No. 12-4366

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEABODY COAL COMPANY,

Petitioner

v.

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

and

EVA ELIZABETH HILL,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

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 Eva Elizabeth Hill. Mrs. Hill is the widow of Arthur Hill, a former coal miner of forty-one years. A

Department of Labor (DOL) administrative law judge (ALJ) awarded her claim, and the Benefits Review Board affirmed. Peabody Coal Company, Mr. Hill's former employer, has petitioned the Court to review the Board's decision.[1] 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. Prior to 1982, eligible dependents of a miner who had been awarded benefits on a lifetime disability claim were automatically entitled to survivors' benefits after the miner's 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.

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[1] Peabody does not contest that it is the party liable to pay benefits on Mrs. Hill's claim. *See* 20 C.F.R. § 725.495.

Mrs. Hill filed a pre-ACA claim for survivors' benefits shortly after the 2000 death of her husband, who had received a lifetime disability award. This Court finally denied Mrs. Hill's pre-ACA claim in 2004. Mrs. Hill filed a subsequent claim in January 2011, 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). Peabody does not contend otherwise. Rather, the issues now before the Court are:

Does ACA Section 1556's reinstatement of automatic benefits apply to survivors' subsequent claims?[2] And if so, is it barred by the separation-of-powers principle when the prior claim was finally denied by an Article III court?

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 since the BLBA was first enacted in 1969. *Vision Processing*, 705 F.3d at 553 (citations omitted). The statute has been substantially

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[2] This issue is also presented in another case pending before the Court: *Eastover Min. Co. v. Beverly*, No. 12-4402.

amended over the years.[3] As a result, the requirements to secure survivors' benefits have changed over time. *See id.*

Prior to 1982, a deceased miner's qualifying dependents[4] 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 pneumoconiosis played no role in the miners' deaths.[5] *See* 30 U.S.C. § 922(a)(2) (1970).

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[3] 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.

[4] 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. Hill satisfies these requirements.

[5] Automatic benefits have also been described as "derivative benefits" or "unrelated death benefits."

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 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 respiratory or pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis, to have died due to pneumoconiosis, and to have been totally disabled by the disease at the time of death. 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)."[6] *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.[7] 20 C.F.R. §§ 725.212, .218, .222.

With respect to subsequent claims, the regulations provide in

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[6] As mentioned previously, this Court held in *Vision Processing* that 30 U.S.C. § 932(*l*) provides automatic entitlement on survivors' *original* claims. 705 F.3d at 553-56. The issue here is whether Section 1556's automatic-entitlement provision applies to survivors' subsequent claims, such as that filed by Mrs. Hill.

[7] 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).

B. Procedural History

After spending forty-one years in the mines, Mr. Hill filed a claim for lifetime disability benefits in 1983. Director's Exhibit (DX)

1.[8] An ALJ ultimately awarded his claim in 1990, and the Board affirmed that decision on appeal. *Id.* Peabody petitioned this Court for review, but the Court affirmed the Board's decision. *Peabody Coal Co. v. Hill*, 123 F.3d 412 (6th Cir. 1997). Peabody thereafter paid benefits until Mr. Hill's death in May, 2000. Joint Appendix (JA) at 46.

Mrs. Hill, his widow, filed a claim for survivors' benefits on June 19, 2000. JA at 17. An ALJ denied her claim in 2002, finding that although Mr. Hill had pneumoconiosis, Mrs. Hill failed to prove that his death was due to the disease. JA at 20, 30-32; *see* 20 C.F.R. §§ 718.202, .205. She appealed, but the Board affirmed the ALJ's decision in February 2003. JA at 34. Mrs. Hill petitioned this Court for review, but the Court affirmed the denial of her claim because she failed to prove that Mr. Hill's death was due to pneumoconiosis. *Hill v. Peabody Coal Co.*, 94 Fed. Appx. 298, 300-01 (6th Cir. Apr. 7, 2004) (JA at 40, 42-44). Mrs. Hill took no further action, and the Court's decision became final on June 1,

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[8] Exhibit numbers refer to the administrative record created when this case was before the ALJ.

2004, upon the issuance of the mandate. *See Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-53 (6th Cir. 1999).

After Congress amended the BLBA via the enactment of Section 1556 of the ACA, Mrs. Hill filed a new claim on January 18, 2011. JA at 17. After a DOL district director awarded this claim, Peabody asked for an ALJ hearing. DX 17-20. Prior to the hearing, the ALJ issued an order directing Peabody to show cause why Mrs. Hill's claim should not be awarded pursuant to ACA Section 1556. No party responded to this order.

The ALJ then issued a decision awarding Mrs. Hill's 2011 claim. JA at 14. She found that Mrs. Hill satisfied the familial relationship and dependency criteria for survivors under the BLBA. JA at 15A. She also found, based on the award on Mr. Hill's lifetime claim and the filing date of Mrs. Hill's subsequent 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. *Id.*

Peabody appealed to the Board, arguing that Mrs. Hill's subsequent claim was barred by 20 C.F.R. § 725.309(d)(3), principles of res judicata, and the separation-of-powers doctrine.[9] It also argued that ACA Section 1556 impermissibly created an irrebuttable presumption that a miner's death was due to pneumoconiosis. The Director urged affirmance of the ALJ's award, but modification of her entitlement-date determination.

The Board rejected Peabody's contentions and affirmed the ALJ's award of benefits. JA at 9, 11-12. It rejected the company's 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.[10] JA at 11-12. In *Richards*, the three-judge majority held that, in reinstating

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[9] Peabody also made several other arguments that it no longer pursues. It argued that retroactive application of Section 1556 violated both the due-process and takings clause of the Fifth Amendment. This Court rejected identical due-process arguments in *Vision Processing*, 705 F.3d at 556-58, and the Board rejected Peabody's contentions here. JA at 11. The company, however, now raises a slightly different due-process contention as a variant of its res-judicata argument. *See* pp. 41-42, *infra*.

[10] The Board did not address Peabody's separation-of-powers argument.

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 1-37/38 (footnote and citation omitted).[11]

The Board also rejected Peabody's argument that Section 1556 created an irrebuttable presumption. JA at 11; *see B & G Constr.*, 662 F.3d at 254. Although it affirmed Mrs. Hill's award, the Board modified the entitlement date on her claim to July 2004, the month after the Court's decision in her original claim became final.[12] JA at

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[11] One judge dissented, and would have held that automatic entitlement under ACA Section 1556 is not available in survivors' subsequent claims. 25 BLR at 1-43/48.

[12] The concurring judge would have granted benefits as of May 2000, the month of Mr. Hill's death, the entitlement date applicable (cont'd . . .)

12; *see* 20 C.F.R. § 725.309(d)(5); *Richards*, 25 BLR at 1-38/39. Peabody then petitioned this Court for review. JA at 1.

SUMMARY OF THE ARGUMENT

The Court should affirm Mrs. Hill'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.

Moreover, automatic entitlement for subsequent claims does not abrogate the amendment's time limitations. Those limitations directly govern living miners' claims and are given effect in survivors' claims by requiring survivors to make a filing after January 1, 2005, in order to receive the benefit of automatic

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(. . . cont'd)
in survivors' original claims. JA at 12-13; *see* 20 C.F.R. § 725.503(c). Mrs. Hill's entitlement date is not at issue in this appeal.

entitlement. The time limits make clear, in contrast to earlier amendments to the BLBA that required DOL to notify claimants and reopen previously denied claims, that the burden to engage the administrative mechanism rests with claimants. And since Mrs. Hill was not attempting to reopen and relitigate her original claim, the Supreme Court's decision in *Sebben* is not implicated.

Consistent with the broad and unqualified statutory text, there is little or no evidence that Congress intended to prohibit automatic entitlement for subsequent claims. Contrary to Peabody's contentions, the post-enactment statement of Senator Byrd (the sponsor of Section 1556) supports a wide application of Section 1556.

In addition, automatic entitlement on survivors' claims is not barred by res judicata. Where a statutory amendment creates an entirely new and independent cause of action, res judicata does not apply. Here, Mrs. Hill did not, indeed could not, litigate automatic entitlement in her prior claim. Moreover, survivors' subsequent claims for automatic entitlement based on the administrative fact of the miner's lifetime award are different causes of action than prior claims alleging pneumoconiosis caused the miner's death. They

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. As the term "automatic" suggests, such claims will not result in vexatious litigation or consume significant judicial resources. In fact, Peabody (like virtually all the coal mine operators in similar appeals) has not raised a single defense to the merits of Mrs. Hill's subsequent claim, should it be allowed to proceed.

Finally, application of Section 1556's automatic-entitlement to provision does not implicate the constitutional separation-of-powers principle or the Supreme Court's decision in *Plaut*. Subsequent claims are distinct from original claims, and an award of a subsequent claim leaves the denial of a prior claim intact.

ARGUMENT

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.[13] 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

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[13] As noted above, the Director intends to promulgate a final regulation addressing ACA Section 1556 by September 2013. *See* note 7, *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).

> 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 (citing *Skidmore*, 323 U.S. at 140).

B. The plain language of Section 1556 permits automatic awards on survivors' subsequent claims. Even if that language were ambiguous, the Court should defer to the Director's persuasive construction of the statute.

The Court should affirm the award of benefits on Mrs. Hill's subsequent claim. Under the plain statutory language, the automatic-entitlement provision is applicable to *all* survivors' claims, both original and subsequent filings. Even if there is some ambiguity in the statutory 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." 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."[14] 705 F.3d at 555 (emphasis in

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[14] Peabody notably does not come to grips with the plain language of the statute. It does however, contend, in summary fashion, that Section 932(*l*) impermissibly creates an irrebuttable presumption that a miner's death was due to pneumoconiosis. Pet. Br. at 24, n. 10. The Third Circuit rejected an identical argument, holding that a miner's death is not presumed to be due to pneumoconiosis under Section 932(*l*); rather, the cause of death is irrelevant (*i.e.*, the statute creates an alternative basis for recovery on a survivor's claim—automatic entitlement). *B & G. Constr. Co.*, 662 F.3d at 254 ("properly understood, section 1556 does not create a presumption at all"); *see also Stacy*, 671 F.3d at 390-91 (automatic entitlement under amended Section 932(*l*) overrides requirement of proving death due to pneumoconiosis). This Court should likewise reject Peabody's claim that *B & G Constr.* and *Stacy* are distinguishable because they involved original, not subsequent, claims. This contention is unexplained, and it is a distinction without a difference. There is no basis for construing Section 932(*l*) as creating an irrebuttable presumption of death due to (cont'd . . .)

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 some people as opposed to others." *Vision Processing*, 705 F.3d at

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(. . . cont'd)
pneumoconiosis in survivors' subsequent claims, but not in original claims.

In this context, the Court's statement in *dicta* in *Vision Processing* that the revived Section 932(*l*) "resurrect[s] a former method for [proving that a miner's death was due to pneumoconiosis]," 705 F.3d at 559, is incorrect. Section 932(*l*), as the Third Circuit noted, makes the cause of the miner's death irrelevant. Rather, the statute conditions entitlement on whether the miner was awarded benefits for total disability due to pneumoconiosis prior to his death.

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.[15]

Nor is this plain reading inconsistent with Section 1556's time limitations. First, currently-pending survivors' claims filed on or before January 1, 2005, do not fall under the ACA amendments. Second, and perhaps more importantly in the subsequent-claim context, the time limitations are effectuated by requiring benefits claimants to take some action to initiate the administrative application of Section 932(*l*) after January 1, 2005.[16] While Section

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[15] 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.

[16] This reading of Section 1556 also furthers its underlying purpose—restoration of automatic entitlement for survivors of miners who were found to be totally disabled by pneumoconiosis during their lifetimes. It can be no accident that the use of the term "equity" in the title of Section 1556 evokes the very purpose for the initial enactment of section 932(*l*)—"to correct an egregious inequity (cont'd . . .)

932(*l*), by its terms, provides that survivors need not file new formal claims for benefits, its real purpose is to relieve survivors of the

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(. . . cont'd)
which has arisen under Part C." Sen. Rept. No. 95-209 at 18 (1977), reprinted in H. Comm. on Education and Labor, 96th Cong., Rep. on Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 (Comm. Print 1979) at 621; *see B & G Constr.*, 662 F.3d at 250-51. Various survivor-friendly BLBA provisions, like Section 932(*l*), were enacted out of Congress' "concern for the welfare of these widows, whose husbands gave their physical strength, their bodies and their lives to this most difficult occupation." Sen. Rept. No. 95-209 at 18.

Notwithstanding congressional concern for "equity," the ACA's 2010 restoration of automatic entitlement comes too late for many previously-denied survivors who could have taken advantage of automatic entitlement. This is true because the ACA does not automatically reopen previously-denied claims, and because only a living survivor can "file something." *B & G Constr.*, 662 F.3d at 244, n. 12; *see also*, 20 C.F.R. §§ 725.301(d) (claimant must be alive when claim is filed), .213(b)(2) (surviving spouse may receive benefits on awarded claim until month before death). By contrast, under the 1972 and 1977 BLBA amendments, previously-denied claims were reopened automatically *and* the claim would be paid if awarded, notwithstanding the death of the claimant. *See* 20 C.F.R. § 725.545(a), (c). Thus, the *practical* effect of the ACA time constraints is to greatly reduce the *actual* number of survivors' subsequent claims. According to the Director's records, of approximately one thousand forty dependents who could potentially file subsequent claims under the automatic-entitlement provisions (*i.e.*, they were dependents of miners with lifetime awards, and their original survivors' claims had been denied), there have been only approximately 130 refilings as of December 2012. (In point of fact, Mrs. Hill was 79 years old when the ACA was enacted.)

burden of proving that miners' deaths were due to pneumoconiosis. *B & G Constr.*, 662 F.3d at 244, n. 12. Indeed, "[e]ven after [the enactment of Section 1556], survivors need to notify their spouses' employers[17] to trigger § 1556(b) and to obtain survivor benefits." *Vision Processing*, 705 F.3d at 555; *see also B & G Constr.*, 662 F.3d at 244, n. 12 ("a widow seeking benefits must file something in order to receive them)." In other words, if a survivor who would be entitled to benefits under the revived Section 932(*l*) takes no action after January 1, 2005, he or she will not receive the benefit of the revived statute.[18]

In sum, while the reach of the ACA amendment to the BLBA

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[17] In fact, such notification would be filed with DOL's Office of Workers' Compensation Programs.

[18] Conversely, Section 1556(c) does *not* require DOL to initiate any action. In contrast, when Congress amended the BLBA in 1972 and 1977, it placed the burden on the government to identify the affected claimants and reopen their claims (both 1972 and 1977 amendments) or, in some circumstances where the claims were not automatically reopened, notify claimants that they had the right to request reconsideration (1977 amendments). *See* Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 156 (1972); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 103-105 (1978).

may thus appear quite broad, this simply reflects what the statute provides—that the amendment benefits a wide set of current and future claimants. Indeed, the title of Section 1556—"Equity for certain eligible survivors"—reveals Congress' expectation for the fair treatment of survivors, a purpose hardly served when a survivor's claim is denied simply because she filed a pre-ACA claim that did not prove an entirely unrelated fact, namely, the miner's death due to pneumoconiosis. Hence, the Court should apply Section 1556 just as Congress wrote it.

Accordingly, the Court should affirm Mrs. Hill's award under the plain language of Section 1556. She filed her current claim after January 1, 2005, and that claim was pending on and after March 23, 2010. Her 2011 claim therefore satisfies the time limitations of Section 1556. Pub. L. 111-148, § 1556(c) (2010). Mrs. Hill's deceased husband obtained benefits on a claim during his lifetime, and Mrs. Hill meets the dependency and relationship criteria for eligible survivors. Hence, she is automatically entitled to survivors' benefits. 30 U.S.C. § 932(*l*); Pub. L. 111-148, § 1556(b) (2010).

C. Automatic entitlement on survivors' subsequent claims is not precluded by consideration of Congressional intent.

Finding no support in the language of Section 1556, Peabody retreats to supposed Congressional intent to preclude automatic entitlement on survivors' subsequent claims. The company relies on the absence of a directive in Section 1556 to reopen previously denied claims, and on Senator Byrd's post-enactment statement regarding the purposes of Section 1556. Neither prong of its argument has merit.

Citing the 1977 amendments to the BLBA (Pub. L. No. 95-239), in which Congress specifically directed the government to reconsider and reopen finally denied claims, Peabody claims that because 1) Congress did not include a similar directive in Section 1556; and 2) the Supreme Court has held that a denied black lung claim cannot be reopened absent specific Congressional authorization, *Pittston Coal Group v. Sebben*, 488 U.S. 105, 122 (1988), Congress did not intend for the automatic-entitlement provisions of ACA Section 1556 to apply to survivors' subsequent claims. Pet. Br. at 21-22.

The Court should reject this argument. Admittedly Section

1556 does not authorize "reopening" of previously denied claims. But that is not the issue here. As discussed in Sections D and E, *infra*, Mrs. Hill is not attempting to reopen her previous claim. Rather, the question is whether the statute makes automatic entitlement available in *subsequent claims*, which are entirely new assertions of entitlement distinct from any previous claim.

In this context, the discussion in *Sebben* is simply irrelevant. *Sebben* involved the 1977 Black Lung Reform Act amendments that required DOL to reopen and readjudicate certain pending and denied claims under previously-applicable, 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 mandated by the amendments. 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 held that DOL had failed to use the more lenient criteria in adjudicating the reopened claims, it nevertheless

upheld the denial of the second class's claims.[19] 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 laxer standard. 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 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. Hill's first claim was wrongly denied. Indeed, a claimant in a subsequent claim "is . . .

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[19] 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 more lenient criteria.

precluded from collaterally attacking the prior denial of benefits." *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995). Moreover, 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) are not overturned.[20] And the survivor will not be entitled to benefits for any period of time pre-dating the prior denial. 20 C.F.R. § 725.309(d)(5). Thus, contrary to Peabody's arguments, the Court should not infer from the absence of a directive to "reopen" previously denied claims that Congress did not intend the automatic-entitlement provisions of ACA Section 1556 and BLBA Section 932(*l*) to apply to survivors' subsequent claims.

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[20] Relying on *Astoria Fed. S & L Ass'n v. Solimino*, 501 U.S. 104 (1991), Peabody claims that there is a "strong presumption" against reopening previously-denied claims absent an "explicit Congressional direction" to that effect. Pet. Br. at 18-20. As shown above, however, no such reopening occurs under the ACA. Moreover, *Astoria Fed.* teaches the exact opposite lesson regarding res judicata (*see* Section D, *infra*)—namely, that a "clear statement" from Congress is not necessary to overcome it. 501 U.S. at 108. The Court clearly distinguished res judicata from other "weighty and constant" values, such as constitutional ones, where a clear statement would be required. *Id.*

Likewise, the Court should reject Peabody's claim that Senator Byrd's post-enactment statement proves Congress did not intend to bring survivors' subsequent claims within the ambit of Section 1556.[21] Pet. Br. at 12-13. The company specifically relies upon his statement that Section 1556 was meant to apply to "widows who never filed for 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*,

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[21] Before the Board, Peabody argued that Senator Byrd's post-enactment statement should be given no weight in interpreting Section 1556. Peabody Board Br. at 11, n. 5.

> *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 Peabody'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 Peabody places on it.

D. Principles of res judicata do not bar awards of survivors' subsequent claims under Section 1556.

Peabody also contends that automatic entitlement in survivors' subsequent claims is barred by the doctrine of res judicata (also known as claim preclusion). Pet. Br. at 18-23. But res judicata does not apply because Mrs. Hill's claim for automatic entitlement is a new cause of action that is different from (and was unavailable during) her original claim.[22]

This Court has explained that "[a]s a general matter, the doctrine of res 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

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[22] Before the Board, Peabody contended that, notwithstanding Congress' amendment of BLBA, DOL's (pre-ACA) subsequent-claim regulation, 20 C.F.R. § 725.309, mandated the denial of Mrs. Hill's subsequent claim. Although it is unclear whether Peabody is still advancing this argument, the regulation gives no aid to Peabody. To the extent that Section 725.309(d)(3) would mandate that Mrs. Hill's subsequent claim be denied, it is trumped by Congress' revision of the statute. *See Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir.1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"). Thus, Peabody's string citation of decisions denying a survivor's subsequent claim under Section 725.309(d)(3), Pet. Br. at 20, is unconvincing.

omitted); *see generally* 18 James Wm. Moore *et al.*, Moore's Federal Practice § 131.10(1)(a) (3d ed. 2008). Res judicata bars a cause of action when four elements are present:

> 1. A final decision on the merits in the first action by a court of competent jurisdiction;
>
> 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—a final judgment on the merits and an identity of the parties—are satisfied, Peabody's res judicata defense founders on the third and fourth required 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)). The Supreme Court explained this principle thusly, "[w]hile [a prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor*, 349 U.S. at 328.

Although *Lawlor* 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*. *Alvear-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").

The *Alvear-Velez* court (and Professor Moore) clearly differentiate "changes in case law [which] almost never provide a justification for instituting a new action" from "statutory changes that occur after the previous litigation has concluded [which] may justify a new action." 540 F.3d at 678. As to the former, a change in precedent provides no relief from res judicata because it merely reflects the error in the prior decision, which the aggrieved party accepted by not appealing. *Id.*; *Sebben*, 488 U.S. at 122-23; Moore's Federal Practice, ¶ 131.22[3]. By contrast, no such appellate remedy is available where a statutory barrier precludes relief. *Alvear-Velez*, 540 F.3d at 678 n. 4. Moreover, a second action based on a statutory amendment is permissible because "the rule against claim splitting, which is one component of res judicata, is inapplicable when a statutory change creates a course of action unavailable in the previous action." *Alvear-Velez* , 540 F.3d at 678.

Finally, the *Alvear-Velez* court observed that a less rigid application of res judicata was appropriate because the statutory change "is being applied in the administrative context." 540 F.3d at 680 (citation omitted).

Applying these principles here, Mrs. Hill's subsequent claim for automatic entitlement is not barred by res judicata. Section 932(*l*) was not applicable when she filed that claim. Indeed, its very unavailability (by congressional amendment in 1982) gave rise to its subsequent restoration through Section 1556's 2010 enactment. As the Board recognized in *Richards*, 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," 25 BLR at 1-37—*i.e.*, it created a new basis for relief that did not previously exist.

Thus, Mrs. Hill's subsequent claim (on which automatic entitlement is available) represents a different statutory basis for relief than her original claim. Moreover, this new claim arises in the administrative context and in an area in which Congress has amended the law to ease the burden of proof on survivors. While res judicata certainly applies in the administrative context, the Court has recognized that "[r]igid application of administrative *res judicata* is inappropriate" when it would thwart the intent of Congress. *Napier v. Director, OWCP*, 999 F.3d 1032, 1037 (6th Cir.

1993) (citation and footnote omitted). Indeed, similar factors led to the courts' rejection of res judicata in *Alvear-Velez* and its progeny, and should lead this Court to reject Peabody's res judicata arguments here.

Peabody'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).

A comparison of the underlying factual elements here demonstrates that Mrs. Hill's original claim and her subsequent

claim are not the same cause of action. In her original claim, Mrs. Hill could recover only by proving that her husband's death was due to pneumoconiosis. JA at 30-31; *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. Hill's death, as well as the etiology of those conditions, in particular, whether pneumoconiosis hastened Mr. Hill's death from pancreatic cancer. *See* JA at 31-32; Pet. Br. at 3. In contrast, in this subsequent claim, the cause of Mr. Hill's death is not at issue, and medical evidence is wholly irrelevant. *See* JA at 14A. Rather, entitlement for Mrs. Hill turns solely on an administrative fact—whether her husband had been awarded benefits in his lifetime claim—that was irrelevant in Mrs. Hill's prior unsuccessful claim. 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. Hill's subsequent claim would not further the purposes of res judicata. "[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits,

conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *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); *see generally* 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4403 (2d ed. 2002).

Mrs. Hill's subsequent claim typifies that where a subsequent claim is based on automatic entitlement, there will be little need for factual development, and most such claims can be decided in summary fashion without protracted litigation or the expenditure of significant judicial resources.[23] Indeed, as is apparent from the

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[23] Moreover, the import of repose, which is inherent in the res judicata doctrine, is attenuated in the black lung context, as operators are aware that the statute may be amended and contour their insurance coverage accordingly. *See* 20 C.F.R. § 726.203(a); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 850 (7th Cir. 2011) ("the black lung benefits program has long-since required an endorsement in insurance policies making carriers—and self-insured operators . . .—liable for obligations from any amendments enacted while the policy is in force"); *see also Channer v. DHS*, 527 F.3d 275, 280, n. 4 (2d Cir. 2008) ("[A] doctrine of repose should not (cont'd . . .)

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 truth applies not only here, but to the vast majority (if not all) of the appeals presenting the same survivor-subsequent-claim/automatic-entitlement issues pending before the courts of appeals.[24]

Furthermore, the danger of inconsistent decisions between original and subsequent claims is absent because subsequent claims represent different causes of action. In fact, the danger of inconsistency lies in the other direction. If res judicata bars

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(. . . cont'd)
be applied so as to frustrate clearly expressed congressional intent.").

[24] 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*, 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.

survivors' subsequent claims, there would be different results for similarly situated survivors who satisfy the ACA requirements based solely on the fact that one previously failed to prove a fact (death due to pneumoconiosis) that is now wholly irrelevant. *See Commissioner IRS v. Sunnen*, 333 U.S. 591, 599 (1984) (expressing concern that collateral estoppel will result in unequal treatment of taxpayers in same class where revenue laws changed following original litigation).

Finally, Peabody offers a variant of its res judicata argument, contending that automatic entitlement on survivors' subsequent claims violates due process because it deprives coal-mine operators of the benefit of finality. Pet. Br. at 23-25. *See* U.S. Const. amend. V; *cf. RAG American Coal v. OWCP*, 576 F.3d 418, 428 n. 6 (7th Cir. 2009) (rejecting similar "due process" argument as "nothing more than a variation of the operator's res judicata argument").

Peabody, however, essentially ignores due process principles and jurisprudence. In the black-lung context, due process for coal-mine operators requires two things: 1) that the operator receive notice of a claim; and 2) that it have the opportunity to mount a meaningful defense to the claim. *See Arch of Kentucky, Inc., v.*

Director, OWCP, 556 F.3d 472, 478 (6th Cir. 2009).

Peabody received notice of Mrs. Hill's subsequent claim, and was afforded the opportunity to contest the elements of that claim (that Mr. Hill had been awarded benefits on his lifetime claim, and that Mrs. Hill was, indeed, his widow). As succinctly put by the Fourth Circuit, "[d]ue process requires nothing more." *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 504 (4th Cir. 1999). And, its rhetoric notwithstanding, *compare* Pet. Br. at 19 n.9 *with Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013), *reh'g denied* (Mar. 19, 2013), Peabody has received the full protection of finality. Because Mrs. Hill's previous claim was denied, she cannot receive benefits for any period before that denial became final. *See* 20 C.F.R. § 725.309(d)(5). Moreover, finality does not bar a survivor from relief on a new cause of action, and as demonstrated above, Mrs. Hill's subsequent claim is a new cause of action.

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 failure to prove that a miner's death was due to pneumoconiosis.

E. Application of Section 1556 to survivors' subsequent claims is not barred by the separation-of-powers principle.

Peabody further argues that the application of Section 1556 to survivors' subsequent claims constitutes a violation of the constitutional separation-of-powers principle. Pet. Br. at 14-17. The Court should reject this argument. As explained above, a subsequent claim is a different cause of action than a prior claim and does not reopen the denial of the prior claim. In point of fact, an award of benefits on a subsequent claim may not predate a prior denial, but rather commences after the date of the prior denial.

As initial matter, however, the narrow scope of Peabody's separation-of-powers argument should be emphasized. The argument applies only where a survivor's prior claim was denied by an Article III court, namely a court of appeals. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (distinguishing and not calling into question precedent "upholding legislation that altered rights fixed by final judgments of non-Article III courts . . . or administrative agencies"). For example, 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 that decision. 514 U.S. at 232. Thus, although Peabody's separation-of-powers argument applies here (because Mrs. Hill's first claim was denied by this Court), it has no relevance to the great majority of subsequent claims.[25]

In any event, Peabody's sole reliance on *Plaut* is misplaced. In *Plaut*, the plaintiffs filed suit in federal district court alleging securities fraud under Section 10(b) of the Securities Exchange Act

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[25] The courts of appeals decide only a small percentage of all black lung claims filed, and survivors' claims comprise only a portion of the cases appealed to the courts. For example, in Fiscal Year 2009 (the most recent year for which published statistics are available), the Office of Workers' Compensation Programs issued initial decisions on 3,109 claims. OWCP Annual Report to Congress FY 2009 (published in 2011) at 66. In contrast, only thirty-eight appeals were filed with the circuit courts involving black lung claims. *Id.* at 25. Indeed, in *Eastover Min. Co. v. Beverly*, No. 12-4402, the other survivor's-subsequent-claim case currently pending before the Court, the prior claim was denied administratively and was not appealed to the Court.

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, 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 the constitutional separation-of-powers principle. 514 U.S. at 217-30. The Court 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 (quoting Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)) (emphasis in *Plaut*). Section 27A(b), "[b]y retroactively commanding the federal courts to reopen final judgments," abridged this principle. 514 U.S. at 219.

Plaut and the separation-of-powers principle have no relevance with respect to ACA Section 1556. Unlike Section 27A of the 1934 Act, Section 1556 does not require the reopening of final judicial decisions.[26] 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 judicial

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[26] 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).

decisions.[27]

Peabody's argument that Section 1556 requires the reopening of a previously denied claim 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

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[27] The *Plaut* court rejected an argument that statutes of limitations should be treated differently for separation-of-powers purposes because such statutes were creatures of Congress. 514 U.S. at 228-29. In so doing, it noted that in addition to amending statutes of limitations, "Congress can eliminate . . . a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule . . . ; or a rule of offsetting wrong . . . that has often prevented recovery." *Id.* To the extent that this statement suggests that any congressional alteration of a statutory scheme necessarily implicates the separation-of-powers principle, the statement is *dicta*. As noted by the District Court for the District of Columbia, absent direction from the Supreme Court, *Plaut* should not be extended beyond the situation where Congress directs the reopening of a final judicial determination on a suit for a money judgment. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F.Supp.2d 31, 80 (D.D.C. 2009); *see also Miller v. French*, 530 U.S. 327, 344 (2000) (observing that *Plaut* was carefully limited to the situation before it). And, in particular, *Plaut* does not apply where Congress alters the underlying substantive law to create a previously-unavailable cause of action. *See Islamic Republic of Iran*, 659 F.Supp.2d at 77.

would necessarily be a "reopening" of the prior denial.

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." *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc).

Further, as noted above, a claimant in a subsequent claim cannot "collaterally attack[] the prior denial of benefits." *LaBelle Processing Co.*, 72 F.3d at 314. 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*, 86 F.3d at 1361. 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.[28] *Buck Creek 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)); *cf. In re Swanson*, 540 F.3d 1368, 1378-79 (Fed. Cir. 2008) (rejecting separation-of-powers challenge to reexamination of patent previously upheld by court, as two examinations were "different proceedings with different evidentiary standards"). Thus, adjudication of the subsequent claim does not involve relitigation of the prior claim.

In short, Section 1556 does not require the courts to reopen and re-examine their prior decisions. Rather, Section 1556 changed the underlying substantive law and, as a result, a subsequent claim represents a new cause of action that was previously unavailable. *Cf. In re Islamic Republic of Iran Terrorism*

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[28] The regulations governing the entitlement date for a survivor's claim are further proof that the prior denial remains inviolate. Mrs. Hill's 2000 claim, if awarded, would have resulted in an award of benefits dating back to the month of her husband's death, May 2000. *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). As a result, Mrs. Hill can receive benefits on her current claim only for the period beginning July 2004. That is the month after the Court's denial of her prior claim became final. *See* pp. 11-12, *supra*.

Litigation, 659 F.Supp.2d at 77. Because there is no reopening, *Plaut* and the separation-of-power principle simply are not implicated.

CONCLUSION

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

Respectfully submitted,

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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 contain contains 10,208, 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.

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CERTIFICATE OF SERVICE

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