

No. 12-4402

---

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

EASTOVER MINING COMPANY,  
c/o DUKE POWER COMPANY,

Petitioner

v.

DOROTHY E. BEVERLY

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**

M. PATRICIA SMITH  
Solicitor of Labor

RAE ELLEN JAMES  
Associate Solicitor

GARY K. STEARMAN  
Counsel for Appellate Litigation

BARRY H. JOYNER  
Attorney, U.S. Department of Labor  
Office of the Solicitor, Suite N-2119  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210  
(202) 693-5660  
joyner.barry@dol.gov

Attorneys for the Director, Office  
of Workers' Compensation Programs

---

# TABLE OF CONTENTS

	<b>Page:</b>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES .....	2
STATEMENT OF THE FACTS.....	4
A. Statutory and Regulatory Background .....	4
1. Relevant Statutory Provisions.....	4
2. Relevant Regulatory Provisions .....	9
B. Procedural History .....	11
SUMMARY OF THE ARGUMENT .....	16
ARGUMENT	
I. The automatic entitlement provisions of BLBA Section 932(l), as reinstated by ACA Section 1556, apply to all survivors' claims that satisfy Section 1556's time limitations, including subsequent claims. ....	18
A. Standard of Review .....	18
B. The plain language of Section 1556 permits automatic awards on survivors' subsequent claims.....	19

**TABLE OF CONTENTS (cont'd)**

	<b>Page:</b>
C. Senator Byrd’s post-enactment statement does not support Eastover’s position.....	23
D. Automatic entitlement on survivors’ subsequent claims is not barred by principles of finality.....	25
1. An award of a survivor’s subsequent claim based on automatic entitlement respects the finality of decisions on a prior claim.....	25
2. Automatic entitlement is not barred by the Supreme Court’s decisions in <i>Sebben</i> and <i>Plaut</i> ..	28
3. Res judicata does not bar awards of survivors’ subsequent claims under Section 1556.....	34
II. The entitlement date on a survivor’s subsequent claim is the month after the denial of her prior claim became final.....	41
CONCLUSION .....	47
CERTIFICATE OF COMPLIANCE .....	48
CERTIFICATE OF SERVICE.....	49

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page:</b>
<i>Alvear-Velez v. Mukasey</i> , 540 F.3d 672 (7th Cir. 2008).....	36
<i>B &amp; G Constr. Co. v. Director, OWCP</i> , 662 F.3d 233 (3d Cir. 2011) .....	3, 9, 21, 22
<i>Brown v. Rock Creek Min. Co., Inc.</i> , 996 F.2d 812 (6th Cir. 1993).....	7, 38
<i>Buck Creek Coal Co. v. Sexton</i> , 706 F.3d 756 (6th Cir. 2013), <i>reh’g denied</i> (Mar. 19, 2013).....	26, 27
<i>Caldera v. J.S. Alberici Constr. Co.</i> , 153 F.3d 1381 (Fed. Cir. 1998).....	23
<i>Carbon Fuel Co. v. Director, OWCP</i> , 20 F.3d 120 (4th Cir. 1994).....	21
<i>Chevron USA, Inc., v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	19
<i>Conley v. Nat’l Mines Corp.</i> , 595 F.3d 297 (6th Cir. 2010).....	18
<i>Consolidation Coal Co. v. McMahon</i> , 77 F.3d 898 (6th Cir. 1996).....	44
<i>Director, OWCP v. Goudy</i> , 777 F.2d 1122 (6th Cir. 1985).....	34
<i>Director, OWCP v. Hamm</i> , 113 F.3d 23 (4th Cir. 1997).....	12, 21

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page:</b>
<i>Dotson v. McCoy Elkhorn Coal Corp.</i> , 25 BLR 1-13 (BRB 2011), <i>aff'd</i> No. 12-3037 (6th Cir. Feb. 1, 2013) (unpub. order), <i>reh'g petition filed</i> .....	42-44
<i>Duhaney v. Att'y Gen'l of the U.S.</i> , 621 F.3d 340 (3d Cir. 2010) .....	38, 39
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992) .....	20
<i>Federal Land Bank of St. Paul v. Bismarck Lumber Co.</i> , 314 U.S. 95 (1941) .....	24
<i>Federated Dep't Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1982) .....	30
<i>Fellowship of Christ Church v. Thorburn</i> , 758 F.2d 1140 (6th Cir. 1985) .....	35
<i>Johnson v. First Nat'l Bank of Montevideo, Minn.</i> , 719 F.2d 270 (8th Cir. 1983).....	42
<i>Kane v. Magna Mixer Co.</i> , 71 F.3d 555 (6th Cir. 1995).....	36
<i>King v. Tennessee Consolidated Coal Co.</i> , 6 BLR 1-87 (BRB 1983).....	44
<i>LaBelle Processing Co. v. Swarrow</i> , 72 F.3d 308 (3d Cir. 1995) .....	26
<i>Lampf, Pleva, Lipkind, Prupis &amp; Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991) .....	31, 32

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases:</b>	<b>Page:</b>
<i>Lawlor v. Nat'l Screen Serv. Corp.</i> , 349 U.S. 322 (1955) .....	36
<i>Lisa Lee Mines v. Director, OWCP</i> , 86 F.3d 1358 (4th Cir. 1996) (en banc).....	26, 28
<i>Ljutica v. Holder</i> , 588 F.3d 119 (2d Cir. 2009) .....	36
<i>Lovilia Coal Co. v. Harvey</i> , 109 F.3d 445 (8th Cir. 1997) .....	27
<i>Maldonado v. U.S. Att'y Gen'l</i> , 664 F.3d 1369 (11th Cir. 2011) .....	36
<i>Mansfield v. Director, OWCP</i> , 8 BLR 1-445 (BRB 1986) .....	45, 46
<i>Marvel Characters, Inc., v. Simon</i> , 310 F.3d 280 (2d Cir. 2002) .....	36
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990) .....	42, 44
<i>Oklahoma Chapter of the Am. Academy of Pediatrics v. Fogarty</i> , 2010 WL 3341881 (10th Cir. Jul. 20, 2010) .....	31
<i>Paramino Lumber Co. v. Marshall</i> , 309 U.S. 370 (1940) .....	33
<i>Pittston Coal Group v. Sebben</i> , 488 U.S. 105 (1988) .....	17, 28-30
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995) .....	17, 28, 30-34

## TABLE OF AUTHORITIES (cont'd)

<b>Cases:</b>	<b>Page:</b>
<i>Pothering v. Parkson Coal Co.</i> , 861 F.2d 1321 (3d Cir. 1988) .....	7
<i>Richards v. Union Carbide Corp.</i> , 25 BLR 1-31 (BRB 2012), appeal docketed, 4th Cir. No. 12-1294 ....	11, 14, 15, 37, 43-46
<i>Rubin v. Islamic Republic of Iran</i> , 709 F.3d 49 (1st Cir. 2013) .....	42, 44
<i>Sanders Confectionery Products, Inc. v. Heller Financial, Inc.</i> , 973 F.2d 474 (6th Cir. 1992).....	35, 37, 39
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134 (1944) .....	19, 22
<i>Toler v. Eastern Assoc. Coal Corp.</i> , 12 BLR 1-49 (BRB 1988) .....	45, 46
<i>U.S. Steel Min. Co., LLC, v. Director, OWCP</i> , 386 F.3d 977 (11th Cir. 2004) .....	27
<i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1 (1976) .....	43
<i>Vision Processing, LLC, v. Groves</i> , 705 F.3d 551 (6th Cir. 2013).....	3, 5, 6, 9, 14, 19-23, 43
<i>West Virginia CWP Fund v. Stacy</i> , 671 F.3d 378 (4th Cir. 2011), <i>cert. den.</i> 133 S.Ct. 127 (Mem.) (2012) .....	3, 9, 21, 22
<i>Westwood Chemical Co. v. Kulick</i> , 656 F.2d 1224 (6th Cir. 1981).....	37, 39

## TABLE OF AUTHORITIES (cont'd)

<b>Cases:</b>	<b>Page:</b>
<i>Winget v. J.P. Morgan Chase Bank, N.A.</i> , 537 F.3d 565 (6th Cir. 2008).....	36
<i>Wolf Creek Collieries v. Robinson</i> , 872 F.2d 1264 (6th Cir.1989).....	23
<i>Youghiogheny &amp; Ohio Coal Co. v. Milliken</i> , 200 F.3d 942 (6th Cir. 1999).....	44, 45

### **United States Constitution:**

Article III .....	31-33
Amendment V .....	14

### **Statutes:**

Affordable Care Act, Pub. L. No. 111-148 (2010)	
§ 1556.....	1-4, 8, 13-25, 30, 33, 34, 37, 41-43, 45
§ 1556(a) .....	8, 9
§ 1556(b).....	9, 23, 34
§ 1556(c) .....	9, 20, 22, 34
Black Lung Benefits Act, 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010) (unless otherwise noted)	
30 U.S.C. §§ 901-44 .....	1
30 U.S.C. § 901 (1970) .....	5
30 U.S.C. § 901(a) (1976 and Supp. III 1979) .....	6
30 U.S.C. § 921 (1970) .....	5
30 U.S.C. § 921(c)(4) .....	9
30 U.S.C. § 921(c)(4) (1982).....	8

## TABLE OF AUTHORITIES (cont'd)

<b>Statutes:</b>	<b>Page:</b>
30 U.S.C. § 921(c)(4) (1976).....	8
30 U.S.C. § 922(a)(2) (1970).....	5, 6
30 U.S.C. § 922(a)(2) (1976 and Supp. III 1979) .....	6
30 U.S.C. § 932.....	27
30 U.S.C. § 932(e)(2) .....	43
30 U.S.C. § 932(g) .....	12, 21
30 U.S.C. § 932(l) .....	9, 13, 18, 21, 22, 28, 37, 40, 45
30 U.S.C. § 932(l) (1976 and Supp. III 1979) .....	6
30 U.S.C. § 932(l) (1982) .....	7, 8
Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150 (1972) .....	5, 6, 34
Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981) .....	5, 7, 8
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) .....	5, 6, 34
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) .....	5
Longshore and Harbor Workers' Compensation, 33 U.S.C. §§ 901-50	
33 U.S.C. §§ 901-50 .....	33
Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp	
15 U.S.C. § 78j(b) .....	31
15 U.S.C. § 78aa-1 .....	31, 32, 34
15 U.S.C. § 78aa-1(b) .....	32

**TABLE OF AUTHORITIES (cont'd)**

<b>Statutes:</b>	<b>Page:</b>
Social Security Act	
42 U.S.C. §§ 301-1397mm	
42 U.S.C. § 1396a .....	31
 <b>Regulations:</b>	
Title 20, Code of Federal Regulations (2012) (unless otherwise noted)	
20 C.F.R. § 718.202 .....	12
20 C.F.R. § 718.205 .....	12, 38
 20 C.F.R. § 725.101(a)(10).....	27
20 C.F.R. § 725.201(a)(2)(ii) (1984) .....	7
20 C.F.R. § 725.202(d) .....	10
20 C.F.R. § 725.212 .....	5, 9, 10
20 C.F.R. § 725.218 .....	5, 9, 10
20 C.F.R. § 725.222 .....	5, 9, 10
20 C.F.R. § 725.309 .....	14, 15, 23
20 C.F.R. § 725.309(c).....	24
20 C.F.R. § 725.309(d) .....	3, 9, 10, 12, 24
20 C.F.R. § 725.309(d)(3).....	12, 14, 38
20 C.F.R. § 725.309(d)(5).....	11, 15, 26, 42, 43
20 C.F.R. § 725.419(d) .....	13, 15, 43
20 C.F.R. § 725.495 .....	2
20 C.F.R. § 725.503(c).....	11, 26, 41
20 C.F.R. § 725.533 .....	12
 20 C.F.R. § 802.205(b) .....	44
20 C.F.R. § 802.404(a).....	45
20 C.F.R. § 802.407 .....	15

**TABLE OF AUTHORITIES (cont'd)**

<b>Other:</b>	<b>Page:</b>
156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) .....	24
65 Fed. Reg. 79968 (Dec. 20, 2000) .....	10, 13
77 Fed. Reg. 19456-19478 (Mar. 30, 2012).....	9
77 Fed. Reg. 19468 (Mar. 30, 2012).....	9, 23
77 Fed. Reg. 19478 (Mar. 30, 2012).....	9
<a href="http://www.reginfo.gov/public/do/eAgendaViewRule?pubID=201210&amp;RIN=1240-AA04">http://www.reginfo.gov/public/do/eAgendaViewRule?pubID=201210&amp;RIN=1240-AA04</a> (Department of Labor Regulatory Agenda) .....	9
James Wm. Moore <i>et al.</i> , <u>Moore's Federal Practice</u> (3d ed. 2008).....	35, 36

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

---

**No. 12-4402**

---

EASTOVER MINING COMPANY,  
c/o DUKE POWER COMPANY,

Petitioner

v.

DOROTHY E. BEVERLY,

and

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

Respondents

---

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

---

BRIEF FOR THE FEDERAL RESPONDENT

---

This appeal involves a claim for survivors' benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, as amended by Section 1556 of the Affordable Care Act (ACA), Pub. L. No. 111-148, § 1556 (2010), filed by Dorothy E. Beverly. Mrs. Beverly is the

widow of James Beverly, a former coal miner. A Department of Labor (DOL) administrative law judge (ALJ) awarded her claim, and the Benefits Review Board affirmed. Eastover Mining Company, Mr. Beverly's former employer, has petitioned the Court to review the Board's decision.<sup>1</sup> The Director, Office of Workers' Compensation Programs, responds in support of the award.

### **STATEMENT OF THE ISSUES**

In addition to lifetime disability benefits for coal miners, the BLBA provides survivors' benefits to certain of their dependents. Before 1982, eligible dependents of a miner who had been awarded benefits on a lifetime disability claim were automatically entitled to survivors' benefits after his death. Congress eliminated automatic survivors' benefits in 1982, after which survivors were generally eligible for benefits only by proving that pneumoconiosis caused the miner's death. In 2010, Congress enacted Section 1556 of the ACA, and restored automatic survivors' benefits for claims filed after January 1, 2005, and pending on or after March 23, 2010.

---

<sup>1</sup> Eastover does not contest that it is the party liable to pay benefits on Mrs. Beverly's claim. See 20 C.F.R. § 725.495.

Mr. Beverly, who had received a lifetime disability award, died in 1999. Mrs. Beverly filed pre-ACA claims for survivors' benefits in March 2000, shortly after the death of her husband, and again in February 2007. DOL district directors finally denied these claims in June 2000 and May 2007, respectively. Mrs. Beverly filed a subsequent claim in September 2010, following the ACA's restoration of automatic entitlement. See 20 C.F.R. § 725.309(d) (a "subsequent" claim is a claim filed more than one year after the final denial of a previous claim). An ALJ awarded the new claim based on the automatic-entitlement provision of ACA Section 1556, and the Board affirmed that decision.

There is no question that the ACA restored automatic entitlement with regard to survivors' original claims. This Court so held in *Vision Processing, LLC, v. Groves*, 705 F.3d 551, 553-56 (6th Cir. 2013). *Accord West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 381-82 (4th Cir. 2011), *cert. den.* 133 S.Ct. 127 (Mem.) (2012); *B & G Constr. Co. v. Director, OWCP*, 662 F.3d 233, 238-51 (3d Cir. 2011). Eastover does not contend otherwise. Rather, the issues now before the Court are:

1. Does ACA Section 1556's reinstatement of automatic benefits apply to survivors' subsequent claims?<sup>2</sup>
2. What is the correct entitlement date (the date on which benefits commence) for a survivor's subsequent claim that is awarded by virtue of the ACA's restoration of automatic entitlement?

## **STATEMENT OF THE FACTS**

The issues presented in this case are both legal and procedural in nature. Thus, we will summarize the relevant statutory and regulatory provisions, as well as the procedural history of the case.

### **A. Statutory and Regulatory Background**

#### **1. Relevant Statutory Provisions**

In addition to compensating miners who are totally disabled by pneumoconiosis, Congress has also provided benefits to certain surviving dependents of coal miners afflicted with pneumoconiosis

---

<sup>2</sup> This issue is presented in another case pending before the Court: *Peabody Coal Co. v. Director, OWCP*, No. 12-4366. It is also presented in numerous cases pending before the Third and Fourth Circuits. See note 21, *infra*.

since the BLBA was first enacted in 1969. *Vision Processing*, 705 F.3d at 553 (citations omitted). The statute has been substantially amended over the years.<sup>3</sup> As a result, the requirements to secure survivors' benefits have changed over time. *See id.*

Prior to 1982, a deceased miner's qualifying dependents<sup>4</sup> could obtain survivors' benefits by showing that the miner's death was caused by pneumoconiosis or that the miner had been awarded total-disability benefits during his lifetime. *See, e.g.*, 30 U.S.C. §§ 901, 921, 922(a)(2) (1970). The survivors of such awarded miners were automatically entitled to benefits even if

---

<sup>3</sup> In addition to the 2010 amendments at issue here, the BLBA was significantly amended in 1972, 1977, and 1981. *See* Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150 (1972); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978); Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981); *Vision Processing*, 705 F.3d at 553.

<sup>4</sup> To qualify for survivors' benefits, a claimant also must satisfy the program's familial relationship and dependency requirements. *See* 20 C.F.R. §§ 725.212, .218, .222. There is no dispute that Mrs. Beverly satisfies these requirements.

pneumoconiosis played no role in the miners' deaths.<sup>5</sup> See 30 U.S.C. § 922(a)(2) (1970).

Congress reinforced the right to automatic survivors' benefits in the 1972 and 1977 amendments to the BLBA. See Pub. L. No. 92-303, 86 Stat. 150 (1972) and Pub. L. No. 95-239, 92 Stat. 95 (1978), codified as 30 U.S.C. §§ 901(a), 922(a)(2), 932(l) (1976 & Supp. III 1979); *Vision Processing*, 705 F.3d at 553. Of particular relevance, Congress enacted Section 932(l), which provided:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

Pub. L. No. 95-239, 92 Stat. 95, 100 (1978).

In 1981, Congress prospectively eliminated automatic benefits for the survivors of any miner who had not yet filed a claim. This change was effected by appending a limiting clause to 30 U.S.C. § 932(l), which then provided:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this

---

<sup>5</sup> Automatic benefits have also been described as “derivative benefits” or “unrelated death benefits.”

subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 [December 31, 1981]*.

Pub. L. 97-119, 95 Stat. 1635, 1644 (1981), codified as 30 U.S.C.

§ 932(l) (1982) (new clause emphasized). Consequently, unless a miner was awarded benefits in a disability claim filed before

January 1, 1982, his dependents were not entitled to automatic benefits. See 20 C.F.R. § 725.201(a)(2)(ii) (1984); *Pothering v.*

*Parkson Coal Co.*, 861 F.2d 1321, 1328 (3d Cir. 1988). Rather, they could receive survivors' benefits only after proving that

pneumoconiosis actually contributed to the miner's death. See *Brown v. Rock Creek Min. Co., Inc.*, 996 F.2d 812, 816 (6th Cir.

1993).

The 1981 amendments also tightened the BLBA's eligibility requirements by eliminating three statutory presumptions, including one known as the fifteen-year presumption. Under it, workers who had spent at least fifteen years in underground coal mines and suffered from a totally disabling pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis

and/or to have died due to pneumoconiosis. 30 U.S.C. § 921(c)(4) (1976). As with Section 932(l), the 1981 amendments limited Section 921(c)(4) to claims filed before January 1, 1982. Pub. L. No. 97-119, 95 Stat 1635, 1643 (1981), codified as 30 U.S.C. § 921(c)(4) (1982).

There things stood until 2010, when Congress once again amended the BLBA via Section 1556 of the ACA, which provides:

**SEC. 1556. EQUITY FOR CERTAIN ELIGIBLE SURVIVORS**

(a) REBUTTABLE PRESUMPTION.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence [which restricted the applicability of Section 921(c)(4) to claims filed before 1982].

(b) CONTINUATION OF BENEFITS.—Section 422(l) of the Black Lung Benefits Act (30 U.S.C. 932(l)) is amended by striking “, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981”.

(c) EFFECTIVE DATE.—The amendments made by this Section shall apply with respect to claims filed . . . after January 1, 2005, that are pending on or after the date of enactment of this Act [March 23, 2010].

Pub. L. No. 111-148, § 1556 (2010).

As correctly described by this Court, “[t]he point of § 1556(a) is to reinstate the fifteen-year rebuttable presumption

[of BLBA Section 921(c)(4); t]he point of § 1556(b) is to reinstate the right to automatic survivor benefits once found in [BLBA Section] 932(l) and now found there again[; and t]he point of § 1556(c) is to provide an effective date for § 1556(a) and § 1556(b).” *Vision Processing*, 705 F.3d at 554-55; *accord Stacy*, 671 F.3d at 382; *B & G Constr.*, 662 F.3d at 243-44 & n. 10.

## **2. Relevant Regulatory Provisions**

DOL’s current regulations, which became effective on January 19, 2001, implement the pre-ACA version of BLBA Section 932(l). Thus, the regulations provide that survivors may only recover on claims filed after 1981 upon proof that a miner’s death was due to pneumoconiosis.<sup>6</sup> 20 C.F.R. §§ 725.212, .218, .222.

With respect to subsequent claims, the regulations provide in

---

<sup>6</sup> DOL has issued a notice of proposed rulemaking, in which it proposes to revise the black lung program regulations in light of the ACA amendments, including the restoration of automatic entitlement on certain survivors’ claims. 77 Fed. Reg. 19456-19478 (Mar. 30, 2012). In particular, DOL proposes to revise 20 C.F.R. § 725.309(d) to provide for automatic entitlement on survivors’ subsequent claims. 77 Fed. Reg. 19468, 19478 (Mar. 30, 2012). A final regulation is to be promulgated by September 2013. The relevant portion of DOL’s regulatory agenda is available on the Internet at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1240-AA04>.

pertinent part that

(d) [a] subsequent claim shall be processed and adjudicated in accordance with the provisions [for adjudication of original claims], except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final.

\* \* \*

(3) [a] subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

\* \* \*

20 C.F.R. § 725.309(d). Thus, prior to the ACA amendments, the regulations mandated denial of a survivor's subsequent claim when "the denial of previous claim was based solely on a finding or findings that were not subject to change," such as when the miner did not die due to pneumoconiosis. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000).

DOL's regulations also prescribe the date on which a claimant's entitlement to benefits commences. Generally, a survivor is entitled to benefits as of the month of in which the miner

died. 20 C.F.R. § 725.503(c). This rule is subject to the proviso that “[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.” 20 C.F.R. § 725.309(d)(5). Thus, the Board has held that the entitlement date on a survivor’s subsequent claim is the month after the denial of the survivor’s prior claim became final. *Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-38/39 (BRB 2012), appeal docketed, 4th Cir. No. 12-1294.

## **B. Procedural History**

After spending thirty-four years in the mines, Mr. Beverly filed a claim for lifetime disability benefits in 1983.<sup>7</sup> Director’s Exhibit

---

<sup>7</sup> Mr. Beverly had filed a prior claim in 1970. Director’s Exhibit 1. This claim was denied the Social Security Administration (SSA) in 1971. *Id.* The 1970 claim was reconsidered by SSA under the 1972 amendments to the BLBA, and by DOL under the 1977 amendments. *Id.* SSA denied the claim again in 1973, and DOL denied it in 1981. *Id.* Mr. Beverly took no further action on this claim.

(DX) 1.<sup>8</sup> An ALJ ultimately awarded his claim in 1988. *Id.*

Eastover did not appeal that award, and it became final.<sup>9</sup>

Mr. Beverly died in December 1999. DX 9. Mrs. Beverly filed a claim for survivors' benefits on March 4, 2000. DX 1A. A DOL district director denied her claim in June 2000, finding that Mrs. Beverly failed to prove either that her husband had pneumoconiosis or that his death was due to the disease. Petitioner's Appendix (PA) at 21; *see* 20 C.F.R. §§ 718.202, .205. Mrs. Beverly took no further action on this claim. She filed a subsequent claim on February 1, 2007. DX 2; *see* 20 C.F.R. § 725.309(d). Since her first claim had been denied solely on grounds related to her husband's physical condition, a district director denied this claim in May 2007 pursuant to 20 C.F.R. § 725.309(d)(3). PA at 23, 24; *see* 65 Fed.

---

<sup>8</sup> Exhibit numbers refer to the administrative record created when this case was before the ALJ.

<sup>9</sup> Mr. Beverly also received a Kentucky state workers' compensation award for disabling pneumoconiosis. DX 1. Because the payments under the state award equaled or exceeded the federal benefit, his federal benefit was offset by the state award (*i.e.*, Eastover was not required to make payments to Mr. Beverly pursuant to the federal award). *See* 30 U.S.C. § 932(g); 20 C.F.R. § 725.533; *Director, OWCP v. Hamm*, 113 F.3d 23, 25 (4th Cir. 1997).

Reg. 79968 (Dec. 20, 2000). Mrs. Beverly took no further action on the 2007 claim, and the denial became final in June 2007. *See* 20 C.F.R. § 725.419(d).

After Congress amended the BLBA via the enactment of Section 1556 of the ACA, Mrs. Beverly filed another subsequent claim on September 19, 2010. DX 6. A DOL district director awarded this claim (PA at 26; DX 17), and Eastover asked for an ALJ hearing. DX 20, 21. Prior to the hearing, the ALJ issued an order directing Eastover to show cause why Mrs. Beverly's claim should not be awarded pursuant to ACA Section 1556. Eastover responded in opposition to an award.

The ALJ then issued a decision awarding Mrs. Beverly's 2010 claim. PA at 12. He found that Mrs. Beverly satisfied the familial relationship and dependency criteria for survivors under the BLBA. PA at 17. He also found, based on the award on Mr. Beverly's lifetime claim and the filing date of Mrs. Beverly's 2010 claim, that she was entitled to benefits under BLBA Section 932(l), as revived by ACA Section 1556. *Id.* The ALJ also awarded benefits as of March 2010, the month of the ACA's enactment, although he did not explain why he chose that date. PA at 18.

Eastover appealed to the Board, arguing that that Mrs. Beverly's subsequent claim was barred by 20 C.F.R. § 725.309(d)(3) and principles of finality and res judicata.<sup>10</sup> The Director urged affirmance of the ALJ's award, but modification of his entitlement-date determination. Eastover filed a reply, reiterating its prior arguments, but not addressing the entitlement-date issue.

The Board rejected Eastover's contentions and affirmed the ALJ's award of benefits. JA at 6, 8-9. It rejected the company's finality/res judicata and Section 725.309 arguments based on its prior decision in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (BRB 2012), appeal docketed, 4th Cir. No. 12-1294. JA at 11-12.

In *Richards*, a Board three-judge majority held that, in reinstating automatic benefits, Congress had "effectively created a 'change,' establishing a new condition of entitlement unrelated to

---

<sup>10</sup> Eastover also argued that Section 1556 violated the due-process clause of the Fifth Amendment, and that application of the provision was governed by the miner's claim-filing date, not the survivor's. The Board rejected these contentions, PA at 8-9, and Eastover does not pursue those arguments before the Court. In any event, the Court rejected similar due-process arguments in *Vision Processing*. 705 F.3d at 556-57.

whether the miner died due to pneumoconiosis.” 25 BLR at 1-37. A fourth judge concurred. 25 BLR at 1-41. Thus, the Board concluded that “the principles of res judicata addressed in Section 725.309 . . . are not implicated in [a subsequent survivor’s claim governed by ACA Section 1556] because entitlement thereto is not tied to relitigation of the prior finding that the miner’s death was not due to pneumoconiosis.”<sup>11</sup> 25 BLR at 1-37/38 (footnote and citation omitted).

Although it affirmed Mrs. Beverly’s award, the Board modified the entitlement date on her claim. It held, as a matter of law, that she was entitled to benefits as of July 2007, the month after the district director’s denial of her 2007 claim became final. PA at 9-10; *see* 20 C.F.R. §§ 725.309(d)(5); 725.419(d); *Richards*, 25 BLR at 1-38/39.

Eastover filed a timely motion for reconsideration, 20 C.F.R. § 802.407, in which it reiterated its previous contentions, and also

---

<sup>11</sup> One judge dissented in *Richards*, and would have held that automatic entitlement under ACA Section 1556 is not available in survivors’ subsequent claims. 25 BLR at 1-43/48.

argued that the Board erred in addressing entitlement date since no party has cross-appealed on that issue. The Board summarily denied this motion. PA at 4. Eastover then petitioned this Court for review. PA at 1.

### **SUMMARY OF THE ARGUMENT**

The Court should affirm Mrs. Beverly's award. The plain language of ACA Section 1556 applies without qualification to all claims that satisfy its time limitations. Thus, miners' and survivors' claims, both original and subsequent, that are filed after January 1, 2005, and are pending on or after March 23, 2010, are governed by the ACA amendments. Even if this ACA language were somehow ambiguous, the Court should defer to the Director's persuasive interpretation of Section 1556 as applying to survivors' subsequent claims. And, contrary to Eastover's contentions, the post-enactment statement of Senator Byrd (the sponsor of Section 1556) supports a wide application of Section 1556.

Awarding a survivor's subsequent claim does not undermine the finality of the denial of a prior claim. An original survivor's claim and a subsequent one are not the same—they involve different bases of relief, have different factual predicates, and cover

different periods of entitlement. Thus, the award of the subsequent claim respects the findings made on a prior claim. Since a subsequent claim does not involve the reopening of a prior decision, the Supreme Court's decisions in *Sebben* and *Plaut* are not implicated.

In addition, *res judicata* does not bar automatic entitlement on a survivor's subsequent claim. In restoring automatic entitlement, Congress created an entirely new and independent cause of action that was previously unavailable to Mrs. Beverly. This new cause of action for automatic entitlement is based on the administrative fact of the miner's lifetime award, not whether his death was caused by pneumoconiosis, the basis for Mrs. Beverly's prior claims. Thus the two causes of action arise out of different facts and are supported by different documentation. Furthermore, barring survivors' subsequent claims for automatic entitlement will not advance the underlying purposes of *res judicata*.

Finally, Congress gave no indication that DOL's long-standing entitlement-date regulations should not apply to claims awarded under Section 1556, including survivors' subsequent claims. Thus, those rules apply here, and Mrs. Beverly is entitled to benefits as

July 2007, the month after the denial of her prior claim became final. Moreover, even in the absence of a cross-appeal, the Board was right to fix on its own motion the ALJ's mistaken entitlement-date finding.

## **ARGUMENT**

**I. The automatic entitlement provisions of BLBA Section 932(l), as reinstated by ACA Section 1556, apply to all survivors' claims that satisfy Section 1556's time limitations, including subsequent claims.**

### **A. Standard of Review**

This case presents a legal question—whether the automatic-survivors'-benefits provision of BLBA Section 932(l), as revived by ACA Section 1556, is applicable to subsequent claims filed by survivors. The Court “reviews the legal issues raised in [an] administrative appeal *de novo*.” *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 301 (6th Cir. 2010) (citation omitted).

The Director has yet not promulgated a final regulation with respect to Section 1556.<sup>12</sup> Nonetheless, because the Director is the administrator of the BLBA, his interpretation of the statute,

constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). When the Director's position parallels the plain language of the statute, "[that] position has considerable 'power to persuade.'" *Vision Processing*, 705 F.3d at 556 (quoting *Skidmore*, 323 U.S. at 140).

**B. The plain language of Section 1556 permits automatic awards on survivors' subsequent claims.**

The Court should affirm the award of benefits on Mrs. Beverly's subsequent claim. Under the plain statutory language, the automatic-entitlement provision is applicable to *all* survivors'

---

<sup>12</sup> As noted above, the Director intends to promulgate a final regulation addressing ACA Section 1556 by September 2013. See note 6, *supra*. A final regulation would be entitled to *Chevron* deference. See *Chevron USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

claims, both original and subsequent filings. Even if there is some ambiguity in the provisions, the Court should defer to the Director's persuasive interpretation of the statute as providing automatic entitlement on survivors' subsequent claims.

In construing a statute, “the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Section 1556 states, without qualification, that the amendments to the BLBA “apply with respect to *claims* filed . . . after January 1, 2005, that are pending on or after [March 23, 2010].” Pub. L. 111-148, § 1556(c) (2010) (emphasis added). As this Court held in *Vision Processing*, these provisions are “painfully clear.”<sup>13</sup> 705 F.3d at 554. “Congress

---

<sup>13</sup> Eastover attempts to distinguish *Vision Processing* on the basis that Mr. Beverly’s lifetime federal award had been offset by his state workers’ compensation benefits. Pet. Br. at 11, n. 1; see note 9, *supra*. According to Eastover, because Mr. Beverly was not actually receiving payments on his federal award, there can be no “continuation” of payments to Mrs. Beverly. This argument is specious. Congress intended that state workers’ compensation programs (rather than the federal black lung program) be the (cont’d . . .)

signaled that the new rules [of Section 1556] apply to *all* claims [that satisfy Section 1556’s time limitations], whether they were miner claims or survivor claims.” 705 F.3d at 555 (emphasis in original); *accord Stacy*, 671 F.3d at 388; *see also B & G Constr.*, 662 F.3d at 249 (“[t]he language of section 932(l) in itself is not ambiguous. Quite to the contrary, it is clear and unequivocal.”).

As further support, the *Vision Processing* court explained that the Director’s natural, unqualified reading of the amendment “maintains consistency” by allowing the term “claims” to refer to all claims throughout Section 1556 and thus “respects the interpretive norm that ‘identical terms within an Act bear the same meaning.’” 705 F.3d at 555 (citation omitted); *accord Stacy*, 671 F.3d 388; *see also B & G Constr.*, 662 F.3d at 250. And the Court further contrasted Section 1556’s unqualified “claim” with “other places in the statute” where Congress wished to “distinguish[] claims filed by

---

(. . . cont’d)

primary source of compensation for disabled miners, *see* 30 U.S.C. § 932(g); *Carbon Fuel Co. v. Director, OWCP*, 20 F.3d 120, 121-22 (4th Cir. 1994), and that is why state benefits are offset against federal benefits. *Director, OWCP v. Hamm*, 113 F.3d at 25.

Payments under a state compensation program are merely in lieu of federal benefits, and do not vitiate the federal award to the miner or interrupt the “continuity” of payments to a survivor.

some people as opposed to others.” *Vision Processing*, 705 F.3d at 555. Thus, just as Section 1556 does not distinguish between miners’ and survivors’ claims, it does not distinguish between original and subsequent claims. Under the reasoning of *Vision Processing*, *Stacy*, and *B & G Constr.*, amended Section 932(l) applies to all survivors’ claims, both original and subsequent.<sup>14</sup>

Accordingly, the Court should affirm Mrs. Beverly’s award under the plain language of Section 1556. She filed her current claim after January 1, 2005, and that claim was pending on or after March 23, 2010. Her 2010 claim therefore satisfies the time limitations of Section 1556. Pub. L. 111-148, § 1556(c) (2010). Mrs. Beverly’s deceased husband obtained benefits on a claim during his lifetime, and Mrs. Beverly meets the dependency and relationship criteria for eligible survivors. Hence, she is automatically entitled to survivors’ benefits. 30 U.S.C. § 932(l);

---

<sup>14</sup> Should the Court find Section 1556 ambiguous, it should defer to the Director’s interpretation as permitting automatic entitlement on survivors’ subsequent claims for the reasons set forth above. *Skidmore*, 323 U.S. at 140; *Vision Processing*, 705 F.3d at 556; *Stacy*, 671 F.3d at 388.

Pub. L. 111-148, § 1556(b) (2010).

**C. Senator’s Byrd’s post-enactment statement does not support Eastover’s position.**

Eastover does not come to grips with either the plain language of Section 1556 or this Court’s decision in *Vision Processing*.<sup>15</sup>

Rather, citing Senator Byrd’s post-enactment statement regarding Section 1556, the company claims Congress did not intend to bring survivors’ subsequent claims within the ambit of statute. Pet. Br. at 12.

Eastover specifically relies on Senator Byrd’s statement that Section 1556 was meant to apply to “widows who never filed for

---

<sup>15</sup> Eastover does contends that, notwithstanding Congress’ amendment of the BLBA, DOL’s pre-ACA subsequent-claim *regulation*, 20 C.F.R. § 725.309, mandates the denial of the Mrs. Beverly’s 2010. Pet. Br. at 12-14. This argument has no merit. To the extent that the regulation would require that Mrs. Beverly’s subsequent claim be denied, it is trumped by Congress’ revision of the statute. *See, e.g., Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.\*\* (Fed. Cir. 1998) (“Statutes trump conflicting regulations”); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir.1989) (“statutory language...prevail[s] over inconsistent regulatory language”). Moreover, Section 725.309, promulgated nearly a decade before the ACA amendments, simply does not anticipate the fundamental changes in the legal landscape for survivors occasioned by the ACA’s restoration of automatic entitlement. It is for this reason that DOL has proposed changes in the regulation. 77 Fed. Reg. 19468.

benefits following the death of a husband,” and his reference to 20 C.F.R. § 725.309(c) (merger of claims) rather than 20 C.F.R. § 725.309(d) (subsequent claims). 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010).

This reliance is misplaced, as the Senator’s statement confirms the wide reach of Section 1556. According to Senator Byrd,

section 1556 of the [ACA] is intended to apply to *all claims* filed after January 1, 2005, that are pending on or after the date of enactment of that act.

It is clear that the section will apply to *all claims* that will be filed henceforth, *including* many claims filed by miners whose prior claims were denied or by widows who never filed for benefits following the death of a husband[, . . . and that it] applies immediately to *all pending claims*, *including* claims that were finally awarded or denied prior to [March 23, 2010], for which the claimant seeks to modify a denial . . . .

*Id.* (emphases added). His references to the scope of the statute as “including” certain types of claims is merely an illustration of the claims to which Section 1556 applies, not an exhaustive list. *Cf. Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (in statutory construction, “the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative

application of the general principle”) (citations omitted).

Indeed, Senator Byrd did not specifically mention the largest class of potential claims—original claims filed by miners, either pending or “filed henceforth.” Under Eastover’s argument, Senator Byrd’s failure to specifically cite miners’ original claims would preclude application of ACA Section 1556 to those claims. This certainly was not Congress’ intent, and would be contrary to the express language of the statute. Similarly, Senator Byrd’s omission of survivors’ subsequent claims—the smallest set of potential claims—is not determinative of the applicability of Section 1556 to those claims. In short, Senator Byrd’s statement will not bear the weight Eastover places on it.

**D. Automatic entitlement on survivors’ subsequent claims is not barred by principles of finality.**

**1. An award of a survivor’s subsequent claim based on automatic entitlement respects the finality of decisions on a prior claim.**

Eastover’s primary defense to Mrs. Beverly’s 2010 subsequent claim is that DOL finally determined that her husband did not die due to pneumoconiosis, and that Section 1556 cannot strip that prior determination of its finality or

validity. Pet. Br. at 7-12. Although true, this argument is irrelevant.

The award of benefits on Mrs. Beverly's 2010 subsequent claim does not undermine the finality of the denials of her prior claims. It is undisputed that a claimant in a subsequent claim "is . . . precluded from collaterally attacking the prior denial of benefits." *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995). Indeed, for purposes of a subsequent claim, "the correctness of [the prior decision's] legal conclusion" must be accepted in adjudicating the latter application. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc). Thus, as this Court recently affirmed, albeit in the context of a miner's claim, the adjudication of a subsequent claim gives "full credit" to the finality of the prior denied claim.<sup>16</sup> *Buck Creek Coal*

---

<sup>16</sup> The regulations governing the entitlement date for a survivor's claim are further proof that the prior denial remains inviolate. Mrs. Beverly's 2000 claim, if awarded, would have resulted in an award of benefits dating back to the month of her husband's death, December 1999. See 20 C.F.R. § 725.503(c). However, "[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." 20 C.F.R. § 725.309(d)(5). Thus, (cont'd . . .)

Co., 706 F.3d at 759-60 (quoting *U.S. Steel Min. Co., LLC, v. Director, OWCP*, 386 F.3d 977, 990 (11th Cir. 2004)).

Eastover’s finality argument is implicitly premised on the view that a “claim” refers to an operator’s general liability to a particular claimant without regard to how many applications she may have filed, when she filed them, or the theories on which she seeks to recover. Thus, in this view, if the company successfully defends against a claim by a particular claimant, any subsequent claim would necessarily be a “reopening” of the prior denial, and would undermine the finality of the prior decision.

That, however, is not what “claim” means under the BLBA. Under the plain language of the statute (in particular, Section 932), a “claim” refers to a distinct application for benefits. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 449 (8th Cir. 1997); accord 20 C.F.R. § 725.101(a)(10) (defining “claim” as a “written assertion of entitlement to benefits” submitted in an authorized form and

---

(. . . cont’d)

because Mrs. Beverly’s 2000 and 2007 claims were denied, she can receive benefits on her current claim only for the period beginning July 2007. That is the month after the district director’s denial of her prior claim became final. See p. 12, *supra*.

manner). Thus, a subsequent claim and a prior one “are not the same.” *Lisa Lee Mines*, 86 F.3d at 1362.

This rule is not altered by applying amended Section 932(l) to a survivor’s subsequent claim—the conclusions in the prior denial (namely, that the miner did not die due to pneumoconiosis and that the survivor is not entitled to any benefits prior to the date of that denial) remain intact. Rather, the new amendments simply give rise to a new cause of action (automatic entitlement) that was not litigated in the prior claims and is the basis for the pending claim. Thus, Eastover’s finality argument is off the mark, and should be rejected by the Court.

**2. Automatic entitlement is not barred by the Supreme Court’s decisions in *Sebben* and *Plaut*.**

Eastover places much reliance on two Supreme Court decisions—*Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)—in its finality argument. But those cases (and the doctrines they embody) provide no support for Eastover’s argument.

*Sebben* stands for the principle that incorrect decisions stand if not appealed. It involved the 1977 Black Lung Reform Act

amendments that required DOL to reopen and readjudicate certain claims using less-restrictive entitlement criteria. 488 U.S. at 110-11. DOL reopened and readjudicated these claims, but was sued by two classes of claimants for allegedly failing to use the less-restrictive criteria. The first class of claimants had timely appealed the administrative denials of their claims and their appeals remained pending. The second class of claimants, however, had allowed their administrative denials to become final and was seeking to reopen their claims *again*. 488 U.S. at 112-13.

Although the Court agreed that DOL had failed to use the less-restrictive criteria in adjudicating the reopened claims, it nevertheless upheld the denial of the second class's claims.<sup>17</sup> In doing so, it rejected the second class's argument that their finally-denied claims should be reopened a second time—indeed for readjudication of the exact same factual elements—based on the less-restrictive criteria. 488 U.S. at 122. It explained that those claimants had received the required reopening and readjudication

---

<sup>17</sup> The Court held that the first class of claimants (those whose administrative denials had not become final) was entitled to readjudication of their claims under the less-restrictive criteria.

under the 1977 amendments albeit under the wrong legal standard. *Id.* But, unlike the first class, “they chose instead to accept the incorrect adjudication. They are in no different position from any claimant who seeks to avoid the bar of res judicata on the ground that the decision is wrong.” 488 U.S. at 122-23. Thus, the *Sebben* reopening discussion, properly understood, is no more than a straight-forward application of the teaching of *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1982)—that incorrect decisions stand when they are not appealed.

In contrast, no one asserts that Mrs. Beverly’s prior claims were wrongly denied. As discussed above, the denial of those claims remains valid and final, even if her current claim is awarded under Section 1556. Rather, Mrs. Beverly (unlike the claimants in *Sebben*) is pursuing a new claim, based on a new cause of action. Thus, her 2010 subsequent claim does not implicate the concerns elucidated in *Sebben*.

Likewise, the Supreme Court’s decision in *Plaut*, provides no

shelter to Eastover.<sup>18</sup> In *Plaut*, the Court invalidated legislation that abridged the separation-of-powers principle. The *Plaut* plaintiffs filed suit in federal district court alleging securities fraud under Section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. § 78j(b). 514 U.S. at 213. The suit was then dismissed as time-barred as a result of the Supreme Court’s decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). 514 U.S. at 214.

In response, Congress enacted Section 27A of the 1934 Act,

---

<sup>18</sup> In addition to *Plaut*, Eastover cites an unpublished decision from the Tenth Circuit, *Oklahoma Chapter of the Am. Academy of Pediatrics v. Fogarty*, 2010 WL 3341881 (10th Cir. Jul. 20, 2010). That decision, of course, has no precedential authority. Nor does it have any persuasive value in the context of the instant case. *Fogarty* involved a motion for relief from a final judgment—filed three years after the Tenth Circuit’s mandate issued—explicitly seeking to reopen a final decision of an Article III court in light of an amendment to a Medicaid statute, 42 U.S.C. § 1396a, contained in the ACA. *Id.* at \*2. The court denied the motion, noting that if Congress had required (as opposed to the plaintiffs requesting) reopening of the court’s prior final judgment, such a requirement would be impermissible under *Plaut*. *Id.* The court, however, held that the amended statute did not require reopening of the final decisions of Article III courts. *Id.* Thus, *Fogarty* did not involve either a prior final decision by an administrative agency or a Congressional requirement to reopen the final decision of an Article III court.

codified at 15 U.S.C. § 78aa-1, to clarify the statute of limitations applicable to suits under Section 10(b). 514 U.S. at 214-15.

Section 27A(b), 15 U.S.C. § 78aa-1(b), specifically made the new statute-of-limitations provision applicable to certain suits that had already been finally dismissed as time-barred (including that of the *Plaut* plaintiffs) and, as a result, allowed the plaintiffs to reinstate their dismissed claims. 514 U.S. at 214-17. Thus, Section 27A(b) effectively “require[d] federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*.” 514 U.S. at 217.

The Supreme Court struck down Section 27A(b) as a violation of the constitutional separation-of-powers principle. 514 U.S. at 217-30. It explained that Article III of the Constitution established a “judicial department,” with “the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts . . . — with an understanding . . . that a judgment conclusively resolves the case because [the judiciary] render[s] dispositive judgments.” 514 U.S. at 218-19 (internal quotations and citation omitted) (emphasis in original). Section 27A(b), “[b]y retroactively commanding the federal courts to reopen final judgments,” abridged

this principle. 514 U.S. at 219.

*Plaut* is of no relevance here, because no prior decision by an Article III court is implicated. Both of Mrs. Beverly's prior claims were denied at the administrative level (by a DOL district director). Even if Section 1556 required the reopening of those decisions (which it does not), the Supreme Court has long recognized that Congress can require administrative agencies to reopen their final determinations. Indeed, in *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940), Congress enacted legislation specifically directing the reopening of a compensation claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, that had been finally denied by an administrative agency. 309 U.S. at 375-76. The Supreme Court rejected a constitutional challenge to this legislation, as it did not infringe on the domain of the judiciary. 309 U.S. at 378-81. And *Plaut* reaffirmed the validity of *Paramino Lumber*. 514 U.S. at 232 (distinguishing and not calling into question precedent "upholding legislation that altered rights fixed by final judgments of non-Article III courts . . . or administrative agencies").

More broadly, however, *Plaut* and the separation-of-powers

principle have no relevance with respect to ACA Section 1556. As argued *supra* at 25-28, ACA Section 1556, unlike Section 27A of the 1934 Act, does not require the reopening of final decisions, judicial or administrative.<sup>19</sup> Rather, the statute changes underlying substantive law and applies only to claims pending on or after its enactment date (March 23, 2010). Pub. L. No. 111-148 § 1556(b), (c) (2010). In other words, Section 1556 is not a legislative veto of prior decisions. Because there is no reopening, *Plaut* and the separation-of-powers principle simply are not implicated.

### **3. Res judicata does not bar awards of survivors' subsequent claims under Section 1556.**

Although it does not develop the notion in any detail, Eastover's argument that Mrs. Beverly 2010 claim is barred by principles of finality is inextricably linked to the doctrine of res judicata. See Pet. Br. at 11-12. But res judicata does not bar Mrs.

---

<sup>19</sup> Congress, of course, knew how to mandate the reopening of black lung claims if it so chose. See Pub. L. Nos. 92-303, 86 Stat. 156 (1972) and Pub. L. No. 95-239, 92 Stat. 103-105 (1978) (requiring reopening of previously denied claims pursuant to 1972 and 1977 amendments to BLBA); *Director, OWCP v. Goudy*, 777 F.2d 1122, 1125 (6th Cir. 1985).

Beverly’s 2010 claim because that claim for automatic entitlement is a new cause of action that is different from (and was unavailable during) her original claim.

“[R]es judicata forecloses relitigation of matters that were determined, or should have been raised, in a prior suit in which a court entered a final judgment on the merits.” *Fellowship of Christ Church v. Thorburn*, 758 F.2d 1140, 1143 (6th Cir. 1985) (citation omitted); see generally 18 James Wm. Moore *et al.*, Moore’s Federal Practice § 131.10(1)(a) (3d ed. 2008). It bars a cause of action when four elements are present:

1. A final decision on the merits in the first action . . . ;
2. The second action involves the same parties . . . as the first;
3. The second action raises an issue actually litigated or which should have been litigated in the first action;
4. An identity of the causes of action.

*Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992) (citation omitted).

While the first two requirements are met here, Eastover’s res judicata defense founders on the third and fourth elements.

Element three turns on whether the second action involves claims

that were or could have been raised in the prior action. *See Winget v. J.P. Morgan Chase Bank, N.A.*, 537 F.3d 565, 579 (6th Cir. 2008). Claims that existed at the time of the first suit and *could* have been brought in that action are barred by res judicata. *Id.* But a claim that did not exist at the time of the prior proceeding, because it *could not* have been raised in the prior proceeding, is not so barred. *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (citing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)).

Although this principle is typically invoked when new facts give rise to new claims, several courts of appeals have recognized that a *statutory amendment* subsequent to a first action can create a new cause of action that is not barred by res judicata, *even where the new action is based on the same facts as the prior one.* *Alvarez-Velez v. Mukasey*, 540 F.3d 672, 678 (7th Cir. 2008); *Maldonado v. U.S. Att'y Gen'l*, 664 F.3d 1369 (11th Cir. 2011); *Ljutica v. Holder*, 588 F.3d 119, 127 (2d Cir. 2009); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002); *see also Moore's Federal Practice*, ¶131.22[3] (“when a new statute provides an independent basis for relief which did not exist at the time of the prior action, a second action on the new statute may be justified”).

Applying these principles here, Mrs. Beverly's 2010 subsequent claim for automatic entitlement is not barred by res judicata. Section 932(l) was not applicable when she filed her prior claims. Indeed, its very unavailability (by congressional amendment in 1982) gave rise to its subsequent restoration through Section 1556's 2010 enactment. When Congress reinstated the automatic-entitlement provision of Section 932(l), it "effectively created a 'change,' establishing a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis," *Richards*, 25 BLR at 1-37—*i.e.*, it created a new basis for relief that did not previously exist. Thus, Mrs. Beverly's subsequent claim (on which automatic entitlement is available) represents a different statutory basis for relief than her original claim.

Eastover's argument also fails with respect to the fourth element of res judicata—identity of the cause of action. "Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" *Sanders Confectionary Products*, 973 F.2d at 484 (quoting *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir.

1981)). As explained by the Third Circuit, identity of the causes of action is *not* determined by the similarity in the ultimate remedy or the existence of some common facts, but rather “the focus of the inquiry is whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same.” *Duhaney v. Att’y Gen’l of the U.S.*, 621 F.3d 340, 348 (3d Cir. 2010) (internal quotations and citations omitted).

Comparison of the underlying factual elements here demonstrates that Mrs. Beverly’s prior claims and her 2010 subsequent claim are not the same cause of action. In her original claim, Mrs. Beverly could recover only by proving that her husband’s death was due to pneumoconiosis.<sup>20</sup> PA at 21; *see* 20 C.F.R. § 718.205; *Brown*, 996 F.2d at 816. Resolution of that issue was based on a review of medical evidence. The fact-finder was required to determine what condition or conditions resulted in Mr. Beverly’s death, as well as the etiology of those conditions, in

---

<sup>20</sup> And her 2007 claim was denied on the same basis as her 2000 claim. DX 2; *see* 20 C.F.R. § 725.309(d)(3).

particular, whether pneumoconiosis hastened Mr. Beverly's death from metastatic colon cancer. *See* PA at 21; DX 1A; Pet. Br. at 2. In contrast, in this subsequent claim, the cause of Mr. Beverly's death is not at issue, and medical evidence is wholly irrelevant. *See* PA at 16. Rather, entitlement for Mrs. Beverly turns solely on an administrative fact—whether her husband had been awarded benefits in his lifetime claim—that was irrelevant in Mrs. Beverly's prior unsuccessful claims. Thus, the current and prior proceedings are not based on the same “critical acts and necessary documentation.” *Duhaney*, 621 F.3d at 349; *Sanders Confectionary*, 973 F.2d at 484.

Moreover, precluding Mrs. Beverly's 2010 claim would not further the purposes of res judicata. *See Westwood Chemical Co.*, 656 F.2d at 1227 (“The purpose of res judicata is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources.”) (citations omitted). In cases like this one, where the subsequent claim is based on automatic entitlement, there will be little need for factual development. Indeed, once the courts decide the legal question regarding the applicability of the ACA amendments to survivors’

subsequent claims, there will likely be *no* litigation in most cases.<sup>21</sup> Here, for example, Eastover has no defense whatsoever to the merits of Mrs. Beverly's automatic-entitlement claim. Indeed, as is apparent from the absence of any factual defense here, the doctrine is not being used as a shield against harassing lawsuits or to conserve resources, but as a sword to defeat a plainly meritorious claim. And this is so not only here, but in the vast majority (if not all) of the appeals involving survivors' subsequent claims that are pending before the courts.

In short, survivors' subsequent claims based on the automatic-entitlement criteria of BLBA Section 932(l) are not barred

---

<sup>21</sup> In addition to the two cases pending before this Court, *see* note 2, *infra*, the issue of whether automatic entitlement is available on a survivor's subsequent claim is presented in approximately twenty cases pending before the Fourth Circuit. That court designated *Union Carbide Corp. v. Richards*, No. 12-1294(L) and *Peabody Coal Co. v. Director, OWCP (Morgan)*, No. 12-1978, as the lead cases and consolidated them (while holding the remainder in abeyance). The court heard oral argument in *Richards/Morgan* on March 21, 2013.

The same issue is presented in two cases pending before the Third Circuit: *Marmon Coal Co. v. Director, OWCP*, No. 12-3388, and *Skytop Contracting Co. v. DiCasimirro*, No. 12-4075. Oral argument is scheduled in *Marmon Coal* for May 14, 2013, and in *Skytop Contracting* for June 26, 2013.

by res judicata. Rather they represent new causes of action that are not precluded by prior denials based on a survivor's failure to prove that a miner's death was due to pneumoconiosis.

**II. The entitlement date on a survivor's subsequent claim is the month after the denial of her prior claim became final.**

The Board modified the ALJ's finding that benefits should commence as of March 2010 and held, as a matter of law, that Mrs. Beverly was entitled to benefits as of July 2007, the month after the denial of her 2007 claim became final.

Eastover raises two objections to this action. Neither need long detain the Court.

First, Eastover argues that the entitlement date on Mrs. Beverly's 2010 subsequent claim (and, apparently, on any claim effected by Section 1556—miner's or survivor's, original or subsequent) cannot predate March 23, 2010, the enactment date of the ACA. This is incorrect.

Under DOL's regulations, an eligible survivor is generally entitled to benefits "beginning with the month of the miner's death, or January 1, 1974, whichever is later." 20 C.F.R. § 725.503(c) (emphasis added). For subsequent claims, however, the entitlement

period is more limited. In order to give effect to the denial of a prior claim, a claimant can only receive benefits beginning with the month after the denial of the prior claim became final. 20 C.F.R. § 725.309(d)(5). This regulatory framework constituted the controlling law at the time the ACA was enacted.

Congress is presumed to know the law when it legislates. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). This includes knowledge of existing regulations. *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57 (1st Cir. 2013); *Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13, 1-18 (BRB 2011), *aff'd* No. 12-3037 (6th Cir. Feb. 1, 2013) (unpub. order), *reh'g petition filed*. And “it follows that, absent a clear manifestation of contrary intent, a newly-created or revised statute is presumed to be harmonious with existing law . . . .” *Johnson v. First Nat'l Bank of Montevideo, Minn.*, 719 F.2d 270, 277 (8th Cir. 1983).

In amending the BLBA via ACA Section 1556, Congress gave no indication that it wished to alter the long-established rules for determining the entitlement date on awarded claims.

Consequently, those rules govern all claims awarded pursuant to Section 1556, including survivors' subsequent claims. As a result,

automatic-entitlement awards on survivors' claims are payable from either the month of the miner's death (original claims) or the month after the denial of a prior claim became final (subsequent claims). *Dotson*, 25 BLR at 1-18 (original claims); *Richards*, 25 BLR 1-38/39 (subsequent claims).

Here, Mrs. Beverly filed prior claims in 2000 and 2007, both of which were denied. The 2007 claim was denied by a DOL district director in May 2007, and that denial became final in June 2007. *See* 20 C.F.R. § 725.419(d). Thus, the correct entitlement date on her 2010 claim is July 2007.<sup>22</sup> *See* 20 C.F.R. § 725.309(d)(5);

---

<sup>22</sup> Eastover suggests that because Mrs. Beverly could not pursue an automatic-entitlement claim before March 23, 2010, her entitlement period cannot begin before that date. Pet. Br. at 15. This is essentially an attempt to argue that Section 1556 cannot be applied retroactively. This Court, however, has already made clear that it can. *Vision Processing*, 705 F.3d at 556-58; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976) (affirming retroactive application of BLBA in general). Moreover, Eastover simply confuses the ACA's time limits identifying the claims that will be covered (those filed after January 1, 2005 and pending on or after March 23, 2010) with an award of benefits resulting from such a timely-filed claim. As noted above, the ACA made no change in the existing benefit commencement dates. By contrast, Congress knows how to and has constrained benefits eligibility periods when it so chooses. *See* 30 U.S.C. § 932(e)(2) (providing for any claim filed after December 31, 1973, that benefits cannot commence (cont'd . . .))

*Richards*, 25 BLR at 1-38/39. In arguing for a March 2010 date, Eastover is asking this Court to create out of whole cloth an entitlement-date rule that has no basis in the statute or the regulations.

Second, Eastover argues that the Board could not modify Mrs. Beverly's entitlement date because neither she nor the Director cross-appealed the ALJ's finding that she was entitled to benefits as of March 2010 (which was entirely unexplained). Admittedly, neither Mrs. Beverly nor the Director filed a cross-appeal in this case.<sup>23</sup> See 20 C.F.R. § 802.205(b).

---

(. . . cont'd)

before January 1974). The absence of any such provision cabining entitlement periods in the ACA suggests that Congress intended for DOL's pre-existing entitlement-date regulation to govern. See *Miles*, 498 U.S. at 32; *Rubin*, 709 F.3d at 57; *Dotson*, 25 BLR at 1-18.

<sup>23</sup> While absent a cross-appeal the Board will not generally consider issues raised by a prevailing party that would expand its rights under an ALJ's decision, *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 (BRB 1983), such rules are prudential and not jurisdictional. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999) (citations omitted); cf. *Consolidation Coal Co. v. McMahan*, 77 F.3d 898, 903-04 (6th Cir. 1996) (court will consider issue not preserved in cross-appeal to Board where appeal would have been futile).

Even in the absence of a cross-appeal on the ALJ’s entitlement-date finding, however, the Board was empowered to modify the ALJ’s decision on its own motion. The Board, “[i]f deemed necessary to reach the correct result and fundamental to the fair administration of the [BLBA], . . . will *sua sponte* consider points not raised by any party.” *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1-446 (BRB 1986) (citations omitted); *see also* 20 C.F.R. § 802.404(a) (Board can modify ALJ decisions). Moreover, the Board has held that it “must raise . . . issues *sua sponte* when, after the decision is made below and the case is pending on appeal, there has been a judicial interpretation of existing law which, if applied, might materially alter the result.” *Toler v. Eastern Assoc. Coal Corp.*, 12 BLR 1-49, 1-50 (BRB 1988). Notably, this Court follows similar policies. *See Youghiogheny & Ohio Coal Co.* 200 F.3d at 955 (citing, *inter alia*, the Board’s decision in *Mansfield*).

Here, the Board issued its decision in *Richards*—which clarified that the existing entitlement-date regulations apply to survivors’ subsequent claims awarded under ACA Section 1556 and BLBA Section 932(l)—after the ALJ’s decision and while this case was pending before the Board. In these circumstance, it was

appropriate for the Board to apply *Richards* and the existing-entitlement-date regulations, even though no party had cross-appealed on that issue. *See Toler*, 12 BLR at 1-50; *Mansfield*, 8 BLR at 1-446. Thus, the Court should affirm the Board's holding that Mrs. Beverly is entitled to benefits as of July 2007.<sup>24</sup>

---

<sup>24</sup> In the event that the Court determines that the Board erred in modifying the ALJ's entitlement-date finding, then it should reinstate the ALJ's finding.

## **CONCLUSION**

The Director requests that the Court affirm the decisions of the ALJ and the Board awarding Mrs. Beverly's claim.

Respectfully submitted,

M. PATRICIA SMITH  
Solicitor of Labor

RAE ELLEN JAMES  
Associate Solicitor

GARY K. STEARMAN  
Counsel for Appellate Litigation

s/Barry H. Joyner  
BARRY H. JOYNER  
Attorney, U.S. Department of Labor  
Office of the Solicitor  
Frances Perkins Building  
Suite N-2119  
200 Constitution Ave, N.W.  
Washington, D.C. 20210  
(202) 693-5660  
joyner.barry@dol.gov

Attorneys for the Director, Office  
of Workers' Compensation Programs

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 9,260, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

s/Barry H. Joyner  
BARRY H. JOYNER  
Attorney  
U.S. Department of Labor

## **CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 2013, an electronic copy of this brief was served through the CM/ECF system on the following:

Ronald E. Gilbertson, Esq.  
Ronald.Gilbertson@huschblackwell.com

Ryan C. Gilligan, Esq.  
rgilligan@wrrrlawfirm.com

s/Barry H. Joyner  
BARRY H. JOYNER  
Attorney  
U.S. Department of Labor