

No. 12-4075

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**SKYTOP CONTRACTING COMPANY;
LACKAWANNA CASUALTY COMPANY,**

Petitioners

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;
CHARLOTTE J. DICASIMIRRO (Widow of BERNARD J.
DICASIMIRRO),**

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

BRIEF FOR THE FEDERAL RESPONDENT

INTRODUCTION

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 Charlotte DiCasimirro. Mrs. DiCasimirro is the widow of Bernard J. DiCasimirro, a former coal miner. A Department of Labor ("DOL") administrative law judge

awarded her claim, and the Benefits Review Board affirmed. Skytop Contracting Company, Mr. DiCasimirro's former coal mine 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 JURISDICTION

Mrs. DiCasimirro filed this claim for federal black lung survivors' benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-944, on April 5, 2011. Petitioner's Appendix Volume ("App.") II 71a. ALJ Theresa C. Timlin awarded Mrs. DiCasimirro's claim on August 29, 2011. App. II 103a. Skytop timely appealed the ALJ's decision to the Board on September 20, 2011. App. II 107a. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (thirty-day period for appealing ALJ decisions to the Board). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated. On September 5, 2012, the Board affirmed the award of benefits. App. Volume I 3a.

The Court docketed Skytop's timely petition for review of the Board's decision on October 31, 2012. *See* 33 U.S.C. § 921(c), as incorporated (sixty-day period for seeking review after final decision of the Board). The Court has

¹ Skytop does not contest that it is the party liable to pay benefits on Mrs. DiCasimirro's claim, if awarded. *See* 20 C.F.R. § 725.495.

jurisdiction over Skytop's petition under 33 U.S.C. § 921(c), as incorporated, as the injury in this case—Mr. DiCasimirro's employment and consequent exposure to coal-mine dust—occurred in Pennsylvania.

STATEMENT OF THE ISSUES

In addition to lifetime disability benefits for coal miners, the BLBA provides survivors' benefits to certain of their dependents. Before 1982, eligible dependents of a miner who had been awarded benefits on a lifetime disability claim were automatically entitled to survivors' benefits after 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.

Mrs. DiCasimirro filed two pre-ACA claims for survivors' benefits after the death of her husband, who had received a lifetime disability award. Both pre-ACA claims were denied. Mrs. DiCasimirro filed this subsequent claim in April 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 *B & G Constr. Co., Inc. v. Director, OWCP*, 662 F.3d 233, 238-51 (3d Cir. 2011). *Accord Vision Processing, LLC v. Groves*, ___ F.3d ___, 2013 WL 332082, *2-*4 (6th Cir. 2013); *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 381-82 (4th Cir. 2011), *cert. den.* 133 S.Ct. 127 (Mem.) (2012). And Skytop 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

Did the ALJ properly order Mrs. DiCasimirro's benefits to commence in April 2003?

² This issue is currently pending before this Court in *Marmon Coal Co. v. Director, OWCP and Ethel Eckman*, No. 12-3388 (oral argument set for May 14, 2013). There are approximately 20 cases raising the issue pending in the Fourth Circuit, which has consolidated two lead cases: *Union Carbide Corp. v. Richards*, No. 12-1294(L) and *Peabody Coal Co. v. Director, OWCP*, No. 12-1978 (oral argument set for March 21, 2013). In the Sixth Circuit, the issue is raised in *Peabody Coal Co. v. Hill*, No. 12-4366 and *Eastover Mining Co. v. Beverly*, No. 12-4402.

STATEMENT OF THE CASE

The issue presented in this case is 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 were totally disabled by pneumoconiosis, “Congress first provided benefits to the dependents of coal miners affected with pneumoconiosis in [the BLBA in] 1969.” *B & G Constr.*, 662 F.3d at 239 (citations omitted). The statute has been substantially amended over the years.³ As a result, the requirements to secure survivors’ benefits have changed over time. *See B & G Constr.*, 662 F.3d at 239-44.

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); *see generally B & G Constr.*, 662 F.3d at 239-44.

Until 1982, a deceased miner's qualifying dependents⁴ 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 30 U.S.C. § 922(a)(2) (1970); 20 C.F.R. § 410.210(e)(1) (1972).

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); *B & G Constr.*, 662 F.3d at 241-42. 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.

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. DiCasimirro satisfies these requirements.

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

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 Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989).

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 and Supp. III 1979). 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, 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

Pub. L. No. 111-148, § 1556 (2010).

In effect, as described by the Fourth Circuit, “Section 1556(a)...revived the 15-year presumption...[and] Section 1556(b) reinstated automatic survivors’

benefits” for claims filed after January 1, 2005, and pending on or after the ACA’s March 23, 2010, enactment date.⁶ *Stacy*, 671 F.3d at 382; *accord 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. 20 C.F.R. §§ 725.212, .218, .222.

A “subsequent” claim is a claim filed more than one year after the final denial of a previous claim. 20 C.F.R. § 725.309(d). In a subsequent claim, the prior denial must be accepted as correct when made. *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995). With respect to survivors’ subsequent claims, the regulations provide in 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)

⁶ As mentioned previously, this Court held in *B & G Constr.* that 30 U.S.C. § 932(l) provides automatic entitlement on survivors’ *original* claims. 662 F.3d at 239-51. The issue here is whether Section 1556’s automatic-entitlement provision applies to a survivor’s subsequent claim.

(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.

(5) 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). 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).⁷

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. §§ 725.212(a)(3) and 725.309(d) to provide for automatic entitlement on survivors' subsequent claims filed after January 1, 2005 which was pending on or after March 23, 2010. 77 Fed. Reg. 19467, 19468, 19477-78 (Mar. 30, 2012). The proposed rules, however, do not alter § 725.309(d)(5) set forth above

(continued...)

B. Procedural History.

After leaving coal mining, Mr. DiCasimirro filed a claim for lifetime disability benefits in 1987. Director's Exhibit (DX) 1.⁸ An ALJ awarded his claim and the Board ultimately affirmed that decision in July 1994. *Id.* Skytop thereafter paid benefits until Mr. DiCasimirro's death. He died in April 1996. App. II 21a.

Mrs. DiCasimirro, his widow, filed a claim for survivors' benefits in May 1996. App. II 16a-20a. An ALJ denied her claim in 1997, finding that although Mr. DiCasimirro had pneumoconiosis, Mrs. DiCasimirro failed to prove that his death was due to the disease. App. II 45a, 47a-51a; *see* 20 C.F.R. §§ 718.202, .205. She appealed to the Board but failed to file a brief; accordingly, by Order dated December 23, 1997, the Board dismissed her appeal as abandoned and the ALJ's denial of benefits became final. App. II 57a; *see* 20 C.F.R. § 802.402(a).

(...continued)

(establishing the earliest date for the commencement of payment of benefits in subsequent claims). *Id.* at 19468. 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>.

⁸ Exhibit numbers refer to the unpaginated administrative record created when this case was before the ALJ. *See* App. II 12a-13a (Index of Documents in administrative record).

Mrs. DiCasimirro filed a subsequent claim on December 16, 2002. App. II 59a-60a. On February 6, 2003, a DOL district director issued a proposed order denying that claim. App. II 64a-65a. Mrs. DiCasimirro took no further action and the proposed denial order became final and effective thirty days later. App. II 68a; *see* 20 C.F.R. § 725.419(d).

After Congress amended the BLBA via the enactment of Section 1556 of the ACA, Mrs. DiCasimirro filed the current claim on April 5, 2011. App. II 71a. A DOL district director awarded this claim and Skytop asked for an ALJ hearing. App. II 76a, 81a. Prior to the hearing, the Director moved for summary decision, arguing that Mrs. DiCasimirro was entitled to benefits under the automatic-entitlement provision of Section 1556.

An ALJ agreed with the Director and awarded benefits. App. II 104a. She found that Mrs. DiCasimirro satisfied the familial relationship and dependency criteria for survivors under the BLBA. *Id.* at 103a. She also found, based on the award of Mr. DiCasimirro's lifetime claim and the filing date of Mrs. DiCasimirro's pending subsequent claim, that she was entitled to benefits under BLBA Section 932(l), as revived by ACA Section 1556. *Id.* The ALJ awarded benefits as of April 2003, the month after the denial of Mrs. DiCasimirro's prior claim became final. *Id.* at 104a.

Skytop appealed to the Board, arguing that Mrs. DiCasimirro's subsequent claim was barred by 20 C.F.R. § 725.309(d)(3) and principles of res judicata.⁹ The Director urged affirmance of the ALJ's award.

The Board rejected Skytop's contentions and affirmed the ALJ's decision. App. I 8a. It rejected the operator's res judicata arguments based on its prior decision in *Richards v. Union Carbide Corp.*, 2012 WL 423911, 25 Black Lung Rep. (Juris) 1-31 (Ben. Rev. Bd. 2012), appeal docketed, 4th Cir. No. 12-1294.¹⁰

⁹ Skytop also argued that the provisions of ACA Section 1556 violated the due-process clause of the Fifth Amendment and that the filing date of Mr. DiCasimirro's lifetime claim (rather than the filing date of the survivor's claim) determined the applicability of Section 1556. App. II 116-122a. This Court rejected identical due-process arguments in *B & G Constr.*, 662 F.3d at 253-59, and the Fourth Circuit rejected an identical filing-date argument in *Stacy*, 671 F.3d at 388-89 (as the Sixth Circuit recently did in *Vision Processing*, 2013 WL 332082 at *3). The Board rejected Skytop's contentions based on *B & G Constr.* and *Stacy*. App. I 6a.

¹⁰ In *Richards*, the 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." *Id.* at 1-37. The concurring judge agreed. *Id.* 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 Black Lung Rep. (Juris) at 1-37/38 (footnote and citation omitted). One judge dissented, and would have held that automatic entitlement under ACA Section 1556 is not available in survivors' subsequent claims. *Id.* at 1-43/48.

App. I 6a. The Board also rejected Skytop’s contention that the ALJ acted arbitrarily in determining that benefit payments should commence as of April 2003. Citing its holding in *Richards* “that derivative benefits are payable in a subsequent survivor’s claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became final,” the Board noted that the February 6, 2003, denial of Mrs. DiCasimirro’s prior claim became final thirty days later in March 2003 so benefits payments properly commenced the following month, April 2003. App. I 7a n.6.

Skytop then petitioned this Court for review. App. I 1a.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Neither the claims of Mrs. DiCasimirro, nor the claim of Mr. DiCasimirro have been before this Court previously.

The underlying legal issue—whether the automatic-entitlement provision of ACA Section 1556 is applicable to survivors’ subsequent claims—is currently pending before this Court in *Marmon Coal Co. v. Director, OWCP and Ethel Eckman*, No. 12-3388, and in the Fourth and Sixth Circuits. *See* footnote 2, *supra*).

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 “exercise[s] plenary review over all questions of law.” *B & G Constr.*, 662 F.3d at 247 (citation omitted).

The Director has yet not promulgated a final regulation with respect to Section 1556. Nonetheless, since 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); *see Stacy*, 671 F.3d at 388 (“[w]hen...the Director’s position is being advanced via litigation, it is entitled to respect...to the extent that it has the power to persuade”) (citations, internal quotations and punctuation omitted).¹¹

¹¹ 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
(continued...)

On the benefits-commencement-date question, this Court undertakes an independent review of the record to determine whether the ALJ's factual findings are rational, consistent with applicable law, and based upon substantial evidence. *Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004).

SUMMARY OF THE ARGUMENT

The Court should affirm Mrs. DiCasimirro's award. The plain language of ACA Section 1556 applies without qualification to all claims that satisfy its time limitations. Interpreting "claim" without qualification is also fully consistent with the term's use throughout the statute. 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.

Contrary to Skytop's contention, Section 1556's limited legislative history (the post-enactment statement by its sponsor) supports a wide application of Section 1556.

In addition, automatic entitlement on survivors' claims is not barred by res judicata or the subsequent claim regulation, Section 725.309. Res judicata does

(...continued)

would be entitled to *Chevron* deference. See *Chevron, USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

not apply because a survivor's subsequent claims for automatic entitlement based on the administrative fact of the miner's lifetime award is a new and different cause of action than a prior claim alleging pneumoconiosis caused the miner's death. The two claims arise out of different facts and are supported by different documentation. Moreover, where a statutory amendment creates an entirely new and independent cause of action, res judicata does not apply. Here, Mrs. DiCasimirro did not, indeed could not, litigate automatic entitlement in her prior claim, and res judicata thus poses no bar. Similarly, Section 725.309 predates the ACA and accordingly does not account for the congressional restoration of automatic entitlement on subsequent claims. To the extent the provision is inconsistent with the later-enacted ACA amendments, the amendments govern.

Finally, the ALJ did not arbitrarily set April 2003 as the commencement date for benefit payments. Rather, in the absence of contrary congressional or administrative guidance, the ALJ properly applied the plain language of the subsequent claim regulation to insure that no benefits would be paid "for any period prior to the date upon which the order denying the prior claim became final."

ARGUMENT

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

The Court should affirm the award of benefits on Mrs. DiCasimirro'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.

1. Automatic entitlement applies to survivors' subsequent claims under the plain language of the statute.

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); *B & G Constr.*, 662 F.3d at 248 (“we presume that Congress most clearly expresses its intent through the plain language of a statute”). 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 the Fourth Circuit held in *Stacy*, “the plain language of [Section 1556(c)] requires that amended § 932(l) apply to *all* claims [that satisfy Section 1556’s time limitations].” 671 F.3d at 388 (emphasis in original); *Vision Processing*, 2013 WL 332082 at *3 (same); *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 Fourth and the Sixth Circuits 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” (citation omitted). *Vision Processing*, 2013 WL 332082 at *3; *Stacy*, 671 F.3d 388; *see also B & G Constr.*, 662 F.3d at 250. And the Sixth Circuit 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*, 2013 WL 332082 at *4. 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 *B & G Constr.*, *Vision Processing*, and *Stacy*, amended Section 932(l) applies to all survivors’ claims, both original and subsequent.

Accordingly, the Court should affirm Mrs. DiCasimirro's award under the plain language of Section 1556.¹² 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).¹³ Mrs. DiCasimirro's deceased husband obtained benefits on a claim during his lifetime, and Mrs. DiCasimirro 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).

¹² 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; *Stacy*, 671 F.3d at 388 (absent a final regulation codifying his interpretation, the Director's interpretation is entitled to *Skidmore* deference). The Director's interpretation also furthers the underlying purpose of the ACA amendment—to restore automatic entitlement for survivors of miners who were found to be totally disabled by pneumoconiosis during their lifetimes.

¹³ Skytop repeatedly points out that Mrs. DiCasimirro had no claim pending on the date the ACA became effective. *See* Pet. Br. at 10, 12, 15. The statute expressly requires that a claim filed after January 1, 2005, be “pending on *or after*” the March 23, 2010, enactment date. Pub. L. No. 111-148, § 1556(c) (2010) (emphasis added).

2. Skytop overreads Senator Byrd's post-enactment statement.

Finding no support in the language of Section 1556, Skytop retreats to supposed Congressional intent to preclude automatic entitlement on survivors' subsequent claims. The company cites Senator Byrd's post-enactment 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). Pet. Br. at 11-12; 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010).

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

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

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

156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (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 Skytop’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 Skytop places on it.¹⁴

3. Neither res judicata nor collateral estoppel precludes Mrs. DiCasimirro’s pending subsequent claim.

Skytop also generally asserts that automatic entitlement in survivors’ subsequent claims is barred by the doctrine of res judicata because the survivor’s entitlement has been fully and fairly litigated and a final decision rendered. Pet.

¹⁴ In any event, Mrs. DiCasimirro’s 2011 claim is a claim “filed henceforth,” after the enactment of Section 1556; therefore, Senator Byrd’s statement supports including, not excluding, her new claim within the amendment.

Br. at 14-15. Res judicata bars a cause of action “when three circumstances are present: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit on the same cause of action.” *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008) (citation and internal quotations omitted). Although the first two elements are met here, Skytop’s res judicata defense founders on the third—Mrs. DiCasimirro’s claim for automatic entitlement is a new cause of action that is different from (and was unavailable during) her original claim.

This Court has “disavowed attempts to create a simple test for determining what constitutes a cause of action for res judicata purposes.” *Duhaney v. Att’y Gen’l of the U.S.*, 621 F.3d 340, 348 (3d Cir. 2010) (internal quotations and citation omitted). Nonetheless, it has made clear that a similarity in the remedy sought in the two proceedings is not determinative. 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.” *Id.* (quoting *Davis v. U.S. Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982) (en banc) and *U.S. v. Athlone Indus., Inc.*, 746 F.2d 977, 984 (3d Cir. 1984)) (internal quotations omitted).

A comparison of the underlying factual elements here demonstrates that Mrs. DiCasimirro’s original claim and her subsequent claim are not the same cause of action. In her original claim, Mrs. DiCasimirro could recover only by proving that her husband’s death was due to pneumoconiosis. App. II 45a; *see* 20 C.F.R. § 718.205. 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. DiCasimirro’s death, as well as the etiology of those conditions. App. II 46a-51a. In contrast, in this subsequent claim, the cause of his death is not at issue, and medical evidence is wholly irrelevant. App. II 103a-104a. Rather, entitlement for Mrs. DiCasimirro turns solely on an administrative fact—whether her husband had been awarded benefits in his lifetime claim—that was irrelevant in Mrs. DiCasimirro’s prior unsuccessful claims. Thus, the current and prior proceedings are not based on the same “critical acts and necessary documentation.” *Duhaney*, 621 F.3d at 349.¹⁵

¹⁵ Skytop also asserts that allowing survivors’ subsequent claims will undermine *res judicata*’s goal of preventing wasteful relitigation. Pet. Br. at 14. In cases like this one, however, where the subsequent claim is based on automatic entitlement, there will be little need for factual development. Indeed, once the Court decides the legal question regarding the applicability of the ACA amendments to survivors’ subsequent claims, there will likely be *no* litigation in most cases. Here, for example, Skytop has no defense whatsoever to the merits of Mrs. DiCasimirro’s automatic entitlement claim. Thus, its concern is unfounded.

Furthermore, even if Mrs. DiCasimirro's subsequent claim were viewed as arising from the same facts as her original claim, res judicata still would not apply. It is undoubtedly correct that claims that existed at the time of the first suit and *could* have been brought in that action are barred by res judicata. *In re Mullarkey*, 536 F.3d at 225. And a change in case law, or an overruling of legal precedent, typically provides no relief from res judicata. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). But a claim that did not exist at the time of the prior proceeding, because the new claim *could not* have been raised in the prior proceeding, is not so barred. *Alexander & Alexander, Inc., v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986) (citing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)). Thus, 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”).¹⁶

Last, Skytop argues that the cause of the miner’s death was adjudicated and finally determined not to be due to pneumoconiosis by an ALJ in 1997 and that the new amendments cannot strip the prior decisions of their finality or validity. Pet. Br. at 15. Although correct, the point is a non-starter. It is undisputed that a claimant in a subsequent claim “is...precluded from collaterally attacking the prior denial of benefits.” *LaBelle Processing*, 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 v. Director, OWCP*, 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc). This rule is not altered by applying amended Section 932(l) to a survivor’s subsequent claim—the conclusions in the prior denial (namely, that the miner did not die due to pneumoconiosis and that the survivor is not entitled to any benefits prior to the date of that denial) remain intact. Rather, the new amendments simply give rise to a new cause of action

¹⁶ In *Duhaney*, this Court found it unnecessary to reach the question of whether “the enactment of new statutory grounds [for relief] render[s] res judicata inapplicable.” 621 F.3d at 352. We are not aware of any published decision by the Court subsequent to *Duhaney* addressing the issue.

(automatic entitlement) that was not litigated in the prior claims and is the basis for the pending claim.¹⁷

4. Section 725.309, which predates the ACA amendments to the BLBA, does not bar survivors' subsequent claims based on automatic entitlement.

Skytop further contends that, notwithstanding Congress' amendment of BLBA, DOL's pre-ACA subsequent-claim regulation, 20 C.F.R. § 725.309, mandates the denial of the Mrs. DiCasimirro's subsequent claim. Pet. Br. at 13-14. This argument has no merit. To the extent that the regulation would require that Mrs. DiCasimirro's subsequent claim be denied, it is trumped by Congress' revision of the statute. *See, e.g., Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.** (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir.1989) ("statutory language...prevail[s] over inconsistent regulatory language"). Moreover, Section 725.309, promulgated nearly a decade before the ACA amendments, simply does not anticipate the fundamental changes in the legal landscape for survivors

¹⁷ Collateral estoppel, which requires an identity of issues in the first and second case, is thus inapplicable. *See e.g. Howard Hess Dental Lab., Inc. v. Dentsply Intern'l Inc.*, 602 F.3d 237, 247-48 (3d Cir. 2010) (setting forth elements of collateral estoppel).

occasioned by the ACA's restoration of automatic entitlement.¹⁸ Finally, as explained in argument 3, the ACA amendments created an entirely new cause of action and element of entitlement (automatic entitlement), which constitute a changed circumstance sufficient to meet Section 725.309's requirements. *See* 77 Fed. Reg. 19468. Skytop thus misses the forest for the trees—the underlying purpose of Section 725.309 is to allow subsequent claims to proceed when changed circumstances are present (albeit typically, but not exclusively, when the miner's health deteriorates), and newly-enacted automatic entitlement comprises such a change. Thus, Section 725.309 presents no bar against Mrs. DiCasimirro's subsequent claim.

5. This Court has previously rejected an operator's argument that the application of ACA to survivors' claims is unfair and should reject Skytop's similar allegation of unfairness.

Skytop offers a variant of its *res judicata* argument, contending that it is unfair to award Mrs. DiCasimirro's claim now when she previously failed to demonstrate that the miner's death was due to pneumoconiosis. Pet. Br. at 15. In *B & G Constr.*, this Court rejected a similar fairness contention that "depends on a

¹⁸ It is for this reason that the Secretary has proposed changes in the regulation. 77 Fed. Reg. 19468.

non-existent overarching principle that a mining company cannot be responsible to a survivor for benefits on account of a miner's death unless the miner died from pneumoconiosis." 662 F.3d at 254-55. Likewise, the Supreme Court rejected this premise in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 25-26 (1976) (survivor benefits comprised a form of deferred compensation for the suffering endured by a miner's dependents by virtue of his illness). The Court further held that the amendment was not unfair because an operator "is only liable for paying benefits to the survivors of the miners it employs or employed and who received, are receiving, federal black lung benefits at the time of their death." *Id.*, at 262.

To the extent that Skytop claims the outcome here is unfair because Mrs. DiCasimirro is being allowed to relitigate the previously denied claim and "completely change the outcome of the prior determination," Skytop's argument again is based on its flawed understanding of subsequent claims and res judicata. The prior denials are final, and consequently, Mrs. DiCasimirro cannot receive benefits before the month of the miner's death (April 1996) or for any period before the most recent denial became final. *See* 20 C.F.R. §§ 725.503(c), 725.309(d)(5).

6. The benefit-payment-commencement date is correct.

Finally, Skytop wrongly contends that the ALJ acted arbitrarily by setting April 2003 as the benefit-commencement date. Pet. Br. at 16. The ALJ correctly found, by operation of regulation, that the denial of Mrs. DiCasimirro's prior claim became final and effective in March 2003, making the following month—April 2003—as the month to commence benefit payments. 20 C.F.R. § 725.309(d)(5) (“[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final”). The ACA amendments, while establishing (or restoring) the new cause of action of automatic entitlement, did not alter, explicitly or impliedly, the Secretary's regulations pertaining to the commencement dates for the payment of benefits. 20 C.F.R. §§ 725.503; 725.309(d)(5). And the Secretary has continued to interpret and apply these provisions as written post-ACA. *E.g. Richards*, 2012 WL 423911. Thus, there is no basis—and Skytop provides none—for setting a commencement date different than the one authorized by regulation. The ALJ's benefit-payment-commencement date complied with the regulations and, therefore, should be affirmed.

CONCLUSION

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

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 6,601 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee Security VirusScan Enterprise 8.0.0. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, the Director's brief was served electronically through the Court's CM/ECF website on, and copies mailed, postage prepaid to:

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