly because pneumoconiosis is a potentially latent and progressive disease that may first become detectable – or disabling – after a claimant stops mining. 20 C.F.R. § 718.201(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013). For this reason, miners who unsuccessfully sought benefits in the past are permitted to file “subsequent claims,” arguing that they now satisfy the conditions of entitlement. 20 C.F.R. § 725.309.

A miner's subsequent claim is not, however, an opportunity to relitigate the original claim. *Buck Creek Coal Co.*, 706 F.3d at 759. To ensure that the previous denial's finality is respected, a miner must prove that his condition has changed. *See, e.g., 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.”); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th 1994) (“[T]he doctrine of *res judicata* is not implicated by the claimant's physical condition or the extent of his disability at two different times.”).

The method of proving a change in condition 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 conditions of entitlement decided against him in the earlier claim. 20 C.F.R. § 725.309(c)(4) (“[T]he subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.”). As this Court explained in *Cumberland River Coal*,

[W]e construe the term “change” to mean “disproof of the continuing validity” of the original denial, rather than the “actual difference between the bodies of evidence presented at different times.” 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.* at 486 (internal citations omitted). If the claimant fails to establish a change of condition, the subsequent claim will be denied. 20 C.F.R. § 725.309(c).

If the new evidence establishes a condition of entitlement previously decided against the miner, the subsequent claim is allowed to proceed, and the ALJ

considers all the evidence, old and new, to determine whether the miner satisfies the remaining elements of entitlement. 20 C.F.R. § 725.309(c)(5) (“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.”); 65 Fed. Reg. 79973 (Dec. 20, 2000) (“[O]nce a claimant has submitted new evidence in order to establish one of the elements of entitlement previously resolved against him, an administrative law judge must conduct a de novo weighing of the evidence relevant to the remaining elements, regardless of whether any of that evidence is newly submitted.”); *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 314 (6th Cir. 2014).

## 2. Entitlement date

The date for the commencement of benefits on an awarded claim, known as the “entitlement date,” is determined by regulation.

The main provision is found at 20 C.F.R. § 725.503, entitled “Date from which benefits are payable.”<sup>1</sup> It prescribes two alternative means for determining

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<sup>1</sup> Section 725.503(b) states, in pertinent part, “[b]enefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.” 20 C.F.R. § 725.503(b).

the entitlement date. First, the adjudicator must consider whether the medical evidence establishes the month in which the miner became totally disabled due to pneumoconiosis. This is called the “onset date.”

If the evidence is insufficient to identify an onset date, the adjudicator will then resort to the month in which the miner filed the claim. This is the “default date.” Since 1973, DOL has emphasized the necessity of a default rule:

In light of the fact that it may not be possible . . . to determine the date upon which a miner became totally disabled due to pneumoconiosis, the [fact-finder] may, in the absence of evidence to the contrary . . . , determine that . . . total disability due to pneumoconiosis began on the [claim-filing] date.

20 C.F.R. §725.503(d) (1973). DOL reiterated these concerns when it revised Section 725.503 in 1978 and 2000. *See* 43 Fed. Reg. 36828-29 (Aug. 18, 1978); 65 Fed. Reg. 80011-13 (Dec. 20, 2000).

The need for such a default rule is evident, as often the evidence will not establish the date when a miner became totally disabled due to pneumoconiosis. Pneumoconiosis is a progressive and irreversible disease that may manifest itself over a lengthy period of time. 20 C.F.R. § 718.201(c). Hence, detecting the precise month when disability began can be problematic. The filing date standard thus reflects both a rule of administrative convenience and the rational assumption that miners, by and large, file claims when they believe themselves entitled to benefits (*i.e.*, totally disabled by pneumoconiosis).

The basic entitlement date rules apply to awarded subsequent claims. 64

Fed. Reg. 54985 (Oct. 8, 1999). There is, however, one special limitation regarding onset date: “no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.” 20 C.F.R. § 725.309(c)(6). This ensures that the “correctness of the [prior] denial’s legal conclusion – the claimant was not eligible for benefits at that time -- is respected. 64 Fed. Reg. 54985 (Oct. 8, 1999), (quoting *Lisa Lee Mines*, 86 F.3d at 1361).<sup>2</sup>

## **B. Relevant medical evidence**

The only relevant evidence is Dr. Forehand’s medical report from February 18, 2008, which was admitted into the record in Coleman’s prior denied claim. JA 3. Dr. Forehand diagnosed Coleman as being totally disabled due to smoking and coal mine dust exposure. JA 6.

## **C. Decisions below**

### 1. The denial of Coleman’s prior claim

Coleman filed his initial claim in January 2008. JA 78. On September 30, 2008, the district director denied the claim in a proposed decision and order, which

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<sup>2</sup> Similarly, if a claim is awarded on modification based on a change in conditions, no benefits are payable for any month prior to the most recent denial. 20 C.F.R. § 725.503(d)(2). A party may request modification of a prior decision based on a mistake of fact or change in conditions within one year of the last payment of benefits or the denial of a claim. 20 C.F.R. § 725.310(a); *see generally*, *Consolidation Coal v. Worrell*, 27 F.3d 227 (6th Cir. 1994).

became final when Coleman did not request an ALJ hearing. JA 7; 20 C.F.R. § 725.419. The district director found that neither the x-rays nor medical opinions established the presence of pneumoconiosis. Notably, the district director found the medical reports of Drs. Broudy and Rosenberg, who opined smoking alone caused Coleman’s respiratory impairment, more persuasive than Dr. Forehand’s, who stated smoking and coal dust exposure were the causes. JA 10. The district director further found that the pulmonary function studies demonstrated total respiratory disability, but that the disability was not due to pneumoconiosis (because the disease was not proved in the first instance).<sup>3</sup> JA 11. The district director accordingly denied the claim for failing to establish the presence of pneumoconiosis arising out of coal mine employment and total disability due the disease. JA 8.

2. The award of Coleman’s current claim

Coleman filed his current claim in August 2012, nearly four years after the denial of his prior claim. JA 78. The district director issued a proposed decision and order awarding benefits, and Employer requested a hearing and a de novo

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<sup>3</sup> The proposed decision and order is somewhat unclear regarding the existence of total respiratory disability. When discussing the pulmonary function studies, the district director found total respiratory disability, JA11, but in the “Findings of Fact” section, reached the opposite conclusion. JA 7 (Finding of Fact #4).

determination by an ALJ. *Id.*

- a. The ALJ awards benefits and orders payment to begin November 2008.

Following a hearing in April 2016, the ALJ determined that Coleman invoked the fifteen-year presumption of entitlement and that Employer failed to rebut it.<sup>4</sup> JA 77. She accordingly determined that Coleman established “a change in an applicable condition of entitlement since denial of the previous claim,” JA 82, and that he was entitled to benefits. JA 108.

The ALJ then addressed the entitlement date. She found

that the Claimant has been totally disabled by a pulmonary impairment since at least March 2008 when he was first examined by Dr. Forehand in connection with the prior claim. I also conclude that his disability has always been due to legal pneumoconiosis. The District Director issued his proposed decision and order denying the Claimant’s prior claim on September 8, 2008. As the Claimant took no further action on that claim, it became final one year later, on September 2009. There is no evidence that he was not disabled at any time thereafter.

JA 109. Recognizing that Section 725.309(c)(6) prohibits the payment of benefits before a prior final denial, JA 109, the ALJ set November 1, 2008 (one month after

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<sup>4</sup> Totally disabled miners with fifteen or more years of qualifying coal mine employment are rebuttably presumed to be totally disabled due to pneumoconiosis. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(c). The party opposing entitlement can rebut the presumption by proving that the miner does not have clinical and legal pneumoconiosis, or that the miner’s pneumoconiosis played no part in the pulmonary disability. 20 C.F.R. § 718.305(d).

the prior denial, as the entitlement date.<sup>5</sup> JA 114, 115.

b. The Benefits Review Board affirms the award of benefits but changes the entitlement date to August 2012, the month in which the current claim was filed, i.e., the default date.

The Board affirmed the award of benefits, but changed the entitlement date to August 2012. The Board held that the ALJ improperly “reconsidered the medical opinion evidence submitted in the prior denied claim and determined, contrary to the district director’s original finding, that [Coleman] has been totally disabled due to pneumoconiosis since March 2008” (based on Dr. Forehand’s February 2008 evaluation.). JA 126. The Board reasoned that “[t]he district director’s decision in the prior claim, and its underlying findings, must be given effect as final and correct.” *Id.* It thus concluded, “Because the evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we modify the [ALJ’s] decision to reflect that benefits are payable from August 2012, the month in which claimant filed his subsequent claim.” *Id.*

In a footnote, the Board also found misguided the ALJ’s reliance on *Dalton*

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<sup>5</sup> At first, the ALJ mistakenly believed that the denial of the prior claim did not become final until September 2009, and so ordered payment from that date. JA 109. Following the Director’s one-paragraph motion for reconsideration, JA 112, the ALJ adopted November 2008 as the commencement date.

*v. Director, OWCP*, 738 F.3d 779 (7th Cir. 2013). JA 126 n.13. It observed that although *Dalton* “dealt with an initial claim filed in 1999, and held that an [ALJ] permissibly found, based on medical evidence, that the onset date of the miner’s total disability due to pneumoconiosis was in 1991 . . . Dalton did not involve a subsequent claim, [and] there were no prior decisions and findings to prevent the [ALJ] from making such a finding[.]” *Id.*

### **SUMMARY OF THE ARGUMENT**

The Court should affirm the Board’s decision to change the entitlement date to August 2012, the month in which Coleman filed his current claim. Section 725.503(b) provides that “[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.” The ALJ erred in finding that the evidence established March 2008 as the month of the onset of total disability due to pneumoconiosis. Coleman’s prior denial in September 2008 necessarily established that he was *not* totally disabled by pneumoconiosis six months earlier. That finding may not be attacked or relitigated in Coleman’s current, subsequent claim. No other evidence establishes an onset date after the prior denial and before the current claim filing. The Board therefore correctly adopted the default date (the month of this claim filing) as the entitlement date.

Coleman argues that the ALJ cured any error by pushing forward the actual

entitlement date to November 2008 (after the prior denial became final), in accordance with Section 725.309(c)(6). But Section 725.309(c)(6) does not alleviate the requirement that the onset date be properly established with evidence in the first instance.

Perhaps the simplest way to understand this case is to recognize the basic, undisputed facts: (1) the prior denial established that Coleman was not totally disabled due to pneumoconiosis before September 2008; and (2) his current award establishes that he is now totally disabled by the disease. At some point in time, the *nature* of Coleman's disability necessarily changed – from being due to smoking alone to being due to smoking *and* pneumoconiosis. To establish a pre-filing onset date, Coleman needed to produce evidence demonstrating when that change occurred. The ALJ's finding that Coleman was always disabled by pneumoconiosis does not accomplish this, and the Board determined that no such proof exists, a finding Coleman seems to concede. Opening Brief (OB) 11, 29. In the absence of evidence establishing when Coleman became totally disabled by pneumoconiosis, the default date (the month of filing of the subsequent claim) is the correct entitlement date.

## ARGUMENT

### A. Standard of review

The issue whether an ALJ may establish an onset date in an awarded subsequent claim based on a finding that the miner was actually totally disabled by pneumoconiosis in his prior denied claim is a legal one.

The Court exercises plenary review with respect to questions of law. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). In reviewing an appeal from the Board, the Court “review[s] the Board’s legal conclusions de novo . . . [and] will not vacate the Board’s decision unless the Board has committed legal error or exceeded its scope of review[.]” *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1068 (6th Cir. 2013). The Director’s interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013). Similarly, “[t]he 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.” *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999).

**B. The ALJ erred in setting an onset date in Coleman’s awarded subsequent claim based on a finding that Coleman was totally disabled by pneumoconiosis in his prior, denied claim.**

The basic entitlement date rules govern an awarded subsequent claim. The ALJ erred in relying on Dr. Forehand's 2008 medical report to establish an onset date of total disability due to pneumoconiosis because that report was rejected in the prior denied claim, and the prior denial definitively established that Coleman was not then totally disabled by pneumoconiosis. Because no other evidence affirmatively establishes when Coleman became totally disabled by pneumoconiosis (the onset date),<sup>6</sup> the Board properly employed the default date, the month Coleman filed his subsequent claim, as the entitlement date.

Section 725.503 governs entitlement date findings. It provides that “[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.” 20 C.F.R. § 725.503(b). To establish the onset date, it is not enough to prove total disability; the evidence must establish total disability *due to pneumoconiosis*. *Edmiston v. F & R Coal Co.*, 14 Black Lung Rep. 1-65, 1-69 (Ben. Rev. Bd. 1990); *see also Rochester & Pittsburgh Coal Co. v. Krecota*, 868

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<sup>6</sup> Coleman concedes this fact. Opening Brief (OB) at 11 (“The record contains no evidence that the disabling lung condition known now under current law and evidence to be legal pneumoconiosis developed in the years between his 2008 claim and the filing of his 2012 claim.”); *see also* OB 29 (the “record [is] utterly devoid of any evidence that a different disease had developed during the time between the two claims”).

F.2d 600, 603 (3d Cir. 1989) (Section 725.503(b) “clearly provides that benefits are payable from the month when a claim is filed only when the evidence does not establish when the disease progressed to such a stage as to render the claimant totally disabled.”).

Thus, if a miner believes that he is entitled to benefits prior to filing his current claim, he must establish the onset date – when he became disabled due to pneumoconiosis. *See* 65 Fed. Reg. 80012 (Dec. 20, 2000) (“a claimant may also prove he is entitled to benefits commencing before he filed his benefits application. In such a situation, the burden of persuasion remains, as always, with the claimant”); *Green v. Director, OWCP*, 790 F.2d 1118, 1120 n.4 (4th Cir. 1986) (employing default date where “[t]he record in the instant case contains insufficient evidence as to the precise month of [claimant’s] onset of disability”); *Youghigheny and Ohio Coal Co. v. Pickana*, 117 F.3d 1421 (6th 1997) (unpub.) (affirming default date where no evidence “suggest[ed] specific onset date”). Conversely, if an employer (or the Director) wants to establish a post-filing onset date, it must adduce evidence demonstrating the miner became disabled due to pneumoconiosis after he filed. *Krecota*, 868 F.2d at 603 (vacating default date where three post-filing medical opinions concluded claimant was not disabled).

That said, direct evidence, such as a medical opinion identifying a date specific, while helpful, is not necessarily required. The onset date may be

established through circumstantial evidence, *Dalton v. OWCP*, 738 F.3d 779, 786 (7th Cir. 2013); or with evidence that first invokes an un rebutted presumption of entitlement. *Sea B Mining Co. v. Dunford*, 188 F.App'x. 191, 201 (4th Cir. 2006) (date of qualifying pulmonary function studies establishes onset date); *cf. Green*, 790 F.2d at 1120 n.4 (4th Cir. 1986) (utilizing default date after observing that post-filing evidence invoking presumption indicates miner became disabled at some prior point in time).

These principles apply with equal force to the entitlement date determinations in awarded subsequent claims. 64 Fed. Reg. 54985. The ALJ here, however, erred in not utilizing the default date because there is no legally-sufficient evidence establishing the onset date. Dr. Forehand's 2008 opinion, which was developed and submitted in Coleman's first claim, JA 3, is the only evidence the ALJ cites in support of the onset date. JA 109. But Coleman could not have been disabled due to pneumoconiosis at that time. His prior claim was denied; the finality of that decision is legally binding; and its conclusion must be respected. *Buck Creek Coal Co*, 706 F.3d at 759 (miner's subsequent claim is not an opportunity to relitigate the original claim); *Lisa Lee Mines*, 86 F.3d at 1361 (correctness of legal conclusion that claimant was not entitled to benefits must be accepted as correct and is "off-limits"); *id.* at 1362 ("We accept the final 1986 decision, *as well as its necessary factual predicate*, as correct.") (emphasis added);

78 Fed. Reg. 59109 (Sep. 25, 2013) (quoting *Lisa Lee Mines*).<sup>7</sup> Indeed, the ALJ’s impermissible frontal attack on the prior denial is made plain in her conclusion that “[Coleman’s] disability has *always* been due to legal pneumoconiosis.” JA 109 (emphasis added).

The ALJ’s reliance on Dr. Forehand’s 2008 opinion is also inconsistent with this Court’s treatment of previously-rejected medical opinions in the context of the BLBA’s statute of limitations. *See* 30 U.S.C. § 932(f) (requiring miners to file for benefits within three years of receiving a medical diagnosis of disabling pneumoconiosis). When a claim is denied, a prior medical diagnosis of disabling pneumoconiosis is considered a *misdiagnosis*, and as such, does not trigger the running of the limitations period. As this Court explained in *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472 (6th Cir. 2009),

if a positive medical diagnosis, though found wanting by the adjudicator, was deemed to be sufficient to start the clock, the correctness of the adjudicator's denial would be called into question, at least implicitly. A

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<sup>7</sup> In addition to articulating basic subsequent claim doctrine, *Lisa Lee* is significant because the ALJ set an onset date based on his belief that the prior claim was wrongly denied (as the ALJ here did regarding Coleman’s first claim). *Rutter v. Lisa Lee & Terrilynne Mines*, 15 Black Lung Rep. 3-735, 740 (Ben. Rev. Bd. 1991); *Lisa Lee Mines*, 86 F.3d at 1360. In affirming the award, the Board vacated the onset date finding, adopting instead the default date (when Rutter filed his subsequent claim) because “the ALJ had no power to reopen or review the denial of the 1986 claim, which became final upon Rutter’s failure to appeal or move to modify it.” *Lisa Lee Mines*, 86 F.3d at 1360. The Fourth Circuit let stand the Board’s correction.

legal determination that a claim should be denied on the merits “necessarily refutes” the countervailing evidence submitted in support of the claim.

*Id.* at 483 (quoting *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616 (4th Cir. 2006)); *see also Peabody Coal Co. v. Director, OWCP*, 48 F.App’x. 140, 146 (6th Cir. 2002) (“[I]f a miner’s claim is ultimately rejected on the basis that he does not have [pneumoconiosis], this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes”). Just as a rejected medical opinion of totally disabling pneumoconiosis cannot start the limitations clock to bar a subsequent claim (because it was wrong), it cannot establish the onset date in an awarded subsequent claim.

The ALJ’s onset date determination also suffers from a fundamental logical defect. On the one hand, the ALJ determined that Coleman established “a change in an applicable condition of entitlement since denial of the previous claim,” JA 82; on the other, she found Coleman always totally disabled by pneumoconiosis. JA 109. Both assertions cannot be true, and the former must take precedence. The threshold determination in a subsequent claim requires that new evidence establish a previously-denied element of entitlement. 20 C.F.R. § 725.309(c)(4); *Cumberland River*, 690 F.3d at 486 (the ALJ “will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.”); *see Buck Creek Coal Co.*, 706 F.3d at 759 (“A claimant is required to

submit newly developed evidence to ensure that he is not merely relitigating the prior claim.”). Because new evidence must establish a previously-denied element of entitlement, old evidence alone cannot establish total disability due to pneumoconiosis, *i.e.* the onset date. If old evidence could, then there would have been no *change* in condition. Thus, the onset date must depend, at least in part, on new evidence.

Coleman sees things differently. He argues that Sections 725.309(c)(6) and 725.503(b), read together, lead to the following result: “in a subsequent claim benefits go back to the earliest proof of disability due to pneumoconiosis – limited by the date when the last prior claim became final.” OB 16. This view, while superficially unobjectionable, ignores the fundamental question of what “the earliest proof” must look like. As discussed previously, Section 725.503(b) governs subsequent claims, and an onset date determination requires evidence when the miner became totally disabled due to pneumoconiosis. Applying Section 725.309(c)(6) to push the onset date past the prior denial does not eliminate the need for this medical evidence, or cure the problem here: there is still no legally-sufficient evidence establishing an onset date, even the later one.

Coleman likewise misses the point in arguing that *Cumberland River Coal* and *Lisa Lee Mines* have little relevance here because they do not directly involve onset date determinations. OB 21-25. An onset date can only be established with

evidence and these cases (as well as Section 725.309 itself) provide definite rules on how both new and old evidence can be used.<sup>8</sup>

Oddly, Coleman believes *Cumberland River Coal Co.* supports the ALJ's onset finding. OB 21. There, the miner's third claim for benefits was successful. The ALJ determined that the miner had proved a previously-denied element of entitlement based on evidence developed following the denial of the previous claim, as well as a medical report from a prior claim. The Court held that the ALJ had erred in considering the older evidence "because it predates the denial of his last claim and, therefore, cannot constitute new evidence," but held the error "harmless because the ALJ's decision was supported by two other medical opinions that were afforded full probative weight." 690 F.3d at 488. Having affirmed the ALJ's one element finding, the Court further affirmed the ALJ's weighing of both the old and new evidence to find the miner entitled to benefits.

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<sup>8</sup> Coleman takes out of context the Court's statement in *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 314 (6th Cir. 2014), that "[w]hen assessing a subsequent claim, all evidence, both new and old, is considered." OB 16. The preceding paragraph in *Arkansas Coals* makes clear that before the ALJ considers "all evidence, both new and old," she must first determine whether the miner has "demonstrate[d] that one of the applicable conditions of entitlement . . . *has changed* since the date upon which the order denying the prior claim became final." *Id.*, quoting 20 C.F.R. § 725.309(d) (emphasis added in decision).

Nothing in *Cumberland River Coal* supports the ALJ's onset finding in Coleman's case or Coleman's arguments in support of that finding. Rather, *Cumberland River Coal* reinforces the Director's point that evidence found insufficient in a prior claim cannot alone support a finding of totally disabling pneumoconiosis in a subsequent claim.

Coleman also criticizes the Board for distinguishing *Dalton v. Office of Workers' Compensation Programs*, 738 F.3d 779 (7th Cir. 2013). OB 20-21. Coleman argues that *Dalton* stands for the proposition that while benefits are not payable prior to the denial of his initial claim becoming final, "evidence and findings of fact are not restricted." OB 21. *Dalton* stands for no such thing. *Dalton* concerned a miner who last worked in 1991, filed his claim in 1999, and was awarded benefits dating back to 1991 by the ALJ, only to have the Board modify the onset date to the month in which he filed his claim. *Dalton*, 738 F.3d at 781-82. On appeal, the Seventh Circuit reinstated the ALJ's onset date finding, holding that it was supported by two medical opinions, and that the Board's holding that there was no pre-filing evidence linking Dalton's disability to pneumoconiosis was simply factually incorrect. *Dalton* at 738 F.3d at 784-85.

As the Board correctly explained here, however, *Dalton* did not involve a subsequent claim. JA 126 n.13. *Dalton* therefore does not address whether prior evidence of disabling pneumoconiosis that had been conclusively proved incorrect

can establish the onset date. In fact, *Dalton* emphasized that the ALJ there had “expressly found that [the employer’s] experts’ contention that [the miner’s] lung disease was caused exclusively by smoking (rather than by a combination of smoking and mine) was unreasoned.” 738 F.3d 784. Here, by contrast, the district director reached the opposite conclusion in Coleman’s prior claim – finding the medical opinions of a smoking-related disability more persuasive than Dr. Forehand’s dual-cause scenario, and consequently finding neither legal pneumoconiosis nor disability causation established. JA 7-8, 10. Thus, if Coleman were to succeed in establishing a pre-filing onset date, he was required to prove when, following the prior denial, legal pneumoconiosis arose and when it became a substantial contributor to what was previously a smoking-related disability. The ALJ’s finding that Coleman was “always” disabled by legal pneumoconiosis is not based on new evidence, recognizes no change in Coleman’s condition, and ignores the correctness of the prior denial. It plainly does not suffice. *Cf. Buck Creek Coal*, 706 F.3d at 760 (affirming ALJ’s finding that new evidence developed subsequent to the denial established a change in condition, specifically that the pneumoconiosis substantially contributed to his total disability).

The last arrow in Coleman’s quiver is his suggestion that reinstatement of the 15-year presumption, 30 U.S.C. § 921(c)(4),<sup>9</sup> somehow permits reliance on Dr. Forehand’s 2008 opinion because “a subsequent claim can be awarded even where the evidence is indistinguishable from the prior claim’s” and “when the [ACA] changed a claimant’s eligibility criteria, this allows for a subsequent claim based on current law.” OB 17-18 (footnote omitted); *and see* OB 22 n.8. Exactly what Coleman means by “indistinguishable” is unclear, but a change in a previously-denied element can only be established with new evidence. *See supra* at 18. Although new evidence may establish a pre-filing onset date (by medical opinion for instance), an ALJ cannot, as here, simply rely on previously-rejected evidence. Nor does the fifteen-year presumption bridge the evidentiary gap. It may allow using the default (filing) date, *Green*, 790 F.2d at 1120 n.4, but because Coleman was previously adjudicated not to be totally disabled by pneumoconiosis, there must be evidence identifying when the change took place.

The cases Coleman relies on are easily distinguished: *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756 (6th Cir. 2013); *Consolidation Coal Co. v. Maynes*, 739 F.3d 323 (6th Cir. 2014); *Earley v. Commissioner of Social Security*, 893 F.3d 929

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<sup>9</sup> *See* Affordable Care Act, Pub. L. No. 111-148, § 1556(a), 124 Stat. 119 (2010).

(6th Cir. 2018); and *Eastern Associated Coal Corp. v Director, OWCP*, 805 F.3d 502 (4th Cir. 2015).

*Buck Creek Coal* affirmed that under Section 725.309 “[a] claimant is required to submit newly developed evidence to ensure that he is not merely relitigating the prior claim.” 706 F.3d at 759. Yet Coleman is attempting to relitigate his finally denied prior claim by arguing that Dr. Forehand’s incorrect 2008 opinion alone supports the earlier onset date chosen by the ALJ.

In *Maynes*, the Court considered the award of a subsequent survivor’s claim under 30 U.S.C. § 932(l), which (like the 15-year presumption) had been reinstated by the ACA.<sup>10</sup> The Court held that the award did not violate principles of finality because “the doctrine of res judicata does not preclude parties from bringing claims that did not exist at the time of the prior proceeding.” 739 F.3d at 327. It further explained that “Mrs. Maynes’s subsequent claim is based on a different statutory basis for benefits eligibility than her prior claims, and because her subsequent claim does not undermine either the factual or legal conclusions resulting in the denial of her 2003 claim, the doctrine of res judicata is simply not implicated.” 739 F.3d at 328.

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<sup>10</sup> Section 932(l) awards derivative benefits to survivors of certain miners found entitled to benefits.

*Maynes* thus stands in stark contrast to Coleman’s case. In Mrs. Maynes’s prior claim, she had to prove that pneumoconiosis contributed to her husband’s death, while in her subsequent claim she had to prove that he had been found entitled to benefits. *Id.* But Coleman had to prove that he was totally disabled due to pneumoconiosis in both his initial and subsequent claims, the only difference being that in his current claim he was aided by a presumption.

In *Earley*, the Court held that a subsequent Social Security claim for disability benefits was not barred by res judicata because the claimant was alleging that his condition had changed, *i.e.*, that she had become disabled since the denial of her earlier claim. 893 F.3d at 933. This same principle applies in black lung claims, *supra* at 5, but here, Coleman is attempting to relitigate the prior denial by using Dr. Forehand’s rejected 2008 opinion as the basis to establish a pre-filing onset date.

Finally, Coleman argues that *Eastern Associated Coal Corp.* establishes that “‘principles of finality’ are not violated by subsequent claims.” OB 19. True enough, but not relevant to the issue here. No party is contesting the validity of Coleman’s subsequent claim or his entitlement to benefits. At issue is whether the ALJ could set an onset date, first by relying on Dr. Forehand’s 2008 opinion – proved wrong by the denial of Coleman’s first claim – and second, by finding that Coleman was always totally disabled by legal pneumoconiosis, likewise proved

wrong by the denial of the first claim. If anything, *Eastern Associated* undermines the ALJ's finding – in affirming the award of the miner's subsequent claim, the court emphasized that “new evidence” gave rise to invocation of the 15-year presumption. 805 F.3d at 513-14.

The finality of Coleman's denied prior claim establishes that he was not totally disabled due to pneumoconiosis when Dr. Forehand offered his legally incorrect 2008 diagnosis. Section 725.503 sets the onset date as the first of the month in which the claim is filed unless evidence establishes that the miner was totally disabled due to coal workers' pneumoconiosis at some earlier or later date. Coleman concedes that the record lacks any evidence that he became totally disabled due to pneumoconiosis at some point between the denial of his first claim and the filing of his current claim. The facts and the law support the Board's modification of the ALJ's onset date finding.

## CONCLUSION

The Court should affirm the Board's decision.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, 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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## **STATEMENT REGARDING ORAL ARGUMENT**

The Director agrees with Coleman that oral argument is unnecessary here given the facts of the case and the clear statement and intent of the relevant law.

## **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 6,453 words, as counted by Microsoft Office Word 2010.

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