

**No. 12-14992-D**

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

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**COWIN & COMPANY, INC.**

**Petitioner**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR  
and  
DONALD R. HENLEY**

**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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**No. 12-14992-D**  
**Cowin & Company, Inc. v. Director, OWCP**

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U.S. Department of Labor

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Claimant-Respondent

Henley, Donald R.

**No. 12-14992-D**  
**Cowin & Company, Inc. v. Director, OWCP**

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## STATEMENT REGARDING ORAL ARGUMENT

Because the legal issues Cowin raises on appeal have been decided by the Court, *see U.S. Steel Mining Co., LLC v. Director, OWCP*, 386 F.3d 977 (11th Cir. 2004), the Director does not believe oral argument is needed.

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**DONALD R. HENLEY,**

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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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**STATEMENT OF SUBJECT-MATTER AND APPELLATE  
JURISDICTION**

This case arises from Respondent Donald Henley's claim for benefits under the Black Lung Benefits Act (the "BLBA"), 30 U.S.C. §§ 901-944. On January 14, 2011, Administrative Law Judge Stansell-Gamm ("the ALJ") awarded

Henley's benefits claim, payable by Petitioner Cowin & Company. On February 10, 2011, Cowin & Company filed a timely appeal of that order to the Benefits Review Board, within the 30-day period required by 33 U.S.C. § 921(a). The Board had jurisdiction to review the ALJ's order pursuant to Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3). The Board affirmed the ALJ's award on July 31, 2012.

Cowin filed an appeal with this Court on September 27, 2012. This Court has jurisdiction to review the Board's order pursuant to Section 21(c) of the Longshore Act, 33 U.S.C. § 921(c). The appeal is timely because it was filed within 60 days of the Board's July 31, 2012 order. 33 U.S.C. § 921(c). The Court has jurisdiction over the petition under 33 U.S.C. § 921(c), as the "injury" in this case, Henley's exposure to coal mine dust, occurred in Alabama.

### **STATEMENT OF THE ISSUE<sup>1</sup>**

Henley's initial claim for federal black lung benefits was denied after an ALJ found that he was not totally disabled by pneumoconiosis at that time. In this subsequent claim, an ALJ found that Henley is now totally disabled by pneumoconiosis and awarded BLBA benefits. The issue presented is whether the ALJ's award is precluded by res judicata.

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<sup>1</sup> The Director addresses only Cowin's legal argument that Henley's subsequent claim is barred by res judicata. Cowin also challenges the ALJ's findings as unsupported by substantial evidence. *See* Pet. Br. at 25-30.

## STATEMENT OF THE CASE

### A. Statutory Background.

#### 1. Conditions of Entitlement

The BLBA provides 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 or she (1) suffers from pneumoconiosis (“disease”); (2) the pneumoconiosis arose out of coal mine employment (“disease causation”); (3) is totally disabled by a respiratory or pulmonary impairment (“disability”); and (4) the pneumoconiosis contributes to the total respiratory disability (“disability causation”). 20 C.F.R. § 725.202(d).

***Disease:*** 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 pneumoconiosis” 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).<sup>2</sup>

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<sup>2</sup> See *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 982 n.6 (11th Cir. 2004) (discussing x-ray standards for diagnosing clinical pneumoconiosis);

“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 Bradberry v. Director, OWCP*, 117 F.3d 1361, 1368 (11th Cir. 1997). 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).

***Disease causation:*** This element requires a miner to establish that his or her pneumoconiosis “arose out of coal mine employment.” 20 C.F.R. § 725.202(d)(2)(ii). As a practical matter, this element applies only where the miner has clinical pneumoconiosis, which is often diagnosed by chest x-ray and without reference to etiology. If the miner is determined to have “legal” pneumoconiosis, the element is superfluous because he or she will, by definition, have established the existence of a chronic lung disease arising out of coal mine employment. *See* 20 C.F.R. § 718.201(a)(2).

***Disability:*** This element is satisfied if the miner is “totally disabled,” which is defined as a pulmonary or respiratory impairment that keeps the miner from “performing his or her usual coal mine work” or work requiring comparable skills and abilities. 20 C.F.R. § 718.204(b)(1).

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*Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993) (affirming ALJ’s pneumoconiosis finding based on biopsy evidence).

***Disability causation:*** This element is satisfied if pneumoconiosis contributes to the miner’s total disability. 20 C.F.R. §725.202(c)(2)(iv). Much like the relationship between dust exposure and disease necessary to establish legal pneumoconiosis, pneumoconiosis need not be the sole or even the primary cause of a miner’s disability to establish this element of entitlement. A miner need only prove that pneumoconiosis is “a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment.” 20 C.F.R. § 718.204(c)(1). Thus, the element is satisfied if pneumoconiosis “[h]as a material adverse effect on the miner’s respiratory or pulmonary condition” or if it “[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease . . . unrelated to coal mine employment.” 20 C.F.R. §§ 718.204(c)(1)(i)-(ii).

2. Subsequent claims<sup>3</sup>

A miner’s medical condition can change over the course of a lifetime, particularly because pneumoconiosis 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). For this reason, miners who unsuccessfully pursue black

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<sup>3</sup> A subsequent claim is one filed by a claimant more than one year after a previous claim is denied. 20 C.F.R. § 725.309(d). Until a decision denying a claim has been final for more than one year, a claimant is entitled to use the Longshore Act’s broader modification procedure to re-open the claim. 33 U.S.C. § 922; 20 C.F.R. § 725.310; *see generally O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

lung benefits are permitted to file “subsequent claims,” arguing that they now satisfy the conditions of entitlement. 20 C.F.R. § 725.309; *see U.S. Steel Mining Co.*, 386 F.3d at 979 (“duplicate claims are feasible under the BLBA precisely because pneumoconiosis is a latent and progressive disease, from which a miner’s condition may deteriorate over time”); *Coleman v. Director, OWCP*, 345 F.3d 861, 863 (11th Cir. 2003) (“if a miner’s condition has materially changed, he may allege a new cause of action based on a very different physical condition”).

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 – known as the “one-element standard” – 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 conditions of entitlement 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).<sup>4</sup>

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<sup>4</sup> The current subsequent-change regulation became effective on January 19, 2001, and applies only to claims, such as Henley’s, 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 conditions of entitlement. 20 C.F.R. § 735.309(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. Procedural History.**

### 1. Henley’s first claim

Henley filed his original claim in 1993. Administrative Law Judge Clement Kichuk ultimately found that Henley had established total disability, but had “failed to establish with sufficient evidence that he suffers from pneumoconiosis”

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not explicitly provide that a change in condition can be shown by establishing, with new evidence, a condition 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). This Court and most other Circuits had adopted the Director’s one-element standard even under the previous regulation. *See U.S. Steel Mining Co.*, 386 F.3d at 990 (adopting one-element standard and summarizing its treatment by other courts). The one-element standard is now “formally codified” in the current regulation. *Id.* at 986.

in either clinical or legal form. ALJ 2000 at 8.<sup>5</sup> He also ruled against Henley on the disability-causation element. *Id.* (“Assuming *arguendo* that the claimant had established that he suffers from legal pneumoconiosis . . . [he] would not be able to prove by preponderance of the evidence that the pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disease.”). Instead, Judge Kichuk attributed Henley’s respiratory condition to sarcoidosis and asthma unrelated to coal dust exposure.<sup>6</sup> *Id.*, at 5. On April 24, 2001, the Benefits Review Board affirmed Judge Kichuk’s weighing of the medical evidence as within his discretion.

## 2. Henley’s subsequent claim

Henley filed his current claim more than one year later, on July 15, 2002. DX 3.<sup>7</sup>

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<sup>5</sup> Having found that Henley did not have clinical pneumoconiosis, a separate finding on the disease-causation element was unnecessary. *See supra* at 4.

<sup>6</sup> “Sarcoidosis” is “a chronic, progressive, systemic granulomatous reticulosis of unknown etiology, characterized by hard tubercles . . . in almost any organ or tissue[.]” Dorland’s Illustrated Medical Dictionary at 1656 (30th ed. 2003).

<sup>7</sup> This brief employs the following citation conventions for record materials. The decisions reproduced in Cowin’s Record Excerpts are cited as (*tribunal, year*), *e.g.*, ALJ 2004, ALJ 2005, BRB 2006. Director’s Exhibits, which are included in the Board’s index but are not paginated, are cited as “DX” and reference the exhibit number and page number of the exhibit.

***ALJ's denial of summary judgment:*** On May 5, 2004, Administrative Law Judge Richard Stansell-Gamm (the ALJ) denied Cowin's motion for summary judgment on res judicata grounds, finding that "since coal workers' pneumoconiosis may develop long after exposure to coal dust has ceased, the regulations and courts permit relitigation of the ultimate issue of entitlement to benefits in one unique circumstance – the claimant has experienced a change in his pulmonary condition since the denial of the prior claim." ALJ 2004 at 5. The ALJ further rejected Cowin's argument that considering pneumoconiosis to be a progressive disease violates due process because "nearly all federal circuit courts of appeals permit the adjudication of subsequent black lung claims[.]" *Id.* at 6.

***ALJ's initial awards and Board remands:*** Three times, the ALJ found that Henley was entitled to benefits because the new evidence established that the miner now suffers from "complicated" pneumoconiosis. ALJ 2005 at 22; ALJ 2007 at 8, 20; ALJ 2009 at 17-18. Complicated pneumoconiosis is a particularly severe form of clinical pneumoconiosis that triggers an irrebuttable presumption that a miner is entitled to BLBA benefits. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *see generally, Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-25 (1976). The Board, however, vacated these decisions after finding that the ALJ had either considered inadmissible evidence or improperly weighed the evidence. BRB 2006 at 6-7; BRB 2008 at 5; BRB 2010 at 8-9.

*Fourth award and affirmance:* The ALJ awarded benefits on January 14, 2011. This time, the ALJ found that the new evidence did not establish that Henley suffers from complicated pneumoconiosis or simple clinical pneumoconiosis. ALJ 2011 at 18. He therefore turned to the issue of legal pneumoconiosis. Weighing the new evidence addressing Henley's condition after the previous claim was denied, the ALJ found that Henley now suffers from legal pneumoconiosis, thereby establishing an element of entitlement (disease) decided against him in the earlier claim. After allowing the subsequent claim under the one-element standard, the ALJ considered all the evidence of record, determining that Henley has legal pneumoconiosis that substantially contributes to his totally disabling respiratory impairment. *Id.* at 19-21, 22. On July 31, 2012, the Board affirmed the award as supported by substantial evidence. BRB 2012 at 5. Cowin's petition for review to this Court followed.

**C. Statement of the Relevant Facts.**<sup>8</sup>

The ALJ found that Henley mined coal in Alabama for eighteen years, retiring in 1975. ALJ 2005 at 6.

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<sup>8</sup> Because the Director addresses only the legal issue raised in Cowin's brief, the conflicting medical evidence and the ALJ's weighing of that evidence is not summarized in this brief.

#### **D. Standard of Review.**

This Court exercises *de novo* review over the Board's legal conclusions. *Jordan v. Benefits Review Bd.*, 876 F.2d 1455, 1458-59 (11th Cir. 1989). The Director's interpretation of the BLBA as expressed in its implementing regulations is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as is his interpretation of the BLBA's implementing regulations in a legal brief. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *U.S. Steel Mining Co.*, 386 F.3d at 985; *see also Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

#### **SUMMARY OF THE ARGUMENT**

The ALJ's award does not offend *res judicata*. The issue in Henley's 1993 claim was whether he was totally disabled by pneumoconiosis at that time. Because a miner's health can change over time, the ALJ's conclusion that Henley is now totally disabled by pneumoconiosis is perfectly consistent with the prior ALJ's decision. It merely shows that Henley's condition has changed in the interim. The fact that Henley was found to suffer from respiratory diseases unrelated to coal dust exposure in his initial claim does not change this result. Pneumoconiosis is a latent and progressive disease that can arise, or become disabling, after a claimant has left the mines. The ALJ properly applied the one-element test by accepting the conclusions of the earlier decision as correct and

examining the new evidence addressing Henley’s condition after the previous claim was denied to determine whether it satisfied an element of entitlement previously decided against Henley. This ensured that the previous decision’s finality was respected.

## **ARGUMENT**

Cowin devotes much of its brief to arguing that this subsequent claim is barred by res judicata and accusing Henley of trying to relitigate his prior claim. Pet Br. 18, 22-24. It would be more accurate to say that Cowin is attempting to relitigate *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 990 (11th Cir. 2004), which explicitly “adopt[ed] the agency’s ‘one element’ standard.” Under that standard, now codified at 20 C.F.R. § 725.309, a miner must first prove that his condition has changed by establishing – with new evidence addressing his condition after the previous claim was denied – that he now satisfies one of the elements of entitlement decided against him in the earlier claim. 20 C.F.R. § 725.309(d)(3).<sup>9</sup> If he fails to do so, the subsequent claim will be denied. 20 C.F.R.

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<sup>9</sup> A miner pursuing a subsequent claim is only required to establish one of the elements previously decided against him in the prior claim because “holdings in the alternative, ‘either of which independently would be sufficient to support the result . . . [are] not conclusive with respect to either issue standing alone.’” *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc) (quoting Restatement (Second) of Judgments § 27, cmt. 1 (1982)). Accord *RAG Amer. Coal Co. v. OWCP*, 576 F.3d 418, 427 (7th Cir. 2009) (“[A] claimant need not negate every alternative ground on which an earlier denial was based.”) (citation omitted); 65 Fed. Reg. 79920, 79973 (Dec. 20, 2000) (same).

§ 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).

Judge Stansell-Gamm properly applied the one-element standard to Henley's subsequent claim. In his prior claim, Henley established the disability element, but the disease and disability-causation elements were decided against the miner. *See* ALJ 2000 at 7-8.<sup>10</sup> In this claim, the ALJ determined – based solely on the new evidence addressing Henley's current condition – that Henley suffers from legal pneumoconiosis. ALJ 2011 at 20. Because this element of entitlement had been decided against Henley in the previous claim, the one-element standard was satisfied and the subsequent claim allowed. *Id.* at 19. The ALJ then went on to consider all the evidence, concluding that it established all four elements of entitlement in Henley's favor.

Allowing a subsequent claim to proceed where the one-element standard is satisfied “respects the principles of res judicata.” *U.S. Steel Mining Co.*, 386 F.3d

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<sup>10</sup> Cowin argues that “the existence of pneumoconiosis” was not the “dispositive issue in the prior claim[.]” Pet Br. at 15-16. But ALJ Kichuk's ruling on the disease element could not have been more explicit: “claimant has failed to establish that he suffers from pneumoconiosis under any method[.]” ALJ 2000 at 7.

at 990. The reason res judicata does not bar a subsequent claim is simple – the later claim is a separate cause of action.<sup>11</sup> “It 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).<sup>12</sup> This principle is particularly apposite in BLBA claims because pneumoconiosis is a latent and progressive disease that can become manifest (or become disabling) long after a claimant has left the mines. *U.S. Steel Mining Co.*, 386 F.3d at 979; *Coleman*, 345 F.3d at 863; 20 C.F.R. § 718.201(c).

The denial of Henley’s 1993 claim “established only that [the miner] was not *then* totally disabled due to pneumoconiosis.” *LaBelle Processing*, 72 F.3d at 314. And that ruling has res judicata effect. Henley is forever barred from

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<sup>11</sup> For res judicata to apply, “both cases must involve the same causes of action.” *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 892 (11th Cir. 2013).

<sup>12</sup> See also *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013) (“res judicata is not violated by the filing of a subsequent claim under the Black Lung Benefits Act”); *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”) (citation omitted); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450 (8th Cir. 1997) (where miner establishes entitlement based on change in condition, “res judicata does not bar his claim”); *Lisa Lee Mines*, 86 F.3d 1358, 1362 (“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).

pursuing a claim arguing that he was totally disabled in 1993 (or indeed at any point before that claim was finally denied by the Board in 2001). *See* 20 C.F.R. § 725.309(d). This subsequent claim, in contrast, is an “asserti[on] that [Henley] is *now* totally disabled due to . . . pneumoconiosis[.]” *Id.* The ALJ’s conclusion that Henley is now totally disabled by pneumoconiosis does not conflict with the prior decision, it merely shows that Henley’s health has changed in the interim.<sup>13</sup>

Cowin argues that *res judicata* nevertheless bars this particular subsequent claim because Henley’s first claim was denied for want of “causation.” Pet. Br. 15-16. It is not entirely clear whether Cowin means disability causation, the causation inquiry inherent in the definition of legal pneumoconiosis, or both. But the gist of the argument is clear enough. In the first claim, the ALJ found that Henley suffered from disabling sarcoidosis and asthma caused by factors other than his occupational exposure to coal dust. ALJ 2000 at 8. How is it possible,

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<sup>13</sup> At one point, Cowin appears to recast its *res judicata* argument in terms of collateral estoppel or issue preclusion. *See* Pet. Br. at 23. This does not advance the employer’s cause. Collateral estoppel applies only where the issues are “identical to those involved in another proceeding.” *Vasquez v. YII Shipping Co., Ltd.*, 692 F.3d 1192, 1196 (11th Cir. 2012) (citation omitted). But the issues decided in Henley’s initial and subsequent claims involve his health at two different times, and are therefore not identical. *Cf. Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1319 (11th Cir. 2012) (“[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues.’ A party ‘need only point to one material differentiating fact that would alter the legal inquiry and thereby overcome the preclusive effect.’”) (quoting *Montana v. United States*, 440 U.S. 147, 159 (1979) and *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317 (11th Cir.2003)).

Cowin asks, that coal dust is now responsible for Henley's disabling lung condition?

The answer is clear from the regulations governing legal pneumoconiosis and disability causation. Given the latent nature of pneumoconiosis, it is entirely possible that Henley has developed a new pulmonary condition in the interim that is "significantly related to" his coal dust exposure and has a "material adverse effect on the miner's respiratory or pulmonary condition." 20 C.F.R. §§ 718.201(a)(2), (b); 718.204(c)(1)(i). Or a coal-dust-related condition that was previously mild may have progressed to the point where it now "substantially aggravat[es]" Henley's sarcoidosis or asthma and "[m]aterially worsens" his respiratory impairment. 20 C.F.R. §§ 718.201(a)(2), (b); 718.204(c)(1)(ii). In either scenario (and there are others), Henley is totally disabled by legal pneumoconiosis. And both are entirely consistent with the decision in his previous, unsuccessful claim.

Given these regulatory standards, it is unsurprising that the courts have had no difficulty concluding that miners whose previous claims were denied on causation grounds can successfully prosecute subsequent claims by proving that they now satisfy those elements of entitlement. For example, in his initial claim for BLBA benefits, the claimant in *Buck Creek Coal Co.* was found to have pneumoconiosis and a totally disabling respiratory impairment caused solely by

cigarette smoking, but lost on disability-causation grounds. 706 F.3d at 760. The Sixth Circuit nevertheless affirmed the miner’s subsequent award, explaining that “new evidence developed subsequent to the denial established a change in condition, specifically that the pneumoconiosis substantially contributed to his total disability in 2001, when the last claim was filed[.]” *Id.* See also *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 481, 486 (6th Cir. 2012) (affirming award where initial claim had been denied on the ground that the miner’s disabling respiratory disease was due to smoking rather than dust exposure); *RAG Amer. Coal Co.*, 576 F.3d at 426-27 (same). Cowin’s argument that miners whose claims are denied on causation grounds cannot file subsequent claims because their condition cannot change is baseless.<sup>14</sup>

Of course, the fact that such change is possible does not mean that it actually happened. That question is answered by applying 20 C.F.R. § 725.309(d)’s one-

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<sup>14</sup> Cowin cites *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1512 n.17 (10th Cir. 1996), for the proposition that “causation conclusions” cannot change because they are not “technically progressive.” Pet. Br. at 16. As the only decision to squarely reject the one-element test under the prior version of 20 C.F.R. § 725.309, see *U.S. Steel Mining Co.*, 386 F.3d at 986 n.11, *Wyoming Fuel* is of dubious persuasive value in a case governed by the current regulation in this Circuit. In any event, the cited portion of *Wyoming Fuel* is not helpful to Cowin. The Tenth Circuit actually stated that disability causation “has no meaning in a context where the claimant has been found not to have pneumoconiosis and a claimant need not demonstrate a material change in this element when the ALJ in his prior claim decided the claimant did not have pneumoconiosis.” *Id.* This reasoning suggests that findings about disability causation in a prior claim have no preclusive effect at all in a later claim if the miner was also found not to suffer from pneumoconiosis.

element test. The previous decision – which res judicata requires us to accept as correct – held that Henley did not suffer from a chronic lung disease arising out of coal mine employment in the past. In this claim, the ALJ determined, based on evidence addressing Henley’s current condition, that the miner now suffers from such a disease. Assuming that the ALJ’s determination is supported by substantial evidence, the necessary conclusion is that Henley’s condition has changed since his previous claim was denied.

Unsatisfied with this outcome, Cowin argues that the ALJ “must consider how the new evidence differs qualitatively from the evidence submitted in the prior claim to ensure that claimant ‘indeed has shown the existence of a material change in his condition since the earlier denial.’” Pet. Br. at 25-26 (quoting *Sharondale Corp. v. Ross*, 42 F.3d 998 (6th Cir. 1994)); *see also id.* at 19-20. But this argument is barred by *U.S. Steel*, which held that “the ‘one element’ test does not compel a comparison of the evidence associated with the second claim with the evidence presented at the first claim; rather, it mandates a comparison of the second claim’s evidence with the *conclusions* reached in the prior claim.” 386 F.3d at 989 (emphasis in original).<sup>15</sup> As this Court recognized, requiring an ALJ to

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<sup>15</sup> The Sixth Circuit has itself repudiated the portion of *Sharondale* Cowin quotes. *See Banks*, 690 F.3d at 486-487 (“[T]he 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.”).

compare the evidence underlying the prior claim with the new evidence would undermine the finality interests Cowin claims to champion by “subjecting that [earlier] decision to searching scrutiny.” *Id.* at 986. Comparing the new evidence with the prior claim’s conclusions, as the ALJ did here, “respects the finality of the decision rendered in the first claim, shielding that decision from the second guessing that hindsight inevitably invites.” *Id.* at 989.<sup>16</sup>

The ALJ applied the correct legal framework in analyzing this subsequent claim – the one-element test codified at 20 C.F.R. § 725.309 and accepted by this Court in *U.S. Steel*. Cowin’s argument that this framework violated res judicata is simply incorrect. Assuming that the ALJ’s findings are supported by substantial evidence, the award should be affirmed.

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<sup>16</sup> See also *Lisa Lee Mines*, 86 F.3d at 1363-64 (Permitting “a plenary review of the evidence behind the first claim” would “make mincemeat of res judicata.”) (citation and quotation omitted).

## CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court reject Cowin's argument that this subsequent claim is barred by res judicata.

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 3,483 words, as counted by Microsoft Office Word 2010.

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## **CERTIFICATE OF SERVICE**

I certify that on April 22, 2013, the foregoing brief was served electronically using the Court's CM/ECF system, and served by mail, postage prepaid, on the Court and the following:

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