IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1294 (L)

UNION CARBIDE CORPORATION, Petitioner

v.

VIRGINIA RICHARDS

and

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

Respondents

No. 12-1978

PEABODY COAL COMPANY, Petitioner

v.

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

and

MARY ELLEN MORGAN,

Respondents

On Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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These cases involve claims for survivors' benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Virginia E. Richards (No. 12-1294) and Mary Ellen Morgan (No. 12-1978). Department of Labor (DOL) administrative law judges (ALJs) awarded the claims, and the Benefits Review Board affirmed. Union Carbide Corporation and Peabody Coal Company have petitioned for review of the Board's decisions on Mrs. Richards' and Mrs. Morgan's claims respectively.[1] By order of November 9, 2012, the Court consolidated these cases for purposes of appeal.

STATEMENT OF THE ISSUE

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 claim were automatically entitled to survivors' benefits after the miner's death. Congress eliminated automatic survivors' benefits in 1982, after which survivors were generally

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[1] Neither Union Carbide nor Peabody contests that it is the party liable for paying benefits on the respective claims. *See* 20 C.F.R. § 725.495.

eligible for benefits only by proving that pneumoconiosis caused the miner's death. In 2010, Congress enacted Section 1556 of the Affordable Care Act (ACA), Pub. L. No. 111-148 § 1556 (2010), and restored automatic survivors' benefits for claims filed after January 1, 2005, and pending on or after March 23, 2010.

Mrs. Richards and Mrs. Morgan filed pre-ACA claims for survivors' benefits shortly after the deaths of their respective husbands, who had received lifetime disability awards. Both claims were denied. Mrs. Richards filed a subsequent claim in 2009, and Mrs. Morgan filed one in July 2010, following the ACA's restoration of automatic entitlement. *See* 20 C.F.R. § 725.309(d) (a "subsequent" claim is a claim filed more than one year after the final denial of a previous claim). ALJs awarded the new claims based on the automatic-entitlement provision of ACA Section 1556, and the Board affirmed those decisions.

There is no question that the ACA's restoration of automatic survivors' benefits applies to survivors' original claims. This Court so held in *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 381-82 (4th Cir. 2011), *cert. den.* 133 S.Ct. 127 (Mem.) (2012), and neither Union Carbide nor Peabody contends otherwise. Rather, the issue

now before the Court is:

Does ACA Section 1556's reinstatement of automatic benefits apply to survivors' subsequent claims?

STATEMENT OF THE FACTS

The issue presented in these appeals is both legal and procedural in nature. Thus, we will summarize the relevant statutory and regulatory provisions, as well as the procedural histories of the claims.

A. Statutory and Regulatory Background

1. Relevant Statutory Provisions

"The black lung benefits program was enacted in 1969 to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment. . . . The statute, now known as the [BLBA], also provides survivors' benefits for miners' dependents." *Stacy*, 671 F.3d at 381. The statute has been substantially amended over the years.[2] As a result, the

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[2] 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 (cont'd . . .)

requirements to secure survivors' benefits have changed over time. *See Stacy*, 671 F.3d at 681-82.

Prior to 1982, a deceased miner's qualifying dependents[3] 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.[4] *See* 30 U.S.C. § 922(a)(2) (1970).

Congress reinforced the right to automatic survivors' benefits in the 1972 and 1977 amendments to the BLBA. *See* Pub. L. No.

(. . . cont'd)
(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).

[3] To qualify for survivors' benefits, a claimant also must satisfy the program's relationship and dependency requirements. *See* 20 C.F.R. §§ 725.212, .218, .222. There is no dispute that both Mrs. Richards and Mrs. Morgan satisfy these requirements.

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

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). 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 Shuff v. Cedar Coal Min. Co.,* 967 F.2d 977, 980 (4th Cir. 1992).

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.

Pub. L. No. 111-148, § 1556 (2010).

In effect, "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. *Stacy*, 671 F.3d at 382.[5]

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[5] As mentioned previously, this Court held in *Stacy* that 30 U.S.C. § 932(*l*) provides automatic entitlement on survivors' *original* claims. 671 F.3d at 381-82. Neither Union Carbide nor Peabody contends otherwise. The issue here is whether Section 1556's automatic-entitlement provision applies to survivors' subsequent claims, such as those filed by Mrs. Richards and Mrs. Morgan.

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.[6] 20 C.F.R. §§ 725.212, .218, .222.

With respect to 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) (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.

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[6] 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.

* * *

> (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

1. Richards

Arlie C. Richards worked as a coal miner for over thirty years, and he obtained an award of disability benefits under the BLBA in 1987. Richards Director's Exhibit (RDX) 1; Richards Joint

Appendix (RJA) at 1.[7] Union Carbide paid his BLBA benefits until his death in January 1994. *See* RDX 1, 2, 12.

Mrs. Richards, his widow, filed her first claim for survivors' benefits in February 1994. RJA at 10. After a long procedural history, this claim was finally denied by an ALJ on May 9, 2006. RJA at 52. Because the claim had been filed after 1981 (and consistent with then-governing pre-ACA law), the ALJ required Mrs. Richards to prove, *inter alia*, that her husband's death was due to pneumoconiosis. RJA 54. This Mrs. Richards failed to do. RJA at 54-56; *see* 20 C.F.R. §§ 718.202, .205. Mrs. Richards did not appeal the ALJ denial.

Mrs. Richards filed a new claim in May 2009. RJA at 59; *see* 20 C.F.R. § 725.309(d). In October 2009, approximately six months before enactment of the ACA, a district director denied this claim because Mrs. Richards failed to demonstrate a change in any condition of entitlement. RJA at 68, 70; *see* 20 C.F.R. § 725.309(d)(3). Mrs. Richards requested an ALJ hearing. RDX 23.

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[7] Exhibit numbers refer to items in the record created before the respective ALJs in Mrs. Richards' and Mrs. Morgan's claims.

While her request was pending, Congress enacted the ACA and restored automatic survivors' benefits under the BLBA. The Director moved for a summary ALJ decision, arguing that Mrs. Richards was automatically entitled to benefits based on the award of benefits in her husband's claim. An ALJ agreed and determined that Mrs. Richards was entitled to benefits as of May 2009, the month in which she filed her subsequent claim. RJA at 77-79.

Union Carbide timely appealed the ALJ's decision to the Board. On appeal, Union Carbide contended that Mrs. Richards' subsequent claim was barred by 20 C.F.R. § 725.309(d)(3) and principles of res judicata.[8] On January 9, 2012, the Board issued an *en banc* published decision affirming the ALJ's award of benefits, but modifying the entitlement-date determination. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (BRB 2012) (RJA at 197). Four

[8] Union Carbide also argued that ACA Section 1556 violated the due-process and takings clauses of the Fifth Amendment and that the filing date of Mr. Richards' lifetime claim (rather than the filing date of the survivor's claim) determined the applicability of Section 1556. This Court rejected identical arguments in *Stacy*, 671 F.3d at 383-89, and the Board rejected them here based on *Stacy*. RJA at 178-179, 183.

judges (three in a majority opinion and one in a concurrence) rejected Union Carbide's *res judicata* arguments. RJA at 179-81, 185.

The four judges held that the plain language of ACA Section 1556 applies to survivors' subsequent claims because the provision states, without qualification, that it applies to "claims" filed after January 1, 2005, and pending on or after March 23, 2010.[9] RJA at 180-81, 185. They further 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." RJA at 181, 185. Thus, the Board concluded that "the principles of res judicata addressed in Section 725.309 . . . are not implicated in [a subsequent survivor's claim

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[9] The three-judge majority also modified the entitlement date to July 2006 in accordance with 20 C.F.R. §725.309(d)(5), which provides that payments on subsequent claims cannot begin until the month after the denial of the prior claim became final. RJA at 181-83. The concurring judge believed Section 725.309(d)(5) was inapplicable, and would have awarded benefits as of the month of Mr. Richards' death. RJA at 183-87; *see* 20 C.F.R. § 725.503(c) (on original survivor's claim, claimant entitled to benefits beginning in month of miner's death).

governed by ACA Section 1556] because entitlement thereto is not tied to relitigation of the prior finding that that miner's death was not due to pneumoconiosis." RJA at 181 (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. RJA at 13-19. Union Carbide then petitioned this Court for review. RJA at 204.

2. Morgan

Don Morgan worked for two decades in the mines, and filed a claim for lifetime disability benefits in 1987. Morgan Director's Exhibit (MDX) 1. After an ALJ initially awarded his claim in 1991, a Dickensian series of appeals, remands and reconsideration motions ensued, stretching over more than a decade. *See id.* This Court finally affirmed Mr. Morgan's award of benefits in June 2004. *Peabody Coal Co. v. Morgan*, 98 Fed. Appx. 966 (4th Cir. Jun. 9, 2004). Unfortunately, Mr. Morgan did not live to see his award confirmed. He died on January 29, 2004. MDX 1.

Mrs. Morgan, his widow, filed a claim for survivors' benefits in May 2004. MDX 2. The district director initially awarded her claim, but an ALJ denied benefits on the ground that Mrs. Morgan

failed to prove that her husband's death was due to pneumoconiosis. Morgan Joint Appendix (MJA) at 34, 40-43; *see* 20 C.F.R. §§ 718.202, .205. Mrs. Morgan appealed, and the Board affirmed the denial in October 2008. MJA at 18. Mrs. Morgan took no further action on her 2004 claim, and the Board's decision became final. *See* 20 C.F.R. § 802.406.

After Congress amended the BLBA via ACA Section 1556, Mrs. Morgan filed a new claim. MJA at 46; *see* 20 C.F.R. § 725.309(d). The district director determined that Mrs. Morgan was automatically entitled to benefits on her new claim, and Peabody requested an ALJ hearing. MDX 14, 16.

As he did in *Richards*, the Director moved for summary decision, arguing that Mrs. Morgan was entitled to benefits as a matter of law because she satisfied all the requirements for automatic entitlement under ACA Section 1556. The ALJ granted the motion and set November 2008, the month after the Board affirmed the denial of Mrs. Morgan's claim, as the entitlement date. MJA at 14-16, 17

Peabody appealed to the Board, arguing that Mrs. Morgan's subsequent claim was barred by 20 C.F.R. § 725.309 and principles

of res judicata, and that Section 1556 created an impermissible irrebuttable presumption that a miner's death was due to pneumoconiosis.[10] In response, the Director urged affirmance of the ALJ's award of benefits, but modification of the ALJ's entitlement-date determination.

The Board affirmed the ALJ's award of benefits. MJA at 6. It rejected Peabody's Section 725.309 and res judicata arguments based on its previous rejection of the same arguments in *Richards*, and further rejected Peabody's irrebuttable-presumption contention based on the Third Circuit's rejection of the same argument in *B & G Constr. Co. v. Director, OWCP*, 662 F.3d 233, 254-58 (3d Cir. 2011). MJA at 9-10. Finally, the Board modified the entitlement date on Mrs. Morgan's claim to January 2009, the month after the denial of her prior claim became final. *Id.* Peabody then petitioned this Court for review. MJA at 1.

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[10] Peabody also contended that the provisions of ACA Section 1556 violated the due-process and takings clauses of the Fifth Amendment, and that the filing date of Mr. Morgan's lifetime claim determined the applicability of Section 1556. The Board rejected these arguments based on the Court's decision in *Stacy*. MJA at 8-9; *see* 671 F.3d at 383-89.

SUMMARY OF THE ARGUMENT

The Court should affirm the awards to both Mrs. Richards and Mrs. Morgan. As the Court recognized in *Stacy*, 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. The Director's reading comports with not only the statutory text, but also with the meaning of the term "claim" as it is used throughout the BLBA and its implementing regulations and with the underlying purpose of the ACA amendment—restoration of automatic entitlement for survivors of miners who were awarded lifetime benefits.

By contrast, neither petitioner comes to grips with the plain language of Section 1556. Union Carbide's indirect challenge that automatic entitlement for subsequent claims abrogates the

amendment's time limitations is without merit. The time limitations directly govern living miner 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 entitlement. The time limits make clear, in contrast to earlier amendments to the BLBA which required DOL to notify claimants and reopen previously denied claims, that the burden to engage the administrative mechanism rests with claimants. And since Mrs. Richards and Mrs. Morgan were not attempting to reopen and relitigate the denial of their original claims, 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 petitioners' 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. Although res judicata bars subsequent suits based on the same cause of action, 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. Moreover, where a statutory amendment creates an entirely new and independent cause of action, res judicata does not apply. Here, the survivors did not, indeed could not, litigate automatic entitlement in their prior claims.

Finally, barring survivors' subsequent claims for automatic entitlement will not further 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, neither Union Carbide nor Peabody (like virtually all the coal mine operators in similar appeals) has raised a single defense to the merits of the subsequent claims, should they be allowed to proceed.

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. "This court exercises de novo review over questions of law, including statutory interpretation." *Stacy*, 671 F.3d at 388 (citation omitted).

With respect to the BLBA, "[t]he Director, as the administrator of the [statute], is entitled to deference in his reasonable interpretation of the [statute's] ambiguous provisions." *Id.* (citation omitted). "When . . . the Director's position is being advanced via litigation, it is entitled to respect . . . to the extent that it has the power to persuade." *Id.* (internal quotations and punctuation omitted) (quoting *Christenson v. Harris County*, 529 U.S. 576, 587

(2000), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[11]

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 both Mrs. Richards' and Mrs. Morgan's subsequent claims. 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.

Section 1556 plainly makes automatic entitlement applicable

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[11] As noted above, the Director intends to promulgate a final regulation addressing the impact of ACA Section 1556 by September 2013. *See* note 6, *supra*. If a final regulation is promulgated prior to a decision in these cases, the regulation would be entitled to *Chevron* deference. *See Chevron USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

to all qualifying survivors' claims, both original and subsequent. It 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). This provision makes no distinction between miners' and survivors' claims, or between original and subsequent claims. Rather, as the Court 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).

The *Stacy* court further explained, in rejecting the argument that the applicability of Section 1556 was governed by the filing date of the miner's claim, that

> [b]ecause Congress used the term 'claims' without any qualifying language, and because both miners and their survivors may file claims under the BLBA, . . . the plain language supports the Director's position that amended § 932(*l*) applies to survivors' claims that comply with Section 1556(c)'s effective date requirements.

Id. Just as Section 1556 does not distinguish between miners' and survivors' claims, amended Section 932(*l*) plainly applies to both original and 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). Here, Congress simply did not qualify the language of Section 1556 in regard to original versus subsequent claims. Thus, a survivor whose prior claim was denied because she failed to prove that the miner's death was due to pneumoconiosis, may take advantage of the automatic-entitlement provision of Section 932(*l*) on a subsequent claim that meets the filing and pendency requirements of ACA Section 1556(c).

Peabody does not come to grips with the language of Section 1556 at all, but instead premises its appeal on legislative intent and principles of res judicata.[12] *See infra*. While Union Carbide

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[12] Peabody does 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 19 n. 6. This argument is simply wrong. As the Third Circuit has held, 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 (cont'd . . .)

indirectly challenges a plain reading of Section 1556, its argument lacks merit.

Union Carbide contends that permitting awards of survivors' subsequent claims on the basis of automatic entitlement will effectively abrogate the time limitations contained in Section 1556(c). Pet. Br. (Richards) at 30-31, 48-49. To the contrary, as the Board recognized in its decision in *Stacy*, "the accurate application of Section 1556(c)'s time limitations does not render them 'meaningless.'" *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-212 (BRB 2010).

First, for any survivors' claims (original or subsequent) filed on or before January 1, 2005, which may still be pending before a

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(. . . cont'd)
("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). Peabody's claim that *B & G Constr.* and *Stacy* are distinguishable because they involved original, not subsequent, claims 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 pneumoconiosis in survivors' subsequent claims, but not in original claims.

district director, an ALJ, the Board or the courts, the automatic-entitlement provision of BLBA Section 932(*l*) remains inapplicable.[13] *See* Pub. L. 111-148, § 1556(c) (2010). Any dependent with such a claim may obtain benefits only by proving that the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205.

Perhaps more importantly in the subsequent-claim context, the limitations in Section 1556(c) are effectuated by requiring benefits claimants to take some action to initiate the administrative application of Section 932(*l*) after January 1, 2005. While Section 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 burden of proving that miners' death were due to pneumoconiosis. *Stacy*, 671 F.3d at 388-89.

In fact, "survivors will need to file some sort of 'claim' to notify the Office of Workers' Compensation Programs of the miner's death and the survivor's current status." 671 F.3d at 389; *see also B & G*

[13] The limitations also apply to claims involving the revived fifteen-year presumption of Section 921(c)(4). Thus, even if the limitations had no application to survivors' claims under Section 932(*l*), they would not be mere surplusage.

Constr., 662 F.3d at 244, n. 12 ("surely a widow seeking benefits must file something in order to receive them"). In other words, if a survivor who would be automatically 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.

Conversely Section 1556(c) does *not* require DOL to initiate any action. As the concurring Board judge noted in *Richards*:

> [Section 1556(c)'s limitations] provide a temporal framework for the orderly implementation of the amended [BLBA]. The Director is presumed to be aware of all pending claims and . . . is required to apply the amended [BLBA] to those claims as appropriate. He is, however, relieved of the burden of finding claimants who previously became eligible survivors or those whose survivors' claims were previously denied.

RJA at 185. 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); *Director, OWCP v. Bethlehem Mines Corp.*, 669 F.2d 187,

190-91 (4th Cir. 1982) (1977 amendments); *Talley v. Mathews*, 550 F.2d 911, 916 n. 13 (4th Cir. 1977) (1972 amendments).

While the reach of the ACA amendment to the BLBA may thus appear quite broad, this simply reflects what the statute provides—that the amendments benefit 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.[14] Hence, the Court should reject Union

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[14] It can be no accident that the use of the term "equity" in the title of Section 1556 invokes the very purpose for the initial enactment of automatic entitlement (which applied to all survivors) under section 932(*l*)—"to correct an egregious inequity 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. 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." *Id.*

Notwithstanding congressional concern for "equity," the ACA's 2010 (cont'd . . .)

Carbide's contention that automatic entitlement on subsequent claims abrogates the time limitations of Section 1556(c) and should apply the section just as Congress wrote it.

(. . . cont'd)
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 approximately 130 refilings as of December 2012. (In point of fact, Mrs. Richards was 81 years old and Mrs. Morgan 63 when the ACA was enacted.)

Whether "equitable" or not, the demonstrated practical impact resulting from the ACA time limitations further rebuts the companies' charge that allowing survivors' subsequent claims makes those time limits meaningless.

2. The Court should defer to the Director's persuasive interpretation of ACA Section 1556.

Even if the statutory language were not plain, however, the Court should defer to the Director's persuasive interpretation of the statute as permitting automatic entitlement on survivors' subsequent claims. *Stacy*, 671 F.3d at 388 (absent a final regulation codifying his interpretation, the Director's interpretation is entitled to *Skidmore* deference—*i.e.*, it "is entitled to respect . . . to the extent that it has the power to persuade") (internal quotations and punctuation and citations omitted).[15]

The Director's view is consistent with the plain language of Section 1556, as outlined above. *Cf. Stacy*, 671 F.3d at 389-90. And his interpretation of Section 1556 also maintains consistency within the statute by allowing the term "claims" to refer to all

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[15] Union Carbide asserts that the Board erred in according the Director's views *Chevron* deference in *Richards*. Pet. Br. (Richards) at 45. In fact, the level of deference afforded by the three-member Board majority is unclear. *See* RJA at 180 (observing that deference is "generally granted" and citing *Chevron* as indirect support). Regardless, since both the applicability of automatic entitlement to subsequent claims and the level of deference due the Director's position are legal questions, this Court can resolve those matters de novo. *Stacy*, 671 F.3d at 388.

claims—miners' or survivors', original or subsequent—throughout the section. *Cf. Stacy*, 671 F.3d at 389. Finally, equity is served by treating original and subsequent survivors' claims in the same way.

Union Carbide claims that because the Director has taken inconsistent positions regarding the applicability of Section 1556 to survivors' subsequent claims, his views are not entitled even to *Skidmore* deference. Pet. Br. (Richards) at 47. It bases this assertion on the fact that the Director (via a district director) initially denied Mrs. Richards' claim in 2009. But Union Carbide conveniently ignores the simple fact that Section 1556 was enacted *after* the district director denial.[16]

[16] It cannot be seriously disputed that the Director's position here reflects the DOL's consistent and considered views. For instance, four months after passage of the ACA, the Office of Workers' Compensation Programs issued BLBA Bulletin 10-08, instructing district directors that survivors whose prior claims had been denied could take advantage of automatic entitlement on subsequent claims. Thus, the district director awarded Mrs. Morgan's claim, filed on July 26, 2010, after March 23, 2010, the effective date of Section 1556, pursuant to Section 932(*l*). Furthermore, the rationale for DOL's proposed regulatory changes providing for automatic entitlement on subsequent claims, see note 6, *supra*, largely tracks the arguments presented here. 77 Fed. Reg. 19477-78 (Mar. 30, 2012).

In sum, under either the plain language of Section 1556 or the Director's interpretation thereof, the Court should affirm the awards for both Mrs. Richards and Mrs. Morgan. They filed their current claims after January 1, 2005, and those claims were pending on and after March 23, 2010. Both claims therefore satisfy the time limitations of Section 1556. Pub. L. 111-148, § 1556(c) (2010). Their deceased husbands both obtained benefits on claims during their lifetimes, and both Mrs. Richards and Mrs. Morgan meet the dependency and relationship criteria for eligible survivors. Hence, they are automatically entitled to survivors' benefits. 30 U.S.C. § 932(*l*); Pub. L. 111-148, § 1556(b) (2010).

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

Finding no support in the language of Section 1556, Union Carbide and Peabody retreat to supposed Congressional intent to preclude automatic entitlement on survivors' subsequent claims. They rely 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

the companies' argument has merit.

Citing the 1972 and 1977 amendments to the BLBA, in which Congress specifically directed the government to reconsider and reopen finally denied claims,[17] Union Carbide and Peabody claim 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. (Richards) at 19-22; Pet. Br. (Morgan) at 15-16.

The Court should reject this argument. Admittedly Section 1556 does not authorize "reopening" of previously denied claims. But that is not the issue here. Neither Mrs. Richards nor Mrs. Morgan is attempting to reopen their previous claims. Rather, the question is whether the statute makes automatic entitlement

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[17] *See* Pub. L. Nos. 92-303 and 95-239; *Director, OWCP v. Bethlehem Mines Corp.*, 669 F.2d at 190-91; *Talley v. Mathews*, 550 F.2d at 916 n. 13.

available in *subsequent claims*, which are entirely new assertions of entitlement distinct from any previous claim. *See Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 449 (8th Cir. 1997) (a "claim" under the BLBA refers to a distinct application for benefits, not an operator's general liability to a particular claimant).

In this context, *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 110-111. DOL reopened these claims, but allegedly failed to readjudicate them under the less restrictive criteria mandated by the amendment. Two classes of claimants brought suit against DOL, arguing that even though DOL had reopened their claims, the agency had denied them on reconsideration without the benefit of the mandated, less restrictive criteria. The first class of claimants had timely appealed the administrative denials of their claims and their appeals remained pending. The second class of claimants, however, had allowed their administrative denials to become final and was seeking to reopen their claims *again*. 488 at 112-113.

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.[18] 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, the second class "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.

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[18] 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.

In contrast, for purposes of a subsequent claim "the correctness of [the prior decision's] legal conclusion" must be accepted in adjudicating the latter application.[19] *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) are not overturned.[20] And the survivor will not be entitled to benefits for

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[19] Union Carbide contends that applying automatic entitlement to survivors' subsequent claims would effectively overrule prior decisions on claims, even decisions by this Court. Pet. Br. (Richards) at 31, n. 10. This is not correct. As with awards on miners' subsequent claims, prior decisions are not abrogated. *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1361 (4th Cir. 1996) (*en banc*). Rather, because subsequent claims are based on new causes of action and cover different periods of time, the decisions on prior claims are fully respected.

[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. (Morgan) at 11, 14. As shown above, however, no such reopening occurs under the ACA. Moreover, *Astoria Fed.* teaches the exact opposite lesson regarding res judicata (*see 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 (cont'd . . .)

any period of time pre-dating the prior denial. 20 C.F.R. § 725.309(d)(5); *see* note 9, *supra*. Thus, contrary to the arguments of Union Carbide and Peabody, 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.[21]

(. . . cont'd)
statement would be required. *Id*.

[21] Union Carbide claims that Section 932(*l*)'s reference to "eligible" survivors demonstrates Congress' intent that survivors be precluded from obtaining benefits on subsequent claims. Pet. Br. (Richards) at 22, n. 6; *see* 30 U.S.C. § 932(*l*). It blithely contends that a survivor whose previous claim was denied is no longer an "eligible" survivor.

Beyond its circularity, the argument simply ignores the statutory and regulatory meaning of "eligible," which for survivors and miners alike, means that they meet the criteria for benefits. *See* 30 U.S.C. § 932(*l*); 20 C.F.R. §§ 725.212, .218, .222. Conversely, no provision precludes eligibility solely because the survivor was denied benefits on a previous claim. Indeed, even prior to the ACA, survivors could receive benefits on a subsequent claim where the prior claim was denied based on a factor unrelated to the miner's physical condition. 20 C.F.R. § 725.309(d)(3). Thus, if a widow's first claim was denied because she had remarried, she could still obtain benefits on a subsequent claim if the later marriage terminated. *See* 65 Fed. Reg. 79973 (Dec. 20, 2000).

Likewise, the Court should reject the companies' claim that Senator Byrd's post-enactment statement proves Congress did not intend to bring survivors' subsequent claims within the ambit of Section 1556. Pet. Br. (Richards) at 23-24; Pet. Br. (Morgan) at 9-10. Union Carbide and Peabody specifically rely 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*, *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 the companies' 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 placed on it by Union Carbide and Peabody.

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

Union Carbide and Peabody also contend that automatic entitlement in survivors' subsequent claims is barred by the doctrine of res judicata (also known as claim preclusion).[22] Pet. Br. (Richards) at 26-42; Pet. Br. (Morgan) at 10-17. The Court should reject this contention because Mrs. Richards' and Mrs. Morgan's claims for automatic entitlement are newly-created statutory causes of action that are different from (and were unavailable during) their original claims, making res judicata inapplicable.[23]

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[22] Oddly, Peabody also suggests that automatic entitlement is barred by principles of collateral estoppel (or issue preclusion). Pet. Br. (Morgan) at 10-11. Since collateral estoppel requires an identity of issues in both a first and second judgment, and since "automatic entitlement" was not an issue in the original claims of either Mrs. Richards or Mrs. Morgan (Or their husbands' lifetime disability awards), that doctrine has no application in this appeal. *See Collins v. Pond Creek Min. Co.*, 468 F.3d 213, 217-18 (4th Cir. 2006) (setting forth elements of collateral estoppel).

[23] Before the Board, Union Carbide and 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 the subsequent claims filed by Mrs. Richards and Mrs. Morgan. The companies appear to have abandoned that argument on appeal to this Court. In truth, they had no choice. To the extent that the regulation would require that the subsequent claims at (cont'd . . .)

This Court has explained that res judicata

> bars a party from suing on a claim that has already been "litigated to a final judgment by a party . . . and precludes the assertion by such parties of any legal theory, cause of action or defense which could have been asserted in that action."

Ohio Valley Environmental Coalition v. Arcoma Coal Co. (*OVEC*), 556 F.3d 177, 210 (4th Cir. 2009) (quoting 18 James Wm. Moore *et al.*, Moore's Federal Practice § 131.10(1)(a) (3d ed. 2008). In order for res judicata to bar a subsequent action, "three elements must be present: (1) a judgment on the merits in a prior suit resolving (2) claims by the same parties . . ., and (3) a subsequent suit based on the same cause of action." *OVEC*, 556 F.3d at 210 (internal quotation, citation and footnote omitted).

As Union Carbide and Peabody suggest, the first two requirements—a final judgment on the merits and an identity of the parties—are satisfied. The companies' res judicata defense

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issue here 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").

founders, however, on the third required element. The subsequent claims for automatic entitlement, arising by virtue of the ACA's 2010 amendment of the BLBA, are not the same causes of action as the original claims and thus are not barred by res judicata.

It is undoubtedly correct that "[a] claim [that] existed at the time of the first suit and 'might have been offered' in the same cause of action, . . . is barred by res judicata." *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43-44 (4th Cir. 1990). 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. *OVEC*, 556 F.3d at 210-11. 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 v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955).

Although *Lawlor* is typically invoked when new facts give rise to new claims, it is well-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); 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."[24] 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]. (No party here asserts that Mrs. Richards' or Mrs. Morgan's initial claims were wrongly denied.) By contrast, no such appellate

[24] As the Supreme Court explained in *Sebben*, a claimant who received an unfavorable decision based on incorrect standards has a remedy available in the form of an appeal. *See* 488 U.S. at 122-23. If she elects to forego that remedy, she has "chose[n] to accept incorrect adjudication," even if another claimant later pursues a successful appeal on the same issue. *See id.*

remedy is available where a statutory barrier precludes relief. 540 F.3d at 678 n.4. Moreover, the second action is permissible where there is a statutory amendment 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.

The facts in *Alvear-Velez* bring these general principles into clear relief. There, the government initially sought to deport an alien who had been convicted in the United States of sexual assault on a minor. A statute allowed removal based on conviction of a crime of moral turpitude resulting in imprisonment for one year or more. Because the alien did not serve a year in prison, however, an immigration judge dismissed the deportation proceedings. Later, Congress amended the statutory definition of aggravated felony, another basis for removal, to include sexual abuse of a minor. The government then attempted to remove the alien under the amended statute, but based on the same conviction as in the prior proceeding.

The Seventh Circuit rejected the alien's res judicata defense to the second action. 540 F.3d at 677-81. It explained that

> the two . . . proceedings cannot be said to share an identity of the cause of action . . . [because although the same conviction underlay both proceedings], the ground that the immigration authorities now invoke was unavailable to them in the first proceeding and therefore could not have been asserted.

540 F.3d at 679 (quotations and citations omitted). It further explained that a less rigid application of res judicata was appropriate because "[t]he relevant change in the law is statutory in nature, as opposed to a change in case law, and that change is being applied in the administrative context." 540 F.3d at 680 (citation omitted).

The Eleventh Circuit reached a similar conclusion based on the same rationale. In *Maldonado v. U.S. Att'y Gen'l*, 664 F.3d 1369 (11th Cir. 2011), the court rejected a res judicata defense to the removal of an alien on a new statutory ground in a second proceeding (although for the same offense as in a prior proceeding). It explained that "the doctrine does not say that a new claim is barred when it is based on a new theory not otherwise available at the time of the prior proceeding," and thus permitted removal based on the new statutory ground. 664 F.3d at 1377. Likewise, the Second Circuit has rejected a res judicata defense to a second

removal proceeding (based on the same crime as the first proceeding) because Congress created a new ground for removal subsequent to the first action. *Ljutica v. Holder*, 588 F.3d 119, 127 (2d Cir. 2009). Similarly, although in *dicta*, the First Circuit has stated that res judicata does not apply when Congress amends the statutory grounds for removal: "Because a different and broader definition [of removal offenses] now controlled and that definition applied retroactively, the two proceedings did not involve the same claim or cause of action." *Dalombo Fontes v. Gonzales*, 498 F.3d 1, 2-3 (1st Cir. 2007).

The statutory-amendment exception to res judicata is not limited to the immigration context. For instance, the Second Circuit has followed the same principle in a copyright case. In *Marvel Characters, Inc., v. Simon*, 310 F.3d 280 (2d Cir. 2002), an author transferred his copyright of certain works to others. He later sued the transferees under the 1909 Copyright Act, attempting to recover his copyright under the renewal provision of that statute, but lost. After Congress enacted a new copyright law in 1979, permitting authors to terminate a transfer, the author filed a new action seeking to terminate the rights of the transferees. The court

rejected the transferees' argument that the new action was barred by res judicata. 310 F.3d at 287-88. Although the two actions "spr[a]ng from the same underlying facts," the author's request to terminate the transferees' rights was based on "an entirely new and wholly separate right than the renewal right," which could not have been adjudicated in the first action.[25] 310 F.3d at 287; *accord* *Smith v. Guest*, 16 A.3d 920, 935 (Del. 2011) (*dicta* indicating same principle applies in child-custody context).

Applying these principles here, Mrs. Richards' and Mrs. Morgan's subsequent claims for automatic entitlement are not barred by res judicata. Section 932(*l*) was not applicable when they

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[25] Union Carbide and Peabody assert that a change in the governing law never creates an exception to res judicata, but as demonstrated above, there is no such absolute rule. Moreover, the legal support for their claim rests almost entirely on cases where the law changed through the judicial decisional process, not statutory amendment. *See* Pet. Br. (Richards) at 43-44 and Pet. Br. (Morgan) at 16-17, and the cases cited therein. Further, Union Carbide's reading of its sole statutory-change authority, the forty-year old Third Circuit decision in *Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171 (3d Cir. 1971), overreaches. Unlike ACA Section 1556, the amendment to the railway labor statute at issue in *Antonioli* did not create a new cause of action, but rather changed only the manner in which the amount of relief could be determined. *See* 451 F.2d at 1177.

filed their original claims. 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," RJA at 181—*i.e.*, it created a new cause of action that did not previously exist.[26]

Thus, the subsequent claims of Mrs. Richards and Mrs. Morgan (on which automatic entitlement is available) represent different statutory causes of action than their original claims. Moreover, these new claims arise in the administrative context where "[r]es judicata . . . is not encrusted with the rigid finality that

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[26] Union Carbide makes the peculiar claim that the Board violated the Administrative Procedure Act by failing to make a specific determination that ACA Section 1556 created a new cause of action for survivors' subsequent claims. Pet. Br. (Richards) at 36-37. The language quoted in the text above, however, is capable of only one rational construction—that Section 1556 did indeed create a new cause of action. And, even if the Board had not addressed the issue, whether the statute creates a new cause of action is a question of law over which this Court exercises de novo review. *See Stacy*, 671 F.3d at 388.

characterizes the precept in judicial proceedings." *Grose v. Cohen*, 406 F.2d 823, 824-25 (4th Cir. 1969) (citations omitted). These same factors led the courts to reject the application of res judicata in *Alvear-Velez* and its progeny, and should lead this Court to reject the res judicata arguments raised by Union Carbide and Peabody.[27]

Furthermore, even viewed on a purely factual level, the subsequent claims filed by Mrs. Richards and Mrs. Morgan represent new causes of action. Res judicata does not apply where a later claim "arises from events separate from those at issue in the first suit"—*i.e.*, from a different "transaction." *Meekins v. United Transportation Union*, 946 F.2d 1054, 1058 (4th Cir. 1991).

As explained by the Third Circuit, res judicata does not apply when "[a]though there are common elements of fact between the two . . . proceedings, the critical acts and necessary documentation were different for the two proceedings." *Duhaney v. Att'y Gen'l of*

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[27] While the Seventh Circuit limited its holding to a particular context ("the res judicata effect of an administrative final judgment rendered prior to a congressional decision to expand the relief available and to make those additional avenues of relief retroactive"), *Alvear-Velez*, 540 F3d at 681, the claims at issue here exist in the very same context.

the U.S., 621 F.3d 340, 349 (3d Cir. 2010). And contrary to the suggestion made by Union Carbide and Peabody, it does not matter that the same ultimate remedy (an award of survivors' benefits in the cases at issue here) is available in both the first and second actions. Indeed, the Third Circuit specifically rejected a similar argument, holding that a focus on the underlying factual elements (rather than the ultimate remedy) was "more faithful to our res judicata precedent and the principles underlying the doctrine." *Id.* Thus, a second alien-removal proceeding based on a different criminal conviction, involving a different crime and different proof than the first proceeding, was not barred by res judicata. *Id.*

Similarly, the subsequent claims at issue here are not barred by res judicata. Although the original and subsequent claims would result in the same ultimate remedy, the subsequent claims are based on different factual predicates than the original claims. In their original claims, Mrs. Richards and Mrs. Morgan could recover only by proving that their husbands' deaths were due to pneumoconiosis. *See* 20 C.F.R. § 718.205. Resolution of that issue was based, in both cases, on an intensive review of medical evidence. The fact-finders were required to determine what

condition or conditions resulted in the deaths of Mr. Richards and Mr. Morgan, as well as the etiology of those conditions. In contrast, in the subsequent claims, the cause of the miners' deaths is not at issue, and medical evidence is wholly irrelevant. Rather, entitlement for both Mrs. Richards and Mrs. Morgan turns solely on a fact—whether their husband had been awarded benefits in their lifetime claims—that was irrelevant in their prior unsuccessful claims.[28] Thus, the two proceedings were not based on the same "critical acts and necessary documentation."

Moreover, precluding the subsequent claims of Mrs. Richards and Mrs. Morgan 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 generally* 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4403 (2d ed. 2002).

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[28] There is no question that Mrs. Richards and Mrs. Morgan satisfy the other requirements for entitlement. *See* note 3, *supra*.

The two claims now at issue exemplify that where subsequent claims are 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.[29] Indeed, as is apparent from the absence of any defense besides res judicata here, the doctrine is not being used as a shield against harassing lawsuits or to conserve resources, but as a sword to defeat plainly meritorious claims. 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 before the Court.[30]

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[29] 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 they 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").

[30] For instance, in its motion to hold claim in abeyance or to designate a lead case, document number 26, filed October 19, 2012, Union Carbide identified 15 additional cases presenting legal issues "common" to those herein. In *none* of those cases did the (cont'd . . .)

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

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(. . . cont'd)
employer contest before the Board that the survivor (a widow) met the terms of amended Section 932(*l*). *See*, *e.g.*, *Billlups v. Perry & Hylton, Inc.*, 2012 WL 1391751 *2, n. 2, BRB No. 11-0508 BLA (BRB Mar. 29, 2012) (appeal docketed, 4th Cir. No. 12-1654) (observing that the employer did not challenge that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*)").

claims violates due process because it deprives coal-mine operators of the benefit of finality. Pet. Br. (Morgan) at 17-19. *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, procedural 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 Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 504 (4th Cir. 1999).

Peabody received notice of Mrs. Morgan's subsequent claim, and was afforded the opportunity to contest the elements of that claim (that Mr. Morgan had been awarded benefits on his lifetime claim, and that Mrs. Morgan was, indeed, his widow). As succinctly put by this Court, "[d]ue process requires nothing more." *Id.* And, its rhetoric notwithstanding, Peabody has received the full protection of finality. Because Mrs. Morgan'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. Richards' and Mrs. Morgan's subsequent claims are new causes 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.

CONCLUSION

The Director requests that the Court affirm the awards of benefits on both Mrs. Richards' claim and Mrs. Morgan'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 10,855, 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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