THE BLACK LUNG BENEFITS ACT—SIXTEEN TONS, WHAT DO YOU GET?: HOW DO YOU DETERMINE A MINER HAS HAD A MATERIAL CHANGE IN CONDITION TO ALLOW A SUBSEQUENT CLAIM FOR BENEFITS?

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NOTES

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INTRODUCTION

In 1969 the United States Congress passed the Black Lung Benefits Act (BLBA) in order to compensate miners who have been disabled by the lung disease pneumoconiosis (more commonly known as black lung), and their spouses and dependent children. A miner can apply for and receive benefits under the BLBA if the miner satisfies the four elements of entitlement.1 Due to the progressive nature of pneumoconiosis, a miner suffering from the disease may not satisfy the elements of entitlement at their first application for benefits, but may be entitled to benefits at a later time and can reapply if there has been a “material change”2 in the miner's condition.3 The Director of the Office of Worker's Compensation Programs (OWCP), an agency within the Department of Labor, has promulgated regulations that state the requirements that must be met in order to file a subsequent claim for benefits. These regulations state that in order to bring a subsequent claim for black lung benefits, a miner must prove that there has been a material

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2. The phrase "material change" is a vestige of the original version of the regulations governing the processing and adjudication of claims under the Black Lung Benefits Act. Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, as Amended, 43 Fed. Reg. 17,732 (Apr. 25, 1978). While the language of material change is not used in the current regulations, it is still used by the courts and relevant to the discussion. 20 C.F.R. § 725.309(d); see, e.g., U.S. Steel Mining Co. v. Dir., OWCP, 386 F.3d 977, 979 (11th Cir. 2004); see also infra text accompanying notes 81-110.

3. 20 C.F.R. § 725.309(d).
change in the miner's condition with respect to one of the elements of entitlement previously adjudicated against the miner. 4

There has been controversy among the federal appeals courts as to whether the Director's standard for the filing of subsequent claims is proper, or whether it is too lax and does not respect the finality of the original judgment. Due to this split in the circuits, miners in different geographical locations are treated unequally under the same law. 5 This Note will explore which is the most appropriate test for determining whether a miner making a subsequent application for black lung benefits has had a material change in condition since the original claim's denial. Inherent to the discussion of this issue is an analysis to determine whether the Director's standard offends the principles of res judicata. This determination will be explored in the context of the scope of judicial review of agency actions and regulations as dictated by the Administrative Procedure Act and the relevant case law on that issue.

Part I of this Note will examine the BLBA and the Department of Labor regulations under that Act. Also in Part I, this Note will delve into the area of administrative law and judicial deference to agency regulations, as well as the doctrine of res judicata. Part II will look at the cases representing the current split in the federal courts of appeals, and how those courts have reached their respective positions. Finally, Part III will look at the controversy and discuss whether the "one element" test is indeed the appropriate and applicable test for determining whether a miner has shown a material change in condition.

Hypothetical Fact Pattern

Mr. Murphy, a hypothetical miner, lives and works in Wyoming, a state within the Tenth Circuit, and has already been denied a claim for black lung benefits, as he did not meet all four elements of entitlement at the time of his first claim. Mr. Murphy has worked in a subterranean mine for ten years, and suffers greatly from pneumoconiosis. Though he had some symptoms and adverse effects from the disease at the time of his original claim, he has

4. Id. §§ 725.202(d), 725.309(d).
5. Compare U.S. Steel Mining Co., 386 F.3d 977 (holding that the one-element test was the appropriate test to determine whether a miner could bring a subsequent claim for benefits), with Wyo. Fuel Co. v. Dir., OWCP, 90 F.3d 1502 (10th Cir. 1996) (holding that the one-element test violated the principles of res judicata, and was not appropriate for determining whether a miner has had a material change in conditions to warrant a subsequent claim).
since become totally disabled by it. Not only can he no longer ob­
tain gainful employment, but regular activities in his every day life
are difficult and he is almost always short of breath. In his original
claim, elements of entitlement were decided against him.

Now, a year after his first claim was denied, he is eligible to
make a subsequent application for benefits if he can show a mate­
rual change in his condition. However, because he is in the Tenth
Circuit, he will need to show a material change in all the elements
of entitlement decided against him in his original claim. In contrast,
if Mr. Murphy lived outside the Tenth Circuit, he would only have
to show a material change in one of the elements of entitlement
adjudicated against him in his original claim. Because the Court of
Appeals for the Tenth Circuit has broken with its sister circuits, and
does not apply the test adopted by the Director of the OWCP, he
must meet the more stringent standard applied by the Tenth Cir­
cuit. Therefore, this hypothetical miner will need to persuade the
court to abandon its material change test and adopt the Director's
one-element test.

I. BACKGROUND

A. The Black Lung Benefits Act and its Legislative History

1. The 1969 Federal Coal Mine Health and Safety Act

In 1969, the United States Congress passed the Federal Coal
Mine Health and Safety Act as part of a large initiative to compen­
sate miners in the wake of a devastating mine explosion.6 This ex­
losion brought the plight of coal miners to public attention and
raised concern for the health and safety of miners and the well­
being of their families (specifically, their spouses and dependent
children).7 While the explosion did not specifically bring to light
the problem of black lung among miners, it raised public awareness
regarding the hardships suffered by miners as a result of their work­
ing conditions; one of these hardships is pneumoconiosis.8 This fed­
eral initiative to compensate miners was originally intended to
spark action on the state level, while providing federal compensa­
tion until those states with large coal mining industries could pro­

The Federal Coal Mine Health and Safety Act of 1969 included the first incarnation
of the federal black lung benefits scheme. Federal Coal Mine Health and Safety Act of
8. Id.
vide their own funds to support miners within their state. However, the state governments have not risen to the expectations of the federal government, and as the Director of the OWCP has yet to approve a state compensatory program, compensation for pneumoconiosis remains, for all intents and purposes, completely federal.

2. The Process of Receiving Benefits

The Department of Labor regulations provide, as a preliminary matter, that any person who believes that they are entitled to benefits under the BLBA may apply for such benefits. If a miner satisfies the elements of entitlement, the miner is entitled to receive benefits payable as of the month when total disability occurred. The regulations state that any person over the age of eighteen is considered to be competent to file his or her own claim, but also provide that another person may make a claim on behalf of someone judged to be incompetent under the regulations. To make a claim, the claimant must either be living or must have filed an intention to make a claim within six months before their death. In the latter situation, the claimant’s authorized representative may continue with the claim in his or her stead.

The Department of Labor regulations state that a claim can be filed by mail with any of the district offices of the Social Security Administration, or any office of the Department of Labor authorized to accept claims. In the case of a claimant residing outside of the United States, the claim may be filed with the Foreign Service. A claim is considered to have been filed on the day that it was delivered, unless that would affect the party’s rights, in which case a legible postmark will establish the date the claim was filed.

12. Id. § 725.503(b).
13. Id. § 725.301(c).
14. Id. §§ 725.301(d), 725.305(c).
15. Id. § 725.305(a). This regulation provides that the written notice is treated as a claim for purposes of § 725.301, and therefore, the claim may be continued after the miner’s death. Id. § 725.305.
16. Id. § 725.303(a)(1).
17. Id.
18. Id. § 725.303(b).
miner may file a claim within three years of a determination that he is totally disabled, and there is no time limit on a survivor claim for benefits.\textsuperscript{19} The regulations provide a presumption that a claim was timely filed; however, time limits may not be waived or tolled, except in extreme cases.\textsuperscript{20}

A claim for benefits under the BLBA may be decided on its merits by a district director.\textsuperscript{21} After the determination by the district director, a party\textsuperscript{22} has a right to a hearing on a contested issue of fact or law\textsuperscript{23} and a party may request such a hearing after the completion of proceedings before the district director.\textsuperscript{24} That hearing will take place before an Administrative Law Judge (ALJ),\textsuperscript{25} within seventy-five miles of the claimant's residence,\textsuperscript{26} and will lead to resolution of the contested issue by the presentation of oral, written, and documentary evidence.\textsuperscript{27} After the hearing, the judge's order becomes final thirty days after it is filed, unless appealed, or unless the parties move for reconsideration.\textsuperscript{28} A party may also appeal his or her claim to the Benefits Review Board before the decision becomes final.\textsuperscript{29} After a final order has been entered by the Benefits Review Board, an aggrieved party may appeal to the federal court of appeals in the circuit where the injury (exposure to coal dust resulting in black lung) occurred.\textsuperscript{30}

3. Pneumoconiosis

Because the purpose of the BLBA is to compensate miners disabled by pneumoconiosis, the Department of Labor Regulations adopt a broad definition of this term.\textsuperscript{31} The BLBA's definition is substantially more inclusive than a medical definition would be.\textsuperscript{32}
stating that pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 33 The definition of pneumoconiosis found in the Department of Labor regulations closely mirrors the definition adopted by the U.S. Congress in the BLBA. 34 This broad definition furthers the asserted goal of Congress, which is to compensate miners for their injuries and aid in the support of their spouses and minor children. 35

4. The Black Lung Benefits Act of 1972

The original 1969 statute has been amended significantly three times since it was passed. In 1972 Congress amended the statute to broaden the coverage through the introduction of an additional statutory presumption to aid a miner in proving the elements of entitlement. 36 Among the biggest changes in the expansion of coverage under the 1972 Amendment was the provision of benefits to the orphans or dependent children of a miner who died from pneumoconiosis. 37 The Senate Report stated that this amendment was designed to correct an anomaly under the original BLBA, by which a child of a disabled or deceased miner, whose other parent had also passed, could not receive benefits under the Act, because the statutory language provided benefits only to a miner's widow. 38

The 1972 Amendment also added a new statutory presumption of entitlement under the Act. Before enacting the 1972 Amendment, a presumption of entitlement attached if a miner worked in an underground coal mine for ten years or more, or if such a miner died due to pneumoconiosis after working in a coal mine for ten or more years, a rebuttable presumption attached that his pneumocon-

34. 20 C.F.R. § 718.201(a) ("'Pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal employment."). The regulations make a distinction between "clinical" and "legal" pneumoconiosis; however, they clearly state that the overall definition of pneumoconiosis encompasses both. Id.
38. S. Rep. No. 92-743, at 7-8, as reprinted in 1972 U.S.C.C.A.N. at 2311-12. The Amendment also provides that in the absence of a widow or dependent child, benefits being paid to a disabled miner may be paid at his death to any dependent parents or siblings the miner may have. Black Lung Benefits Act of 1972, 86 Stat. 150.
iosis was due to mining.\textsuperscript{39} The original 1969 Act also contained a third statutory presumption, based on X-ray diagnosis of a certain type, that pneumoconiosis was the cause of disability or death.\textsuperscript{40} In 1972 a fourth statutory presumption was added to create a rebuttable presumption of pneumoconiosis regardless of a negative chest X-ray if a miner had worked in an underground coal mine for at least fifteen years (or a surface miner working in similar conditions) and shows other signs or symptoms of pneumoconiosis.\textsuperscript{41} The presumption is that the miner suffers from and is disabled by pneumoconiosis, even if his X-ray is read as negative for the disease.\textsuperscript{42} The Senate Report also provides that both houses of Congress had intended to allow these benefits to surface miners, who are equally as afflicted as underground miners, but who had been neglected by this program.\textsuperscript{43} This oversight was remedied by striking the phrase “underground” and providing benefits for all afflicted coal miners.\textsuperscript{44}

The 1972 Amendment also sought to increase the level of compensation available to miners by broadening the definition of “total disability” for the purpose of black lung benefits.\textsuperscript{45} Up to this point the definition of “total disability” was found in Title II of the Social Security Act, but Congress felt the definition there was too restrictive and effectively denied benefits to those people intended to receive them.\textsuperscript{46} The relevant Social Security definition provided that total disability was an “inability to engage in any substantial gainful


\textsuperscript{40} \textit{Id}.


\textsuperscript{42} \textit{Id}. The Legislative History provides that this presumption is necessary due to the fact that an X-ray showing that the miner is negative for pneumoconiosis would preclude any further processing of a claim for benefits. Evidence of post-mortem findings of black lung has urged commentators to favor less reliance on X-ray diagnoses, which seem to be less reliable than previously thought. As such, this provision expands the ability to prove pneumoconiosis by allowing other tests to establish the affliction. S. Rep. No. 92-743, at 11-16, as reprinted in 1972 U.S.C.C.A.N. at 2315-20.


activity.” However, Congress found that in practice this kept miners from receiving the benefits they were entitled to, because they were able to engage in gainful activity, even if not physically able to engage in mining. In many coal mining areas, there is no realistic opportunity for employment outside of mining, and even if there is an opportunity, it is rarely for comparable wages. As a result, many miners were unable to receive benefits because they could work, but they were unable to find work outside the mining industry. After the 1972 Amendment, the definition of “total disability” for black lung benefits reflected the intention that a miner who could no longer mine should receive the benefits provided to afflicted coal miners by this federal statute.

5. The 1977 Black Lung Benefits Reform Act

In 1977 Congress amended the BLBA again. This time it created the Black Lung Disability Trust Fund to better provide funding for the benefits program. This Amendment also levied an excise tax on coal mining. The revenue raised by this tax would help pay benefits under the Act by funding the Black Lung Disability Trust Fund. The Black Lung Disability Trust Fund and the excise tax on mining were needed in part because the states had not risen to Congress’s expectation that they would formulate plans for helping to support disabled miners on the state level. Also, the Trust Fund shifted the primary burden of administering this benefit plan.

47. Id. at 16, as reprinted in 1972 U.S.C.C.A.N. at 2320.
49. Id.
50. Id.
51. See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4, 86 Stat. 150, 153 (codified as amended at 30 U.S.C. § 902 (2000)). A miner is totally disabled when “pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.” Id.
52. Donald T. DeCarlo, The Federal Black Lung Experience, 26 How. L.J. 1335, 1342-45 (1983). The Black Lung Disability Trust Fund was created to assume liability for payments due to disabled miners and survivors whose last coal mine employment was before January 1, 1970, when the last employment was after that date but no responsible coal operator could be found to assume liability, or if the operator responsible refused to make payments. Id. at 1343; Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3, 92 Stat. 11, 13 (codified as amended at 26 U.S.C. § 9501(d) (2000)).
54. DeCarlo, supra note 52, at 1342-46.
55. Id. at 1342-43.
to the coal industry, as originally intended by Congress.56 This became necessary due to the Department of Labor's inability to effectively distribute benefits amidst contestation by the coal operators.57 After the 1977 Amendment, the Black Lung Disability Trust Fund was responsible for the payment of black lung claims.58 However, coal operators sought to take advantage of the Trust Fund, by shifting the burden of paying claims solely to the Trust Fund, and away from the insurance policies purchased by the operators.59

This Amendment was also an attempt to further the goal of compensation by removing several of the more restrictive provisions, expanding the definition of the term "miner," and extending the statute of limitations on claims for benefits to three years from the date of injury.60 These changes expanded the definition of "miner" to include not only surface and underground miners, but also self-employed miners, and coal mining support staff—but only if they had been exposed to coal dust over the course of their employment.61 This Amendment also added a fifth rebuttable presumption—that a deceased miner who had worked for twenty-five years or more in a coal mine had died due to pneumoconiosis.62 It was clear by this Amendment that Congress preferred over-inclusive compensation to under-inclusive compensation, and further evidenced the intent of Congress to provide effective compensation to miners suffering from pneumoconiosis.

The 1977 Amendment to the BLBA was tremendously successful in increasing the number of miners who received benefits; however, it also caused numerous problems.63 The main problem was that this amendment left the door wide open for coal mine operators to try to shift the burden to the Black Lung Disability Trust

56. Id. at 1343; see also S. REP. NO. 92-743, at 19 (1972), as reprinted in 1972 U.S.C.C.A.N. 2305, 2323.
57. DeCarlo, supra note 52, at 1343.
58. Id.
59. Id. at 1346.
60. Id. at 1343-45, 1343 n.40.
61. Id. at 1344-45; Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2, 92 Stat. 95, 95 (1978) (codified as amended at 30 U.S.C. § 902(d) (2000)) ("[M]iner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.").
63. DeCarlo, supra note 52, at 1346.
Fund. The coal mine operators used the Trust Fund to avoid paying benefits if they were liable to a miner who was eligible for benefits through the Social Security Administration. The coal operators argued that any claim that was approved by the Social Security Administration should be paid from the Black Lung Disability Trust Fund and not from the operator's insurance policy; a position largely accepted by ALJs and the Benefits Review Board. Although these concerns, among others, resulted in considerable litigation, these issues were largely resolved by the 1981 Amendment to the BLBA.

6. The Black Lung Benefits Amendment of 1981

The 1981 Amendment scaled back the compensation provided by the BLBA, albeit only slightly. Three of the five statutory presumptions were removed, making it tougher for miners to prove entitlement under the Act. This amendment also changed the administration of the Black Lung Disability Trust Fund by transfer-

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64. Id.
65. Id. Employers also tried to place the blame for lung conditions on the miners' cigarette smoking. However, the rebuttable presumptions largely precluded this as a line of argument, and still allowed disabled miners to recover under the Act. Id. at 1347.
66. Id. at 1342-46.
67. Id. at 1350-59.
68. Id. at 1350-51. The Black Lung Benefits Act currently provides only two statutory presumptions for finding entitlement under the BLBA:
1. A miner who suffers from black lung and was employed as a coal miner for ten years or more enjoys the rebuttable presumption that his pneumoconiosis arose from coal mining. 30 U.S.C. § 921(c)(1) (2000).
2. If a miner can show a specific type of mass, by X-ray or autopsy, there shall be an irrebuttable presumption that he suffers from pneumoconiosis or that his death was caused by pneumoconiosis. Id. § 921(c)(3).

The BLBA also provides that the following three statutory presumptions will not apply to claims arising after 1981:
1. A miner who had been employed for ten or more years in a coal mine and dies due to respiratory dysfunction enjoys the rebuttable presumption that he died due to pneumoconiosis. Id. § 921(c)(2).
2. If a miner who had been employed in the underground coal industry for fifteen or more years had a chest X-ray interpreted as negative for pneumoconiosis, any other evidence that he was afflicted with black lung attaches a rebuttable presumption that he suffered from the disease. Id. § 921(c)(4) (Supp. III 2003).
3. Any miner who died prior to the enactment of the Black Lung Benefits Reform Act of 1977 and was employed in the coal industry for twenty-five or more years enjoys the rebuttable presumption that his death was caused by pneumoconiosis. Id. § 921(c)(5).
ring control of this fund to the Internal Revenue Service.\footnote{H.R. Rep. No. 97-406, at 6 (1981), as reprinted in 1981 U.S.C.C.A.N. 2671, 2675.} Congress transferred the Trust Fund’s administration because the Trust Fund had been operated at a deficit for many years.\footnote{Id.} Although the compensatory plan was changed slightly to make it more difficult to gain benefits, the intent of Congress to compensate miners for their disability and to help support their spouses and children was still clear. If Congress had intended to completely undercut the benefits provided, it would have removed all the statutory presumptions that aid a miner in proving entitlement.\footnote{30 U.S.C. § 921(c) provides that two of the five original rebuttable statutory presumptions are applicable to claims after 1981; the other three presumptions are not applicable to new claims.} Furthermore, it was well within the power of Congress to eliminate these benefits altogether, a path it did not take.

In general, the BLBA, as amended, requires coal mine operators to provide benefits for their employees who are disabled by pneumoconiosis.\footnote{30 U.S.C. § 933 (2000). This requirement applies to operators who operate a coal mine in a state without a workers compensation law, providing benefits to miners afflicted with black lung. Id. The statute requires a claim for black lung benefits be filed under a state workers compensation program, if one exists. Id. § 931. But as noted above, no state has enacted a benefits plan that has met with the approval of the Secretary of Labor. Olson, supra note 10, at 706.} The Act also provides regulatory teeth by allowing the Department of Labor to levy a civil penalty of not more than one thousand dollars for every day that the employer does not comply with the Act’s requirements of paying benefits.\footnote{30 U.S.C. § 933(d).} The Act provides that an employer may secure the payment of benefits by obtaining independent liability insurance, or by becoming a self-insurer, qualified under the Act.\footnote{Id. § 933(a).} However, the failure to obtain insurance from an outside source or to become a self-insurer does not relieve the employer of its statutory duty to provide benefits to its workers.\footnote{20 C.F.R. § 726.4(b) (2006).} This provision solves the problem of coal mine opera-
tors shifting the burden of paying black lung claims to the Black Lung Disability Trust Fund.76

The BLBA as a whole is intended to compensate miners who are injured in the course of their job by a disease that afflicts a majority of career miners.77 It is also intended to aid those afflicted miners in the support of their families.78 Due to the disabling nature of pneumoconiosis and the fact that it will end miners’ careers by preventing them from obtaining other gainful employment, this mechanism of federal and possible future state compensation is necessary to the welfare of this group.79 The intent of Congress is clear; compensation should be broad rather than narrow, and all those entitled should be compensated under the BLBA.80

B. The History of the Director’s One-Element Test

The Director of the OWCP first proposed the rules containing the one-element test, for determining whether a miner who had been denied claims could bring a subsequent claim, in January of 1997.81 To bring a subsequent claim for benefits under the BLBA, a miner must show a material change in his condition since the denial of his first claim. Under the Director’s test, a material change in condition is shown if the miner establishes a change in any one of the elements of entitlement previously adjudicated against that miner.82 The Director stated, in part, that the rules were meant to resolve the questions raised by the decision in Wyoming Fuel Co. v. Director, OWCP.83

1. Why Change the Original 1978 Regulations?

The Department of Labor felt that the one-element test was the proper way to determine whether a subsequent claim should be allowed.84 In formulating this opinion, it took into account the pro-
gressive nature of black lung and stated that the "preclusive effect of a previous denial . . . should be limited." This amendment to the previous 1978 regulations shows a change in mentality precipitating this change in the rules, as the original 1978 regulations required that "a subsequent claim for benefits be denied on the grounds of prior denial." This complete prohibition against a miner filing a new claim, even where a miner had a material change or worsened condition, received much objection. In response, the Department added a clause stating that the Deputy Commissioner could allow such claims upon finding a material change in the miner's condition. The Director felt it necessary to propound the amended regulations in 1997 due to the confusion and significant litigation over the meaning of the wording of the material change provision in the original 1978 regulations.

The Director felt that both the Tenth and Seventh Circuits were applying too stringent a standard in deciding the material change question. The new rules explicitly adopted the one-element test by stating that once a miner had proven a material change in one of the elements of entitlement previously adjudicated against him, then the relitigation of issues of entitlement to benefits is no longer precluded.

2. The First Proposed Rules

The original formulation of the proposed regulations in 1997 went much farther than the simple institutions of the one-element test; it also sought to make compensation easier for a miner to obtain by creating a rebuttable presumption of a material change in condition. Not only did the regulations state that a miner need only prove a material change or worsened condition in one of the elements of entitlement previously adjudicated against him, but upon that showing a rebuttable presumption would attach that the

recognizes that, once a change in one of the applicable conditions [of entitlement] has been established, the relitigation of issues previously decided is not precluded." Id.

85. Id. at 3352.
86. Id. at 3351 (citing Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, as Amended, 43 Fed. Reg. 17,743 (Apr. 25, 1978)). This language operated to completely preclude a subsequent or duplicate claim for benefits under the BLBA.
87. Id.
88. Id.
89. Id. at 3351-52.
90. Id. at 3353.
91. Id. at 3352.
miner’s physical condition had changed since the prior denial.\textsuperscript{92} The proposed rules forbade operators from rebutting the presumption by taking a position contrary to the one they adopted in the prior litigation.\textsuperscript{93} As such, to rebut the presumption, the coal mine operator or fund would have to prove that the miner’s condition had not changed, rather than the miner having to prove that his condition had changed.\textsuperscript{94}

This presumption effectively shifted the burden of proof in the subsequent adjudication. If the miner could show a material change in one element of entitlement, a presumption of change arose. However, even if the coal operator or fund properly rebutted the presumption, the claimant would still be entitled to benefits if he could show that his physical condition, even if it was totally disabling before, had significantly deteriorated since that claim.\textsuperscript{95} A presumption not properly rebutted would require the fact-finder to consider all the “relevant evidence of record,” including the evidence from the prior litigation, to determine the claimant’s entitlement.\textsuperscript{96} This presumption was ultimately abandoned by the Director because of concerns raised by interested parties during the comment phase of the rulemaking. Thus, the final regulations, adopted in 2000, were not as they appeared in 1997.

3. The Second Proposed Rules

The Director of the OWCP released a second set of proposed rules in October of 1999, amending the 1997 proposed rules slightly.\textsuperscript{97} This second set of proposed rules still contained the one-element test,\textsuperscript{98} but lacked the burden-shifting rebuttable presump-

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. "Once invoked, the presumption may be rebutted if the party opposed to the claimant's entitlement demonstrates that the denial of the prior claim was erroneous as a matter of law." Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{98} Id. at 54,968; 20 C.F.R. § 725.309 (2006).
tion that attached on a showing of material change in one element of entitlement.99

The Director noted in this second set of proposed rules that the Seventh Circuit had acquiesced to the agency’s position, by adopting the one-element test.100 The Director also noted that the only circuit that had not deferred to the one-element test was the Tenth Circuit.101 Therefore, the Director stated that the proposed rules “merely codifie[d] case law that is already applicable to more than 90 percent of the claimants who apply for black lung benefits.”102

4. The Promulgation of Final Rules

The Department promulgated its final set of rules, after reviewing the relevant comments, via publication in the Federal Register in December of 2000.103 This publication represents the rules and regulations now codified in the Code of Federal Regulations, and stands as the body of administrative law that determines whether or not a miner can bring a subsequent claim for benefits.104 These rules clearly state that in order for a miner to bring a subsequent claim for benefits, he need only satisfy the Director’s one-element test.105

The Director again noted that the majority of federal appellate courts that have dealt with the issue of what a miner must show to establish a material change in their condition have adopted the Director’s one-element test.106 The Tenth Circuit is the only circuit that has not adopted this test and continues, even after the promulgation of these final rules, to use its own test for determining a material change in a miner’s condition.107

100. Id.; see Peabody Coal Co. v. Spese, 117 F.3d 1001 (7th Cir. 1997).
102. Id.
104. Id.
The Director also explicitly stated that the one-element test does not offend the concepts of res judicata and issue preclusion. This cuts against the Tenth Circuit’s stated reason for not deferring to the agency’s interpretation of its own regulations. The Director has taken the position that the one-element test properly weighs the need for claim preclusion and respect for final judgments with the reality of pneumoconiosis being a progressive disease.

C. Res Judicata

The doctrine of preclusion rests on the notion that final judgments should be respected and not circumvented lightly. The doctrine of res judicata requires a binding and final judgment before it will interfere with a subsequent or potential claim. In general, when a binding and final judgment is rendered, it can affect the parties in three ways: 1) a judgment for the plaintiff extinguishes the claim and merges it into the judgment; 2) a judgment for the defendant extinguishes the claim and bars further action on that claim; and 3) a judgment in favor of either party is conclusive between them, on the same or different claims, to the extent that the issue was actually litigated and determined between them.

If a final and valid judgment is rendered in favor of the defendant, although the claim is generally extinguished and barred by

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109. Id.
110. Id. at 79,972-74.
111. Michael Wells, Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments, 47 EMORY L.J. 89, 101-03 (1998). “Finality demands that, once the designated court decides an issue, other tribunals must respect the holding and may not reexamine it at the request of a disappointed litigant. . . . Finality is the value served by the doctrines of res judicata and collateral estoppel.” Id. at 101-02. The term res judicata, or claim preclusion, refers to the binding effect that a final judgment in one action affects or disallows a new action on that same claim. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 590-91 (3d ed. 1985). The term collateral estoppel, or issue preclusion, refers to the effect that a final judgment in one action has in precluding a litigant from raising issues decided or not decided in one action, in future litigation. Id. Res judicata and collateral estoppel “[b]oth involve the conclusive effect of judgments in subsequent actions. The difference lies in the fact that in res judicata that subsequent suit involves the same cause of action, while in collateral estoppel the subsequent suit involves a different cause of action.” MILTON D. GREEN, BASIC CIVIL PROCEDURE 234 (2d ed. 1979).
112. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982). “However, for the purposes of issue preclusion . . . ‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.” Id.
113. Id. § 17.
that judgment, there are several general exceptions to the rule of bar.\textsuperscript{114} A final and valid judgment will not bar relitigation if that judgment is based on: 1) "a dismissal for lack of jurisdiction, for improper venue, or for non-joinder or misjoinder of parties,"\textsuperscript{115} 2) when a non-prejudicial non-suit is entered,\textsuperscript{116} 3) "when by statute or rule of court the judgment does not operate as a bar to another action on the same claim,"\textsuperscript{117} or 4) when the judgment for the defendant rests on the fact that the plaintiff's claim was premature, in this case the plaintiff may begin litigation again when the claim has matured.\textsuperscript{118}

Defining the scope of a "claim" is crucial to the doctrine of preclusion. This is because the scope of that term affects what actions can be brought and what actions are precluded by the previous litigation. When a claim is extinguished under the rules of merger\textsuperscript{119} and bar,\textsuperscript{120} the extinguished claim includes any and all rights the plaintiff would have to remedies against the defendant arising from the transaction or series of transactions that gave rise to the original cause of action litigated.\textsuperscript{121} The terms "transactions" and "series of transactions" are to be determined "pragmatically," giving consideration to how the "facts are related in time, space, origin, or motivation, whether they form a convenient trial unit and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."\textsuperscript{122} A claim should be precluded even if the plaintiff is prepared to offer different evi-

\begin{itemize}
\item \textsuperscript{114} Id. §§ 19-20.
\item \textsuperscript{115} Id. § 20(1)(a).
\item \textsuperscript{116} Id. § 20(1)(b).
\item \textsuperscript{117} Id. § 20(1)(c).
\item \textsuperscript{118} Id. § 20(2).
\item \textsuperscript{119} Id. § 18.
\item \textsuperscript{120} Id. § 19.
\item \textsuperscript{121} Id. § 24.
\item \textsuperscript{122} Id. § 24(2). In explaining the pragmatic standard that should be used in defining a claim for preclusion, the American Law Institute stated, \[U\]nderlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.

\ldots

In general, the expression connotes a natural grouping or common nucleus of operative facts. \ldots \text{If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not substantial overlap, the second action may be precluded if it stems from the same transaction or series.}

\emph{Id.} § 24 cmt. b.
dence and theories of liability, or to seek different relief in the second action.123

D. Administrative Law and Judicial Deference

1. General Background on the Administrative Procedure Act

In the 1940s, against a backdrop of rapid agency expansion, the United States Congress passed the Administrative Procedure Act (APA).124 This Act was passed to establish a default system of procedures and requirements that must be observed by an agency unless the congressional statute creating an agency provides different procedures or requirements.125 The APA also replaces the traditional notions of judicial review with an explicit system of statutory rules of judicial review of agency actions.126 Overall, the APA embodies the congressional intent of instituting a system of judicial review that provides aggrieved parties the right to judicial review but also grants deference to an agency presumably composed of experts in a particular field.127

2. Notice and Comment Rulemaking

The APA defines the requirements an agency must follow when creating a rule.128 Congressionally created agencies can create rules that apply to the public as a whole or to the community the agency is meant to regulate.129 The definition of a “rule” for the purposes of the APA is very broad,130 but in the common un-

123. Id. § 25.
126. 5 U.S.C. § 706. In the absence of different standards of review, made applicable to an agency's action by the act of Congress establishing that agency, this section establishes the role of the judiciary in reviewing agency action.
127. H. REP. NO. 79-1980, at 17, as reprinted in 1946 U.S.C.C.A.N. at 1205; BERNARD SCHWARTZ, ADMINISTRATIVE LAW 584-86 (2d ed. 1984) (“[T]wo overriding considerations have combined to narrow the scope of [judicial] review of agency action. The first is that of deference to the administrative expert. . . . The second consideration . . . is that of calendar pressure.”).
128. 5 U.S.C. § 553.
129. Id.
130. Id. § 551.

“[R]ule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the
derstanding of the term, a rule is an agency regulation with the “force and effect of law.” Most administrative rulemaking is accomplished by the mechanism of notice and comment rulemaking. Simply put, an agency must publish proposed rules in the Federal Register, putting any interested parties on notice that the agency plans to promulgate rules. The agency must then give interested persons the opportunity to participate in the making of the proposed rules by allowing for the submission of written data and perhaps an oral hearing. After the period for comment has ended, the agency must then consider the “relevant matter presented” and publish the final rules in the Federal Register with a “concise general statement of basis and purpose.” It has also become settled in the law of administrative bodies that the judiciary can not require any more procedure on the part of an agency than found in the APA.

future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id.

131. Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979). “In order for a regulation to have the ‘force and effect of law,’ it must have certain substantive characteristics and be the product of certain procedural requisites.” Id. at 301. “[T]he promulgation of these regulations must conform with any procedural requirements imposed by Congress [in the Administrative Procedure Act, or the organic act that formed the agency].” Id. at 303.


133. 5 U.S.C. § 553(b).

134. Id. § 553(c).

135. Id. §§ 553(c)-(d).


[5 U.S.C. § 553] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.

Id. But cf. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971) (imposing upon the agency a requirement to generate a written record of proceedings, for the purposes of judicial review, when the agency was not required to by the APA or its organic act). This limited exception to the rule of not forcing procedures on an agency is for the sole purpose of a court fulfilling its duty to review the validity of agency action, which is
The BLBA, as amended, requires that the Secretary of Labor prescribe appropriate regulations for the administration of the Act in accordance with the informal rule making process set out in the APA.\textsuperscript{137} In promulgating the rules that contain the one-element test, the Secretary of Labor has complied with the procedural requirements of the APA for notice and comment rulemaking.\textsuperscript{138} As such, the Secretary's regulations are properly classified as substantive rules with the force and effect of law.\textsuperscript{139}

3. Judicial Review of Agency Actions with the Force and Effect of Law

The APA specifically provides how the judiciary is to review the actions of agencies, and when and how the judiciary can set those actions aside.\textsuperscript{140} When reviewing an agency action, courts generally apply the arbitrary or capricious standard of review.\textsuperscript{141} Though the APA provides other grounds for invalidating an agency action,\textsuperscript{142} and those other grounds provide for a cumulative review,\textsuperscript{143} for most notice and comment rules, it is typically the arbitrary and capricious standard that is applicable to determine the

\textsuperscript{139} Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979).
\textsuperscript{140} 5 U.S.C. § 706.
\textsuperscript{141} Id. "The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." Id.
\textsuperscript{142} Id.

The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case [of formal adjudication] or otherwise reviewed on the record of an agency hearing provided by statute; (F) or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court [when the agency's organic statute of Congress provides for such].

\textit{Id.} An organic statute is a law that establishes an administrative agency.\textsuperscript{143} Black's Law Dictionary 1449 (8th ed. 2004).
\textsuperscript{143} Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve, 745 F.2d 677 (D.C. Cir. 1984). Then Circuit Judge Scalia stated that "The
validity of agency regulations. 144 Under this standard, a rule can be held invalid only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 145 allowing for a judicial check on agency action that is not reasonable or in accord with the principles of law. The regulations containing the one-element test have the force and effect of law, as they were promulgated through a valid notice and comment rulemaking. 146 As such, these substantive rules are subject to review under the APA provisions for judicial review. 147

II. PRINCIPAL CASES

A. Cases Refusing to Adopt the One-Element Test

1. Sahara Coal Company v. OWCP 148

This was the first case heard by a federal appellate court dealing with the applicable test for establishing a material change in condition, for the purposes of bringing a subsequent claim for black lung benefits. When Sahara Coal came before the court, the one-element test had not yet been offered by the Director as an interpretation of the regulations. 149 The court, applying the 1978 Department of Labor regulations, stated that unless the miner had established a "material change in condition," the subsequent claim was barred by the previous denial. 150

The court held that a material change in condition under the regulations 151 meant

'scope of review' provisions of the APA, 5 U.S.C. § 706(2), are cumulative." Id. at 683 (citation omitted).

147. 5 U.S.C. § 706.
148. Sahara Coal Co. v. OWCP, 946 F.2d 554 (7th Cir. 1991).
149. Id.
150. Id. at 556.
151. 20 C.F.R. § 725.309(d).
either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application. 152

The court also held that new evidence proffered in the second claim is not sufficient to establish a material change 153 because that new evidence might only show that the original denial had been erroneous, rather than demonstrating that a material change had taken place, and that would constitute an impermissible attack on the finality of the original judgment. 154

The Seventh Circuit plainly rebuked the Benefits Review Board’s interpretation of the material change provision in the Department of Labor Regulations. 155 The Board claimed that a material change in condition is established by “evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result.” 156 The court stated that this standard made “mincemeat of res judicata” and was “a plain misreading of the regulation.” 157

2. Wyoming Fuel Co. v. Director, OWCP 158

The claimant in Wyoming Fuel came before the Tenth Circuit on his subsequent claim for benefits, which was made in 1985. 159 The miner was denied benefits in his original claim, for failure to establish any of the elements of entitlement. 160 The ALJ allowed the subsequent claim on the finding that the miner had shown a material change in his condition, a finding that was affirmed by the Benefits Review Board. 161 The Wyoming Fuel Company appealed the award of benefits on several grounds, including a challenge to the standard the ALJ had used to determine whether a material change had taken place.

152. Sahara Coal Co., 946 F.2d at 556 (citing Lukman v. Dir., 896 F.2d 1248, 1253 (10th Cir. 1990)).
153. Id.
154. Id.
155. Id. at 556-57.
156. Id. at 556 (quoting Spese v. Peabody Coal Co., 11 Black Lung Rptr. 1-74, 1-76 (BRB 1988) (per curiam)).
157. Id. at 556-57.
159. Id. at 1504.
160. Id.
161. Id.
change in condition had occurred.\footnote{162} The Tenth Circuit rejected the ALJ's standard as violating the principle of res judicata.\footnote{163}

The Tenth Circuit did not uphold the ALJ's finding that a material change in condition had been demonstrated, holding the standard used to determine that change to be invalid.\footnote{164} However, the Tenth Circuit also did not agree with the other tests formulated to determine a material change in condition.\footnote{165} They found that the Seventh Circuit's \textit{Sahara Coal} test was flawed because it requires the claimant to argue against self-interest by imposing a duty on the claimant to persuade the court that he or she did not meet the elements of entitlement at the time of the prior denial, even though when the claimant brought the prior claim he or she alleged that the elements of entitlement were met.\footnote{166}

The Tenth Circuit also found the Director's one-element test to be flawed and refused to adopt it.\footnote{167} The Tenth Circuit disagreed with the Director, and found his standard to be flawed for four reasons, three of them relating to the doctrine of claim preclusion: 1) The one-element test requires a claimant to prove too much, by showing that they meet one element of entitlement, where they should only need to prove that their condition has worsened, with respect to each element of entitlement adjudicated against them; 2) the Director's standard allows the claimant to present evidence not presented at the prior hearing; 3) by allowing a claimant to proceed only on the showing of a change in one element, it enables the claimant to relitigate the prior claim without proving a change in each particular element decided against them; and 4) the one-element test unlocks the entire record once a change has been shown in one element of entitlement, allowing the claimant to relitigate that prior denial.\footnote{168}

With respect to reasons one and three, it seems as though the court felt that the one-element test required too much proof and too little proof, at the same time. The Court found that the test required the miner to prove too much of a change in one element, but allowed the miner to ignore the other elements adjudicated

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162. \textit{Id.}
163. \textit{Id.} at 1508-09.
164. \textit{Id.}
165. \textit{Id.} at 1509.
166. \textit{Id.}
167. \textit{Id.} at 1510.
168. \textit{Id.} 1510-11.
against him, and thus would not apply the test.\textsuperscript{169} Instead, the Tenth Circuit formulated its own test, which requires a claimant to prove a material change in condition by showing a material change in “each element that actually was decided adversely to the claimant.”\textsuperscript{170}

B. \textit{Cases Adopting the One-Element Test}

1. \textit{Sharondale Co. v. Ross}\textsuperscript{171}

This was the first case in which the Director of the OWCP advocated for the one-element test for determining a material change in condition.\textsuperscript{172} The Sixth Circuit stated that because courts owe deference to an agency’s reasonable interpretation of that agency’s regulations, and because the Director’s standard was reasonable, the one-element test is the applicable test for determining a material change in condition.\textsuperscript{173} The court held that the Director’s interpretation of the material change provision was reasonable, stating, it “takes into account the statutory distinction between a request for a modification of the [Benefits Review] Board’s decision and a request for benefits based on a material change in condition.”\textsuperscript{174}

2. \textit{Labelle Processing Co. v. Swarrow}\textsuperscript{175}

In \textit{Labelle Processing}, the Third Circuit rejected the Seventh Circuit’s \textit{Sahara Coal} standard, and followed the Sixth Circuit in adopting the one-element test.\textsuperscript{176} The court adopted this test on the basis of deference owed to an agency’s reasonable interpretation of its own regulations.\textsuperscript{177} However, the Third Circuit found the Director’s standard to be reasonable on different grounds than the Sixth Circuit had.\textsuperscript{178} The Third Circuit upheld the standard because it is in accord with the principle that “courts should liberally construe remedial legislation . . . to include the largest number of claimants within its entitlement provisions.”\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 1511.
\item \textsuperscript{171} \textit{Sharondale Corp. v. Ross}, 42 F.3d 993 (6th Cir. 1994).
\item \textsuperscript{172} \textit{Id.} at 997-98.
\item \textsuperscript{173} \textit{Id.} at 998.
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Labelle Processing Co. v. Swarrow}, 72 F.3d 308 (3d Cir. 1995).
\item \textsuperscript{176} \textit{Id.} at 317-18.
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.} at 318.
\end{itemize}
Interestingly, the Third Circuit only briefly discussed res judicata, finding that if a miner establishes a material change in his condition since the prior denial, a new cause of action has arisen and the second claim is thus not barred by res judicata.\footnote{180} The court primarily accepted the Director’s test as a matter of judicial deference to an agency’s interpretation of its own regulations, and the principle that remedial legislation should be broadly construed.\footnote{181}

3. \textit{Lisa Lee Mines v. Director, OWCP}\footnote{182}

When \textit{Lisa Lee Mines} first reached the Fourth Circuit Court of Appeals, the court adopted the Seventh Circuit’s \textit{Sahara Coal} standard for determining a material change in condition.\footnote{183} The Fourth Circuit then vacated that opinion and granted a petition for rehearing en banc.\footnote{184} At the rehearing the court found that the Director’s one-element test was appropriate for determining a material change in condition.\footnote{185}

The Fourth Circuit chose to defer to the Director’s one-element standard as a matter of judicial deference to an agency’s reasonable interpretation of its own regulations, as well as a matter of practicality.\footnote{186} The court found that the Director’s standard “strikes a reasonable balance” between the finality of the original claim without subjecting a miner’s health to a once in a lifetime adjudication.\footnote{187} The Fourth Circuit rejected the Seventh Circuit’s \textit{Sahara Coal} test as they did not agree with the theory of alternative holdings embodied in that test, noting that by requiring a miner to prove a “change on every element that was previously decided against him,” the law would be imposing the burden on the claimant to “file a meaningless appeal [just] to ‘correct’ [an] erroneous alternative holding.”\footnote{188}

\begin{thebibliography}{9}
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\item 180. \textit{Id.} at 313-14.
\item 181. \textit{Id.} at 318.
\item 185. \textit{Lisa Lee Mines}, 86 F.3d at 1362-63.
\item 186. \textit{Id.} at 1362 (“The Director’s standard, to which we owe deference, is easily the most reasonable and workable of the lot.”).
\item 187. \textit{Id.} at 1363.
\item 188. \textit{Id.} The alternative holdings idea, discussed by the court, basically addresses the fact that a miner may have been denied benefits on more than one element of entitlement in his original claim. The court exposed the flaw to the alternative holdings conditions.
\end{thebibliography}
The only argument broached by the court against the adoption of the one-element standard was that of the “perpetual litigator.”189 The court dismissed this argument because the reality is that the black lung claims process is so slow that most miners don’t have the time on earth to make it through two claims and thus could not litigate perpetually.190

4. Lovilia Coal Co. v. Harvey191

The Eighth Circuit in Lovilia Coal decided that the Director’s one-element standard was proper on the basis of deference to an agency’s reasonable interpretation of its own regulations.192 Furthermore, the court rejected the coal company’s argument that the one-element standard violated due process because of its burden shifting.193 The court found that the coal company’s argument—that the fact presumed (material change) bears no rational relationship to the fact proved (new evidence of disease or disability)—ignores the proposition that pneumoconiosis is a progressive disease.194 The court did not discuss the competing standards formulated by the Seventh and Tenth Circuits, stating that even if those tests were reasonable, the court “would be obligated to defer to the Director’s standard.”195

5. Peabody Coal Co. v. Spese196

The Peabody Coal case was heard by the Seventh Circuit Court of Appeals en banc. The court took another look at the standard it had formulated in Sahara Coal.197 The court maintained that this case did not represent a reversal of Sahara Coal, but merely a clari-

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189. Jd. at 1364. The Fourth Circuit cast the “perpetual litigator” as a “wily” claimant with an equally “wily” lawyer that files claims “ad infinitum” despite lack of success. Jd.
190. Jd. (“Few miners have the time or wherewithal to go through the system twice; all too many die during the first run.”).
191. Lovilia Coal Co. v. Harvey, 109 F.3d 445 (8th Cir. 1997).
193. Jd. at 453.
194. Jd.
195. Jd. at 454.
196. Peabody Coal Co. v. Spese, 117 F.3d 1001 (7th Cir. 1997).
197. Jd. at 1003.
The court then adopted the Director’s one-element standard, as articulated by the Sixth Circuit in *Sharondale Corp. v. Ross*.

The *Peabody Coal* court stated that the important distinction drawn in *Sahara Coal* was “between a second claim that merely attempts to relitigate the first one and a genuine showing of changed conditions.”

In that light, the court found that the one-element test does not offend res judicata, so long as it respects the finality of the original judgment and operates under the assumption that the original judgment was correct. Thus if the “miner must show that something capable of making a difference has changed,” the Director’s standard is the correct one.

The Seventh Circuit held that the Director’s test was proper so long as the one element that the miner shows a change in might “independently have supported a decision” against that claimant in the original claim.

6. *U.S. Steel Mining Co. v. Director, OWCP*

In *U.S. Steel Mining*, the Eleventh Circuit declined to follow the *Sahara Coal* test, as urged by the coal company, finding that they owed deference to the Director’s consistent interpretation of his own regulations. The court held that this standard was reasonable and did not violate the principles of res judicata, because it did not require a claimant to relitigate the issues of the prior complaint. The one-element test did not require a claimant to compare “the evidence associated with the second claim with the evidence presented at the first claim.” Rather, the one-element test required the claimant to compare new evidence with the “conclusions reached in the prior claim,” which are final, to determine whether the miner’s condition had changed since the prior denial.

The court held that res judicata was not offended, and that

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198. *Id.* at 1005. “[I]t also became clear that clarification of our Sahara Coal decision is desirable, as a number of our sister circuits appear to have misunderstood what we require to show a ‘material change in conditions’ for purposes of second or subsequent applications.” *Id.*

199. *Id.* at 1009; *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994).


201. *Id.* at 1008.

202. *Id.*

203. *Id.* at 1009.

204. *U.S. Steel Mining Co. v. Dir., OWCP*, 386 F.3d 977 (11th Cir. 2004).

205. *Id.* at 984-88.

206. *Id.* at 988-89.

207. *Id.*

208. *Id.*
the test was appropriate because this was a reasonable interpretation of the regulations and was therefore entitled to judicial deference.209

III. ANALYSIS

The proper test to determine whether a miner has had a material change in condition, and is thus allowed to bring a duplicate or subsequent claim for benefits under the BLBA, is the Director's one-element test. The Director has promulgated regulations containing this standard210 under a valid notice and comment rulemaking;211 as such, the courts are bound to follow these regulations unless they can be set aside pursuant to the APA.212 Further, because the one-element standard does not violate the doctrine of claim preclusion, it is valid, and should be followed by the courts as having the force and effect of law.

A. Res Judicata

1. The Tenth Circuit's Finding that the One-Element Test Violates Res Judicata

Even though the Director of the OWCP has promulgated rules that contain the one-element test, the Tenth Circuit might continue to use res judicata as a means of not following the Department of Labor's regulations. By a finding that the one-element test violates the doctrine of claim preclusion, the Tenth Circuit could hold the standard to be "otherwise not in accordance with the law" and set it aside under the APA.213 This would allow the Tenth Circuit to uphold their precedent and would not force them to use a standard which they believe violates a doctrine entrenched in the law of this country.

The Tenth Circuit has made perfectly clear that it feels the Director's one-element test violates the doctrine of claim preclusion.214 Although the Tenth Circuit has not yet dealt with a case

209. Id. at 990.
212. Id. § 706.
213. Id. § 706(2)(A).
arising under the newly promulgated rules, those rules do not necessarily solve the issue of whether the Director's test will now be followed by the Tenth Circuit. Most of the relevant case law where an agency action is set aside as being not in accordance with the law involves the violation of a federal statute. However, a regulation that is contrary to a common law rule could also be set aside as being not in accordance with the law.

Prior cases have held that an agency regulation that violates a common law principle would be found to be "not in accordance with law" and set aside under the APA. Furthermore, in order to change the common law by a statute, Congress must speak directly to the issue of changing that common law rule. Therefore, the statutory grant of authority to delegate, does not speak directly to or evidence an intent to abrogate common law rules and must be read to allow the OWCP to regulate only within the realm of common law. As such, the Tenth Circuit could hold that the regulation abrogates the principle of claim preclusion and is unlawful for going beyond the jurisdiction given to the OWCP by Congress.

2. Why the One-Element Test Does Not Violate Res Judicata

a. The View of the Director of the OWCP

It should not be surprising that the Director of the OWCP does not think that his regulations are invalid for violating the doctrine

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217. Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360 (Fed. Cir. 2000) (The court reversed the Patent Appeals Board for improperly setting aside a claim as barred by claim preclusion. Because the second claim was not barred by the doctrine of preclusion, the agency's action was not in accordance with law, and was set aside.).

218. United States v. Texas, 507 U.S. 529, 534 (1993). It is a longstanding principle that statutes which invade the common law must be read narrowly, with the presumption that the common law rule is intact, unless it is clear that the legislative intent was to abrogate that common law principle. Id. (citing Astoria Fed. Savings & Loan Ass'n v. Solimimo, 501 U.S. 104, 108 (1991)).


220. 5 U.S.C. § 706(2)(C). (A court may hold unlawful, agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").
of claim preclusion. When the Director of the OWCP published his final rules in the Federal Register, he responded to the issue of claim preclusion and advocated that these rules do not violate that doctrine. The Director argued that these regulations do not offend the doctrine of res judicata because the doctrine's "applicability [to] these principles was limited in two important respects."222

First, the Director references the Longshore and Harbor Workers' Compensation Act,223 which contains a liberal reopening provision,224 and which has been expressly incorporated into the BLBA by Congress.225 This reopening provision, formed by an act of Congress and made applicable to miners suffering from black lung, mitigates the effect of claim preclusion on the Director's regulations by allowing a claim to be reopened on the showing of a change in conditions, and abrogating the common law doctrine of res judicata.226 The United States Supreme Court has held that the reopening provision of the Longshore and Harbor Workers' Compensation Act does not violate the doctrine of claim preclusion.227 The Court held that the relevant portion of the statute,228 which allows for the reopening of a claim due to a change in conditions, was not barred by the doctrine of res judicata.229

The Court looked to the legislative history of the Longshore and Harbor Workers' Compensation Act, and found that the purpose of this section of the Act was to allow for the modification of an award if necessary to "render justice" under the Act.230 The

222. Id. at 79,972.
223. Id. (citing 33 U.S.C. §§ 901-950 (2000)).
228. The relevant portion read:
Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed [for original claims], and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.
Id. at 462 (quoting 33 U.S.C. § 922).
229. Id. at 465.
230. Id. at 464.
Court further found that Congress had amended this provision after enactment in order to enlarge the time frame for modification to extend the authority to change awards in the interest of justice.\(^{231}\) Congress clearly intended this provision of the Longshore and Harbor Workers' Compensation Act to allow for ample opportunity to modify orders, with the hopes that entitled persons would be adequately compensated under the Act.\(^{232}\) By incorporating this provision into the BLBA, Congress has lessened the effects of claim preclusion, and thus attempted to ensure that entitled miners are compensated.\(^{233}\) Because Congress has acted to mitigate the effects of res judicata with respect to black lung compensation, the Director of the OWCP is correct in concluding that his regulations do not violate res judicata,\(^{234}\) as it complies with the congressional mandate of ensuring that miners entitled to benefits receive those benefits.

In his notice of final rules, the Director of the OWCP made a second, more general, argument that his regulations do not violate the concepts of claim preclusion.\(^{235}\) The Director argued that because an individual's eligibility for benefits is not fixed at a specific moment in time, but changes due to the progressive nature of pneumoconiosis, these claims may be subject to relitigation.\(^{236}\) The Director stated that under the principles of claim preclusion, a full and fair opportunity to litigate a position in a final adjudication will preclude any subsequent relitigation of issues that could have been raised in the original litigation.\(^{237}\) However, the Director then took the position that the one-element standard\(^{238}\) embraces these principles.

\(^{231}\) Id. at 464-65 (citing S. REP. NO. 75-1988, at 8 (1938); H.R. REP. NO. 75-1945, at 8 (1938)).
\(^{232}\) See Banks, 390 U.S. at 464-65.
\(^{233}\) 30 U.S.C. § 932(a) (2000); see Dir., OWCP v. Peabody Coal Co., 554 F.2d 310, 330 (7th Cir. 1977) (holding that reference to the Longshore and Harbor Workers' Compensation Act, in the BLBA, is a general reference, and thus also encompasses amendments passed to the Longshore Act, after the passage of the BLBA).
\(^{236}\) Id.
\(^{238}\) 20 C.F.R. § 725.309(d) (2006).
The one-element test, in application, will only allow a miner to bring a subsequent claim if the material change shown is in an element of entitlement that is subject to change.\textsuperscript{239} For example, if a claim is denied on the sole basis that the claimant did not work as a miner,\textsuperscript{240} that is a condition that is not subject to change. If the miner does not allege that he has since worked as a miner, then he has had a full and fair opportunity to litigate his claim, and no subsequent claim will be allowed.\textsuperscript{241} But, if the miner can show a change in a given condition, established by evidence of a worsening in that element of entitlement, he should be allowed a subsequent claim for benefits because he has not had a full and fair opportunity to litigate what is essentially a new cause of action.\textsuperscript{242} The doctrine of res judicata is not violated under the Director's construction of these regulations, because Congress has limited that doctrine to a permissible extent and the regulations appropriately incorporate the doctrine.\textsuperscript{243}

\textbf{b. The Third Circuit's construction of the one-element test}

In \textit{Labelle Processing Co.},\textsuperscript{244} the Third Circuit held that the Director's one-element test was appropriate and did not violate the doctrine of claim preclusion.\textsuperscript{245} When a miner shows a material change in condition, a new cause of action, not barred by res judicata, arises in the miner.\textsuperscript{246} Even though a subsequent claim must follow a previous claim, so long as a material change in condition is demonstrated, the second claim is not barred because the new cause of action is separate and distinct from the original.\textsuperscript{247} The Court further determined that the Director's one-element test was proper based on judicial deference to an agency's reasonable interpretation of its own regulations.\textsuperscript{248}

The Third Circuit also discussed the progressive nature of pneumoconiosis at length as a reason why claim preclusion should not operate to bar a duplicate or subsequent claim for benefits

\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 79,972; 33 U.S.C. § 922 (2000).
\textsuperscript{244} Labelle Processing Co. v. Swarrow, 72 F.3d 308 (3d Cir. 1995).
\textsuperscript{245} Id. at 313-14.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 318.
under the BLBA. A miner whose pneumoconiosis was latent at the time of the original claim should be entitled to prove that his disease has progressed since the denial of his original claim. Whether a new cause of action has arisen is typically determined by the "transaction" or "series of . . . transactions" test, found in the Second Restatement of Judgments. In general, claims or causes of action that arise out of the same "nucleus of operative facts" will be considered barred by a previous final judgment. After stating the new facts, which arise after the original claim, such as a worsening of conditions or becoming totally disabled by pneumoconiosis, a new claim arises that is not precluded. Because the Director's one-element test allows a miner to relitigate his claim only on a showing of a worsening of conditions, once that worsening is established, a new cause of action arises, which is not precluded by res judicata.

Furthermore, the Director's one-element test is proper in light of the "principle that courts should liberally construe remedial legislation." This principle has been enunciated by the Supreme Court and should be applied to the situation at hand. Because this statute is remedial in nature, and the Director's one-element test advances the remedial purposes of the BLBA, the one-element test should be used as it "include[s] the largest number of claimants within its entitlement provisions."

c. The Fourth Circuit's view

In Lisa Lee Mines, the Fourth Circuit found that the Director's one-element test was proper and not contrary to the doctrine of claim preclusion. The one-element test does not direct that an original claim will be a bar to subsequent litigation, but merely acts as a rebuttable presumption that the original claim is final, unless a miner can show that his condition has changed. Thus, the one-

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249. Id. at 314-16.
250. Id. at 316.
252. Id. § 24 cmt. b.
253. Labelle Processing Co., 72 F.3d at 314.
254. Id. at 318.
256. Labelle Processing Co., 72 F.3d at 318.
258. Id. at 1362-63.
element test strikes a balance between finality and the reality that a human’s health is subject to change.\textsuperscript{259} As such, should a miner be denied benefits in his original claim it is presumed that the claim was decided correctly and finally. However, because a person’s health is subject to change, by showing a material change in conditions, a miner should be allowed to bring a subsequent claim for benefits. The Director’s one-element test operates as a balance between considerations of res judicata and the proposition that a person’s health should not be subject to a once in a lifetime adjudication. As such, the Director’s test is appropriate and should be adopted by the Tenth Circuit.

d. The Eleventh Circuit’s view

The Eleventh Circuit did not discuss the issue of claim preclusion at length, basing its decision to adopt the Director’s one-element test on the grounds of deference to an agency’s consistent interpretation of its own regulations.\textsuperscript{260} However, the court found that claim preclusion was not offended by the test, because it does not attack the finality of the original judgment, but rather uses the conclusions reached in that judgment as a benchmark by which to judge whether a material change in condition had occurred.\textsuperscript{261} The one-element test treats the first decision as final by adopting its conclusions, and then compares those conclusions to the miner’s current state of health to determine whether a material change in condition has occurred.\textsuperscript{262} Because this respects the final decision rendered, the test does not violate the principles of res judicata.

In fact, the Sahara Coal Co. test forces a miner to argue that the first denial of benefits was correct, even though he had thought he was entitled to benefits at that point.\textsuperscript{263} Instead of calling for the miner to compare the evidence presented in the first claim with the new evidence, the one-element test only requires that the court compare the new evidence with the final conclusions reached in the first claim.\textsuperscript{264} This “avoid[s] forcing a miner to take a position . . . that plainly contradicts the [position] he took in the first claim,”

\textsuperscript{259} Id.
\textsuperscript{260} U.S. Steel Mining Co. v. Dir., OWCP, 386 F.3d 977 (11th Cir. 2004).
\textsuperscript{261} Id. at 988-89.
\textsuperscript{262} Id.
\textsuperscript{263} Id. at 989. The U.S. Steel Mining Company argued before the Eleventh Circuit Court of Appeals for adoption of the Sahara Coal Co. test, rather than the Director’s one-element test. Id. at 985.
\textsuperscript{264} Id. at 989.
while still treating the first adjudication as final and binding.\textsuperscript{265} As such, the Director's test gives finality to the original judgment, while taking into account the fact that a person's health is subject to change through the course of a progressive disease.\textsuperscript{266}

B. \textit{Mr. Murphy's Claim}

Mr. Murphy is a hypothetical miner who resides and works in Wyoming, a state in the Tenth Circuit. He has been denied benefits under his first claim and now seeks to establish that his condition has changed materially so that he will be allowed to make a subsequent claim for benefits. The Tenth Circuit requires that he show a material change in \textit{every} element of entitlement that was decided against him in his original claim.\textsuperscript{267} In contrast, the Director's one-element standard would allow Mr. Murphy to bring a subsequent claim for benefits on the lesser showing that he has had a material change in only \textit{one} of the elements of entitlement previously decided adversely to him.\textsuperscript{268} Although the Tenth Circuit has not yet decided a claim governed by the newly promulgated rules, which contain the one-element test, the Circuit has not abandoned its position, even when it was clear that the Director would incorporate his test in the Code of Federal Regulations.\textsuperscript{269}

Our hypothetical miner should begin his argument before the Tenth Circuit by stating that the Director's regulations, which contain the one-element test, have the force and effect of law.\textsuperscript{270} While it is true that these regulations were promulgated by a valid notice and comment rulemaking,\textsuperscript{271} the Tenth Circuit may refuse to follow

\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{268} 20 C.F.R. § 725.309(d) (2006).
them, on the grounds that they violate res judicata, and are thus not in accordance with law. 272 The Tenth Circuit could also refuse to follow these regulations on the ground that the Director lacks the authority to abrogate the common law rules without the express permission of Congress; therefore, the regulations purporting to limit the effect of res judicata are in excess of his statutory jurisdiction. 273 The Tenth Circuit may insist that, due to the Director’s lack of authority to abrogate res judicata, the regulations should be read in accordance with the doctrine of claim preclusion, and the regulations are thus invalid for violation of the doctrine. 274 For these reasons, the fact that the Director promulgated regulations containing his one-element test may not completely solve Mr. Murphy’s problems.

If the Tenth Circuit will not uphold the regulations on the ground that they have the force and effect of law, Mr. Murphy should respond by arguing that the one-element test does not violate the doctrine of claim preclusion, as the Tenth Circuit has found it does. 275 To do so he can look to the other circuits that have upheld the one-element test as appropriate and not in violation of that doctrine. He can follow the Third Circuit’s reasoning that once a miner has shown a material change in condition by way of the one-element test, a new cause of action accrues, which is not barred by res judicata. 276 Furthermore, he can argue that the Third Circuit’s construction of this purely remedial BLBA should be construed liberally, so as to include the largest possible group of persons entitled to receive the BLBA’s statutory benefits. 277 In these respects, the one-element test does not violate res judicata, and the regulation has the force and effect of law, and should be applied by the Tenth Circuit as written.

Mr. Murphy could also look to the Fourth Circuit’s reasoning—that the one-element test is appropriate because the health of a human is not subject to a “one shot” adjudication—to persuade the Tenth Circuit to adopt the test. 278 Furthermore, he can argue that the one-element test creates a rebuttable presumption of final-

273. Id. §706(2)(C).
274. Id.
277. Id.
ity, by which a claimant is bound by the original decision, unless he can show a material change in his condition. The presumption saves the one-element test from violating res judicata, because its shows respect for the finality of the original judgment. Because the one-element test respects the finality of the original judgment, the only true requirement of res judicata, the test does not offend that principle.

Under the Eighth and Eleventh Circuits’ analyses, Mr. Murphy could argue that the one-element test does not violate the doctrine of claim preclusion, because it does not permit a collateral attack on the final judgment rendered in the original denial. The one-element test does not allow a claimant to relitigate the original claim, but merely uses the conclusions reached therein, to measure the miner’s current medical condition, to establish whether there has been a material change in his condition; claim preclusion is not implicated by the test.

Although the Tenth Circuit has not found the Director’s advocacy for his one-element standard persuasive in the past, Mr. Murphy could use the Director’s arguments found in the notice of the final rule. He could argue that Congress’ incorporation of the reopening provision from the Longshore and Harbor Workers’ Compensation Act, into the BLBA, abrogates the common law doctrine of claim preclusion’s applicability to the black lung benefit scheme. Because the Supreme Court has found that the application of the reopening provision of the Longshoreman’s Act, does not violate res judicata, so too should the one-element test be upheld as not violating the doctrine of res judicata.

Furthermore, the one-element test should be applied due to the consideration it gives to the fact that pneumoconiosis is a progressive disease, the effects of which are not set at one single time. When a material change in condition is shown, the miner’s

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279. Id. at 1363.
280. See supra text accompanying notes 111-123.
281. Lovilia Coal Co. v. Harvey, 109 F.3d 445, 450-51 (8th Cir. 1997); U.S. Steel Mining Corp. v. Dir., OWCP, 386 F.3d 977 (11th Cir. 2004).
282. U.S. Steel Mining Corp., 386 F.3d 977.
condition is different from that litigated at the original claim, and he should not be barred from litigating his current condition, which he has not had an opportunity to litigate fairly and fully.  

CONCLUSION

In conclusion, since the one-element test has been codified in the Code of Federal Regulations, through valid notice and comment rulemaking, it should be upheld and applied as having the force and effect of law. Even if the rules are not deferred to for that reason, the one-element test does not conflict with the doctrine of claim preclusion. Therefore, the one-element test ought to be applied by the courts in making a determination as to whether a miner has had a material change in his condition for the purposes of deciding whether or not that miner may bring a subsequent claim for benefits.

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288. Id.

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