

No. 13-3576

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

**QUEEN MOUNTAIN MINING CORPORATION,**

**Petitioner**

**v.**

**IRENE GIBSON (widow of Herbert Gibson)**

**and**

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

**Respondents**

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**On Petition for Review of an Order of the Benefits  
Review Board, United States Department of Labor**

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**BRIEF FOR THE FEDERAL RESPONDENT**

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STATEMENT REGARDING ORAL ARGUMENT

The Director agrees with Petitioner Queen Mountain Mining Corporation and Respondent Irene Gibson that oral argument is unnecessary in this case.

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QUEEN MOUNTAIN MINING CORPORATION,

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v.

IRENE GIBSON (widow of Herbert Gibson)

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DEPARTMENT OF LABOR,

Respondents

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BRIEF FOR THE FEDERAL RESPONDENT

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This appeal involves a claim for survivor's benefits filed by Irene Gibson pursuant to the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, as amended by Section 1556 of the Affordable Care Act (ACA), Pub. L. No. 111-148, § 1556 (2010). Mrs. Gibson is the widow of Herbert Gibson, a former coal miner who was awarded BLBA benefits prior to his death. A Department of Labor (DOL) administrative law judge (ALJ) awarded Mrs. Gibson's survivor's claim,

and the Benefits Review Board affirmed. Queen Mountain Mining Corporation (Queen Mountain or the coal company), Mr. Gibson's former employer and the liable coal mine operator, has petitioned this Court for review of the Board's decision. The Director, Office of Workers' Compensation Programs (OWCP), responds in support of the award.<sup>1</sup>

### **STATEMENT OF THE ISSUES**

The BLBA provides lifetime disability benefits to coal miners and 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 this automatic survivors' benefit 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, which restored automatic survivors' benefits for claims filed after January 1, 2005, and pending on or after March 23, 2010.

Mr. Gibson, who received a lifetime disability award, died in June 2004. Shortly thereafter, Mrs. Gibson filed a claim for survivors' benefits. DOL's OWCP finally denied this claim in May 2005 because the evidence failed to prove

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<sup>1</sup> The Black Lung Disability Trust Fund has paid Mrs. Gibson's survivor's benefits on an interim basis. *See* 20 C.F.R. § 725.522(a). If the Court affirms her award, Queen Mountain will have to reimburse the Trust Fund for the payments made, *see* 20 C.F.R. § 725.602, in addition to paying continuing benefits to her.

that pneumoconiosis contributed to Mr. Gibson's death, as required by the BLBA at that time. Mrs. Gibson filed a subsequent claim in July 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 this claim based on the automatic-entitlement provision of ACA Section 1556, and made the award effective June 2004, the month of Mr. Gibson's death. The Board affirmed the ALJ's decision, but corrected the onset date to July 2005 (the month after the month in which the denial of Mrs. Gibson's prior survivor's claim became final).

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), and Queen Mountain does not contend otherwise. Rather, the issues now before the Court concern the fact that Mrs. Gibson's claim was a *subsequent* claim:

1. Does ACA Section 1556's reinstatement of automatic benefits apply to survivors' subsequent claims?
2. Does *res judicata* bar application of ACA Section 1556 to survivors' subsequent claims?

3. Did the Board properly correct the entitlement date on Mrs. Gibson's subsequent survivor's claim?<sup>2</sup>

## STATEMENT OF THE FACTS

The issues presented in this case are both legal and procedural in nature. Thus, this brief 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

Congress has provided benefits to certain surviving dependents of coal miners afflicted with pneumoconiosis since the BLBA was first enacted in 1969. *Vision Processing*, 705 F.3d at 553 (citations omitted). The requirements for securing those survivors' benefits, however, have changed over time as a result of

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<sup>2</sup> Similar issues have been presented and briefed in three other cases pending before this Court: *Peabody Coal Co. v. Director, OWCP [Hill]*, No. 12-4366; *Eastover Mining Co. v. Beverly*, No. 12-4402; and *Consolidation Coal Co. v. Maynes*, No. 12-3653. *Hill* is scheduled for oral argument on Oct. 3, 2013; *Beverly* and *Maynes* are fully briefed. Similar issues are being briefed in the Eleventh Circuit in *Drummond Co., Inc. v. Gardner*, No. 13-11800. And the Third and Fourth Circuits have recently issued published decisions accepting the Director's position that Section 1556's automatic entitlement provision applies to survivors' subsequent claims. *Marmon Coal Co. v. Director, OWCP*, --- F.3d ---, 2013 WL 4017160 (3d Cir. Aug. 8, 2013); *Union Carbide Corp. v. Richards [Richards]*, 721 F.3d 307 (4th Cir. 2013).

substantial statutory amendments.<sup>3</sup> *See id.*

Prior to 1982, a deceased miner's qualifying dependents 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.<sup>4</sup> *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 pneumoconiosis played no role in the miners' deaths. *See* 30 U.S.C. § 922(a)(2) (1970).

Congress further reinforced this 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

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<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 must satisfy the program's relationship and dependency requirements. *See* 20 C.F.R. §§ 725.212, .218, .222. There is no dispute that Mrs. Gibson met these requirements.

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 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 could not receive 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 by 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).

These things stood until 2010, when Congress once again amended the BLBA via Section 1556 of the ACA and restored the automatic entitlement provision and the fifteen-year rebuttable presumption to claims filed after January 1, 2005, and pending on March 23, 2010:

**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:

The 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.

## **2. Relevant Regulatory Provisions**

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

With respect to subsequent claims, the regulations provide in pertinent part that:

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.

20 C.F.R. § 725.309(d).

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)(3). Thus, prior to the ACA amendments, this regulation (which codifies res-judicata principles in the black-lung context) mandated denial

of a survivor's subsequent claim when "the denial of the previous claim was based solely on a finding or findings that were not subject to change," such as whether the miner did or did not die due to pneumoconiosis.<sup>5</sup> 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 the miner's death. 20 C.F.R. § 725.503(c). This rule is subject to a proviso relevant to subsequent claims: "In 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 entitlement date on a survivor's subsequent claim is the month after the month in which the denial of the survivor's prior claim became final. *Richards*, 721 F.3d at 317 n.5; *Skytop Contracting Co. v. Director, OWCP*, -- F. App'x --, 2013 WL 4106409, at \*2 (3d Cir. 2013).

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<sup>5</sup> DOL has issued a notice of proposed rulemaking to take into account the ACA amendments. 77 Fed. Reg. 19456-19478 (Mar. 30, 2012). In particular, DOL proposes to revise 20 C.F.R. § 725.309(d) to specifically provide for automatic entitlement on survivors' subsequent claims. 77 Fed. Reg. 19468, 19478 (Mar. 30, 2012).

## **B. Procedural History**

After spending at least twenty-four years in the mines, Mr. Gibson filed a claim for lifetime disability benefits in 1992. DX 1.<sup>6</sup> An ALJ awarded his claim, and the Board affirmed. *Id.* Queen Mountain did not appeal this award and paid benefits until Mr. Gibson's death in June 2004, DX 3.

Mrs. Gibson filed a claim for survivors' benefits that same month. DX 2. A DOL district director denied her claim on May 31, 2005, because the evidence failed to establish that her husband's death was due to pneumoconiosis. *Id.* Mrs. Gibson did not appeal this decision, which became final thirty days later. *See Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-53 (6th Cir. 1999). In July 2010 – after the enactment of the ACA – Mrs. Gibson filed a subsequent claim, the claim presently before the Court. DX 3. A DOL district director awarded this claim, DX 5, and Queen Mountain thereupon requested an administrative hearing, DX 6. The case was then assigned to Administrative Law Judge Daniel F. Solomon (the ALJ).

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<sup>6</sup>The Index of Documents in the Certified Case Record (CCR), submitted June 14, 2013, by Board Clerk Thomas O. Shepherd, does not contain separate entries for the hearing exhibits, hearing transcript, or the ALJ's April 2012 award of benefits. The Director therefore has not provided separate references to the Certified Case Record for these documents, which are instead referenced as Director's Exhibit No. (DX) or the ALJ's April 2012 award (2012 ALJ). In addition, Queen Mountain's petitioner's brief is referenced as "Pet. Br."

Before a scheduled hearing, Mrs. Gibson moved for summary judgment in light of ACA Section 1556, and the ALJ granted this motion in an April 2012 decision. He found, based on the award on Mr. Gibson's lifetime claim and the filing date of Mrs. Gibson's 2010 claim, that Mrs. Gibson was entitled to benefits under BLBA Section 932(l), as revived by ACA Section 1556. 2012 ALJ at 2-3. The ALJ awarded benefits to Mrs. Gibson effective June 2004, the month of the miner's death.<sup>7</sup> 2012 ALJ at 3.

Queen Mountain appealed to the Board, arguing that Mrs. Gibson's subsequent claim was barred by 20 C.F.R. § 725.309(d)(3) (subsequent claim provision) and principles of finality and res judicata.<sup>8</sup> The Director urged affirmance of the ALJ's award, with correction of the ALJ's entitlement-date determination to July 2005 (the month after the month in which the denial of the survivor's prior claim became final). The Board rejected Queen Mountain's contentions and affirmed the ALJ's award of benefits. CCR 1, 3. In particular, the

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<sup>7</sup> The ALJ mistakenly observed in the "Entitlement" section of the decision that Mr. Gibson died in November 2009, but corrected this mistake in his "Conclusion." 2012 ALJ at 3.

<sup>8</sup> Queen Mountain also argued that Section 1556 violated the due-process and takings clauses of the Fifth Amendment, and that application of Section 1556 was governed by the miner's claim-filing date, not the survivor's. The Board rejected these contentions, CCR 1-3, and Queen Mountain does not pursue them here. In any event, this Court rejected similar due-process arguments in *Vision Processing*, 705 F.3d at 556-57.

Board rejected the company's finality/res judicata and Section 725.309 arguments based on its prior decision in *Richards*, which held that an award of a widow's subsequent claim did not violate finality.<sup>9</sup> CCR 3. The Board did, however, correct the ALJ's entitlement date to July 2005, the month after the month in which the denial of the survivor's prior claim became final. CCR 4; *see* 20 C.F.R. §§ 725.309(d)(5); *Richards*, 25 BLR at 1-38 to 1-39. Queen Mountain then petitioned this Court for review.

### **SUMMARY OF THE ARGUMENT**

The Third Circuit in *Marmon Coal* and the Fourth Circuit in *Richards* have now held in published opinions that a survivor's subsequent claim is properly awarded under the automatic entitlement provision of ACA Section 1556. This Court should follow suit.

The plain language of ACA Section 1556 applies without qualification to all claims that satisfy its time limitations. Thus, miners' and survivors' claims, both

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<sup>9</sup> 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 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." 25 BLR at 1-37 to 1-38 (footnote and citation omitted). The Fourth Circuit recently affirmed the Board's decision. *Richards*, 721 F.3d at 314-16 (4th Cir. 2013).

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. Contrary to Queen Mountain's contentions, the post-enactment statement of Senator Byrd (the sponsor of Section 1556) does not support a different result.

Moreover, 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 survivor's claim 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. Because a subsequent claim does not involve the reopening of a prior decision or otherwise affect the finality of that decision, neither the Supreme Court's decision in *Sebben* nor incorporated provisions of the Longshore Act are 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. Gibson. 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 denying Mrs. Gibson's prior survivor's claim. Thus, the two causes of action arise out of different facts and are supported by

different evidence.

Finally, the Board correctly determined that Mrs. Gibson was entitled to survivor's benefits beginning July 2005, the month after the month the denial of her prior survivor's claim became final. This finding comports with DOL's long-standing entitlement-date regulations, and Congress gave no indication those regulations were not applicable to subsequent claims awarded under Section 1556.

## ARGUMENT

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

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

This case presents legal questions—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, and if so, when such benefits commence. 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).

As noted *supra* n. 5, the Director has yet not promulgated a final regulation with respect to Section 1556. 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). Even without a final regulation, 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 entitlement on survivors’ subsequent claims, and Senator Byrd’s post-enactment statement is not contrary to the plain text.**

Mrs. Gibson’s subsequent claim was properly awarded pursuant to the automatic entitlement provision of ACA Section 1556. Under the plain statutory language, the automatic-entitlement provision applies to *all* survivors’ claims, both original and subsequent filings.

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* (when determining whether Section 1556 applied to survivors’ claims as well as miners’ claims), these provisions are “painfully clear.” 705 F.3d at 554. “Congress 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.”<sup>10</sup> *Vision Processing*, 705 F.3d at 555. Thus, for this very reason – the absence of limiting language – the Third and Fourth Circuits have held that Section 1556’s plain language encompasses survivors’ subsequent claims (as well as their original claims). *Marmon*, 2013 WL 4017160 at \*4; *Richards*, 721 F.3d at 314.

Accordingly, the Court should affirm Mrs. Gibson’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. Gibson’s deceased husband obtained benefits on a claim during his lifetime, and she meets the dependency and relationship criteria for eligible survivors.

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<sup>10</sup> 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.’” *Vision Processing*, 705 F.3d at 555 (citation omitted).

Hence, she is automatically entitled to survivors' benefits.<sup>11</sup> 30 U.S.C. § 932(l); Pub. L. 111-148, § 1556(b) (2010).

Instead of coming to grips with the plain language of Section 1556 or *Vision Processing*, Queen Mountain argues that Senator Byrd's failure to mention survivors' subsequent claims in a post-enactment statement shows that Congress did not intend to bring such claims within the ambit of statute. Pet. Br. at 9-10 (referencing Senator's Byrd's comment that "Section 1556 applies immediately to all pending claims, including claims . . . for which the claimant seeks to modify a

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<sup>11</sup> Notwithstanding Section 1556's plain language, Queen Mountain argues that DOL's pre-ACA subsequent-claim *regulation*, 20 C.F.R. § 725.309(d), mandates the denial of the Mrs. Gibson's 2010 claim. Pet. Br. at 10. In support, the coal company argues that the change of law here does not amount to a "change of condition" as called for by the regulation. This argument has no merit. As *Richards* explains, "[b]y restoring the derivative entitlement provisions of Section 932(l), Congress has effectively created a 'change' establishing a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis." *Richards*, 741 F.3d at 314. *See also Consolidation Coal Co. v. Director, OWCP*, 721 F.3d 789, 794 (7th Cir. 2013) ("Under the reasoning of *Spese*, [117 F.3d 1001 (7th Cir. 1997)], we see no reason why a subsequent change analysis should treat a change in the applicable law any differently than a material change in the physical condition of the miner.").

In any event, to the extent that the pre-ACA regulation would require that Mrs. Gibson'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) ("[S]tatutory 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 subsequent change regulation. 77 Fed. Reg. 19468.

denial. . . in accordance with 20 C.F.R. § 725.309(c).” 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010)).<sup>12</sup> But Queen Mountain’s cherry-picking from Senator Byrd’s discussion of the ACA amendments does not withstand scrutiny. As *Richards* explains, the Senator’s “observation that the amendment applies to ‘all claims that will be filed henceforth’ can be read to encompass subsequent claims, and his description of the scope of the statute as ‘including’ certain types of claims connotes that his selected examples were intended to be illustrative of the amendment’s reach, not exhaustive.” 721 F.3d at 316; *see also Marmon Coal*, 2013 WL 4017160 at \*4 (Senator’s Byrd’s failure to include the largest class of claims – original claims by miners – indicates his list was illustrative, and his reference to “all claims” “does not exclude subsequent claims”); *id.* at \*6 n.4 (Senator Byrd’s reference to the merger and modification of claims was illustrative). In short, Senator Byrd’s statement will not bear the weight Queen Mountain places on it.

**C. Automatic entitlement in 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.**

Queen Mountain’s primary defense to Mrs. Gibson’s 2010 subsequent

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<sup>12</sup> Section 725.309(c) treats claims filed within one year of a prior denial as a modification request. Subsequent claims, by definition, are filed more than one year after the prior denial. 20 C.F.R. § 725.309(d).

survivor's claim is that DOL determined in 2005 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 11. Although true, this argument is irrelevant.

The award of benefits on Mrs. Gibson's 2010 subsequent claim does not undermine the finality of the denial of her prior claim. 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>13</sup> *Buck Creek*

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<sup>13</sup> The regulations governing the entitlement date for a survivor's claim are further proof that the prior denial remains inviolate. Mrs. Gibson's 2005 claim, if awarded, would have resulted in an award of benefits dating back to the month of her husband's death, June 2004. 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, because Mrs. Gibson's 2005 claim was denied, she can receive benefits on her current claim only for the period beginning July 2005, the month after the district director's denial of her prior claim became final. See *Richards*, 721 F.3d at 317 n.5.; see also p.27, *infra*.

*Coal 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)); accord 65 Fed. Reg. 79974 (Dec. 20, 2000) (Section 725.309 “does not have a reopening effect” and does not authorize “relitigation of claims”).

Queen Mountain’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 manner). Thus, a subsequent claim and a prior one “are not the same.”<sup>14</sup> *Lisa Lee Mines*, 86 F.3d at

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<sup>14</sup> Queen Mountain also wrongly argues (Op. Br. at 6, 9, 11) that subsequent claims are inconsistent with Longshore Act procedures establishing the finality of administrative orders, 33 U.S.C. § 921(a), (e), as incorporated into the BLBA by 30 U.S.C. § 932(a), and *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th Cir. 1992) (requiring district director to initiate modification and reopen a prior liability

1362.

This rule is not altered by applying amended Section 932(l) to a survivor's subsequent claim because 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 undisturbed. 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, Queen Mountain'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 decision in *Sebben*.**

In its finality argument, Queen Mountain places much reliance on the Supreme Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988). But that case (and the doctrines it embodies) provides no support for

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determination within one year). As explained above, a subsequent claim does not reopen the prior claim and the prior denial remains both final and intact. Thus, entertaining a new but successive claim does not contravene any finality rule contained in the BLBA or Longshore Act. *See U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 979 (11th Cir. 2004); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994). In any event, the BLBA authorizes DOL's Secretary to depart from otherwise applicable Longshore Act procedures through regulation. 30 U.S.C. § 932(a) (incorporating various Longshore Act procedures "except as otherwise provided in this subsection *or by regulation of the Secretary*") (emphasis added); 20 C.F.R. 725.1(j) (explaining Longshore Act's focus on traumatic injury necessitates deviation from its procedures in Part 725); *see Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977).

the coal company's argument.

*Sebben* exemplifies 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*. *Sebben*, 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>15</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. *Sebben*, 488 U.S. at 122. It explained that those claimants had received the required reopening and readjudication under the 1977 amendments, albeit under the wrong legal standard. *Id.* But, unlike the first class, “they chose instead

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<sup>15</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.

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.” *Sebben*, 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. *See Richards*, 721 F.3d at 316 (“*Sebben* does establish that res judicata can serve as a bar to BLBA claims, but it is inapposite here, where [widows with subsequent claims under Section 1556] have not had any prior opportunity to litigate the cause of action giving rise to their subsequent claims.”); *Marmon*, 2013 WL 4017160 at \*5 (“In contrast to the claimants in [*Sebben*], [a subsequent survivor’s claim under Section 1556] is not seeking to ‘re-open’ a previously denied claim or to ‘avoid the bar of res judicata’ on the ground that her original claim was wrongly decided.”).

In contrast, no one here asserts that Mrs. Gibson’s prior claim was wrongly denied. As discussed above, the denial of that claim remains valid and final, even if her current claim is awarded under Section 1556. Rather, Mrs. Gibson (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*.<sup>16</sup>

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

Although it does not develop the notion in any detail, Queen Mountain's argument that Mrs. Gibson's 2010 claim is barred by principles of finality is inextricably linked to the doctrine of res judicata. *See* Pet. Br. at 4, 9. But res judicata does not bar Mrs. Gibson's 2010 claim because that claim for automatic

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<sup>16</sup> Queen Mountain's finality argument relies to a lesser extent on two other decisions: *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Oklahoma Chapter of the Am. Academy of Pediatrics v. Fogarty*, No. 05-5100, 2010 WL 3341881 (10th Cir. Jul. 20, 2010) (unpublished). Neither decision is dispositive or relevant. In *Plaut*, the Supreme Court dismissed a claim under the Securities Exchange Act of 1934 as untimely. Following this dismissal, Congress enacted a new statute-of-limitation which specifically allowed previously-dismissed claims under the statute to be reinstated. The Supreme Court struck down the new provision as a violation of the constitutional separation-of-powers principle. Here, reliance on *Plaut* is inapposite for the simple reason that Mrs. Gibson's original survivor's claim was administratively denied; consequently, there can be no violation of the separation-of-powers principle. *See Plaut*, 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").

*Fogarty* is similarly irrelevant. It 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, in fact, 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.

entitlement (by proof that the miner was awarded benefits) is a new cause of action that is different from (and was unavailable during) her original claim (in which she had to prove that pneumoconiosis caused or hastened her husband's death).

*Richards*, 721 F.3d at 315 (observing that, while the “initial claims [of the surviving widows filing subsequent claims] turned on whether the deceased miners died due to pneumoconiosis, those subsequent claims concern only whether the miners were determined to be eligible to receive black lung benefits at the time of their deaths—an entirely unrelated factual issue”); *Marmon Coal*, 2013 WL 4017160 at \*6 (“The subsequent claim [] involves a different cause of action. . . .”).

“[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, Queen Mountain'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). But a claim that could not have been raised in the prior proceeding, *because it did not exist*, is not so barred. *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995). Mrs. Gibson's claim for automatic entitlement under the 2010 ACA amendments is such a claim. *Richards*, 721 F.3d at 316; *Marmon*, 2013 WL 4017160 at \*6.

Queen Mountain'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 Confectionery Products*, 973 F.2d at 484 (quoting *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981)).

Comparison of the underlying factual elements here demonstrates that Mrs. Gibson's prior claim and her 2010 subsequent claim are not the same cause of action. In her original claim, Mrs. Gibson could recover only by proving that her husband's death was due to pneumoconiosis. 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. Gibson's death, as well as the etiology of those conditions, and in particular, whether pneumoconiosis hastened Mr. Gibson's death. In contrast, in Mrs. Gibson's subsequent automatic entitlement claim, the cause of Mr. Gibson's death is not at issue, and medical evidence is wholly irrelevant. Rather, entitlement for Mrs. Gibson turns solely on an administrative fact—whether her husband had been awarded benefits in his lifetime claim—that was irrelevant in Mrs. Gibson's prior unsuccessful claim. Thus, the current and prior proceedings are not based on the same facts and evidence. *Richards*, 721 F.3d at 315; *Marmon Coal*, 2013 WL 4017160 at \*6; *see also Sanders Confectionary*, 973 F.2d at 484.

In short, survivors' subsequent claims based on the automatic-entitlement criteria of BLBA Section 932(l) are not barred 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 the miner's death was due to pneumoconiosis.

**II. The Board properly modified the entitlement date in Mrs. Gibson's subsequent claim to July 2005, the month after the month in which the May 2005 denial of Mrs. Gibson's prior claim became final.**

Queen Mountain lastly argues that, even if Mrs. Gibson is entitled to BLBA survivors' benefits under Section 1556, the proper date of entitlement is March 2010, the month of enactment of Section 1556. Pet. Br. 11-12. 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, *Queen Mountain* 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 the entitlement date for an award of benefits resulting from such a timely-filed claim.

DOL regulations (which pre-date the ACA) clearly set forth how to determine the entitlement date for awards of original and subsequent claims. With original claims, 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). And for subsequent claims, the entitlement period is more limited: a claimant can only receive benefits beginning with the month after the month the denial of the prior claim became final. 20 C.F.R. § 725.309(d)(5).

This Court has made clear that these regulatory provisions continue to govern claims awarded pursuant to Section 1556. *McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 946 (6th Cir. 2013). In *McCoy*, the Court explained that "Congress made no mention of when an award of survivor's benefits should commence when it enacted the Black Lung Amendments. That leaves us with the

preexisting regulation, which is still in place and which *still governs survivor-benefits applications* like this one.” *Id.* (emphasis added). *Accord Richards*, 721 F.3d at 317 n.5; *Skytop Contracting Co.*, 2013 WL 4106409 at \*2. 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). Consequently, the Board did not err in modifying the onset date to July 2005 (the month after the month the May 2005 DOL denial of Mrs. Gibson’s original survivor’s claim became final).

## CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and the Board awarding Mrs. Gibson's claim, with an entitlement date of July 2005.

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 8656 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2013, a copy of the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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