IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHMOND, VIRGINIA

No. 11-1020

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND,
as carrier for OLGA COAL COMPANY,

Petitioner,

v.

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

Respondent,

and

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

Party-In-Interest.

ON PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

REPLY BRIEF OF PETITIONER, WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND as carrier for OLGA COAL COMPANY

Kathy L. Snyder
Wendy G. Adkins
Jackson Kelly PLLC
P.O. Box 619
Morgantown, WV 26507
(304) 284-4100
Counsel for West Virginia CWP Fund

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I. INTRODUCTION

The West Virginia CWP Fund, as carrier for Olga Coal Company ("Fund"), filed the Brief of Petitioner on March 17, 2011. The Association of Bituminous Contractors, Inc. filed an amicus brief challenging the rationale provided by the Benefits Review Board ("Board") to award survivors' benefits in this claim. Old Republic Insurance Company also filed a separate amicus brief, identifying similar errors in the Board's decision.

After seeking an extension, the Director filed a Response Brief on May 20, 2011. Mrs. Elsie Stacy ("Claimant") filed her Response Brief on the same day. The United Mine Workers' of America and the Washington and Lee University Black Lung Clinic filed amicus briefs supporting the award of benefits to Mrs. Stacy. The Court extended the deadline for the Fund's Reply Brief until June 17, 2011.

II. ARGUMENT IN REPLY

1. The filing date of the miner's claim is the operative date for determining eligibility for automatic survivor's benefits pursuant to the amendments to 30 U.S.C. § 932(l) contained in the PPACA.

a. The unambiguous statutory language demonstrates that the operative date for determining eligibility for automatic entitlement to survivor's benefits under the amended § 932(1) is the date the miner filed his claim.

Under the amendments to 30 U.S.C. § 932(l) of the Black Lung Benefits Act ("BLBA") contained in the Patient Protection and Affordable Care Act ("PPACA"), a survivor is automatically entitled to benefits if the miner was receiving federal black lung benefits at the time of his death. See Pub. L. No. 111-148, § 1556 (March 23, 2010). With § 1556 of the PPACA, Congress reinstated derivative entitlement for this category of survivors which had not existed since January 1, 1982. Id. Congress, however, limited application of these amendments to claims filed after January 1, 2005, that are pending on or after the date of enactment of this Act. The question presented is *whose* claim - the miner's or the survivor's - must be filed within these timeframes to trigger eligibility to the amended § 932(l).

The parties agree that whether the Claimant is automatically entitled to survivor's benefits under these amendments is a question of statutory construction. See *Director's Br. at 33; Claimant's Br. at 31.* The parties agree that the Court's

analysis must begin and end with the unambiguous language of the statutes. Id. The parties disagree over what specific statutory language this Court should consider.

The Director urges this Court to confine its statutory analysis only to the meaning of terms within § 1556 of the PPACA. See *Director's Br. at 35*. The Fund's position is that § 1556 must be read in conjunction with the language in 30 U.S.C. § 921(c)(4) and § 932(l), the two statutes which it amends. This is the critical distinction in the parties' positions.

The Director argues that the term "claims" in subsection (c) of § 1556 includes both miners' and survivors' claims. See *Director's Br. at 34-35*. The Director contends that the plurality of the word "claims" in § 1556(c) demonstrates Congress' intent for § 1556 to apply to both miners' and survivors' claims. Id. The Director argues the Court's analysis should be limited to the language of § 1556. Because this survivor's claim was filed after January 1, 2005, the Director contends the amendments to § 932(l) contained in § 1556 are applicable. The flaw in the Director's position is that it ignores the language of § 932(l).

The Fund agrees that the term "claims" in § 1556(c) refers to both miners' and survivors' claims. Subsection (c) provides the amendments "made by this section shall apply with respect to claims filed under" the BLBA after January 1, 2005. Applying basic canons of statutory construction, the phrase "*made by this*

section" means that the effective date listed in subsection (c) applies to the entirety of § 1556, encompassing both subsections (a) and (b). See, e.g., Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488-89 (1947) (individual sections within a single statute must be construed together). The plurality of the word "claims" in (c) recognizes that § 1556 applies to the amendments to both 30 U.S.C. § 932(l) *and* § 921(c)(4). As § 921(c)(4) is applicable to both miners' and survivors' claims, the term "claims" under § 1556(c) clearly refers to both miners' and survivors' claims.

The Court's statutory analysis, however, does not end with § 1556. Rather, the canons of statutory construction require that § 1556 be construed in conjunction with the statutes that it amends - 30 U.S.C. § 921(c)(4) and § 932(l). Courts have a "duty to construe statutes not isolated provisions." Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995). "A general rule of construction directs that a statute should be read as a whole. Thus, as to future transactions, *provisions introduced by an amendatory act should be read together with provisions of the original section* that were reenacted or left unchanged as if they had been originally enacted as one section." Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, 22:34 & 22:35 (7th ed. 2010) (emphasis added). Section 1556 must be read in conjunction with the language of the two statutory provisions it amends.

> The PPACA amended § 932(l) of the BLBA as follows:
>
> (l) Filing of new claims or refiling or revalidation of claims of miners already determined eligible at time of death
>
> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner~~, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981~~.

30 U.S.C. § 932(l), *as amended* (stricken language noted); See Pub. L. No. 111-148, § 1556(b). The plain language of § 932(l) states that a survivor is not required to file a claim for derivative entitlement. It would, therefore, contravene the plain language of § 932(l) to construe § 1556 as requiring that the applicability of § 932(l) be based on the date a *survivor's* claim is filed. See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (Court presumes that Congress "says in a statute what it means and means in a statute what it says there.").[1] Section 932(l) provides that the operative date for determining whether the survivor is eligible for benefits under this provision is the date the *miner's* claim was filed because the survivor is not required to file a claim. When § 1556(c) is read in conjunction with § 932(l), the relevant filing date is *only* that of the living miner's claim.

[1] See also Matala v. Consol. Coal Co., 647 F.2d 427, 430 (4th Cir. 1981) (citing State Water Control Bd. v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977) ("The plain meaning of a statute should be rejected only if there is substantial, unambiguous evidence supporting a contrary interpretation.").

The Director concedes that § 932(l) speaks only of miners' claims. *Director's Br. at 38.* He contends, however, that the Fund's interpretation would render inconsistent results in the application of the amendments in § 1556. See *Director's Br. at 36-37.* When § 1556 is interpreted in conjunction with § 921(c)(4) and § 932(1), as advocated by the Fund, a claimant could be eligible for amendments to § 921(c)(4) based on the date she filed her survivor's claim, but would not be eligible for amendments to § 932(1).[2] Id.

While such a result can occur when § 1556 is interpreted in conjunction with § 921(c)(4) and § 932(1), this outcome is not an "inconsistent" application of § 1556. Director's perceived inconsistency originates from his mistaken belief that the Court should confine its statutory analysis to only the language of § 1556. There is nothing improper with the fact that a claimant may be eligible for the amendments to § 921(c)(4), but not § 932(1). That result occurs from the proper statutory construction of § 1556 *in conjunction* with § 921(c)(4) and § 932(1), two distinct statutory provisions with differing language.

Finally, the Director invites this Court to exceed the scope of its review by speculating as to how Congress "could" have amended § 932(1). See *Director's Br. at 39.* The Director argues that if Congress wanted to reinstate automatic

[2] The Director concedes that Mrs. Stacy is not eligible for the amendments to § 921(c)(4) contained in the PPACA because her husband did not work as a coal miner for the requisite fifteen years. *Director's Br. at 37 n.23.*

derivative benefits "only for the survivors of miners who were awarded lifetime benefits on claims filed after 2004," Congress could have added "and on or before January 1, 2005" to the end of § 932(l). Id. The Court need not engage in speculation as to the many things that Congress could have done. Rather, the answer to the question presented can be derived solely by applying the canons of statutory construction to what Congress actually did to § 932(1) with the passage of § 1556.

Section 1556 of the PPACA has no effect standing alone. Thus, to interpret § 1556 independently from the two statutes which it amends is both illogical and contrary to the canons of statutory construction. When § 1556(c) is interpreted in conjunction with § 932(1), the unambiguous statutory language demonstrates that the operative date for purposes of § 932(1) is the filing date of the *miner's* claim. As Mr. Stacy filed his claim before January 1, 2005, his spouse is not eligible to automatically receive benefits deriving from his claim under the amendments reviving § 932(l). Accordingly, the Board's decision should be reversed or vacated.

b. The Director's interpretation is not entitled to deference because it is inconsistent with the plain language of the statute and he has taken inconsistent positions.

The Director concedes his litigation position is not entitled to deference pursuant to Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See *Director's Br. at 44 n.32.* Rather, he argues that his position regarding the question of statutory construction presented in this case is "entitled to respect" based upon its "power to persuade" pursuant to United States v. Mead, 533 U.S. 218, 236 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

Under the Skidmore factors, the weight afforded an agency's judgment in a particular case depends upon the thoroughness of the agency's interpretation and its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control. See Skidmore, 323 U.S. at 140. As the Director voiced an interpretation that completely disregards the language of § 932(1), is inconsistent with his prior interpretation of that same statute, and would provide a sweeping retroactive effect of § 1556 of the PPACA contrary to Congress' intent, his interpretation lacks the power to persuade.

The Director's position is not "entitled to respect" because he has taken inconsistent positions regarding the operative date under § 932(1). See Pauley v.

BethEnergy Mines Inc., 111 S. Ct. 2524, 2535 (1991) ("[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); Malcomb v. Island Creek Coal Co., 15 F.3d 364, 369 (4th Cir. 1994) (citing Pauley). The Director concedes that, following the 1981 amendments to the BLBA, he took the position that the operative date for determining eligibility for the automatic entitlement provisions under § 932(1) was the date the miner's claim was filed. *Director's Br. at 38.* He now asserts the operative date for determining eligibility under § 932(1) is the filing date of *either* a miner's or a survivor's claim. Id. at 39.

The Director's inconsistent interpretations result from his belief that § 1556 should be constructed separately from § 932(l), which is contrary to the canons of statutory construction. See supra, § 1, a. The Director argues that in the 1981 amendments, Congress inserted language into § 932(1), whereas language was deleted in 2010 through a separate, independent amendment - § 1556 of the PPACA. *Director's Br. at 38-39.* Whether § 932(1) was amended within the statutory text of § 932(1) or through an independent amendment in the PPACA, however, is irrelevant.

The Director contends that § 1556 did not amend the limiting language of § 932(l). Id. at 38-39. Rather, § 1556(b) removed the limiting language in its entirety, and § 1556(c) provided the effective date for that removal. Id. According

to the Director, the 1981 limiting language previously interpreted and subject to the Third Circuit's decision in Pothering v. Parkson Coal Co., 861 F.2d 1321 (3d Cir. 1988), is no longer applicable and, therefore, cannot give rise to any inconsistent position. Id.

Neither the 1981 amendments nor the PPACA amendments, however, altered the substantive language of § 932(1). Rather, both the 1981 and the PPACA amendments limited the application of § 932(1). The limiting language added by the PPACA amendments, like the prior limiting language of § 932(1), must be read in conjunction with the substantive statutory language of § 932(1). See supra § 1, a. The sole reference to a "claim" that must be filed for purposes of § 932(1) continues to be the "claim of such miner." Thus, no reasonable explanation exists for Director's change in position concerning the operative date for derivative benefits under § 932(1). Accordingly, the Director's position is not persuasive.

The Director's interpretation also is not persuasive because it renders the limiting language of § 1556(c) meaningless, ignoring the five-year retroactive application imposed by Congress. Pursuant to Director's position, any survivor of a miner who was receiving benefits at the time of his death is now automatically entitled to benefits because the survivor's claim would be filed after January 1, 2005 and pending after March 23, 2010. Under Director's interpretation, survivors

could receive derivative benefits under § 932(l), even if more than five years have passed since the miner's death. Many survivors of miners receiving federal black lung benefits may not have filed survivors' claims in the past because they could not establish death due to coal workers' pneumoconiosis. For example, a survivor would now be automatically entitled to benefits where the miner was receiving benefits and died in 1982 as a result of a car accident. The employer would be liable for twenty-nine years of retroactive liability. If a miner was receiving benefits and died in 1990 from brain cancer, the survivor would now be entitled to twenty-one years of retroactive benefits.[3] These examples demonstrate that Director's interpretation significantly expands the retroactive application of the PPACA amendments beyond the five years expressly provided by Congress in § 1556(c).

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[3] The Director's interpretation makes the eligible group of survivors under § 932(1), as amended by the PPACA, limitless. The Director has taken the position in other survivors' claims that a final denial in a prior survivor's claim does not prohibit a survivor from filing a subsequent claim subject to the PPACA amendments and receiving an award of benefits under § 932(1). See, e.g., Richards v. Union Carbide Corp., 2010-BLA-5248 (Mar. 1, 2011), *appeal acknowledged*, 11-0414 (Ben. Rev. Bd. Mar. 25, 2011); Ford v. Island Creek Coal Co., 2011-BLA-5008, *appeal acknowledged*, 11-0320 BLA (Ben. Rev. Bd. Feb. 9, 2011). Thus, even survivors whose previous claims were denied because they failed to establish death causation will now be able to receive derivative benefits by filing a subsequent survivor's claim. The Director tries to minimize the impact of his position and sidestep the issue by conceding "the application of Section 1556 to subsequent survivor's claims may present legal issues beyond those presented here." *Director's Br. at 46 n.35.*

The Director concedes that the Fund's "observations" are true, but characterizes them as irrelevant. See *Director's Br. at 45.* The Director contends that Congress failed to take steps to limit the application of the PPACA to these types of scenarios and that given the remedial nature of the BLBA, the PPACA amendments must be liberally construed to benefit the most claimants. Id. at 46.

The issue here, however, requires analysis of Congress' intent in enacting § 1556 of the PPACA to amend the BLBA. That intent is demonstrated by the *inclusion* of the limiting language in § 1556(c) restricting the PPACA application to claims filed within a specific time period. See PPACA, Pub. L. No. 111-148, § 1556(c) ("claims filed . . . after January 1, 2005, that are pending on or after the date of enactment of this Act."). With the PPACA amendments, similar to the 1981 amendments, Congress restricted the application of § 932(1) to claims filed within a certain time period. Neither the PPACA amendments nor the 1981 amendments support carte blanche application of § 932(1). Thus, the broad and expansive retroactive application of the PPACA amendments advocated by Director is unreasonable and ignores the express words of Congress.

Finally, the Director asserts that his interpretation is reasonable and persuasive because it is supported by the post-enactment statements of the late Senator Robert C. Byrd. See *Director's Br. at 41-43.* Yet, the Director agrees that

subsequent "legislative history" rarely overrides a reasonable interpretation gleaned from the statutory text or prior legislative history. Id.

As the text of the statute is unambiguous and directly conflicts with the Director's interpretation, no reason exists to look to these post-enactment statements. Chevron, 467 U.S. at 842-43. The Director mischaracterizes the legislative history of § 1556 as "scanty." Id. Rather, no legislative history exists for § 1556 because no member of Congress made any comments prior to its enactment. The post-enactment statements made by Senator Byrd could not have informed or influenced the vote of the legislators who enacted the law two days earlier, and cannot be deemed to demonstrate the considerations or understanding of Congress as a whole. See Pittston Coal Grp. v. Sebben, 488 U.S. 105, 118-19 (1988) (refusing to consider post-enactment statements of key sponsor as those statements were not relied upon by legislators who enacted the law); see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960) (giving little weight to post-enactment legislative history in the interpretation of a statute)). Given this scenario where no pre-enactment legislative history exists, no weight should be given to post-enactment statements to support the Director's interpretation.

2. Retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is unconstitutional.

Retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is contrary to law because it denies the Fund due process and constitutes an unconstitutional taking. The Director and the Claimant assert the Board properly rejected the Fund's constitutional challenges to the BLBA based on the United States Supreme Court's decision in Turner Elkhorn Mining Co. v. Usery, 428 U.S. 1 (1976).[4] See *Director's Br. at 20; Claimant's Br. at 20.* The retroactive application of the BLBA provisions found to comply with Constitutional requirements in Usery, however, are distinguishable from the retroactive legislation set forth in § 1556(c) of the PPACA.

In Usery, the coal mine operators challenged the provisions of the BLBA as they applied to miners who left the industry prior to enactment, arguing that those provisions violated substantive due process by imposing unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at that time. Usery, 428 U.S. at 15. While acknowledging that stricter limits may apply to Congress' authority when legislation operates in a retroactive

[4] They also point out a recent decision by the United States Court of Appeals of the Seventh Circuit, rejecting a constitutional challenge of the retroactive application of 30 U.S.C. § 921(c)(4). See *Director's Br. at 21; Claimant's Br. at 20.* Although it found the Usery decision dispositive, the Seventh Circuit's broad application of Usery is flawed. See Keene v. Consolidation Coal Co., --- F.3d ----, 2011 WL 1886106 (7th Cir. May 19, 2011)

manner, the Supreme Court concluded that the assignment of liability for black lung benefits was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." Usery at 428 U.S. at 16-18. At the time of the Usery decision, however, a substantial portion of the burden for disabilities stemming from the period prior to enactment was borne by the federal government. Id. at 18. Usery also involved prospective claims to be filed by miners or their survivors, who were subject to limitation periods and not eligible for re-filing.[5] Thus, the coal mine operators could reasonably evaluate and insure themselves for *future* claims by miners who previously worked in the coal mines or their survivors.

Section 1556(c) of the PPACA applies to actual claims filed before its enactment, not only to miners employed in the coal mines prior to its enactment or their survivors. Spreading costs of employees' disabilities to those who have profited from the fruits of their labor may rationally explain why the BLBA applies

[5] The Supreme Court decided Usery in 1976. Through the 1977 black lung amendments, Congress eliminated the statute of limitations for filing survivor claims and the requirement that a miner must file his claim within three years of the date of last exposure in order to be eligible for the fifteen-year presumption. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, §§ 3(b)(4), 7(a)-(h), 92 Stat. 95, 97-99 (1978). Following the 1977 amendments, the DOL, through its regulations, also permitted miners to re-file for benefits after their claims had been denied. See 20 C.F.R. 715.309; Proposed Rules for Claims for Benefits Under Federal Coal Mine Health and Safety Act, as amended, 43 Fed. Reg. 17,732, 36,785 (April 25, 1978).

to miners who worked in the coal mines prior to its enactment. The same rationale, however, does not explain why significant changes in the law apply to claims already filed, considered, and possibly already denied prior to the enactment of the PPACA. Here, Congress failed to provide any legitimate purpose for retroactively reinstating the rebuttable presumption of disability/death causation provided by § 921(c)(4) and derivate entitlement provided by § 932(1) to claims filed after January 1, 2005 and pending on March 23, 2010. The PPACA and its legislative history are completely devoid of any explanation for the choice of the January 1, 2005 date. No such legitimate purpose was given for the PPACA amendments because no such reason exists.

Unlike the coal mine operators in Usery, the Fund cannot reasonably evaluate and insure for previously filed claims which are now adjudicated under a more beneficial legal scheme. Rather, those claims were previously evaluated and reserves were set under the prior legal scheme. By arbitrarily and irrationally choosing the January 1, 2005 date, Congress readjusted the rights and burdens of employers, upset otherwise settled expectations, and attached new legal rights and duties to claims filed prior to the enactment of the PPACA amendments.

The Director emphasizes that, under its interpretation of Usery, Congress could have retroactively applied the PPACA amendments to all BLBA claims. See *Director's Br. at 22.* According to Director, Congress could impose any

retroactive legislation related to the BLBA at its will without regard to finality of claims, settled expectations of the law, or the burdens imposed on the coal mine operators. A reasonable reading of Usery does not support the contention that any degree of retroactive application of any provision of the BLBA meets constitutional muster. Rather, Usery recognized that retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions. Thus, a legitimate purpose must be conceivable for the specific type of retroactive application being provided to meet due process guarantees. Because no such legitimate purpose exists for the January 1, 2005 date, retroactive application of the PPACA amendments is constitutionally invalid.

The Director also disagrees that Eastern Enterprises v. Apfel, 524 U.S. 498, 529-37 (1998) is precedent for prohibiting the retroactive application of economic legislation as violating both the Due Process and the Takings Clause of the Fifth Amendment. See *Director's Br. at 24-27.* The plurality opinion written by Justice O'Connor found that the assessment against the corporation violated the Fifth Amendment prohibition against taking private property for public use. Id. at 538. Justice Kennedy, in a concurring opinion, found that the retroactive application of the 1992 Coal Act to the corporation violated substantive due process principles under the Fifth Amendment, because it was an "egregious"

retroactive application of a law. Id. at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part). At minimum, Eastern stands for the proposition that retroactive legislation can fail to meet the requisite constitutional standards and may be struck down as invalid. See A.T. Coal Co. v. Massanari, 305 F.3d 226, 237 n. 17 (4th Cir. 2002). Like the Coal Industry Retiree Health Benefit Act at issue in Eastern, the PPACA amendments fail to provide the necessary constitutional protections to the Fund, as well as other coal mine operators, similarly situated.

In Eastern, the Court cited several reasons for striking down retroactive legislation, including the extreme retroactivity of the Coal Act reaching far into the past and disrupting completed transactions, the legitimacy of the legislative purpose reflected in the Coal Act, the economic impact on the company, the "extent to which the regulation interferes with [the Company's] reasonable investment-backed expectations and the nature of the governmental action." Eastern, 524 U.S. at 518. The Fund has been deprived of the opportunity to submit the evidence necessary to establish these same circumstances with respect to retroactive application of the PPACA amendments.

Mrs. Stacy asserts that the Fund has waived its opportunity to seek remand and submit evidence on the constitutional issues because it did not seek remand before the Board. See *Claimant's Br. at 26-27.* She suggests that the Fund should

have utilized the modification provision to obtain review by the ALJ of any new evidence. Id. Her argument ignores the procedural posture of the claim before the Board.

Mrs. Stacy appealed an ALJ's *denial* of benefits to the Board. JA 1-8. The PPACA was enacted on March 23, 2010, while this claim was pending before the Board. On May 13, 2010, less than two months after the passage of the PPACA, she moved for remand to the District Director for application of the PPACA amendments to her survivor's claim. JA 10-12. The Fund had to file its response to the motion on May 27, 2010, only nine weeks after the passage of the PPACA. At that juncture, the Fund could only state that the amendments to § 932(l) may affect this claim and had very little time to collect the data to demonstrate the shortfall in premiums and the overall projected impact on the Fund. Accordingly, the Fund asked that this claim be held in abeyance until sixty days after the Department of Labor ("DOL") issued guidelines or promulgated regulations implementing § 932(1), or until resolution of the various legal challenges to the PPACA pending in several federal district courts. JA 25-26.

The Board issued an Order on June 18, 2010, denying the motion for remand. JA 15. The Board advised the parties that they would determine the impact of the PPACA amendments on this claim as part of their review of the merits on appeal. Id. Thus, the Board demonstrated that no remand would be

provided for application of the PPACA amendments. Moreover, the Board could not consider new evidence regarding the application of the PPACA amendments on appeal. See 20 C.F.R. § 802.301(a),(b).

On December 22, 2010, the Board applied the PPACA amendments to this claim, vacated the ALJ's denial of benefits, and awarded benefits under § 932(1). At that juncture, modification provision was not an option for the Fund as no change in condition or mistake in determination of fact by the ALJ had occurred as the PPACA amendments were not considered by the ALJ as they were not applicable at that time. See 20 C.F.R. § 725.310. Thus, the Fund was affected by a significant change in the law applied for the first time on appeal by the Board. Thus, at minimum, this claim should be remanded to the ALJ for additional proceedings as the Board did not have the authority to consider and lacked the information necessary to make the findings regarding the economic impact of these amendments.

The Director argues that remand is unnecessary because the Fund cannot meet the three factors that courts consider to determine whether an act of Congress constitutes a taking. See *Director's Br. at 17-22*. The Board agreed that the extent to which the statutory amendments disrupt the Fund's investment-backed expectations is one relevant factor. JA 25; Mathews v. United Pocahontas Coal Co., 24 BLR 1-193, 1-199 (2010) (citing Connolly v. Pension Ben. Guar. Corp.,

475 U.S. 221, 224-25 (1986)). These retroactive amendments in the PPACA impose a harsh new liability on the Fund that it could not have foreseen in 2005. The responding parties assert foreseeability relying upon prior bills presented to the House of Representatives and the Senate. See *Director's Br. at 31; Claimant's Br. at 25.* After these bills were introduced, none of the seven gained any traction before the House of Representatives or the Senate.[6] Thus, as the bills were essentially non-starters when independently introduced, the Fund could not have foreseen reinstatement of the presumptions provided by 30 U.S.C. § 921(c)(4) or derivative entitlement provided by 30 U.S.C. § 932(1) through an amendment hidden within the universal healthcare bill.

Moreover, none of the seven bills contained the retroactive language passed through § 1556(c) of the PPACA. Id. Thus, even if reinstatement of § 921(c)(4) and § 932(1) was foreseeable, their retroactive application to claims filed after January 1, 2005 certainly was not.

In an effort to demonstrate a foreseeability, the responding parties also point to 20 C.F.R. § 726.203(a), a DOL regulation which requires coal mine operators to obtain insurance endorsement covering its obligations from any amendments

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[6] See H.R. 1010, 111th Congress (2009); H.R. 1123, 110th Congress (2007); H.R. 300, 109th Congress (2005); H.R. 1988, 108th Congress (2003); S. 2685, 107th Congress (2002); H.R. 4235, 107th Congress (2002); H.R. 228, 106th Congress (1999).

enacted while the insurance policy is in force. See *Director's Br. at 30; Claimant's Br. at 26*. First, as pointed out by the amicus brief filed on behalf of the Association of Bituminous Contractors, Inc., this insurance requirement is not applicable to every operator subject to liability under the BLBA. See *Bituminous's Amicus Br. at 9*. Thus, reliance on the endorsement would result in individualized degrees of foreseeability for different coal mine operators. Similar to the prior bills introduced before the House of Representatives and the Senate, this endorsement foresees only potential amendments, but not retroactive amendments applied to claims filed at least five years prior to the date of enactment. The endorsement would not alert the Fund to anticipate greater liability for claims already in the system and being processed via a different statutory scheme. Accordingly, at most, the prior bills and endorsement may make prospective amendments foreseeable, not the retroactive amendments subject to this constitutional challenge.

Finally, the Director asserts that the Fund cannot establish the economic impact resulting from the retroactive application of 1556 is substantial in the context of its experience in the black lung program. See *Director's Br. at 32*. Again, the Fund had no opportunity to prove how Section 1556 works to its detriment in the context of the black lung regulatory scheme. As the Fund has produced no evidence of the specific financial effects of the PPACA amendments,

the Director only speculates that the Fund cannot show a substantial impact from its prior experience in the federal black lung program. Due Process requires the Fund to at least have an opportunity to try to make such a showing.

As Old Republic Insurance Company pointed out in its amicus brief, the key question raised is whether an individual black lung claim can ever be a proper vehicle for the Eastern analysis. See *Old Republic's Amicus Br. at 16.* This question calls for a fact-driven analysis, and no such analysis can be performed until the Fund is provided with the opportunity to submit facts specific to the position that it has been placed because of the retroactive application of the PPACA amendments. At minimum, Mrs. Stacy's claim should be remanded for submission of evidence and further constitutional review.

3. The amendments to the BLBA contained in § 1556 of the Patient Protection and Affordable Care Act are not severable if all or portions of that Act are found to be unconstitutional.

Because the individual mandate is necessary to satisfy the overall purpose of the PPACA, and Congress has chosen not to pass the amendments to the BLBA independently, § 1556 must be declared invalid if the entire PPACA or any portion of the Act is deemed unconstitutional. Although she suggests that the Fund failed to properly present this issue before the Board, *Claimant's Br. at 7,* Claimant also asserts that the issue of severability is not ripe. *Claimant's Br. at 11, 14.*

Claimant's positions are blatantly inconsistent. To avoid potential waiver, the Fund raised the severability issue only after two district courts in this circuit issued inconsistent decisions concerning the constitutionality of the PPACA, and both decisions were appealed to resolve the split of authority in the Fourth Circuit. See Virginia v. Sebelius, Nos. 11-1057 and 11-1058 (4th Cir. Jan. 20, 2011); Liberty Univ. Inc. v. Geithner, No. 10-2347 (4th Cir. Dec. 3, 2010).

This Court heard oral argument regarding constitutionality of the PPACA on May 10, 2011. See Virginia, No. 11-1057; Liberty, No. 10-2347. The Director argues that should this Court uphold the PPACA's individual mandate, the Fund's severability argument "would be deprived of its premise." See *Director's Br. at 15-16*. Director merely speculates as to this result. If the converse of the Director's prediction occurs -- this Court declares the PPACA's individual mandate unconstitutional -- severability becomes the initial legal issue to be resolved by this Court. Thus, as the current split in authority in the Fourth Circuit regarding the constitutionality of the PPACA will likely be resolved before its appeal is decided, the Fund properly preserved the severability issue.

The Director and Claimant also assert that the BLBA amendments are severable because they are fully operative as a law and would have been independently enacted despite the questionable provision of the PPACA. See *Director's Br. at 16-17*; *Claimant's Br. at 13, 15*. They campaign for striking only

the problematic provisions pursuant to "general" severability standards. Id. United States Federal District Judge Roger Vinson thoroughly explained why the "general" severability standards are not easily applied to this atypical legislation:

> Severability is a doctrine of judicial restraint, and the Supreme Court has applied and reaffirmed that doctrine just this past year: "' Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.' " Because the unconstitutionality of one provision of a legislative scheme "does not *necessarily* defeat or affect the validity of its remaining provisions," the "*normal* rule" is that partial invalidation is proper. Where Congress has "enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated." As the emphasized text shows, the foregoing is not a rigid and inflexible rule, but rather it is the general standard that applies in the typical case. However, this is anything but the typical case.

Florida [Bondi] v. U.S. Dep't of Health and Human Servs., --- F.Supp.2d ---, 2011 WL 285683, *34 (N.D. Fla. Jan. 31, 2011)(*citations omitted*). This appeal raises an atypical scenario where federal black lung legislation, completely unrelated to universal healthcare and previously introduced on several occasions to no avail, is enacted through an approximately 2,700-page healthcare bill. Thus, Judge Vinson's observation especially rings true in this appeal.

"[S]everability of an unconstitutional provision is well established: [u]nless it is evident that the legislature would not have enacted those provisions which are

in its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987); see also Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010). When considering the "fully operative as law" factor, Judge Vinson explained:

> However, the question is not whether these and the myriad other provisions can function as a technical or practical matter; instead, the "more relevant inquiry" is whether these provisions will comprise a statute that will function "in a manner consistent with the intent of Congress." Thus, the first step in the severability analysis requires (at least to some extent) that I try to infer Congress' intent. Although many of the remaining provisions, as just noted, can most likely function independently of the individual mandate, there is nothing to indicate that they can do so in the manner intended by Congress.

Bondi, 2011 WL 285683, *34. Reviewing courts may look to "the statute's text or historical context" to determine if Congress would have preferred the statute without the stricken provisions to no statute at all. See Free Enter. Fund, 130 S. Ct. at 3161-62. The individual mandate is "the keystone or lynchpin of the entire health reform effort." Bondi, 2011 WL 285683, *35; see also PPACA at § 1501(a)(2)(l) ("[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. . . . The [individual mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."). Thus, if the individual mandate

is stricken, the express words of Congress demonstrate its preference of no statute whatsoever.

Although the lack of a severability clause does not create any presumption, the lack of a severability clause is still relevant. See Bondi, 2011 WL 285683, *35-36 (citing Russello v. United States, 464 U.S. 16, 23-24 (1983) (Where "Congress includes [particular] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended.")). A severability clause was included in an earlier version of the PPACA, but was intentionally removed before enactment. See Bondi, 2011 WL 285683, *36. Like the words used by Congress in the PPACA, its exclusion of a severability clause further demonstrates Congress' preference.

Furthermore, Congress would not have passed § 1556 independent of the PPACA. See, e.g., Alaska Airlines, Inc., 480 U.S. at 684. Seven prior bills attempted to reinstate § 921(c)(4) and § 932(1), but failed to make it out of committee. See supra at § 2. The Director and the Claimant attempt to distinguish the prior bills by pointing to the absence of the limiting language contained in § 1556(c). See *Director's Br. at 17*; *Claimant's Br. at 15.* Neither cite to any legislative history to support this distinction. See supra at § 2. Instead, they only speculate that the inclusion of the limiting language in § 1556(c) resulted in the ultimate passage of the BLBA amendments. It is just as likely that the inclusion of

the BLBA amendments in approximately 2,700 pages of healthcare legislation resulted in their passage.

The legislative record demonstrates that the BLBA amendments would not have passed absent their inclusion in the PPACA. Accordingly, the BLBA amendments should be declared invalid if the individual mandate, or any other provision of the PPACA, is struck down as unconstitutional.

III. CONCLUSION

If the entire PPACA is ultimately declared unconstitutional, the amendments to the BLBA contained in § 1556 are not severable. If the PPACA withstands constitutional review, the retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is still contrary to law because it denies the Fund due process and constitutes an unconstitutional taking.

Should the retroactive application of § 1556 be deemed constitutional, then the operative date for determining eligibility for survivor's benefits pursuant to § 932(1) is the date the miner's claim was filed because no survivor's claim is required. Claimant, therefore, is not automatically entitled to survivor's benefits based on the amendments to 30 U.S.C. § 932(1) because her husband's claim was filed before January 1, 2005 and was not pending on or after March 23, 2010. Accordingly, the Fund respectfully requests the Decision and Order of the Board

be reversed, and this claim be remanded to the Board for consideration of the ALJ's substantive review of the merits of this survivor's claim.

Respectfully submitted,

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, as carrier for OLGA COAL COMPANY,

By Counsel.

/s/ Wendy G. Adkins
Kathy L. Snyder
WV Bar No. 5995
Wendy G. Adkins
WV Bar No. 9412
Jackson Kelly PLLC
P.O. Box 619
Morgantown, WV 26507
(304) 284-4100

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IV. ADDENDUM OF STATUTES, RULES, and REGULATIONS

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (March 23, 2010):

> EQUITY FOR CERTAIN ELIGIBLE SURVIVORS.
>
> (a) REBUTTABLE PRESUMPTION.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.
>
> (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.

30 U.S.C. § 921(c)(4)(2010), in pertinent part:

> Regulations and presumptions
>
> (c) Presumptions
>
> For purposes of this section—
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner’s, his widow’s, his child’s, his parent’s, his brother’s, his sister’s, or his dependent’s claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then 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. In the case of a living miner, a wife’s affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the

> requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. 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. § 932(l)(2010), in pertinent part:

> (l) Filing of new claims or refiling or revalidation of claims of miners already determined eligible at time of death
>
> 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.

V. CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

No.11-1020 Caption: West Virginia CWP Fund v. Elsie Stacy

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because:

   this brief contains 6,903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Wendy G. Adkins
Counsel for West Virginia CWP Fund

Dated: June 17, 2011

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VI. CERTIFICATE OF SERVICE

I, Wendy G. Adkins, do hereby certify that I served **Reply Brief of Petitioner** upon the following by electronic delivery this 17th day of June 2011.

ELECTRONIC AND REGULAR MAIL:

Patricia S. Connor
Clerk of Court
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 E. Main St., Suite 501
Richmond, VA 23219-3517

ELECTRONIC:

Joseph E. Wolfe
Ryan C. Gilligan
Wolfe, Williams, Rutherford & Reynolds
P.O. Box 625
Norton, VA 24273
jwolfe@wwrrlawfirm.com

Laura Metcoff Klaus
Mark Elliott Solomons
Greenberg Traurig, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
Klausl@gtlaw.com
solomonsm@gtlaw.com

Helen H. Cox
Maia S. Fisher
Sean Gregory Bajkowski
U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building, Suite –2117
200 Constitution Avenue, N.W.
Washington, DC 20210
blls-sol@dol.gov
fisher.maia@dol.gov

Arthur Traynor, III
United Mine Workers of America
International Headquarters
18354 Quantico Gateway Drive
Triangle, VA 22172
atraynor@umwa.org

Mary Lou Smith
Howe, Anderson & Steyer, PC
1250 I Street, NW, Suite 650
Washington, DC 20005
mlsmith@haspc.com

Timothy Christopher MacDonnell
Washington and Lee University
School of Law
Black Lung Clinic
Lewis Hall, Room 106
Lexington, VA 24450
macdonnellt@wlu.edu

/s/ Wendy G. Adkins
Counsel for West Virginia CWP Fund