No. 11-1020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WEST VIRGINIA COAL WORKERS' PNEUMOCONOISIS FUND,
Petitioner

v.

ELSIE L. STACY, Surviving Spouse of HOWARD W. STACY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
SEAN G. BAJKOWSKI
Counsel for Appellate Litigation
MAIA S. FISHER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

A. Statutory Background: Black Lung Survivors' Benefits 5

B. Factual and Procedural History 10

SUMMARY OF THE ARGUMENT 12

ARGUMENT 15

A. Standard of Review 15

B. While the question is not presented in this case, Section 1556 is severable from the Affordable Care Act's minimum coverage provision. 15

C. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Due Process Clause 18

D. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Takings Clause 27

E. Section 1556 of the Affordable Care Act restores BLBA Section 422(l) in survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010 33

TABLE OF CONTENTS (cont'd)

1. The Director's interpretation maintains consistency within Section 1556 36

2. The Director's interpretation is supported by the history of Section 422(l) 37

3. The Director's interpretation is supported by Section 1556's legislative history 41

4. The Director's interpretation is entitled to deference 43

CONCLUSION 47

CERTIFICATE OF COMPLIANCE 48

CERTIFICATE OF SERVICE 49

ADDENDUM 51
(*Keene v. Consolidation Coal Company*, ___ F.3d ___, No. 10-1948, slip op. (7th Cir. May 19, 2011))

TABLE OF AUTHORITIES

Cases: **Page**

Alaska Airlines v Brock,
480 U.S. 678 (1987) 17

A.T. Massey Coal Co. v. Massanari,
305 F.3d 226 (4th Cir. 2002) 23, 25, 26

Armstrong v. United States,
364 U.S. 40 (1960) 32

Ass'n of Bituminous Contractors v. Apfel,
156 F.3d 1246 (D.C. Cir. 1998) 24

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 16

B&G Construction Co. v. Campbell,
No. 10-4179 (3d Cir.) 14

Betty B. Coal Co. v. Director, OWCP,
194 F.3d 491 (4th Cir. 1999) 15, 43

Blanchette v. Connecticut Gen. Ins. Corp.,
419 U.S. 102 (1974) 42

Chevron U.S.A., Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 44

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001) 28

Commonwealth of Virginia v. Sebellius,
No. 11-1057 (4th Cir.) 15

Connolly v. Pension Benefit Guar. Corp.,
475 U.S. 211 (1986) 29, 31, 32

TABLE OF AUTHORITIES (cont'd)

Cases: **Page**

Consolidation Coal Co. v. Williams,
453 F.3d 609 (4th Cir. 2006) 46

Consumer Elec. Prod. Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980).....42

De Osorio v. INS,
10 F.3d 1034 (4th Cir. 1993).....45

Director, OWCP v. Bethlehem Mines Corp.,
669 F.2d 187 (4th Cir. 1982)..... 7, 43

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998)..... passim

FCC v. Beach Commc'n, Inc.,
508 U.S. 307 (1993).....21

Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010)..... 16, 17

General Motors Corp. v. Romein,
503 U.S. 181 (1992).....19

Holland v. Big River Minerals Corp.,
181 F.3d 597 (4th Cir. 1999)..... 25, 28

Holland v. Keenan Trucking Co.,
102 F.3d 736 (4th Cir. 1996).....18

Kaiser Alum. & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990).....19

TABLE OF AUTHORITIES (cont'd)

Cases: **Page**

Keene v. Consolidation Coal Company,
___ F.3d ___, No. 10-1948, slip op. (7th Cir. May 19, 2011)..... 14, 20, 30

Keener v. Eastern Associated Coal Corp.,
954 F.2d 209 (4th Cir. 1992).....7

Kicari v. Comm'r of Internal Revenue,
946 F.2d 690 (9th Cir. 1991) 23

Kopp v. Director, OWCP,
877 F.2d 307 (4th Cir. 1989).....3

Labelle Processing Co. v. Swarrow,
2 F.3d 308 (3d Cir. 1996) 46

Laurel Sand & Gravel, Inc. v. Wilson,
519 F.3d 156 (4th Cir. 2008).....29

Liberty University, et al. v. Geithner,
No. 10-2347 (4th Cir.) 15

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005).....29

Long Island Oil Products Co., Inc. v. Local 553 Pension Fund,
775 F.2d 24 (2d Cir. 1985).....18

Mathews v. United Pocahontas Coal Co.,
24 Black Lung Rep (Juris) 1-193
(Ben. Rev. Bd. Sept. 20, 2010) 12, 19

Massachusetts v. EPA,
549 U.S. 497 (2007).....42

TABLE OF AUTHORITIES (cont'd)

Cases: **Page**

Metropolitan Stevedores Co. v. Rambo,
521 U.S. 121 (1997) 43

Nat'l Indep. Coal Operators Ass'n v. Old Republic Ins. Co.,
544 F. Supp. 520 (W.D. Va. 1982) 30

New York v. United States,
505 U.S. 144 (1992) 17

Newport News Shipbuilding & Dry Dock Co. v. Stilley,
243 F.3d 179 (4th Cir. 2001) 28

North American Coal Corp. v. Campbell,
748 F.2d 1124 (6th Cir. 1984) 21

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 5

Pension Ben. Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 18, 19, 23

Pittston Coal Group v. Sebben,
488 U.S. 105 (1988) 42

Pothering v. Parkson Coal Co.,
861 F.2d 1321 (3d Cir. 1988) 7, 38, 40, 41

Regan v. Time, Inc.,
468 U.S. 641 (1984) 17

See v. WMATA,
36 F.3d 375 (4th Cir. 1994) 43

Shadburne-Vinton v. Dalkon Shield Claimants Trust,
60 F.3d 1071 (4th Cir. 1995) 19

TABLE OF AUTHORITIES (cont'd)

Cases: **Page**

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 42

Swisher Int'l v. Schafer,
550 F.3d 1046 (11th Cir. 2008) 28

U.S. R.R. Retirement Bd. v. Fritz,
449 U.S. 166 (1980) 22

United States v. Jackson,
390 U.S. 570 (1968) 17

United States v. Mead,
533 U.S. 218 (2001) 44

Unity Real Estate Co. v. Hudson,
178 F.3d 649 (3d Cir. 1999) 33

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) ..... passim

Westmoreland Coal Co. v. Cox,
602 F.3d 276 (4th Cir. 2010) 15

TABLE OF AUTHORITIES (cont'd)

Statutes: **Page**

Black Lung Benefits Act,
30 U.S.C. §§ 901-945, as amended

30 U.S.C. § 902 ..... 9, 40
30 U.S.C. § 921(a) 8
30 U.S.C. § 921(c)(3) 40
30 U.S.C. § 921(c)(4) ..... passim
30 U.S.C. § 921(c)(5) 21
30 U.S.C. § 931(a) 6, 34
30 U.S.C. § 932(a) 2, 26
30 U.S.C. § 932(l) ..... passim

30 U.S.C. § 901(a) (1970) 6
30 U.S.C. § 932(l) (1976 & Supp. III 1979) 37, 38
30 U.S.C. § 932(l) (1982) 37

Black Lung Benefits Act of 1972,
Pub. L. No. 92-303, 86 Stat. 150 (1972) 6

Black Lung Benefits Reform Act of 1977,
Pub. L. No. 95-239, 92 Stat. 95 (1978) 7, 45

Black Lung Benefits Amendments of 1981,
Pub. L. No. 97-119, 95 Stat. 1635 (1981) 7, 8

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. § 901 et seq.

33 U.S.C. § 921(a) 2
33 U.S.C. § 921(b)(3) 2
33 U.S.C. § 921(c) 2, 3
33 U.S.C. § 922 45
33 U.S.C. § 935 26

TABLE OF AUTHORITIES (cont'd)

Statutes: **Page**

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 (2010)

Pub. L. No. 111-148, § 1556 ..... passim
Pub. L. No. 111-148, § 1556(a) ..... passim
Pub. L. No. 111-148, § 1556(b) ..... passim
Pub. L. No. 111-148, § 1556(c) ..... passim

Regulations: **Page**

20 C.F.R. § 718.1 8
20 C.F.R. § 718.204 34
20 C.F.R. § 718.205 34
20 C.F.R. § 725.204 ..... 9, 40
20 C.F.R. § 725.205 ..... 9, 40
20 C.F.R. § 725.310 45
20 C.F.R. § 725.419 10
20 C.F.R. § 726.203(a) 30
20 C.F.R. § 726.207 26

Other Authorities: **Page**

156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) 41
S. Rep. No. 92-743 (1972), *reprinted in* 2 U.S.C.C.A.N. 2305 6
Black Lung Benefits Survivors Equity Act of 2009,
H.R. 1010, 111th Cong. (2009) 31
Black Lung Benefits Survivors Equity Act of 2007,
H.R. 1123, 110th Cong. (2007) 31
Black Lung Benefits Survivors Equity Act of 2005,
H.R. 300, 109th Cong. (2005) 31
48 Fed. Reg. 24272 (May 31, 1983) 38

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

_____

No. 11-1020

_____

WEST VIRGINIA CWP FUND, as carrier for Olga Coal Company,

Petitioner,

v.

ELSIE L. STACY, surviving spouse of Howard W. Stacy,

and

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

Respondents.

_____

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

_____

BRIEF FOR THE FEDERAL RESPONDENT

_____

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from Respondent Elsie L. Stacy's claim for survivors' benefits under the Black Lung Benefits Act (the "BLBA" or the "Act"), 30 U.S.C. §§ 901-944, as amended by the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA"), Pub. L. No. 111-148, § 1556, 124 Stat. 119,

260 (2010). On September 10, 2009, Administrative Law Judge Jeffrey Tureck (the "ALJ") denied Mrs. Stacy's claim. Joint Appendix ("JA") 1-10.[1] She timely appealed to the Benefits Review Board on October 5, 2009. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (providing a thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On December 22, 2010, the Board issued a final order vacating the ALJ's denial of benefits and remanding the case to the district director for an award of benefits. JA 14-17. Petitioner West Virginia Coal Workers' Pneumoconiosis Fund (the "Fund"), as insurer for Olga Coal Company, timely petitioned this Court to review the Board's order on January 3, 2011. JA 34-39; *see* 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a) (providing a sixty-day period for appealing Board decisions).

This Court has jurisdiction over the Fund's petition for review under 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a). The injury contemplated by 33 U.S.C. § 921(c) – Mrs. Stacy's husband's exposure to coal dust – occurred in

[1] This brief employs the following citation conventions for record materials not in the Joint Appendix. Documents listed in the Board's consecutively paginated index are cited as "Record" or "R." "ALJ Ex." refers to a non-paginated, but indexed exhibit consisting of Howard Stacy's claim for lifetime disability benefits, which was admitted by the ALJ, apparently on his own initiative, for the purpose of evaluating its potential collateral estoppel effect. *See* JA 2.

West Virginia, within the jurisdictional boundaries of this Court. *See Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989).

STATEMENT OF ISSUES

In addition to disability benefits for coal miners, the Black Lung Benefits Act provides for survivors' benefits to the dependents of certain miners. Prior to 1982, the BLBA provided for derivative survivors' benefits; that is, the dependent of a miner who had been awarded benefits on a lifetime disability claim was automatically entitled to survivors' benefits after the miner's death. Congress amended the BLBA to eliminate derivative survivors' benefits for miners' claims filed after January 1, 1982. Subsequently, surviving dependents were generally entitled to benefits only after proving that pneumoconiosis caused the miner's death. In 2010, Congress restored derivative survivors' benefits for certain claims. This recent amendment, Section 1556 of the Affordable Care Act, applies "with respect to claims filed . . . after January 1, 2005, that are pending on the date of enactment of this Act." Pub. L. No. 111-148, § 1556(c) (2010). The Board ruled that this amendment applies to Mrs. Stacy's claim, which was filed in 2007 and remains pending. The questions presented are:

1. In the event a separate provision of the Affordable Care Act is found unconstitutional in an unrelated case, is Section 1556 severable?

2. Is Section 1556's restoration of derivative survivors' benefits a violation of the Fifth Amendment's Due Process Clause?

3. Is Section 1556's restoration of derivative survivors' benefits a violation of the Fifth Amendment's Takings Clause?

4. Does Section 1556 apply to Mrs. Stacy's claim?

STATEMENT OF THE CASE

Howard Stacy, a former coal miner, was found to be totally disabled by pneumoconiosis and awarded black lung benefits in 1987. JA 2. After Mr. Stacy's death, his widow, Elsie Stacy, filed this claim for survivors' benefits. *Id.* The ALJ denied the claim and Mrs. Stacy appealed to the Board. JA 8. While that appeal was pending, the BLBA was amended by the Affordable Care Act, which reinstated derivative benefits to certain survivors of miners who had been awarded black lung benefits in a lifetime claim. Pub. L. No. 111-148, § 1556 (2010). The Board held that Mrs. Stacy met the requisite criteria for derivative survivors' benefits, vacated the ALJ's decision, and remanded the case to the district director to enter an award of benefits. JA 26. The Fund subsequently appealed to this Court. JA 35.

STATEMENT OF THE FACTS

A. Statutory Background: Black Lung Survivors' Benefits

"The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969, to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). The statute, now known as the Black Lung Benefits Act, has always provided for two types of benefits: disability benefits for miners and survivors' benefits for their dependents. Congress has recalibrated the program's eligibility requirements several times since its inception. For disability claims, statutory presumptions have come and gone, the meaning of key terms has evolved, and procedures have changed. But the ultimate element of entitlement has remained constant: a miner who is totally disabled by pneumoconiosis arising out of coal mine employment is entitled to disability benefits.

Claims for survivors' benefits have also been impacted by the addition and removal of various presumptions and other definitional and procedural changes. But the ultimate criteria of entitlement have also changed over the years. Unlike miners' disability claims, the ultimate criteria for survivors' benefits have also changed over the years. As initially enacted in 1968, a survivor could prove

entitlement by showing either (1) that the miner's death was caused by pneumoconiosis, or (2) that the miner was totally disabled by pneumoconiosis at the time of his or her death. 30 U.S.C. § 901(a) (1970).

Congress first amended the statute in 1972.[2] The 1972 Amendments introduced several provisions designed to "[r]elax the often insurmountable burden of proving eligibility" that claimants had faced. S. Rep. No. 92-743 (1972), reprinted in 2 U.S.C.C.A.N. 2305, 2306. While these amendments did not change the ultimate criteria of entitlement for survivors, they introduced several provisions that aided a claimant in establishing those criteria. One such provision, BLBA Section 411(c)(4), created the "15-year presumption." 30 U.S.C. § 921(c)(4). Under that rule, workers who spent at least 15 years in the mines and suffered from a totally disabling respiratory or pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis, to have died due to pneumoconiosis, and to have been totally disabled by the disease at the time of their death. *Id.*

Concerned that the BLBA was still being interpreted "too restrictively[,]" Congress again amended the Act in 1977, further relaxing the eligibility criteria in

[2] These amendments, the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), also redesignated Title IV as the Black Lung Benefits Act.

several ways.[3] *Director, OWCP v. Bethlehem Mines Corp.*, 669 F.2d 187, 190 (4th Cir. 1982). Most importantly for present purposes, the 1977 Amendments added BLBA Section 422(l), 30 U.S.C. § 932(l), which added a third route to survivor's benefits: derivative benefits. As a result, the eligible survivors of a miner who had been awarded disability benefits on a claim filed during his or her lifetime were automatically entitled to survivors' benefits. *See Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988). The survivors of miners who had not been so awarded could still obtain survivors benefits by proving that the miner's death was caused by pneumoconiosis or that the miner was totally disabled by the disease at the time of death.

In 1981, Congress changed course and significantly tightened the BLBA's eligibility requirements.[4] The 1981 Amendments prospectively eliminated derivative benefits for the survivors of any miner who had not yet filed a claim. *Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 211 n.1 (4th Cir. 1992). Congress achieved this result by adding a final clause to Section 422(l), which now provided: "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise

[3] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).

[4] Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981).

revalidate the claim of such miner, *except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981*." 30 U.S.C. § 932(l). The 1981 Amendments also eliminated the ability of survivors to secure benefits by proving that a miner was totally disabled at the time of his or her death. Pub. L. 97-119 § 203(a)(4).[5] As a result, survivors could generally only obtain benefits by proving that pneumoconiosis caused a miner's death. 30 U.S.C. § 921(a); 20 C.F.R. § 718.1. In this endeavor, survivors no longer had the aid of the 15-year presumption which, along with two other statutory presumptions, was prospectively eliminated by the 1981 Amendments. Pub. L. 97-119 § 202(b)(1)-(2).

In 2010, Congress once again recalibrated the BLBA's eligibility requirements by reinstating derivative survivors' benefits and the 15-year presumption. This was accomplished by Section 1556 of the Affordable Care Act, which provides:

> (a) REBUTTABLE PRESUMPTION.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.
>
> (b) CONTINUATION OF BENEFITS.—Section 422(l) of the Black Lung Benefits Act (30 U.S.C. 932(l)) is amended

[5] There was one short-lived exception inapplicable to this appeal. *See infra* at 20-21 and n.13.

> by striking ", except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981".
>
> (c) EFFECTIVE DATE.—The amendments made by this Section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.

Pub. L. No. 111-148, § 1556 (2010).

As a result of these amendments (collectively, the "ACA Amendments" or the "2010 Amendments"), survivors whose claims fall within Section 1556(c)'s effective-date requirements may establish entitlement by showing either (1) that the miner's death was due to pneumoconiosis or (2) that the miner filed a claim during his or her lifetime that results or resulted in an award of benefits. Thus, assuming that the BLBA's other conditions of entitlement (such as relationship and dependency) are met, the survivor is entitled to benefits if the miner was awarded benefits. *See* 30 U.S.C. §§ 902, 932(l); 20 C.F.R. §§ 725.204; 725.205. In addition, a miner or survivor who filed a claim after January 1, 2005, and whose claim was pending on or after March 23, 2010, may rely on the 15-year presumption in establishing his or her entitlement to benefits, assuming the miner satisfies that presumption's prerequisites.

B. Factual and Procedural History

Mr. Stacy mined coal in West Virginia for Olga Coal Company from 1975 until 1986. JA 2; ALJ Ex. 1. Shortly after leaving the mines, Mr. Stacy filed a claim for federal black lung benefits. Based on the submitted evidence, the Department of Labor issued a Proposed Decision and Order finding that Mr. Stacy was totally disabled as a result of pneumoconiosis arising out of his coal mine employment. *Id*. Although entitled to a de novo hearing on the matter, neither Olga Coal nor the Fund contested the proposed award, and it became final 30 days later. *Id.*; JA 2; *see* 20 C.F.R. § 725.419. The Fund paid monthly BLBA benefits to Mr. Stacy for 20 years, until his death in January 2007 at the age of 62. JA 2.

On February 1, 2007, Mrs. Stacy filed a claim for survivors' benefits. A formal hearing was held, after which the ALJ ruled that Mrs. Stacy had failed to prove that her husband suffered from pneumoconiosis; accordingly, he denied the claim. JA 8.[6] Mrs. Stacy appealed the ALJ's denial to the Board.

On March 23, 2010, while Mrs. Stacy's case was on appeal, the Affordable Care Act was enacted. Shortly thereafter, Mrs. Stacy filed a motion with the Board requesting that her case be remanded to the district director for a determination of benefits under the newly-amended BLBA because (1) her

[6] The ALJ determined that the Fund was not collaterally estopped from arguing that Mr. Stacy did not suffer from pneumoconiosis because the miner's claim had not been adjudicated by an ALJ, the Benefits Review Board, or a court. JA 3-4.

husband was receiving federal black lung benefits at the time of his death pursuant to a final award; (2) she filed her claim after January 1, 2005; and (3) her claim was still pending at the time of enactment of the Affordable Care Act. *See* JA 11-13. The Director agreed that Mrs. Stacy was entitled to benefits under BLBA Section 422(l), as revived by the ACA Amendments. R. 220-222. The Fund opposed the motion on the ground that Section 1556 was unconstitutional, R. 204-219, and, in two later filings, on the alternate ground that the ACA's reinstatement of derivative survivors' benefits did not apply to Mrs. Stacy's claim, R. 11-33; 72-200.

On December 22, 2010, the Board vacated the ALJ's denial of benefits and remanded the claim to the district director for the entry of an award of benefits. Agreeing with the Director, the Board held that the plain language of Section 1556(c) mandates the application of the newly-revived Section 422(l) to "all 'claims' filed after January 1, 2005, that are pending on or after March 23, 2010" including survivors' claims. JA 21. The Board accordingly ruled that Mrs. Stacy was entitled to survivors' benefits. *Id.*

Relying on its own precedent, the Board rejected the Fund's argument that the retroactive application of the 2010 Amendments violated the Due Process and Takings Clauses. JA 25 (citing *Mathews v. United Pocahontas Coal Co.*, 24

Black Lung Rep. (Juris) (Ben. Rev. Bd. Sept. 20, 2010)).[7] The Board also declined to hold the case in abeyance pending either the resolution of unrelated constitutional challenges to the ACA or the Department of Labor's promulgation of regulations implementing the 2010 Amendments. *Id.*

The Fund timely appealed the Board's decision to this Court. *See* JA 35-39. The Association of Bituminous Contractors, Inc., ("ABC") and Old Republic Insurance Company ("Old Republic" or "Old Rep.") filed amicus briefs in support of the Fund's petition.

SUMMARY OF THE ARGUMENT

The Board determined that Mrs. Stacy is entitled to derivative survivors' benefits under BLBA Section 422(l), as restored by Section 1556 of the Affordable Care Act. The Fund argues (1) that Section 1556 cannot be severed from other, purportedly unconstitutional elements of the Affordable Care Act; that Section 1556 is unconstitutional in its own right under (2) the Due Process Clause and (3) the Takings Clause; and (4) that Section 1556's restoration of derivative

[7] In *Mathews*, the Board reasoned that applying the 2010 Amendments to pending claims does not offend due process because it is justified by a rational legislative purpose – compensating the survivors of deceased miners for the miners' employment-related injuries. *Mathews*, 24 Black Lung Rep. at 1-193. The Board likewise concluded the application of those amendments does not constitute an unlawful taking, in part because the coal mine operator had no reasonable expectation that its BLBA liabilities would not be increased through statutory amendments. *Id.*

survivors' benefits does not apply to Mrs. Stacy's claim because her husband filed his lifetime claim before 2005. These arguments are meritless, and the Board's decision should be affirmed.

The Fund's first argument is that, "if any provision of the [Affordable Care Act] is declared unconstitutional," Section 1556 "must also be declared invalid because the BLBA amendments are not severable." Fund Br. at 17. While the constitutionality of the ACA's minimum coverage provision is currently pending before this Court in two unrelated cases, neither this Court nor the Supreme Court has declared the minimum coverage provision – or any other provision of the ACA – to be unconstitutional. The severability issue is therefore not, and may never be, presented in this case. Even if it were, no exception to the well-established presumption of severability applies to Section 1556.

The Fund next challenges Section 1556 as an "egregious retroactive application of a law" in violation of the Due Process Clause. Fund Br. at 27-29. But ACA's restoration of derivative survivors' benefits easily passes muster as a permissible reallocation of the benefits and burdens of economic life, rationally related to the legitimate goal of compensating survivors for the effects of past disabilities. The fact that the amendment applies retroactively does nothing to change that result, because the liabilities imposed on the Fund are proportional to its insured's contribution to those disabilities.

The Fund's Takings Clause argument falters at the outset. The only liability imposed on the Fund by Section 422(l), as revived by the ACA, is the obligation to pay money, which cannot form the basis of a takings claim. Moreover, the Fund fails to establish that Section 1556 is in any way akin to a traditional taking, interferes with its reasonable investment-backed expectations, or imposes a disproportionate burden on the Fund.[8]

Finally, the Fund argues that Section 1556(c) revives derivative survivors' benefits only for the survivors of miners who filed lifetime claims in 2005 or later. This is contrary to the plain language of Section 1556(c), which revives derivative benefits and the 15-year presumption in all "claims" filed after January 1, 2005. Even if Section 1556(c) is regarded as ambiguous, the Director's interpretation of it maintains consistency among Section 1556's subsections, is consistent with the structure and history of the BLBA sections the ACA revives, is supported by Section 1556's limited legislative history, and is entitled to deference. The Board's decision should be affirmed.

[8] The ACA's restoration of the 15-year presumption was recently upheld as constitutional in the face of due process and takings challenges almost identical to those raised by the Fund in the instant case. *Keene v. Consolidation Coal Co.*, ___ F.3d ___, No. 10-1948, slip op. at 12 (7th Cir. May 19, 2011). The constitutionality of the ACA's restoration of derivative survivors' benefits is currently pending before the Third Circuit in *B&G Construction Co. v. Campbell*, No. 10-4179.

ARGUMENT

A. Standard of Review.

This Court exercises *de novo* review over questions of law, including interpretations of the BLBA and issues of constitutionality. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). As the administrator of the BLBA, the Director's reasonable interpretation of its ambiguous provisions is entitled to deference. *See Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999); *infra* at 43-46.

B. While the question is not presented in this case, Section 1556 is severable from the Affordable Care Act's minimum coverage provision.

The Fund's first argument is that the Affordable Care Act is "non-severable," and that its amendments to the Black Lung Benefits Act must therefore be deemed inoperable if an entirely unrelated statutory section – the minimum coverage provision of the ACA's health care reform legislation – is held unconstitutional. On May 10, 2011, this Court heard oral argument in two matters involving challenges to the ACA's minimum coverage provision: *Liberty University, et al. v. Geithner*, No. 10-2347 (4th Cir.), and *Commonwealth of Virginia v. Sebelius*, No. 11-1057/1058 (4th Cir.). If the provision is upheld in those cases, the Fund's "non-severability" argument would be deprived of its premise. The severability issue was also briefed to this Court in the

Commonwealth of Virgina case, and is thus pending on appeal in the pair of cases argued on May 10. It is far from clear, therefore, that the issue would at any point need to be addressed in the context of the present case.

In any event, as shown in the briefs for the United States in *Commonwealth of Virginia*, the proposition that the Affordable Care Act is "non-severable" is fundamentally flawed on its own terms. The Supreme Court has repeatedly held that, "when confronting a constitutional flaw in a statute," courts must "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks omitted). "[T]he 'normal rule,'" therefore, "is that 'partial, rather than facial, invalidation is the required course' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)). If provisions are "fully operative as a law," they must be sustained "[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." *Free Enterprise Fund*, 130 S. Ct. at 3161 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987))).

As this case illustrates, the Affordable Care Act includes hundreds of provisions that are "fully operative as a law" and can function independently of the minimum coverage provision. *Id.* Indeed, as this case also illustrates, many of the Act's provisions have already taken effect, years in advance of the minimum coverage provision's 2014 effective date. The Supreme Court has emphasized that, because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," a court must "refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Thus, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [the] court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines*, 480 U.S. at 684 (quoting *Regan*, 468 U.S. at 652). Under these governing principles, the Fund's "non-severability" argument would have to be rejected on its merits, even assuming the issue were properly presented in the context of this appeal.[9]

[9] Nor is the Fund correct to focus on the ACA's lack of an explicit severability clause. As the government's briefs in *Commonwealth of Virginia* explain, the Supreme Court has long held that the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). "'In the absence of a severability clause, . . . Congress' silence is just that – silence – and does not raise a presumption against severability.'" *New York*, 505 U.S. at 186 (quoting *Alaska Airlines*, 480 U.S. at 686).

C. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Due Process Clause.

The Fund argues that the retroactive application of the ACA Amendments to Mrs. Stacy's black lung claim violates the Fifth Amendment's Due Process Clause.[10] "It is difficult to exaggerate the burden that [the Fund] must overcome to carry the day on this argument." *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 740 (4th Cir. 1996). It is well established that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (upholding BLBA against facial due process challenges).[11]

---

[10] The Fund also argues that its due process rights under the Fourteenth Amendment are violated. Fund Br. at 23. The Due Process Clause of the Fourteenth Amendment, however, applies only to state action and is therefore irrelevant to this federal law.

[11] ABC claims that the 2010 Amendments cannot be justified as an adjustment of the benefits and burdens of economic life because Congress already "intentionally readjusted the burdens and benefits of the federal black lung program in 1981." ABC Br. 7. This argument rests on the untenable principle that Congress can never change its mind about the adjustments it makes. Were that true, the 1981 Amendments themselves would have been unconstitutional, as they adjusted the allocation of burdens and benefits that existed under the 1977 Amendments – which, in turn, adjusted the status quo under the 1972 Amendments, and so on. *See*

That Congress elected to apply the amendments retroactively does not substantially alter this burden. "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S.717, 729 (1984). Due process is satisfied if the retroactive application of a statute "serve[s] a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995). *Accord, General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("'[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means.") (quoting *R.A. Gray & Co.*, 467 U.S. at 730) (alterations in original).[12] The 2010 Amendments easily meet this standard.

The Board identified a legitimate purpose for Congress' decision to apply Section 1556 retroactively: "to compensate the survivors of deceased miners 'for

---

generally Long Island Oil Products Co., Inc. v. Local 553 Pension Fund, 775 F.2d 24, 25 (2d Cir. 1985).

[12] The Fund cites *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring) for the notion that retroactive legislation is "constitutionally suspect." Fund Br. at 23. But that opinion stands only for the black-letter principle that "absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." 494 U.S. at 841. This interpretive presumption against retroactivity is inapplicable here because Section 1556(c) explicitly commands that the 2010 Amendments be applied retroactively.

the effects of disabilities bred in the past.'" *Matthews*, 24 Black Lung Rep. at 1-197. The Fund characterizes this purpose as punitive, and argues that it is an illegitimate basis for retroactive legislation. Fund Br. at 26. Incredibly, the Fund cites *Usery* for this proposition. But *Usery* stands for the opposite principle that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor – the operators and coal consumers." *Usery*, 428 U.S. at 18. The Supreme Court therefore rejected an argument that the BLBA violated the Due Process Clause "by requiring [coal mine operators] to compensate former employees who terminated their work in the industry before the Act was passed, and the survivors of such employees." 428 U.S. at 14-15.

In rejecting a due process challenge to the ACA's retroactive revitalization of the 15-year presumption, the Seventh Circuit properly treated *Usery* as dispositive. *Keene*, No. 10-1948, slip op. at 8-9 ("the rational purpose for applying the 15-year presumption retroactively is to give miners and their survivors whose claims were recently filed a better shot at obtaining benefits"). Similarly, the Sixth Circuit relied on *Usery*, as explained in *R.A. Gray & Co.*, in rejecting a due process challenge to a now-defunct BLBA provision allowing "a deceased miner's survivors to file claims on behalf of employees who died many

years before the statute's effective date." *North American Coal Corp. v. Campbell*, 748 F.2d 1124, 1128 (6th Cir. 1984).[13] As the Sixth Circuit explained, "[b]ecause retroactive application of this statute operates only to make mine operators responsible for compensating the families of employees injured by their conditions of employment, we cannot find that it is particularly harsh and oppressive." *Id.* Far from supporting the Fund's due process claim, *Usery* wholly undermines it.

The Fund also attacks the Board's reasoning on the ground that its identification of Congress's purpose was based on statements made by Senator Byrd after the Affordable Care Act's passage. Fund Br. at 26-27. This argument is misplaced.[14] As the Fund itself concedes, "Congress need not articulate a legitimate purpose for imposing its legislation retroactively," so long as a legitimate purpose is "rationally conceivable." *FCC v. Beach Communic'n, Inc.*,

[13] The provision, Section 411(c)(5), provides that the eligible survivors of miners who were employed for at least 25 years before June 30, 1971, and died before March 1, 1978, are entitled to benefits "unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis[.]" 30 U.S.C. §921(c)(5). It does not apply to claims filed after July 1, 1982. *Id.*

[14] While the fact that Senator Byrd's statements were made after the Affordable Care Act's passage has no bearing on the due process issue, it is relevant to their value as legislative history in interpreting any ambiguities in Section 1556. *See infra* at 41-43.

508 U.S. 307, 315 (1993), *cited in* Fund Br. at 25. It is rationally conceivable that Congress retroactively reinstated derivative survivors' benefits to compensate those survivors for the effects of disabilities bred in the past. That goal is unquestionably legitimate under *Usery*. The due process analysis ends there; whether Congress was actually motivated by that goal is entirely irrelevant.

Hemmed in by these precedents, the Fund is reduced to arguing that Section 1556 is constitutionally flawed not because it applies retroactively, but because it applies retroactively only to claims filed after January 1, 2005. Fund Br. at 25-26. The problem, says the Fund, is that Congress' selection of that particular date is arbitrary. As an initial matter, this is a curious argument for the Fund to press. In light of *Usery*, Congress could have applied the 2010 Amendments to all BLBA claims. Its decision to limit the retroactive effect of those amendments can only benefit mine operators and their insurers.

In any event, having decided to limit Section 1556's retroactive effect, Congress' selection of the precise cut-off date is a classic line-drawing exercise uniquely within the competence of the legislative branch. *See U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("This Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-

drawing.").[15] This Court refused to second-guess Congress' selection of an allegedly arbitrary date in *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 240 (4th Cir. 2002). The same should be done here.

Finally, arguing that Section 1556 is an "egregious retroactive application of a law," the Fund seeks shelter in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Fund Br. at 27-29. That fractured decision requires explanation, but offers the Fund no succor. *Eastern Enterprises* arose out of a series of private agreements, beginning in 1946, between certain coal mine operators and the United Mine Workers' Association establishing multiemployer health care funds. 524 U.S. at 505-508. Beginning in 1974, these funds provided for lifetime health benefits to retired miners and their dependents. *Id.* at 509, 530. When insolvency threatened the funds, Congress passed the Coal Act, which required coal mine operators that had signed the agreements to contribute to a new multiemployer benefit plan that would provide the promised lifetime health care coverage. *Id.* at 514.

The Court held the Coal Act unconstitutional as applied to Eastern Enterprises, which stopped mining coal in 1966 and therefore never signed the

[15] *Cf. R.A. Gray & Co.*, 467 U.S. at 731 (1984) (deferring to Congress' selection of retroactive effective date); *Kicari v. Comm'r of Internal Revenue*, 946 F.2d 690, 695 (9th Cir. 1991) ("four-year period of retroactivity" for tax penalty is not "harsh and oppressive" and thus survives due process challenge).

post-1974 agreements promising lifetime health benefits to miners and their dependents. *Id*. at 530. No one theory, however, attracted a majority of the Court. Justice O'Connor, writing for a plurality of four, concluded that Eastern's property had been taken without compensation, but explicitly declined to address Eastern's due process claim. *Id*. at 537-38. Justice Kennedy, concurring in part, concluded that Eastern's due process rights had been violated but that no taking had occurred. *Id*. at 539. Finally, in a dissenting opinion by Justice Breyer, four justices concluded that neither the Due Process Clause nor the Takings Clause had been violated. *Id.* at 553-54.

The most obvious problem with the Fund's reliance on *Eastern Enterprises* is that the decision does not even stand for the proposition that Eastern's due process rights were violated. *A.T. Massey Coal Co.*, 305 F.3d at 237 n.17 ("Nor can *Eastern* stand for the proposition that the Eastern assignments are unconstitutional under the Due Process Clause, because only Justice Kennedy arrived at such a conclusion."); *see also Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998) ("Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises'* fragmented parts."). Instead, *Eastern Enterprises* stands only for the proposition that the Coal Act is unconstitutional – for some reason – as applied to "coal operators that stand in a position

substantially identical to that of Eastern." *A.T. Massey Coal Co.*, 305 F.3d at 237 n.17; *see also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999).

More importantly, the logic underlying *Eastern Enterprises* entirely undermines the Fund's due process argument. The liabilities imposed on Eastern were severely retroactive, "reaching back 30 to 50 years[.]" 524 U.S. at 532. They were also very expensive. *Id.* at 529 ("The parties estimate that Eastern's cumulative payments under the Act will be on the order of $50 to $100 million"). But neither Justice Kennedy's nor Justice O'Connor's opinion concluded that the Coal Act was unconstitutional merely because it imposed such liabilities on Eastern. The lynchpin of both opinions was that those severely retroactive and expensive liabilities were imposed to rectify a problem – the signatory coal mine operators' failure to provide the lifetime benefits they promised after 1974 – that Eastern had no hand in creating. *Id*. at 449-50 ("the remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of that statute" because "Eastern . . . was not responsible for [the miners'] expectation of lifetime health benefits . . . created by promises and agreements made long after Eastern left the coal business.") (Kennedy, J. concurring in the judgment and dissenting in part); *id* at 537 (Coal Act implicates "fundamental principles of fairness underlying the Takings Clause" because it "singles out"

Eastern to bear a substantial burden "unrelated to any commitment that [Eastern] made or to any injury [it] caused[.]").[16] As this Court has explained, "Justice O'Connor's plurality opinion emphasized that the magnitude of Eastern's retroactivity was severely disproportionate to the conduct giving rise to that liability" and "Justice Kennedy . . . emphasized the unfairness of holding Eastern retroactively liable for a benefits crisis that it had not helped to precipitate." *A.T. Massey Coal Co.*, 305 F.3d at 237-38.

In contrast, Olga Coal's liability under newly-revived Section 422(l) – which compensates the survivors of totally disabled coal miners – is proportional to the incidence of totally disabling pneumoconiosis among the miners Olga formerly employed.[17] Indeed, the *Eastern Enterprises* plurality went on to make this exact point in distinguishing *Usery*:

> Eastern's liability . . . differs from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed 'liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to

[16] A secondary focus of Justice O'Connor's analysis was that Eastern could not have reasonably foreseen the liabilities imposed by the Coal Act. 524 U.S. at 532. As discussed *infra* at 30-31, this is not true of the liabilities imposed on Olga and the Fund by Section 1556.

[17] As Olga's insurer, the Fund is bound by "any compensation order, finding, or decision . . . in the same manner and to the same extent as [Olga.]" 33 U.S.C. § 935, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 726.207.

> those who have profited from their labor.' Likewise, Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment[.]

Id. at 536 (quoting *Usery*, 438 U.S. at 18) (first alteration in original). Justice Kennedy distinguished *Usery* on the same ground: "While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past." *Id.* at 549 (quoting *Usery*, 438 U.S. at 19).

Thus, even if Justice Kennedy had been writing for a majority of the Court, *Eastern Enterprises* would lend no support to the Fund's due process argument. To the contrary, that decision deals a fatal blow to the Fund's constitutional claims.

D. Section 1556 of the Affordable Care Act does not violate the Fifth Amendment's Takings Clause.

The Fund also argues that Section 1556 constitutes an uncompensated taking of property in violation of the Fifth Amendment. This argument faces an immediate and insurmountable obstacle in the form of *Eastern Enterprises*. Justice Kennedy and all four dissenters agreed that the Coal Act assessment on Eastern did not implicate the Takings Clause because it did not target any specific property interest but simply imposed an obligation to pay money. 524 U.S. at 543-

44 (Kennedy, J. concurring in the judgment), 554-55 (Breyer, J. dissenting). As this Court has explained, "to the extent *Eastern Enterprises* worked any change with respect to takings jurisprudence," it is that liabilities of the sort imposed by the Coal Act "must be considered as a question of substantive due process rather than as a takings question because no identifiable property interest was infringed by the legislation." *Holland*, 181 F.3d at 606.[18] *Accord Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) ("regulatory actions requiring the payment of money are not takings"). An award of benefits to Mrs. Stacy does not burden any specific property interest of the Fund's. It merely obliges the Fund to pay money – undifferentiated, fungible money – to Mrs. Stacy. The Takings Clause is simply irrelevant.

Even if obligations to pay money were cognizable under the Takings Clause, the Fund's takings claim would fail. As in the due process context, a party

[18] This Court rejected a takings challenge to the Director's interpretation of the Longshore Act out of hand in another post-*Eastern* decision, *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 184 (4th Cir. 2001) ("Because the [last maritime employer] rule is a rational measure that assigns 'the costs of the employees' labor to those who have profited from the fruits of their labor,' it does not violate the Takings Clause.") (quoting *Usery*, 428 U.S. at 18).

challenging governmental action as an unconstitutional taking "bears a substantial burden." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir. 2008). The inquiry into whether a regulatory taking has occurred is fact specific, but focuses on three factors: (1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986). All three factors support the constitutionality of Section 1556.

The "character of governmental action" prong of the takings analysis asks whether the challenged action "amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (internal citations omitted). The Black Lung Benefits Act establishes just such a program. While the Supreme Court did not address the Takings Clause in affirming the retroactive application of the Act in *Usery*, it subsequently indicated that the BLBA would survive a takings challenge. *Connolly*, 475 U.S. at 223 (having sustained the BLBA's retroactive provisions against the due process challenge in *Usery*, "it would be surprising indeed to discover now that . . . Congress had unconstitutionally taken the assets

of the employers there involved."); *see also Keene*, No. 10-1948, slip. Op. at 12 (quoting *Connolly*).

The Fund alleges the 2010 Amendments disrupt its investment-backed expectations because they "impose a harsh new liability on the Fund that it could not have foreseen." Fund Br. 30. But this liability was in no way unforeseeable. The federal black lung program has long required that a specific contractual endorsement appear in each policy issued by an insurance carrier providing BLBA liability coverage. This endorsement explicitly provides that insurers are liable for obligations from any amendments that are enacted while the policy is "in force," *i.e.*, at any time while a claim can be made against the policy. 20 C.F.R. § 726.203(a); *see generally Nat'l Indep. Coal Operators Ass'n v. Old Republic Ins. Co.*, 544 F. Supp. 520, 527-28 (1982) (W.D. Va. 1982) (black lung insurance policy remains "in force" so long as claims may be made against it; holding insurer liable for claims retroactively revived by 1977 Amendments). It defies credulity to suggest that coal mine operators – which are required to obtain insurance or receive authorization to self-insure – are unaware of this regulation. *See Keene*, No. 10-1948, slip op. at 11 (citing required insurance endorsement in rejecting a self-insured operator's claim that Section 1556(a) interfered with its investment-backed expectations). It is simply impossible to believe that an insurance carrier such as the Fund is ignorant of it.

Even aside from this explicit regulatory requirement, it is well-established that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227. Coal mine operators and their insurers are certainly aware that the BLBA has been amended on multiple occasions in the past. Indeed, it was amended in this very respect in 1977, when Section 422(l) was added to the Act, and legislation to reinstate derivative survivors' benefits has repeatedly been introduced in recent years.[19] A claim of surprise rings particularly hollow in this case because derivative survivors' benefits were in effect during much of Mr. Stacy's tenure with Olga Coal. ALJ Ex. 1.

The final element of the takings analysis is economic impact. The Fund makes no effort to quantify the financial impact of Section 1556 beyond broadly stating that the "number of claims filed [that] will be awarded is going to significantly increase" and that it "cannot prospectively adjust the premiums to compensate for this increase." Fund Br. 31. The Fund turns this absence of evidence into an alternative argument that the case "should be remanded to the ALJ for additional proceedings to allow the Fund to present evidence regarding

[19] *See, e.g.*, Black Lung Benefits Survivors Equity Act of 2009, H.R. 1010, 111th Cong. (2009); Black Lung Benefits Survivors Equity Act of 2007, H.R. 1123, 110th Cong. (2007); Black Lung Benefits Survivors Equity Act of 2005, H.R. 300, 109th Cong. (2005).

the economic impact of these amendments." Fund Br. at 32; *accord* Old Rep. Br. at 8-10.

Even if the Fund could muster such evidence, the other two elements weigh heavily against its takings claim. More importantly, the endeavor is based on a misunderstanding of the economic impact analysis. For purposes of the Takings Clause, economic impact is not a simple exercise in comparing the cost of a regulation against a regulated entity's ability to bear it. Instead, the touchstone of the impact analysis is proportionality. As explained *supra* at 25-26, the lynchpin of the *Eastern Enterprises* plurality's takings analysis was not the Coal Act's bare financial impact on Eastern, or its degree of retroactivity, but the fact that Eastern was being ordered to pay to fix a problem that it had no hand in creating.

The Fund has no hope of making such a showing. This is not a case where "some people alone" are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Rather, it presents a "rational measure to spread the costs of the employees' disabilities to those who benefited from the fruits of their labor." *Usery*, 428 U.S. at 15.[20] As a result, evidence of Olga's – or the Fund's –

[20] *See also Connolly*, 475 U.S. at 225 (retroactive application of the Multiemployer Pension Plan Amendments Act did not violate the Takings Clause because the liability imposed "directly depends on the relationship between the employer and the plan to which it had made contributions.").

financial health and Section 1556's impact on that health is simply irrelevant. *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 675 (3d Cir. 1999) ("The constitutionality of the assessment should not depend on the happenstance of the financial condition of the assessed [entity] at the time of the assessment.") (quoting *Branch v. United States*, 69 F.3d 1571, 1577 (Fed. Cir. 1995)).

In sum, a takings analysis is not appropriate here, because the BLBA, as amended, imposes on the Fund only an obligation to pay money. Even if the Takings Clause applied, the Fund has failed to show (1) that the character of the governmental action is in the nature of a taking; (2) interference with its investment-backed expectations; or (3) any disproportionate economic impact. There is no need to remand the case for further development; the Fund's takings claim should simply be rejected.

E. Section 1556 of the Affordable Care Act restores BLBA Section 422(l) in survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010.

The Fund's final argument, that ACA Section 1556(b)'s revival of derivative survivors' benefits does not apply to Mrs. Stacy because her husband did not file his claim for lifetime benefits after January 1, 2005, presents a question of statutory construction. The analysis therefore begins with a consideration of Section 1556's text, which provides:

> (a) REBUTTABLE PRESUMPTION.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.
>
> (b) CONTINUATION OF BENEFITS.—Section 422(l) of the Black Lung Benefits Act (30 U.S.C. 932(l)) is amended by striking ", except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981".
>
> (c) EFFECTIVE DATE.—The amendments made by this Section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.

Pub. L. No. 111-148, § 1556 (2010).

To risk belaboring the obvious, subsection (c) provides the effective date for both subsections (a) and (b). That date is tied to the filing of a "claim" without any qualifying or limiting language except for the specific effective date. Under the BLBA and its implementing regulations, both miners and their survivors may file "claims." *See, e.g.*, 30 U.S.C. § 931(a); 20 C.F.R. §§ 718.204(a); 718.205(a). There is no dispute that Mrs. Stacy filed this claim for survivors' benefits on February 1, 2007, or that it was pending on the day the Affordable Care Act was enacted, March 23, 2010. JA 19; Fund Br. at 3. The plain language of Section 1556 thus supports the Board's decision.

The analysis need go no further. Indeed, the Fund went no further in its initial brief to the Board. R. 208.[21] It later developed, and continues to press, an argument that Section 1556(c) actually means something along the lines of: "the amendment made by subsection (a) shall apply with respect to all claims filed after January 1, 2005, but the amendment made by subsection (b) shall apply only with respect to claims by the survivors of miners who themselves had filed a successful lifetime claim after January 1, 2005." This alternate reading, says the Fund, is justified by the text and history of Section 422(l). Fund Br. at 36-38, 41-42.

The Fund's analysis of Section 422(l) cannot support its conclusion that the Board's decision flies in the face of "unambiguous statutory language." Fund Br. at 38. At most, the Fund's discussion establishes that Section 1556(c) is subject to two interpretations – the Director's interpretation, that "claims" means "claims" or the Fund's interpretation that "claims" means "miners' claims." But this demonstration of ambiguity does the Fund no good because the Director's interpretation of Section 1556(c): (1) maintains consistency within Section 1556's three subsections, (2) is supported by the history of Section 422(l), (3) is

[21] In its initial response to Mrs. Stacy's Motion for Remand, the Fund stated "Mrs. Stacy filed her application for survivor's benefits after January 1, 2005, and her claim was pending as of March 23, 2010 when the [Affordable Care Act] was enacted. Thus, her survivor's claim meets the filing requirements of § 1556(c)." R. 208 (citation omitted).

supported by Section 1556's limited legislative history, and (4) is entitled to deference.

1. The Director's interpretation maintains consistency within Section 1556.

The Director's reading has the virtue of maintaining consistency among Section 1556's various subsections. Section 1556(a) reinstates BLBA Section 411(c)(4)'s 15-year presumption, which explicitly applies to both miners' claims and survivors' claims.[22] Thus, the word "claims" in Section 1556(c) – which provides the effective date for subsection (b) as well – must refer to both types of claims.

In the Fund's view, giving Section 1556(c) a consistent meaning vis-à-vis subsections (a) and (b) is unimportant. Instead, the Fund reads the word "claims" in Section 1556(c) as having a different meaning with regard to each subsection. Fund Br. at 37-38. In the context of Section 1556(a)'s reinstatement of the 15-year presumption, the Fund agrees that the word "claims" in 1556(c) means all kinds of claims. Fund Br. at 38. But in the context of Section 1556(b)'s reinstatement of derivative survivor's benefits, the word has a different meaning, "miners' claims."

[22] BLBA Section 411(c)(4) applies to a "miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this title[.]" 30 U.S.C. § 921(c)(4).

The Fund's interpretation has a curious consequence. Because Mrs. Stacy filed this claim in 2007, Section 1556(a) – which revived the 15-year presumption – applies to it.[23] But Section 1556(b)'s reinstatement of derivative survivors' benefits would not apply to that same claim – despite the fact that 1556(a) and (b) are governed by the same effective date provision.

2. The Director's interpretation is supported by the history of Section 422(l).

The Fund suggests that this counterintuitive result is compelled by the history of Section 422(l), which originally provided: "In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." 30 U.S.C. § 932(l) (1976 & Supp. III 1979).[24] The 1981 Amendments inserted a final limiting clause: "except with respect to a claim filed under this part on or after the effective

[23] This is of no practical value to Mrs. Stacy, because her husband did not work as a coal miner for the requisite 15 years. JA 2. It would, however, benefit an otherwise identically situated claimant whose deceased spouse satisfied the presumption's prerequisites.

[24] There is no significant dispute over the meaning and effect of Section 422(l). As the Fund explains: "This statutory provision provides that a survivor of a miner who was receiving federal black lung benefits at the time of his death, is automatically entitled to survivor's benefits." Fund Br. at 34.

date of the Black Lung Benefits Amendments of 1981." 30 U.S.C. § 932(l) (1982). The Fund correctly points out that this limitation was interpreted to apply only to miners' claims filed after the 1981 Amendments, and not to claims filed by the survivors of miners who were awarded lifetime benefits based on pre-1981 claims. Fund Br. at 49-50; *see Pothering*, 861 F.2d at 1327; 48 Fed. Reg. 24272 (May 31, 1983). But the conclusion the Fund draws from this history – that the effective date of Section 1556's revocation of the 1981 Amendments must also be keyed to the date a miner's claim is filed – simply does not follow.

The original text of Section 422(l) referred to only one species of claim – "the claim of such miner[.]" 30 U.S.C. § 932(l) (1976 & Supp. III 1979). It was therefore natural to conclude that the word "claim" in the limiting clause inserted into that section by the 1981 Amendments also referred only to miners' claims.[25] Section 1556 is quite different. It does not insert the word "claim" – or any other word – into Section 422(l). It merely deletes text from Sections 422(l) and 411(c)(4). The word "claims" appears only in Section 1556(c), which, as

[25] In addition, this interpretation of the 1981 Amendments was strongly supported by their legislative history. *Pothering*, 861 F.2d at 1327 ("Survivors of those miners who are currently [sic] receiving benefits, or who have filed for them, will not be affected by this change. These survivors will receive benefits even if the miner eventually dies from causes unrelated to black lung.") (quoting 127 Cong. Rec. 29932). As discussed *infra* at 41-43, the legislative history of Section 1556 points in the opposite direction.

described above, specifies the category of claims to which both deletions apply, suggesting that the word should be given the only consistent meaning it could have, *i.e.*, "miners' or survivors' claims."

The 1981 Amendments provides a clear model of what Congress could have done – but chose not to do – in Section 1556. If Congress had wished to reinstate derivative survivors' benefits only for the survivors of miners who were awarded lifetime benefits on claims filed after 2004, the most natural thing would be to do what it did in 1981. Section 422(l) could have easily been amended to read ". . . except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 and on or before January 1, 2005." But Congress did not choose that option, instead deciding to write one single effective date clause, Section 1556(c), applicable to the reinstatement of both the 15-year presumption and derivative survivors' benefits. The Director's interpretation gives meaning to this choice; the Fund's does not.

The Fund presses a closely related argument based on the text of Section 422(l). Because Section 422(l) ostensibly relieves the survivors of miners who were awarded benefits during their lifetimes from the obligation to file claims, the argument goes, Congress could not have intended to tie the date on which Section 422(l) is revived to the date a survivor's claim is filed. Fund Br. at 35. But at the time Section 1556 was enacted, the only way a survivor could obtain benefits was

to file a claim.[26] Section 1556(c) should be interpreted with reference to the black lung program as it existed in 2010 rather than 1981, particularly in light of Congress' decision not to follow the example of the 1981 Amendments.[27] And, of course, nothing in either Section 1556 or Section 422(l) can undermine the fact that Mrs. Stacy actually filed this claim in 2007.

Nor does Section 422(l) forbid a survivor from filing a claim. To the contrary, Section 422(l)'s limitation of derivative survivors' benefits to "eligible survivors" suggests that the survivor claimant must prove – and the responsible operator must have an opportunity to contest – his or her eligibility.[28] *See Pothering*, 861 F.2d at 1328 n.13 (Section 422(l) does not "prohibit[] filings for which there is an administrative need – such as providing the OWCP with notice of

[26] This is even true for the survivors of miners awarded lifetime benefits because they suffer from complicated pneumoconiosis, a diagnosis that carries with it an irrebuttable presumption that the miner's eligible survivors are entitled to benefits. *See* 30 U.S.C. § 921(c)(3).

[27] The Fund cites a number of cases for the proposition that statutes concerning the same subject should be interpreted consistently. Fund Br. at 36-38. The Director does not disagree with this venerable canon of construction, but believes that his interpretation of Section 1556(c) renders the provision more consistent with its neighboring subsections, and the two BLBA provisions they revive, than the Fund's.

[28] *See, e.g.*, 30 U.S.C. § 902(a), (e), (g); 20 C.F.R. §§ 725.204; 725.205.

the miner's death or information regarding the survivor's relationship.").[29] Disputes over these issues could only be resolved in the claims process or something functionally identical to it.

3. The Director's interpretation is supported by Section 1556's legislative history.

Section 1556's legislative history, while scanty, directly supports the Director's interpretation of the provision. Senator Robert Byrd, who sponsored Section 1556**,** explained that amended Sections 411(c)(4) and 422(l) were meant to apply to "*all claims* filed after January 1, 2005, that are pending on or after the date of enactment of that act." 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd). He added that Section 1556 "applies immediately to all pending claims, including claims that were finally awarded or denied prior to the date of enactment of the [ACA]." *Id.*

[29] The *Pothering* court's ruling that survivors covered by Section 422(l) are not obligated to file claims, 861 F.2d at 1328, cannot bear the weight placed on it by the Fund. Fund Br. at 41. Nothing in *Pothering* forbids such survivors from filing claims. To the contrary, while they were initiated with a "Notification" form rather than a "Claim" form, the survivor in that case filed claims. *Id.* at 1328 n.12 ("Having completed a form which appeared complete on its face and having received no other guidance from OWCP, Mrs. Pothering did all that was necessary to *file her claims* properly.") (emphasis added). One of those claims – incidentally, not a claim for derivative benefits but for benefits based on death due to pneumoconiosis – was ultimately awarded because the responsible operator failed to timely respond to her filing. *Id.* at 1329.

The Fund does not dispute that only the Director's interpretation is consistent with this expression of Congressional intent. Instead, it argues that Senator Byrd's statement must be ignored because it was made two days after the Affordable Care Act was passed. Fund Br. 39-40.[30] It relies primarily upon Justice Scalia's statement that subsequent legislative history "should not be taken seriously, not even in a footnote." *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J. concurring in part), *quoted in* Fund Br. at 27. Notably, Justice Scalia was reacting to the majority opinion, in which seven Justices did take subsequent legislative history seriously, albeit in a footnote. *Compare id.* at 628 n.8 *with id.* at 631-32 (Scalia, J. concurring in part).[31]

The Director does not disagree with the oft-quoted adage that "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Elec. Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118

[30] Old Republic more colorfully describes Senator Byrd's statement as "back door shenanigans" and an "obvious attempt at bad government." Old Rep. Br. at 12-13.

[31] The remaining cases cited by the Fund are readily distinguishable. In *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007) and *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115-19 (1988), the Court found the statutory provisions at issue to be unambiguous, rendering both pre- and post-enactment legislative history irrelevant. The post-enactment remarks addressed in *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974), were not in conflict with the interpretation adopted by the Court.

n.13 (1980). But this Court has considered subsequent legislative history in construing other ambiguous provisions of the Act. *See Bethlehem Mines Corp.*, 669 F.2d at 196 ("Although statements of legislative intent made subsequent to enactment are not nearly as authoritative as statements contemporaneous to enactment, they are entitled to some weight as secondary expressions of expert opinion."). As the Fund and its supporters take pains to point out, there is no legislative history of Section 1556 prior to its enactment. Fund Br. at 25-27; Old Rep. Br. at 13. Given this dearth of prior history, if the Court finds 1556 to be ambiguous, Senator Byrd's statement – made almost immediately after its passage – is worthy of at least some weight in ascertaining its meaning.

4. The Director's interpretation is entitled to deference.

As the administrator of the BLBA, the Director's interpretation of its ambiguous provisions is entitled to deference. *Betty B Coal Co.*, 194 F.3d at 498 ("We should defer to the Director's interpretation of an ambiguous statute that he administers if his interpretation is reasonable."). The fact that the Director's position is advanced in litigation does not undermine his claim to deference. *See v. WMATA*, 36 F.3d 375, 383 (4th Cir. 1994) ("The position advocated in the Director's brief, which represents a reasonable interpretation of an ambiguous or silent statutory provision by the agency charged with administering that law, is entitled to judicial deference."); *cf. Metropolitan Stevedores Co. v. Rambo*, 521

U.S. 121, 137 n.9 (1997). The Supreme Court has explained that deference is owed to an agency's interpretation of a statute it administers:

> The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

United States v. Mead, 533 U.S. 218, 227-28 (2001) (internal quotation marks and citations omitted).[32]

The Fund agrees that the Director's reasonable interpretations of the BLBA and its amendments are entitled to deference. It incorrectly asserts, however, that deference is not appropriate here because the Director's position is inconsistent with the plain language of the statute. *See* Fund Br. 46, 48. As discussed above, the Director's position is entirely consistent with both the plain language of the statute and with the only available indicator of Congress' intent.[33]

---

[32] In these circumstances, the Director's position is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Department intends to promulgate regulations implementing the 2010 Amendments, which will be entitled to such deference. *See* Department of Labor Semiannual Regulatory Agenda at 8 (Dec. 20, 2010), available at http://www.dol.gov/asp/regs/unifiedagenda/fall_2010_agenda.pdf.

[33] The Fund also argues that deference is not warranted because, in interpreting the 1981 Amendments, the Director took the position that the operative date for determining whether a survivor was eligible for derivative benefits was the date the miner's claim was filed. *See* Fund Br. 49. As discussed *supra* at 37-38, that

The Fund also claims that the Director's interpretation of Section 1556(c) is contrary to congressional intent because it restores derivative survivors' benefits to a wide range of dependents. *See* Fund Br. 41-42. In particular, the Fund objects that the BLBA's liberal modification provision allowed survivors who filed claims after January 1, 2005, to keep those claims alive through March 23, 2010, thereby gaining the benefits of the ACA Amendments. *See* 33 U.S.C. § 922; 20 C.F.R. § 725.310. It also objects to the fact that the survivors of miners who died many years ago may now file claims for survivors' benefits. Fund Br. at 42 and n.14.

These observations are true but irrelevant. Congress chose not to amend the BLBA's liberal modification rules when it reinstated the 15-year presumption and derivative survivors' benefits in Section 1556. Nor did it reinstate the BLBA's statute of limitations for survivors' claims, which it abolished in 1978. *See* Pub. L. 95-239, § 7(e) (deleting former requirement that survivors' claims be filed within three years of a miner's death).[34] The Director's interpretation of Section 1556(c)

---

interpretation was mandated by the plain language and clear legislative history of the amended statute. This is in no way inconsistent with the Director's interpretation of Section 1556. In any event, "an agency is allowed to change its reasonable interpretation so long as its position is reasonable and does not conflict with congressional intent." *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993).

[34] Old Republic objects to the notion that survivors who previously filed unsuccessful claims could file new claims under revived Section 422(l). Old Rep.

is entirely consistent with congressional intent. It also "accords with the principle that courts should liberally construe remedial legislation, such as the BLBA, so as to include the largest number of claimants within its entitlement provisions." *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318 (3d Cir. 1996), *quoted approvingly in Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618 (4th Cir. 2006) ("the Act's remedial nature instructs us to interpret its provisions favorably toward miners"). The Fund understandably objects to the scope of the 2010 Amendments, but those concerns are properly addressed to Congress, not the courts. It has simply failed to demonstrate that those amendments do not apply to Mrs. Stacy's claim.[35]

Br. at 10-11 and n.12. While it is well-established that the BLBA permits subsequent claims, the Director concedes that the application of Section 1556 to subsequent survivors' claims may present legal issues beyond those presented here. Those issues are irrelevant to the instant case, however, because Mrs. Stacy has filed only one claim for survivors' benefits.

[35] If the Court grants the Fund's petition, the case should be remanded to the Board for consideration of Mrs. Stacy's other challenges to the ALJ's decision, which were not entertained by the Board in the decision on appeal.

CONCLUSION

The decision of the Benefits Review Board should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Maia S. Fisher
MAIA S. FISHER
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.,
Suite N-2117
Washington, D.C. 20210
(202) 693-5684
BLLS-SOL@dol.gov
fisher.maia@dol.gov

Attorneys for the Director,
Office of Workers' Compensation
Programs

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 12,843 words, as counted by Microsoft Word 2003.

/s/ Maia S. Fisher
MAIA S. FISHER

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, I electronically filed the foregoing Brief for the Federal Respondent with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that service will be accomplished by the appellate CM/ECF on the following registered CM/ECF users:

Wendy G. Adkins, Esquire
Jackson Kelly, PLLC
Suite 500
150 Clay Street
P. O. Box 619
Morgantown, WV 26507
Telephone: 304-284-4136
Email: wgadkins@jacksonkelly.com

Kathy Lynn Snyder, Esquire
Jackson Kelly, PLLC
Suite 500
150 Clay Street
P. O. Box 619
Morgantown, WV 26507
Telephone: 304-284-4114
Email: ksnyder@jacksonkelly.com

Joseph E. Wolfe, Esquire
Wolfe, Williams, Rutherford & Reynolds
470 Park Avenue
P. O. Box 625
Norton, VA 24273
Telephone: 276-679-0777
Email: usdcadmin@wwrrlawfirm.com

Ryan Christopher Gilligan, Esquire
Wolfe, Williams, Rutherford & Reynolds
470 Park Avenue
P. O. Box 625
Norton, VA 24273
Telephone: 276-679-8266
Email: rgilligan@wwrrlawfirm.com

Mary Lou Smith, Esquire
Howe, Anderson & Steyer, PC
Suite 650
1250 I Street, NW
Washington, DC 20005
Telephone: 202-296-5680
Email: mlsmith@haspc.com

Mark Elliott Solomons, Esquire
Greenberg Traurig, LLP
Suite 1000
2101 L Street, NW
Washington, DC 20037
Telephone: 202-533-2361
Email: solomonsm@gtlaw.com

Laura Metcoff Klaus, Esquire
Greenberg Traurig, LLP
Suite 1000
2101 L Street, NW
Washington, DC 20037
Telephone: 202-533-2362
Email: klausl@gtlaw.com

/s/ Maia S. Fisher
MAIA S. FISHER

ADDENDUM

Keene v. Consolidation Coal Company,
___ F.3d ___, No. 10-1948, slip op. (7th Cir. May 19, 2011)

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-1948

JACQUELINE J. KEENE,

Petitioner,

v.

CONSOLIDATION COAL COMPANY and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of Orders of
the Benefits Review Board.
Nos. 09-BLA-0352 & 09-BLA-0403

ARGUED APRIL 6, 2011—DECIDED MAY 19, 2011

Before FLAUM, EVANS, and TINDER, *Circuit Judges*.

EVANS, *Circuit Judge*. Several cases have been filed around the country concerning the constitutionality of the recently enacted Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Most of the litigation centers around the "individual mandate"

found in § 1501, which requires individuals to purchase federally-approved health insurance or pay a monetary penalty.[1] This case involves the constitutionality of a less well-known (and arguably less controversial) section of the Act (§ 1556).

Jacqueline Keene, the wife of a deceased coal miner, argues that her claim for black lung benefits should be remanded to the administrative law judge (ALJ) because § 1556 entitles her to a presumption under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901 *et seq.*, that was not available when the ALJ issued his decision denying benefits. The government agrees. Mr. Keene's former employer, Consolidation Coal Company (Consol), however, contends that, by virtue of its retroactive nature, § 1556 violates the due process and takings clauses of the U.S. Constitution.[2]

---

[1] The score is currently three-to-two (that is, district court judgments) in favor of constitutionality. *See Mead v. Holder*, ___ F. Supp. 2d ___, 2011 WL 611139 (D.D.C. Feb. 22, 2011) (finding mandate constitutional); *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*, ___ F. Supp. 2d ___, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (finding mandate unconstitutional); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (same); *Liberty University, Inc. v. Geithner*, ___ F. Supp. 2d ___, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) (finding mandate constitutional); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (same).

[2] Consol is on the hook for any benefits awarded to Mrs. Keene because it is the coal mine operator that most recently

(continued...)

Mrs. Keene's appeal actually encompasses two benefits claims: hers (the "survivor's claim") and her late husband's (the "miner's claim"). Before the ALJ, the dispositive issue on the miner's claim was whether Mr. Keene's total disability was due to pneumoconiosis (that is, black lung disease).[3] In addressing that claim, the ALJ considered the opinions of Drs. Perper, Pineda, Tuteur, Wiot, Oesterling, and Fino. Only the first two doctors offered testimony supportive of the claim. The ALJ discounted the opinion of Dr. Perper because he (1) diagnosed a "new" kind of pneumoconiosis, and (2) found that Mr. Keene did not suffer from congestive heart failure. Both of these findings were contradicted by other medical testimony. The ALJ discounted the opinion of Dr. Pineda, despite recognizing that he was Mr. Keene's treating physician, because Dr. Pineda's testimony was conflicting: he stated both that Mr. Keene's disability was due to pneumoconiosis and that Mr. Keene's level of disability would probably have been the same even if he had not worked in coal mines.

The dispositive issue on the survivor's claim was whether Mr. Keene's death was due to pneumoconiosis.

---

[2] (...continued)
employed her husband for at least one year. *See* 20 C.F.R. §§ 725.494-725.495.

[3] Pneumoconiosis is specifically defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); 20 C.F.R. § 718.201(a).

Here, the ALJ considered the autopsy report, the death certificate, and the reports of Drs. Perper, Pineda, Oesterling, and Tuteur. Again, only the first two doctors' testimony supported the claim. Dr. Pineda opined that pneumoconiosis contributed to, but did not hasten, Mr. Keene's death. But the ALJ discounted this testimony because Dr. Pineda did not explain his reasoning. And Dr. Perper's opinion was again afforded little weight because he found that Mr. Keene did not suffer from cardiac disease. This finding even conflicted with that of Dr. Pineda, who concluded that, although pneumoconiosis contributed to Mr. Keene's death, his cardiac condition was a major factor as well. The ALJ therefore determined that Mrs. Keene had not met her burden of proof regarding either claim and denied benefits. The Benefits Review Board affirmed.

After the Board issued its decision, Congress passed the PPACA. Section 1556 of the PPACA amended the BLBA by resurrecting a rebuttable presumption (the "15-year presumption")[4] and making it applicable to claims filed after January 1, 2005, that were still pending on or after March 23, 2010. The 15-year presumption provides:

> if a miner was employed for fifteen years or more in one or more underground coal mines . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, *then*

[4] The 15-year presumption was originally added to the BLBA in 1972. *See* Pub. L. No. 92-303, § 4(c) (1972). In 1981, Congress limited its availability to claims filed before January 1, 1982. *See* Pub. L. No. 97-119, § 202(b)(1) (1981).

> *there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis*. . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. § 921(c)(4) (2010) (emphasis added). In remarks made two days after the passage of the PPACA, the late Senator Robert Byrd[5] stated that § 1556 would "benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order" and would help "ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won." 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Robert Byrd).

There is no dispute that the miner's claim does not qualify for the 15-year presumption, as it was filed in 2001. The survivor's claim, however, was brought on January 3, 2005.

We begin our analysis with a brief review of the ALJ's decision, which we will not overturn if it was rational,

---

[5] When he died in 2010, Senator Byrd of West Virginia (with 51 years of service) was the longest-serving Senator in the history of the United States Congress.

supported by substantial evidence, and consistent with governing law. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 538 (7th Cir. 2002). To be entitled to benefits under the BLBA, a miner must demonstrate that (1) he had pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he was totally disabled, and (4) the total disability was due to pneumoconiosis. *See* 20 C.F.R. §§ 718.202-718.204. Mrs. Keene argues that the ALJ ignored evidence regarding the last element.

Here, the ALJ considered the doctors' reports and correctly noted that only the opinions of Drs. Perper and Pineda supported the claim. The ALJ then explained why he discounted those opinions: (1) Dr. Perper's findings—that Mr. Keene suffered from a "new" kind of pneumoconiosis and did not have congestive heart failure—were contrary to other medical evidence; and (2) Dr. Pineda's findings—that Mr. Keene's disability resulted from pneumoconiosis and that Mr. Keene's level of disability would probably have been the same even if he had not worked in coal mines—were inconsistent. There is no indication that the ALJ ignored evidence on this issue. Indeed, Mrs. Keene's argument is more appropriately characterized as a request to reweigh the evidence, which we cannot do. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 478 (7th Cir. 2001).

The elements of the survivor's claim differ slightly from those of the miner's claim. To be entitled to benefits, a survivor must demonstrate that (1) the miner had pneumoconiosis, (2) the pneumoconiosis arose out of

coal mine employment, and (3) the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). Mrs. Keene argues that the ALJ ignored evidence regarding the last element.

Here, the ALJ considered the autopsy report, the death certificate, and the doctors' reports and correctly noted that only the opinions of Drs. Perper and Pineda supported the claim. The ALJ then explained why he discounted those opinions: (1) Dr. Pineda's finding—that pneumoconiosis contributed to, but did not hasten, Mr. Keene's death—was conclusory; and (2) Dr. Perper's finding—that Mr. Keene did not suffer from cardiac disease—was incredible given the rest of the medical evidence presented. Again, Mrs. Keene has not shown any reversible error and is essentially asking us to reweigh the evidence. Her challenge to the ALJ's determinations therefore must fail.

But that is not the end of the line for Mrs. Keene. To repeat, her primary argument on appeal is that the survivor's claim should be remanded to allow the ALJ to determine the applicability of the 15-year presumption, recently revived by § 1556 of the PPACA, which was not available to her the first time around. Because Mrs. Keene's claim was filed within the applicable time period, the government agrees. Consol, however, argues that the claim should not be remanded because, by virtue of its retroactive nature, § 1556 is unconstitutional under the due process and takings clauses. This is a question of law, which we review *de novo*. *See Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005).

Consol maintains that retroactive application of § 1556 deprives it of due process. Legislation "adjusting the burdens and benefits of economic life" is presumed to be constitutional; the party alleging a due process violation must establish that the legislature "has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This is true even where, as here, a question of retroactivity is involved. *Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir. 1999). "So long as retroactive application of the change is rationally related to a legitimate legislative purpose, the constraints of due process have been honored." *Kopec v. City of Elmhurst*, 193 F.3d 894, 903 (7th Cir. 1999).

Consol falls far short of meeting its burden. Notably, the Supreme Court has already rejected an argument that the BLBA as a whole violates due process because it imposes retroactive liability on coal mine operators. *See Turner Elkhorn*, 428 U.S. at 19-20. There, the Court concluded that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.* at 18.

Consol largely ignores this precedent and contends instead that, because Congress did not discuss the retroactive nature of § 1556, the legislation is irrational. But two days after the passage of the PPACA, one of its senator sponsors emphasized that § 1556 would provide people who recently filed a claim with a "fair shake" at

accessing benefits. *See* 156 Cong. Rec. S2083-84. Thus, the rational purpose for applying the 15-year presumption retroactively is to give miners and their survivors whose claims were recently filed a better shot at obtaining benefits.

Furthermore, Congress is not required to discuss an act's purpose to satisfy due process. It is enough that a rational basis exists. *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1124 (7th Cir. 1996). Here, we have no trouble conceiving of such a basis. With § 1556, Congress decided to ease the path to recovery for claimants who could prove at least 15 years of coal mine employment and a totally disabling pulmonary impairment. Its imposition of retroactive liability for a limited period to individuals who recently filed claims is a rational balance between the parties' interests.

Perhaps recognizing that its initial showing was insufficient, Consol sets forth an expansive history of the 15-year presumption in its supplemental reply brief, citing 1980 and 1982 General Accounting Office (GAO) reports for the first time. Those reports generally found that black lung benefits were being awarded without adequate medical evidence of disability and suggested (among other things) amending the BLBA to eliminate presumptions based on years of coal mine employment. Consol argues that, because the GAO's findings led to Congress's decision to limit the 15-year presumption in 1981, it was irrational to resurrect the presumption in 2010 absent evidence of its effectiveness.

Even if this argument had been timely and relevant (as Consol's counsel conceded at oral argument, the GAO

reports did not parse out awards based solely on the 15-year presumption), it would not help Consol. Due process only requires Congress to have acted rationally, not necessarily intelligently. Just because some members of Congress once believed that the 15-year presumption was unwise or unnecessary doesn't mean that they can't change their minds. And it could very well be that, with the presumption, some undeserving claimants are awarded benefits. But the flip-side is also true: without the presumption, some deserving claimants are not awarded benefits. It is up to Congress to decide which is the lesser evil. In sum, Consol has not shown that § 1556 violates due process.

Consol also argues that § 1556 violates the takings clause. "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But, as with a due process challenge, a party characterizing governmental action as an unconstitutional taking "bears a substantial burden." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998). Evaluating constitutionality under the takings clause involves an examination of the "justice and fairness" of the regulation. *Id.* Three factors have "particular significance" to this inquiry: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

Again, Consol falls far short of meeting its burden. Regarding the first factor, economic impact, Consol

argues in a conclusory fashion that § 1556 will financially burden coal companies. The only specific financial information that Consol provides is a passing reference to the alleged $1.4 billion debt accumulated by the black lung disability trust fund in 1981 (that is, before Congress limited the 15-year presumption) and statistics from the 1980 and 1982 GAO reports (again, in its supplemental reply brief). But this data proves nothing about the economic impact of the legislation on Consol itself, which is necessary to establish a taking. *See Central States*, 181 F.3d at 808 (rejecting a takings clause challenge where the complainant failed to compare the loss at issue to something in order to assess its impact); *cf. Eastern Enterprises*, 524 U.S. at 529 (sustaining a takings clause challenge where the complainant showed that its cumulative payments under the act at issue would be $50 to $100 million).

Regarding the second factor, interference with investment-backed expectations, Consol again makes only vague arguments, predicting that § 1556 will increase insurance premiums for coal companies, lower profits, and result in job loss. But, as both Mrs. Keene and the government point out, the black lung benefits program has long-since required an endorsement in insurance policies making carriers—and self-insured operators like Consol—liable for obligations from any amendments enacted while the policy is in force. *See* 20 C.F.R. § 726.203(a). And § 1556 only allows the 15-year presumption to reach back to claims filed after 2005 that were still pending in early 2010. *Cf. Eastern Enterprises*, 524 U.S. at 532 (sustaining a takings clause challenge where

the act's beneficiary allocation scheme reached back 30 to 50 years to impose liability based on the complainant's activities between 1946 and 1965).

Finally, Consol argues that the third factor, character of the governmental action, cuts in its favor because Congress did not debate whether the 15-year presumption needed to be resurrected. But Consol cites no case law finding that this action (or rather, inaction) supports a takings violation. The nature of the governmental action here is economic legislation with a limited retroactive element. As the BLBA's retroactive provisions have already withstood a due process challenge, "it would be surprising indeed to discover now that . . . Congress unconstitutionally had taken the assets of the employers there involved." *Connolly*, 475 U.S. at 223; *cf. Eastern Enterprises*, 524 U.S. at 537 (sustaining a takings clause challenge where the act "single[d] out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused").

In the end, Consol makes some strong arguments as to why the 15-year presumption should not have been revived. And it may be, as Consol contends, that Congress "slipped § 1556 into page 142 of the 906-page piece of legislation known as the PPACA." But, unfortunately for the company, those assertions do not amount to grounds for sustaining its constitutional challenges.

With respect to the miner's claim, the petition for review is DENIED, and the Board's decision is AFFIRMED.

With respect to the survivor's claim, the petition for review is GRANTED, and the Board's decision is VACATED. The survivor's claim is REMANDED to the ALJ with instructions that the record be reopened to allow the parties to present evidence regarding the applicability of the 15-year presumption. No costs are assessed against either party.