No. 13-93

In the Supreme Court of the United States

BUCK CREEK COAL COMPANY, ET AL., PETITIONERS

v.

GAY NELL SEXTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners who are totally disabled due to pneumoconiosis. 30 U.S.C. 901(a). The Secretary of Labor has promulgated regulations under the Act governing the adjudication of claims for benefits. To preserve the finality of benefit adjudications while recognizing the possibility that a claimant previously denied benefits may later become entitled to benefits for a future period, the Secretary requires by regulation that a claim be denied if it is filed more than one year after the denial of a prior claim, unless new evidence—that is, evidence pertaining to the period after the denial of the prior claim—demonstrates at the threshold "that one of the applicable conditions of entitlement [upon which the prior denial was based] * * * has changed since" the denial of the prior claim. 20 C.F.R. 725.309(d). The question presented is whether that regulation impermissibly conflicts with traditional principles of claim and issue preclusion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 706 F.3d 756. The decision and order of the Benefits Review Board (Pet. App. 12-56) is unreported. The decision and order of the administrative law judge (Pet. App. 57-154) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2013. A petition for rehearing was denied on March 19, 2013 (Pet. App. 186-187). On June 4, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 17, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners who are totally disabled due to pneumoconiosis. 30 U.S.C. 901(a); see *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 683-684 (1991). Under regulations promulgated by the Secretary of Labor (Secretary), to establish entitlement to benefits a miner must prove (1) that he has pneumoconiosis, (2) that it arose out of coal mine employment, and (3) that he is totally disabled by the disease. 20 C.F.R. 725.202(d); see *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). A miner is totally disabled by pneumoconiosis when the disease is a "substantially contributing cause" of his disability, which is established when the pneumoconiosis either has a "material adverse effect" on the miner's respiratory disability or "[m]aterially worsens" a totally disabling respiratory impairment unrelated to coal mine employment. 20 C.F.R. 718.204(c)(1), (i) and (ii). Pursuant to his authority under the Act (30 U.S.C. 932(a), 936(a)), the Secretary has promulgated a broad range of regulations governing the filing, processing, adjudication, and payment of black lung claims. See 20 C.F.R. Pt. 725.

This case concerns 20 C.F.R. 725.309,[1] the rule governing claims filed after the claimant's first application for benefits under the Act. If the first application is still pending, the later claim merges into it. 20 C.F.R. 725.309(b). If the original claim was finally denied less than one year before the later claim is filed, the later

[1] Section 309 was recently amended and partially reorganized. 78 Fed. Reg. 59,118 (Sept. 25, 2013). The substantive changes are immaterial here. For consistency with the decisions and filings in this case, this brief refers to the subsections of Section 309 as they were numbered prior to that revision.

claim is regarded as a request for modification of the decision denying benefits, 20 C.F.R. 725.309(c), and is treated under relatively lenient and flexible standards prescribed by statute and regulations. In particular, modification of the prior denial is permitted "on grounds of a change in conditions or because of a mistake in a determination of fact." 20 C.F.R. 725.310; see 30 U.S.C. 932(a) (incorporating that standard from Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 922). Thus, modification allows for the reopening and relitigation of a final denial on the basis of "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam).

Once the one-year deadline for modification passes, however, the denial is final. It is permanently established that the miner was not totally disabled by pneumoconiosis in the period before the denial, and under no circumstances may he receive benefits for any period before the denial became final. 20 C.F.R. 725.309(d)(5); see *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 121-123 (1988).

Because a miner's health can deteriorate over time, especially given the recognized latent and progressive nature of pneumoconiosis, see 20 C.F.R. 718.201(c), the Secretary has long recognized—since at least 1981, when an earlier version of 20 C.F.R. 725.309 was promulgated—that benefits can appropriately be awarded for total disability from pneumoconiosis arising after the prior claim was denied. Accordingly, the Secretary's regulations permit the filing of an application for benefits more than one year after the final denial of the first claim (known as a "subsequent claim"). 20 C.F.R.

725.309(d); 62 Fed. Reg. 3352 (Jan. 22, 1997); *National Mining Ass'n* v. *Department of Labor* (*NMA*), 292 F.3d 849, 863-864 (D.C. Cir. 2002).

Those regulations, however, have two features that ensure that any proceedings on a subsequent claim will respect the finality of the prior denial. First, as noted, the subsequent claim cannot result in benefits for any period before the prior denial became final. 20 C.F.R. 725.309(d)(5). Second, the regulations require denial of the subsequent claim "unless the claimant demonstrates," at the threshold, "that one of the applicable conditions of entitlement"—that is, one of the "conditions upon which the prior denial was based"—"has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. 725.309(d) and (2).[2] The miner must make such a showing about his

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[2] This test is commonly called the "one-element" test, and the Secretary promulgated Section 725.309(d) (2001) to codify it and resolve a disagreement among the courts of appeals. See *Cumberland River Coal Co.* v. *Banks*, 690 F.3d 477, 483-485 (6th Cir. 2012); *Energy W. Mining Co.* v. *Oliver*, 555 F.3d 1211, 1223 (10th Cir. 2009); *Midland Coal Co.* v. *Director, OWCP*, 358 F.3d 486, 489-490 (7th Cir. 2004); *NMA*, 292 F.3d at 863-864; 65 Fed. Reg. 79,972 (Dec. 20, 2000). Several courts of appeals had endorsed the basic contours of the one-element test under the Secretary's prior regulation, 20 C.F.R. 725.309 (1981), which did not explicitly define the procedure for establishing a "material change in condition." See *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 313-314 (3d Cir. 1995); *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358, 1365 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1090 (1997); *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998 (6th Cir. 1994); *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1008-1009 (7th Cir. 1997) (en banc); *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445, 450 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998); *U.S. Steel Mining Co.* v. *Director, OWCP*, 386 F.3d 977, 979 (11th Cir. 2004). The Tenth Circuit, however, had adopted a different interpretation, under which the claimant was required to show a material deteriora-

physical condition with new evidence, *i.e.*, evidence pertaining to the miner's physical condition in the period after the denial of the prior claim. 20 C.F.R. 725.309(d)(3). If that threshold inquiry is satisfied, then the subsequent claim for benefits—limited to the period after the denial of the prior claim—can proceed. Evidence accepted in connection with the prior claim is automatically part of the record for the subsequent claim, and the earlier findings of fact are conclusive as to the period addressed in the prior claim, though they do not control the decision on the subsequent claim (which is limited to a later period). 20 C.F.R. 725.309(d)(1) and (4).

2. Respondent Gay Nell Sexton (Gay) is the widow of miner Frable Sexton (Frable). Frable filed his first claim for black lung benefits in 1973. That claim was finally denied on February 3, 1999, on the ground that his pneumoconiosis did not contribute to his total disability. Pet. App. 160, 183. Frable filed a second claim but voluntarily withdrew it. 20 C.F.R. 725.306(b). On April 12, 2001, Frable filed the subsequent claim at issue here. The federal respondent in this Court (the Department of Labor's Office of Workers' Compensation Programs (OWCP)) issued a proposed decision and order awarding benefits. Pet. App. 66. Petitioners requested a hearing before an administrative law judge (ALJ).[3]

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tion in the miner's condition with respect to each element previously adjudicated against him. See *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1510-1511 (1996).

[3] Frable died before the ALJ issued a decision. Gay pursued the claim on his behalf and filed her own claim for survivor's benefits, which is currently pending before an ALJ. This petition concerns only Frable's subsequent claim. See Pet. 14 n.2

a. The ALJ awarded benefits. Pet. App. 57-154. The ALJ observed, in conformance with Section 725.309(d), that at the threshold, "[Frable] must establish that one of the applicable conditions of entitlement has changed since the order denying the prior claim became final." *Id.* at 105. The ALJ weighed the medical opinions submitted in connection with the subsequent claim and found that Frable's total disability was (at the time of the subsequent claim) due, in part, to pneumoconiosis; because that conclusion was different from the conclusion on that issue at the time of the prior claim, the ALJ found "an applicable change in condition as required by § 725.309(d)." *Id.* at 143.

Turning from that threshold issue to the merits, the ALJ considered both the new evidence and the evidence submitted with the prior claim (which, because of its age, the ALJ found unpersuasive on the issue of Frable's condition at the time of the subsequent claim, Pet. App. 105). The ALJ concluded that the elements of entitlement were established and awarded benefits. *Id.* at 152-153.

b. Petitioners took an administrative appeal, and the Benefits Review Board (Board) affirmed. Pet. App. 12-56. The Board rejected petitioners' arguments regarding the validity of the regulation governing subsequent claims. *Id.* at 22. It held that Section 309(d) does not contravene principles of claim preclusion because "the issue is claimant's physical condition at entirely different times," and "[b]y requiring a claimant to prove a change in an applicable condition of entitlement with new evidence, the regulation ensures that the claimant is not simply seeking reconsideration of the prior, finally denied claim." *Id.* at 21-22. Next, the Board ruled that Section 309(d) does not create an irrebuttable presump-

tion of change because "claimant is required to establish a change in an applicable condition of entitlement by a preponderance of the relevant evidence, and employer has the right to submit evidence to defeat claimant's proffer." *Id.* at 22. One judge of the Board disagreed with the majority's affirmance of the ALJ's weighing of the medical opinions, but that judge concurred in the Board's "rejection of employer's arguments that the [ALJ] violated the doctrine of *res judicata* * * * and that 20 C.F.R. § 725.309(d) establishes an impermissible irrebuttable presumption." *Id.* at 46.

3. The court of appeals affirmed. Pet. App. 1-9. It held "that 20 C.F.R. § 725.309 is valid and was correctly applied in this case." *Id.* at 2. The court explained that Section 309(d) accords with principles of claim preclusion because "a miner's physical condition changes over time, and thus the presence of the disease at one point in time in no way precludes future proof that the disease has become present or has become so severe as to become totally disabling." *Id.* at 8-9. The court observed that "[t]he latent and progressive nature of black lung disease ensures that a claimant's physical condition may be different at entirely different times." *Id.* at 8. Against that backdrop, the court recognized that the requirement in the regulations that a claimant "submit newly developed evidence * * * ensure[s] that he is not merely relitigating the prior claim." *Ibid.*

Applying those principles, the court of appeals upheld the ALJ's finding of a change in an applicable condition of entitlement (in particular, that pneumoconiosis in part caused Frable's disability). The court explained that "[i]n the prior unsuccessful claim, the ALJ did not find that the pneumoconiosis substantially contributed to [Frable]'s disability at the time the claim was filed,"

but that "new evidence developed subsequent to the denial established * * * that the pneumoconiosis substantially contributed to his total disability in 2001, when the [subsequent] claim was filed." Pet. App. 8.

ARGUMENT

The court of appeals correctly upheld the validity of the Secretary's subsequent-claim regulation. Its decision does not conflict with any decision of this Court or of another court of appeals. Moreover, the Court has previously denied review in two cases presenting similar questions. See *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1090 (1997); *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998). Further review is not warranted.

1. Petitioners contend that the regulation is inconsistent with general principles of claim and issue preclusion, because it assertedly allows "endless relitigation" (Pet. 32) of finally decided cases and "waiv[es] finality" (Pet. 19) in the adjudication of black lung claims. Petitioners' argument fails to distinguish between old claims (which seek benefits for an earlier period and rely on the miner's condition at an earlier time) and new claims (which seek benefits for a distinct later period and rely on the miner's condition at a later time). The Secretary's regulation governing subsequent claims permissibly establishes a framework for distinguishing between the two.

a. Under 33 U.S.C. 922 and 20 C.F.R. 725.310, a denied claim for benefits may be reopened and modified because of a mistake of fact or change in condition, if reopening is requested within one year after the claim is finally denied. See *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam). When a

request to reopen is granted, the original claim is relitigated and (depending on the basis for the modification) benefits may be awarded from a date before the previous denial. See *Eifler* v. *OWCP*, 926 F.2d 663, 666 (7th Cir. 1991); 20 C.F.R. 725.503(b).

The regulation at issue in this case, 20 C.F.R. 725.309(d), does not authorize the reopening of a previously denied claim. A claim that falls outside the one-year reopening period is a subsequent claim, and benefits cannot be awarded for any period before the denial of the previously adjudicated claim. 20 C.F.R. 725.309(d)(5); 65 Fed. Reg. at 79,974. Entertaining such a subsequent claim, even though it may arise between the same parties, does not contravene any finality rule in the Act if it is in fact a new claim. See *U.S. Steel Mining Co.* v. *Director, OWCP*, 386 F.3d 977, 979 (11th Cir. 2004); *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998 (6th Cir. 1994). Nor does entertaining a new claim contravene principles the Act incorporates from the LHWCA. And in any event, the Act authorizes the Secretary to depart by regulation from otherwise applicable LHWCA procedures. See 30 U.S.C. 932(a); 20 C.F.R. 725.1(j) (explaining that Part 725 deviates from the LHWCA's procedures, as the LHWCA's focus is on traumatic injury); see *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1273-1274 (4th Cir. 1977).

Traditional preclusion principles likewise do not bar a new claim, because that claim seeks compensation for a later period and is based on new circumstances—such as a miner's physical condition at the time of the subsequent claim. As a leading treatise explains, "res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases."

7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 127.07[7] (2013). Numerous courts and other authorities agree. See Pet. App. 7-8; *U.S. Steel*, 386 F.3d at 990; *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1008-1009 (7th Cir. 1997) (en banc); *Lovilia Coal*, 109 F.3d at 450; *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1510 (10th Cir. 1996); *Lisa Lee Mines*, 86 F.3d at 1362; *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 313-314 (3d Cir. 1995); see also 62 Fed. Reg. at 3352; *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 327-328 (1955); Restatement (Second) of Judgments § 24 cmt. f (1982) (Restatement).

Entertaining a new claim is also consistent with issue-preclusion principles, which generally bar relitigation between the same parties of issues that were actually decided in a prior adjudication and were essential to the judgment. *Peabody Coal*, 117 F.3d at 1008; *Lisa Lee Mines*, 86 F.3d at 1363; see generally *Baker* v. *General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998); Restatement § 27. Because a factual finding that a miner does not have pneumoconiosis, or is not totally disabled by the disease, speaks to the miner's physical condition only at one point in time based on evidence of his condition at that time, it is not preclusive of the different question of the miner's condition at a later time based on later evidence of his condition. Cf. 65 Fed. Reg. at 79,973 (explaining that certain findings, such as the cause of a miner's death, are not subject to change over time and thus cannot form the basis of a subsequent claim).[4]

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[4] Petitioners do not challenge here the ALJ's factual determination on the question whether pneumoconiosis caused Frable's disability at the time of his subsequent claim. See Pet. App. 7; Pet. 15. As the Secretary's regulations and lower courts recognize, the answer to that question can change over time. Pet. App. 7-8; see 20 C.F.R.

Moreover, when an earlier decision resolves multiple elements of a claim against a party, and any one finding would have been sufficient to resolve the claim in that fashion, the factfinder's resolution of those elements is not, under conventional issue-preclusion principles, conclusive in subsequent proceedings. See *Peabody Coal*, 117 F.3d at 1008 ("[H]oldings in the alternative, either of which would * * * support a result, are not conclusive in subsequent litigation with respect to either issue standing alone," in part because "a claimant who loses on three * * * alternate grounds has no incentive to take an appeal to 'correct' the agency on grounds 2 and 3, even if he thinks there was error, if ground 1 is unassailable."); *Lisa Lee Mines*, 86 F.3d at 1363; 65 Fed. Reg. at 79,973-79,974; see also Restatement § 27 cmts. i and *o* (factual determination that is sufficient but not necessary to support result will be accorded preclusive effect only if an appellate court has specifically upheld it). Thus, so long as a claimant demonstrates that one element previously resolved against him has changed, issue-preclusion principles do not bar the relitigation of all elements of entitlement in pursuing a subsequent claim.

b. To respect precisely the preclusion principles on which petitioners rely, see *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 121-123 (1988), Section 309(d) provides that a subsequent claim generally must be denied, solely

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718.204(c)(1) (pneumoconiosis that "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment" is a "cause" of disability); *Island Creek Coal Co.* v. *Calloway*, 460 Fed. Appx. 504, 512 (6th Cir. 2012) ("[T]he extent to which smoking caused [claimant's] disability is not a matter completely 'not subject to change' in the same way his never having been in the mine would be.").

on the basis of the denial of the prior claim. It then qualifies that general principle through a tailored rule that accomplishes the "difficult task," *Lisa Lee Mines*, 86 F.3d at 1364-1365, of accounting for the potentially latent and progressive nature of pneumoconiosis: A subsequent claim may proceed if new evidence—that is, evidence pertaining to the period after the denial of the prior claim—demonstrates at the threshold "that one of the applicable conditions of entitlement [upon which the prior denial was based] * * * has changed since" the denial of the prior claim. 20 C.F.R. 725.309(d).

That provision (coupled with other aspects of Section 309(d)) establishes a reasonable procedure for assuring that any subsequent claim that proceeds is not precluded: First, by requiring new evidence, the rule focuses the factual inquiry on the miner's current condition, not his prior condition. (Indeed, the findings relating to the miner's prior condition are treated as conclusive.) Second, the rule requires the miner affirmatively to prove that his condition has changed. Cf. pp. 18-19, *infra*. Third, because issue-preclusion principles do not bar relitigation of multiple issues when an adverse decision on any one issue was a sufficient basis for resolving a prior claim (see p. 11, *supra*), the rule appropriately defines the necessary threshold showing using the "one-element" test (see note 2, *supra*) rather than some demanding showing concerning every element of entitlement decided in connection with the prior claim. Fourth, because satisfying Section 309(d) controls only whether a subsequent claim can escape summary denial, a subsequent claim that is allowed to proceed may still fail on the merits when all evidence and all elements of the claim are considered. See 65 Fed. Reg. at 79,972 ("The revised regulation continues to afford coal mine

operators an opportunity to introduce contrary evidence weighing against entitlement."). And finally, any subsequent claim that succeeds on the merits will be different from the prior claim, in that it covers a different time period, because Section 309(d) prohibits the recovery of benefits for any period before the denial of the prior claim. See pp. 3-4, *supra*.

Any finality rule that invariably precluded a claimant from filing a new claim for benefits for a later period notwithstanding a demonstration of changed conditions would be unsound. For example, a miner who misjudged the severity or nature of his condition at an earlier time and filed a claim prematurely would be forever barred from any future award (once the one-year period for reopening his original claim under 20 C.F.R. 725.310 lapsed), even if his pneumoconiosis later became verifiable or totally disabling. See *Lisa Lee Mines*, 86 F.3d at 1364 & n.14 (rule would place claimants in an absurd dilemma); 65 Fed. Reg. at 79,974 (explaining that Congress did not intend to penalize miners for filing for benefits before their disease became totally disabling). Section 309(d) thus represents the Secretary's implementation of a reasonable procedure to respect both the important interest in finality and the need to permit miners to file new claims if their condition worsens to the point at which they meet the statutory criteria for benefits. *Lisa Lee Mines*, 86 F.3d at 1364-1365.

2. Petitioners take issue (Pet. 22-24) with the scientific underpinning for the subsequent-claim regulation, *viz.*, that pneumoconiosis can be a latent and progressive disease. This Court ordinarily would not grant review to pass on a matter of scientific judgment, especially where, as here, the expert agency reached that judgment through notice and comment rulemaking. See

20 C.F.R. 718.201(c) ("'[P]neumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."). That regulation reflects the Secretary's considered and expert judgment on the issue, and it is entitled to controlling deference. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (The Act "has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise * * * . In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations."); *Midland Coal Co.* v. *Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004) ("[W]e see no reason to substitute our scientific judgment, such as it is, for that of the responsible agency."); 65 Fed. Reg. at 79,968-79,971 (evaluating scientific literature on the progressivity of pneumoconiosis); 62 Fed. Reg. at 3344 (same); see also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 151-152 (1987) (noting progressive nature of pneumoconiosis); 65 Fed. Reg. at 79,971-79,972 (collecting circuit court cases recognizing that pneumoconiosis is a progressive disease).

Petitioners' reliance here (Pet. 9 n.1, 22) on two Surgeon General reports and a statement from the American College of Occupational and Environmental Medicine (ACOEM) is misplaced. The Secretary rejected the progressivity findings in the 1985 Surgeon General report as inconsistent with later medical studies, and the 2004 Surgeon General report did not contain those superseded findings. 65 Fed. Reg. at 79,971; *RAG Am. Coal Co.* v. *OWCP*, 576 F.3d 418, 426-427 (7th Cir. 2009). ACOEM's assertion in the Secretary's rulemaking (see Pet. 22) that the medical literature generally shows that

pneumoconiosis does not progress lacked any citation to the medical literature, and it was ultimately proven incorrect. See, *e.g.*, 65 Fed. Reg. at 79,971 (concluding that the rulemaking record contains "abundant evidence demonstrating that pneumoconiosis is a latent, progressive disease"). Indeed, the National Institute for Occupational Safety and Health—which is the statutory medical consultant to the Department of Labor, 30 U.S.C. 902(f)(1)(D)—took the opposite view, concluding that the "scientific evidence [reflects] that pneumoconiosis is an irreversible, progressive condition that may become detectable only after cessation of coal mine employment." 64 Fed. Reg. 54,978-54,979 (Oct. 8, 1999).

Nor is there any conflict between the decision below and *National Mining Ass'n* v. *Department of Labor*, 292 F.3d 849, 863-864 (D.C. Cir. 2002), over that "matter of science" (Pet. 22-24). Rejecting a facial challenge to 20 C.F.R. 718.201(c), the D.C. Circuit found sufficient evidence in the rulemaking record to justify the Secretary's view that pneumoconiosis can be a latent and progressive disease, but is not always so. *NMA*, 292 F.3d at 863, 869 (citing opposing medical studies showing pneumoconiosis may be progressive in as many as either 8% or 24% of cases). The court below likewise understood that because pneumoconiosis can be a latent and progressive disease, "a claimant's physical condition *may* be different at entirely different times," and "a miner's condition *can* change over time." Pet. App. 8 (emphases added). The reasoning of the court below does not depend on the premise that pneumoconiosis will *always* progress, and the *NMA* court likewise refused to read the regulation to establish such an absolute proposition. *NMA*, 292 F.3d at 869 ("We would thus sustain NMA's challenge to [S]ection 718.201(c) *if* the regulation

said that pneumoconiosis is 'always' or 'typically' a latent and progressive disease.") (emphasis added). But neither did the *NMA* court conclude that pneumoconiosis can *never* be progressive. See, *e.g.*, *Helen Mining Co.* v. *Director, OWCP*, 650 F.3d 248, 253 (3d Cir. 2011) (rejecting coal company's argument that *NMA* supports "the proposition that pneumoconiosis cannot be properly characterized as latent and progressive").

Accordingly, 20 C.F.R. 725.309(d) does *not* presume that pneumoconiosis will always progress, but instead establishes a framework that accommodates the *possibility* of progressivity in any given miner's case. See 65 Fed. Reg. at 79,972 ("Although one commenter asserts that the regulation creates an irrebuttable presumption that each miner's condition is progressive, it actually does no such thing. As revised, [Section] 725.309 simply effectuates the * * * one-element test."). Petitioner would evidently prefer a framework under which a miner must specifically prove at the threshold that he suffers from a progressive form of pneumoconiosis. See Pet. 23. But proof of that particular issue is not a statutory requirement, and in this context, finality principles do not demand a threshold showing on that particular issue. See 65 Fed. Reg. at 79,972. In the end, a miner who (1) is denied benefits at an earlier time, (2) later shows a change in his condition at the threshold, and (3) actually prevails when his subsequent claim is adjudicated on the merits has, in every meaningful sense, shown that his disease progressed between the earlier time and the later time.

In any event, the relative merits of alternative approaches are largely beside the point. "[T]he question for [this Court] is whether the [Secretary's framework proceeds from] a permissible construction of the stat-

ute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). The Secretary's framework seeks to distinguish subsequent claims that cannot proceed in the face of the finality of a prior denial from subsequent claims that may proceed. Every court to consider the current framework has concluded that the Secretary's approach is satisfactory. See Pet. App. 2; *Cowin & Co.* v. *Director, OWCP*, No. 12-14992, 2013 WL 4406628, at *1 (11th Cir. Aug. 19, 2013); *Cumberland River Coal Co.* v. *Banks*, 690 F.3d 477, 485-486 (6th Cir. 2012); *Canterbury Coal Co.* v. *Director, OWCP*, 463 Fed. Appx. 90, 92-93 (3d Cir. 2012); *Midland Coal*, 358 F.3d at 491; *NMA*, 292 F.3d at 869-870; see also *Energy W. Mining Co.* v. *Oliver*, 555 F.3d 1211, 1223 (10th Cir. 2009) (concluding that the Secretary's promulgation of a revised Section 309(d) had permissibly "supplanted" the court's interpretation of the prior regulation by "codif[ying] a new version of the one-element rule," and declining to address concerns about the section's operation because there was "an evident change in [the miner's] condition" "[u]nder anyone's test").

Moreover, there is substantial reason to believe the Secretary's framework protects finality interests in practice. We are informed by OWCP that over the last decade, on average only 7.4% of subsequent claims against employers like petitioners—about 1 claim in 14—have resulted in an award of benefits. See also 64 Fed. Reg. at 54,984 (stating that benefits were awarded on 10.56% of refiled claims from January 1982 to July 1998).[5]

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[5] Those same figures show why petitioners overstate (Pet. 33-34) the impact of the regulation. Petitioners are correct that about half of black lung claims over the past decade have been subsequent claims. But awards on such claims are, as noted, infrequent and are

3. Finally, petitioners suggest (Pet. 33) that Section 309(d) impermissibly shifts the burden of proof imposed on a benefits claimant by the Administrative Procedure Act, 5 U.S.C. 556(d), and conflicts with this Court's decisions in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), and *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997). Section 309(d) does not shift the burden of proof away from the claimant, and no conflict exists.

In *Greenwich Collieries*, this Court invalidated an administrative rule under which black lung benefits were awarded if the evidence for and against entitlement was evenly balanced, reasoning that the rule effectively shifted the burden of persuasion from the claimant to the party opposing the claim. 512 U.S. at 281. Section 309(d) does not alter the burden of persuasion; it is a threshold the claimant must clear to avoid having the claim summarily denied on the basis of the prior determination. Cf. *Metropolitan Stevedore*, 521 U.S. at 137 n.9 (explaining that the standard of proof "goes to

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limited to the time period after the denial of the prior claim. Any costs associated with contesting unsuccessful subsequent claims are largely inherent in any system that recognizes the possibility that a miner who is not entitled to benefits at one time may experience a change in physical condition that might make him entitled to benefits in the future. Section 725.309(d) attempts to minimize those costs by providing a focused threshold inquiry upon which a subsequent claim can be allowed to proceed or be summarily denied.

Nor has the Secretary's action "disrupted" insurers' and self-insurers' "expectation of finality" (Pet. 34). They have known of (and presumably accounted for) the possibility of subsequent claims for decades. See 20 C.F.R. 725.309 (1981). Indeed, the wholesale elimination of subsequent claims that petitioners seek would be a windfall to insurers who for decades have collected premiums based on the possibility of having to pay on some such claims.

how convincing the evidence in favor of a fact must be in comparison with the evidence against it * * * , but does not determine what facts must be proven as a substantive part of a claim or defense"). A claimant always retains the burden of proof, both on the threshold issue of whether there has been a change in a previously denied element of entitlement justifying an adjudication of the subsequent claim, and on the ultimate issue of entitlement to benefits once all evidence is taken into account. See, *e.g.*, 20 C.F.R. 725.309(d) (subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement * * * has changed"); *NMA*, 292 F.3d at 870 ("revised rule actually places the burden of proof squarely on the *claimant* to prove a change in condition"); 65 Fed. Reg. at 79,972 (explaining that the miner continues to bear the burden of establishing all the elements of entitlement and that coal mine operators may introduce contrary evidence weighing against entitlement).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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