NO. 11-1020

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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

Petitioner,

v.

ELSIE L. STACY, the 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

RESPONSE BRIEF OF APPELLEE

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May 20, 2011

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1020 Caption: West Virginia CWP Fund et. al. v. Elsie Stacy and DIR, OWCP

Pursuant to FRAP 26.1 and Local Rule 26.1,

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on February 11, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Joseph E. Wolfe (signature)

Feb. 11, 2011 (date)

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JURISDICTIONAL STATEMENT

This appeal arises from a Decision and Order issued by the Benefits Review Board, United States Department of Labor, under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, most commonly known as the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.*, ("BLBA"). This Court has authority to review decisions issued by the Benefits Review Board ("Benefits Review Board" or "the Board") pursuant to 33 U.S.C. §921(c), as incorporated by Section 422(a) of the BLBA, 30 U.S.C. §932(a).

The Benefits Review Board issued a Decision and Order on the 22nd of December, 2010, finding that Mrs. Elsie Stacy is entitled to an award of Federal black lung benefits and directed that this case be remanded to the District Director for entry of an award of benefits. *Joint Appendix* ("*JA*") 18-26. West Virginia Coal Workers' Pneumoconiosis Fund ("Fund") appealed, and filed a petition for review with the Fourth Circuit Court of Appeals, by cover letter dated the 3rd of January, 2011. *JA* 34. The miner, Mr. Howard W. Stacy, was last employed as a coal miner in West Virginia. *Id.* 2. Thus, jurisdiction is properly before this Court.

ISSUES PRESENTED

1. Are the amendments to the BLBA contained in § 1556 of the Patient Protection and Affordable Care Act severable if all or portions of that Act are found to be unconstitutional?

2. Is retroactive application of the amendments to the BLBA, contained in the Patient Protection and Affordable Care Act, unconstitutional?

3. Is the filing date of the miner's claim the operative date for determining the eligibility for automatic survivor's benefits, pursuant to the amendments to the BLBA contained in the Patient Protection and Affordable Care Act?

STATEMENT OF THE CASE

Mrs. Elsie Stacy ("Mrs. Stacy"), the surviving spouse of Mr. Howard W. Stacy ("Mr. Stacy"), filed this claim for Federal black lung survivor's benefits on the 1st of February, 2007. *JA* 2. Mrs. Stacy received a preliminary denial by the District Director, and she subsequently requested that this claim be forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* The Honorable Judge Jeffrey Tureck presided over the formal hearing on the 17th of September, 2008, in Pipestem, West Virginia. *Id.* Judge Tureck found that Mrs. Stacy did not meet the elements of entitlement, and issued a Decision and Order Denying Benefits on the 10th of September, 2009. *Id.* 1-9. Mrs. Stacy timely appealed Judge Tureck's Decision and Order to the Benefits Review Board, and submitted a Petition for Review and Brief in support of her position.

While this case was pending on appeal, President Obama signed the Patient Protection and Affordable Care Act ("PPACA") into law on the 23rd of March, 2010, which amends portions of the BLBA. *See* Pub. L. No. 111-148, § 1556 (2010). Section 1556(a) of the PPACA amends 30 U.S.C. § 921(c)(4) by striking the last sentence.[1] *Id.* at § 1556(a). The PPACA also amends 30 U.S.C. §932(l) by striking ", except with respect to a claim

[1] The struck sentence from 30 U.S.C. § 921(c)(4) reads: "The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981."

filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981." *Id.* at §1556(b). Finally, § 1556(c) of the PPACA holds that the amendments to the BLBA apply to claims filed after the 1st of January, 2005, which are pending on or after the 23rd of March, 2010.

Mrs. Stacy filed a motion for remand with the Benefits Review Board on the 13th of May, 2010, arguing that the PPACA amendments to the BLBA establish that she is entitled to an automatic award of benefits in this claim. *JA* 10-13. Mrs. Stacy supported her motion arguing that she filed this claim after the 1st of January, 2005 and it was still pending on the 23rd of March, 2010. *Id.* Finally, Mrs. Stacy noted that Mr. Stacy received a final award in his living miner's claim, and drew benefits up until the time of his death. The Director, Office of Workers' Compensation Programs ("the Director") responded to Mrs. Stacy's motion and agreed that she is entitled to an automatic award of benefits. *Id.* 15. The Fund also responded to Mrs. Stacy's motion, and requested that this claim be held in abeyance for sixty days. *Id.* The Benefits Review Board denied Mrs. Stacy's motion by Order issued on the 18th of June, 2010. *Id.*

The Fund filed a supplemental brief with the Benefits Review Board on the 5th of August, 2010, arguing that Mr. Stacy filed his claim before the 1st of January, 2005, and therefore,

Mrs. Stacy is not entitled to an automatic award of benefits. *Id.* The Board issued an Order on the 23rd of September, 2010, reciting the procedural history of this claim following the enactment of the PPACA, and afforded the Director and Mrs. Stacy time to submit additional arguments. *Id.* 14-17. Both Mrs. Stacy and the Director submitted additional arguments, and the Fund submitted an additional brief. *Id.* 21.

The Benefits Review Board issued a published Decision and Order on the 22nd of December, 2010, vacating Judge Tureck's denial of benefits, and remanding this claim to the District Director for entry of an award of automatic benefits. *Id.* 18-27. The Board held that Mrs. Stacy is entitled to an automatic award of benefits pursuant to 30 U.S.C. §932(l), as amended by the PPACA. *Id.* Specifically, the Board held that amended §932(l) provides for automatic entitlement to a miner's survivor if the miner received a lifetime award, and the survivor filed a claim after the 1st of January, 2005, which was pending on or after the 23rd of March, 2010. *Id.* 24. The Board rejected the Fund's arguments that the PPACA amendments to the BLBA violate the Fund's due process rights or constitute a taking of the Fund's private property. *Id.* 24-25. The Fund filed a Notice of Appeal with this Court by cover letter dated the 3rd of January, 2011. *Id.* 34-39.

STATEMENT OF FACTS

Mr. Stacy spent a stipulated eleven years employed as a coal miner in West Virginia. *JA* 2. During his lifetime, Mr. Stacy filed for living miner's benefits, and the Fund agreed to pay him benefits by letter dated the 11th of August, 1987. *Id.* 3. Mr. Stacy received Federal black lung benefits until his death on the 17th of January, 2007. *Id.*

Mrs. Stacy filed her claim on the 1st of February, 2007 and received a denial by Judge Tureck on the 10th of September, 2009. *Id.* 1-9. Judge Tureck rejected Mrs. Stacy's argument that the doctrine of collateral estoppel precludes the Fund from contesting that Mr. Stacy suffered from coal workers' pneumoconiosis.[2] *Id.* at 3. Judge Tureck reviewed and analyzed the hospitalization and treatment records, x-ray interpretations, and medical opinions of record and concluded that Mr. Stacy did not suffer from coal workers' pneumoconiosis.[3] *Id.* 4-7. Judge Tureck denied Mrs. Stacy's claim because he found that she did not establish that Mr. Stacy suffered from coal workers' pneumoconiosis. *Id.* at 8.

[2] Pneumoconiosis is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis." 20 C.F.R. § 718.201(a) (2008).

[3] At the time this claim was adjudicated before Judge Tureck, Mrs. Stacy had the burden of establishing that Mr. Stacy suffered from pneumoconiosis which arose from coal mine employment, and that Mr. Stacy's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a)(1)-(3)(2008).

SUMMARY OF ARGUMENT

The Fund believes that Mrs. Stacy is not entitled to an automatic award of benefits pursuant to 30 U.S.C. §932(l), as amended by the PPACA. The Fund raises three arguments in support of its position. First, the Fund believes that if any portion of the PPACA is found to be unconstitutional, the amendments to the BLBA are not severable. Second, the Fund argues that the retroactive application of the PPACA amendments constitute a violation of the Fund's due process rights and effect a taking of the Fund's private property. Third, the Fund believes that the operative date for application of §932(l), as amended, is the date the miner filed his claim for benefits. The Fund further argues that the Director's interpretation of the amendments to the BLBA is not entitled to deference.

The Fund's argument that the amendments to the BLBA by the PPACA are not severable, should any portion of the PPACA be found unconstitutional, is not ripe for consideration. The Fund's entire argument is contingent upon the happening of future events, which may or may not occur. As such, this argument is not ripe for adjudication at this time. Furthermore, the individual mandate contained in the PPACA is not related to the amendments to the BLBA and the Fund's discussion of the cases involving the individual mandate lend nothing to its position. The Fund did not previously raise this

argument before the Benefits Review Board and it only serves to distract attention away from the Fund's issues which directly concern the amendments to the BLBA.

The Fund believes that Congress' actions in amending the BLBA are arbitrary and irrational, but acknowledges that Congress possesses the power to enact retroactive legislation. Specifically, the Fund argues that Congress' selection of January 1, 2005 as the operative filing date for the amendments to apply violates due process. Congress is not required to offer reasons for enacting a statute especially when required to engage line-drawing to determine an eligible class of persons. When interpreting the amendments to the BLBA, the Benefits Review Board did not abuse its discretion in considering the legislative history offered by the late Senator Byrd, who sponsored the amendments to the BLBA. The Board properly found that the rational purpose for applying the amendments to the BLBA retroactively is to compensate eligible survivors for disabilities bred in the past.

The Fund also believes that the retroactive application of the PPACA amendments to the BLBA constitutes an unconstitutional taking of private property. The Fund's argument must fail because it is not supported by any financial documentation which is necessary to support its position. The Fund recognizes that the record lacks this evidence, but believes that the proper

remedy is to remand this case so that the Fund can supply financial documentation. This case should not be remanded because the Fund failed to take any action when this case was before the Benefits Review Board. The Fund failed to request an opportunity to submit this information, and therefore, should not be afforded a second chance to litigate this issue.

This Court should also reject the Fund's argument that the operative date for application of §932(l), as amended, is the date the miner filed for benefits. The Benefits Review Board properly found that the plain language of §1556(c) of the PPACA establishes that §932(l), as amended, applies to survivor's cases filed after the 1st of January, 2005. The Board found alternatively, that if the language of §1556(c) is found ambiguous, the legislative history, the Director's interpretation, and the overall purpose of §932(l) establishes that §932(l) applies to survivor's claims filed after the 1st of January, 2005.

Finally, the Fund's argument that the Board should not have given deference to the Director's interpretation of the amendments to the BLBA by the PPACA should be rejected. The Director's interpretation is consistent with the plain language of §1556(c), and the legislative history by Senator Byrd. The Director's interpretation is not inconsistent with its prior interpretation of §932(l) after it was amended in 1981. The

limiting language added to §932(l) in 1981 was removed by the PPACA amendments. As such, the Board did not abuse its discretion in giving deference to the Director's interpretation of the amendments to the BLBA.

The Fund has failed to demonstrate that the PPACA amendments to the BLBA violate its due process rights or affect an unconstitutional taking of private property. The Benefits Review Board properly found that §932(l), as amended, applies to survivors cases filed after the 1st of January, 2005. Mr. Stacy received an award of Federal black lung benefits and drew benefits until the time of his death. Mrs. Stacy filed this claim after the 1st of January, 2005 and this claim was pending before the Benefits Review Board on the 23rd of March, 2010. As such, the Board did not err in finding that Mrs. Stacy is entitled to an automatic award of benefits in this claim based on §932(l), as amended.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of agency decisions is only appropriate for mistakes of law, and to guarantee that the factual determinations are in adherence with statutory standards of review. *Doss v. Director, OWCP*, 53 F.3d 654, 658 (4th Cir. 1995). This Court reviews the legal findings of the Administrative Law Judge and Benefits Review Board *de novo* to ensure "they are rational and consistent with applicable law." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). This Court "must affirm the decision of the Administrative Law Judge if it is in accordance with the law and supported by substantial evidence." *Id.*

II. THE PPACA AMENDMENTS TO THE BLBA ARE SEVERABLE BUT THIS ISSUE IS NOT RIPE FOR ADJUDICATION

An issue is not ripe for adjudication if it is entirely contingent upon a happening of future events which may not occur as anticipated. *Texas v. U.S.* 523 U.S. 296, 300 (1998). The Fund argues that if "any portion of the PPACA is found to be unconstitutional by this Court or the Supreme Court of the United States, the amendments to the BLBA must also be declared invalid because the BLBA amendments are not severable." *Petition for Review and Brief* ("*Pet. Br.*") at 16-17. The Fund notes that there are numerous challenges to the individual mandate

contained within the PPACA, but at this time, the majority of the decisions have found the PPACA to be constitutional. The Fund simply speculates that a portion of the PPACA may be rendered unconstitutional in the future, but this argument is irrelevant to the issues of this claim. Mrs. Stacy's claim for Federal black lung benefits involves §1556 of the PPACA and is in no way related to the individual mandate which has been the issue of numerous constitutional challenges. Since the Fund's argument is entirely contingent on a series of events which may happen in the future, it is not ripe for adjudication by this Court.

The individual mandate was deemed unconstitutional in *Florida [Bondi] v. U.S. Dept. of Health and Human Servs.*, No. 3:10-cv-00091-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011)*appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.). The Court ultimately determined the individual mandate could not be severed, and therefore, the entire PPACA was deemed unconstitutional. Judge Vinson issued a subsequent Order on the 3rd of March, 2011, wherein he clarified his prior holding. *Florida Bondi v. U.S. Dept. of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT 2011 WL 723117 (N.D. Fla. Mar. 3, 2011). Judge Vinson explained that he previously "held that the individual mandate exceeded Congress's authority under the Commerce Clause." Judge Vinson further recognized "that, if at

all possible, courts will usually only strike down the unconstitutional part of a statute and leave the rest intact." *Id.* at 3. Judge Vinson explained that he found that the individual mandate was not severable from the PPACA and therefore, the entire bill must be deemed unconstitutional. *Id.* at 7. Notably, Judge Vinson granted the Government's motion for stay, which became effective after his decision was appealed to the Eleventh Circuit Court of Appeals. *Id.* at 10.

If a portion of the PPACA is deemed unconstitutional, invalidation of the entire PPACA is not the favored remedy. The Supreme Court has explained:

> "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-329, 126 S.Ct. 961, 163 L.Ed.2d. 812 (2006). Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932), the "normal rule" is "that partial, rather than facial, invalidation is the required course," *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S.Ct. 3138, 3161 (2010). The Court in *Virginia v. Sebelius*, 728 F.Supp.2d 768, 788 (E.D. Va. Dec. 13, 2010), a case arising under the jurisdiction of the Fourth Circuit Court of Appeals, found that the individual mandate at §1501 of the PPACA "exceeds

the constitutional boundaries of congressional power." The Court ultimately only severed §1501 "and directly-dependent provisions" leaving the remainder of the PPACA intact. *Id.* at 790.

The starting point to analyzing the Fund's argument is to determine whether it is ripe for adjudication. Since the Fund's argument is entirely contingent upon the happening of future events it is not ripe for consideration by this Court. The Fund provides a string of cases wherein the constitutionality of the PPACA has been challenged. *See Pet. Br.* 15-16. This only serves to undermine the Fund's argument by demonstrating that this issue will not likely be resolved for some time. The numerous challenges to the constitutionality underscore how controversial this legislation has proven to be. Given the Supreme Court's precedence, and the fact that §1556 of the PPACA is unrelated to the individual mandate, §1556 is severable should the individual mandate be held unconstitutional sometime in the future.

The Fund believes that "Congress would not have passed the amendments to the BLBA independently of the individual mandate and the total PPACA package." *Pet. Br.* 20. The Fund argues that "six bills have been introduced in the House and one in the Senate, all seeking to amend the BLBA exactly as Congress did in

the PPACA."[4] *Pet. Br.* 20.(emphasis added). The amendments to the BLBA contained within §1556 of the PPACA are different from these prior bills. The amendments contained within the PPACA contain the limiting language found at §1556(c), which was not included in any of the prior bills cited to by the Fund. The Fund's argument that Congress would not have passed the amendments to the PPACA without passing the individual mandate is meritless.

The Fund's argument that the amendments to the BLBA contained in the PPACA are not severable is not ripe for consideration by this Court. The Fund's entire argument is based on a happening of events in the future which may not resolve the way the Fund anticipates. Regardless, the Supreme Court has held that if a portion of a statute is flawed, the goal is to only remove the flawed portion. Based on this precedent, if a portion of the PPACA which is unrelated to §1556 is deemed unconstitutional, §1556 would be severable.

III. RETROACTIVE APPLICATION OF THE PPACA AMENDMENTS TO THE BLBA IS CONSTITUTIONAL

It is the Fund's position on this appeal that the retroactive application of the PPACA amendments to the BLBA "is contrary to law because it denies the Fund due process and

[4] *See also* 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).

constitutes an unconstitutional taking of private property."[5] *Pet. Br.* at 22. The Fund bears the burden to demonstrate that the PPACA amendments to the BLBA are unconstitutional. The Supreme Court's well established rule is 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 the 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). The Fund "bears a substantial burden" to establish that Congress' actions are unconstitutional. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 500 (1998). "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery*, 428 U.S. at 16. The standard set forth by the Supreme Court is that:

> [p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . .
>
> "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

[5] The Seventh Circuit in *Consolidation Coal Co. v. Keene*, Case No. 10-1948 (7th Cir., May 19, 2011) found that the retroactive application of §1556 does not violate the due process and takings clauses of the Constitution.

Pension Benefit Guaranty Corp. v. Gray & Co., 467 U.S. 733, 729-730 (1984) quoting *Usery,* 428 U.S. at 16-17.

The Fund recognizes that its arguments were rejected by the Benefits Review Board in *Matthews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010)(pending on recon.). However, the Fund fails to cite to specific error of law with the Board's holding in *Matthews*, and further fails to discuss or distinguish the Board's line of reasoning in that case. Instead, the Fund merely raises the same arguments to this Court, which must fail because the Board's decision in this case, and in *Matthews*, is rational and in accordance with controlling law. The Fund bears a substantial burden to establish that the Board erred in rejecting its constitutional challenges to the PPACA amendments to the BLBA. It is Mrs. Stacy's position that the Fund has failed to meet its substantial burden, and the Board's decision should be affirmed.

A. The Fund has failed to demonstrate that the PPACA amendments to the BLBA deny it due process of law.

It is the Fund's position that the retroactive application of the PPACA amendments to the BLBA unconstitutionally denies it due process of law.[6] The Fund concedes that Congress possesses the power to enact retroactive legislation, but argues "that

[6] The Fifth Amendment's Due Process Clause holds that "No person shall be. . . deprived of life, liberty, or property, without due process of law. . ." U.S. Const. Amend. V.

retroactive application of the amendments to the BLBA contained in the PPACA is unconstitutional because Congress' actions were arbitrary and irrational." *Pet. Br.* at 25. As support for its argument, the Fund argues that Congress failed to provide an explanation for choosing January 1, 2005 as the operative date for the applicability of the amendments to the BLBA. *Id.* The Fund believes that the Supreme Court's holding in *Apfel* establishes precedent "for prohibiting the retroactive application of economic legislation. . ." *Pet. Br.* 27.

The Fund's argument that Congress arbitrarily and irrationally chose January 1, 2005 as the operative filing date for application of the PPACA amendments to the BLBA should be rejected. The Benefits Review Board found no merit to the Fund's argument citing to its decision in *Matthews*. *JA* 8. *citing to Matthews*, 24 B.L.R. 1-193 (2010). The Court in *Matthews*, cited to *U.S. R.R. Retirement Bd. V. Fritz*, 449 U.S. 166, 179 (1980). where the Supreme Court explained that it does not require:

> . . . 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. The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," *Mathews v. Diaz*, 426 U.S. 67, 83-84, 96 S.Ct. 1883, 1893, 48 L.Ed.2d 478 (1976), and the fact the line might have been drawn differently at

> some points is a matter for legislative, rather than judicial, consideration.

449 U.S. 166, 179 (1980). ("Where. . . there are plausible reasons for Congress' action, our inquiry is at an end." *Id.*) The Board also found that the legislative history provided by Senator Robert C. Byrd confirms that "the rational purpose for applying amended Section 932(l) retroactively is to compensate eligible survivors of deceased miners "for the effects of disabilities bred in the past."" *Matthews*, 24 B.L.R. 1-197. *citing to Usery*, 428 U.S. at 15. The Court in *Usery*, upheld the constitutionality of amendments to the BLBA, which imposed liability on coal operators for the very same rational purpose. The Court in *Usery* explained:

> The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored to allocate to the mine operator an actual, measurable cost of his business.

Usery, 428 U.S. at 19.[7]

Contrary to the Fund's position, the rational purpose cited by the Court in *Matthews* would not enable "Congress to impose

[7] The Upper Big Branch Mine explosion occurred on April 5, 2010 and twenty-nine miners were killed. Post-mortem autopsies have found that seventeen of these miners suffered from coal workers' pneumoconiosis. "Some were as young as 25, and five had less than 10 years of experience working in coal mines." Chris Hamby, *Persistent black lung, old scourge of coal, found in autopsies of most Massey miners*, The Center for Public Integrity, May 19, 2011 http://www.iwatchnews.org/2011/05/19/4643/persistent-black-lung-old-scourge-coal-found-autopsies-most-massey-miners

any retroactive legislation at its will to correct any perceived past transgressions." *Pet. Br.* 26. The legislative purpose of the automatic provisions of the PPACA amendments to the BLBA is not to punish bad conduct, but instead to provide compensation to survivors of miners who suffered from a disability which arose from their occupational exposure. Senator Byrd explained that the amendments were intended to "ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won."[8] 156 Cong. Rec. S2084 (daily ed. Mar. 25, 2010). The Board's holding in *Matthews* in no way supports the Fund's argument that the rational purpose for the PPACA amendments to the BLBA is to punish or for deterrence. It flows logically that the rational purpose for these amendments is to compensate those who suffer from disabilities related to coal mining.

The Fund believes that the Benefits Review Board should not have considered the legislative history provided by Senator Byrd because his statements came "two days after the legislations enactment." *Pet. Br.* 26. The Fund again supports its position citing to *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). In *Sullivan*, Justice Scalia stated in his concurring opinion that "[t]he subsequent legislative history rejected as inconclusive

[8] Notably, the Seventh Circuit in *Consolidation Coal Co. v. Keene*, Case No. 10-1948 (7th Cir., May 19, 2011). found that the rational purpose for §1556(a) of the PPACA "is to give miners and their survivor's whose claims were recently filed a better shot at obtaining benefits." *Slip op.* at 9.

in today's footnote, for example, tells us (according to the Court's analysis) what committees of the 99th and 95th Congresses thought the 76th Congress intended." 496 U.S. at 631. The Fund recognizes that the subsequent legislative history discussed in *Sullivan* concerned "legislation passed some 20 years earlier." *Pet. Br.* 40. The post-enactment legislative history in *Sullivan* is in no way analogous to statements offered by the sponsor of the amendments to the BLBA two days after the PPACA was enacted.

The Fund chooses to ignore the cases cited by the Benefits Review Board which support consideration of Senator Byrd's comments. *See Pet. Br.* at 27, *and JA* 6. Senator Byrd, who sponsored the amendments, gave statements which serve as "an authoritative guide to the statute's construction." *North Haven Bd. Of Ed. v. Bell*, 456 U.S. 512, 527 (1982). As the sponsor of the amendments, Senator Byrd's "explanation deserves to be accorded substantial weigh in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). Senator Byrd's statements, even if afforded only little weight as suggested by the Fund, are still a significant guide to the interpretation and application of the PPACA amendments to the BLBA. The Fund is unable to cite to any guiding legislative history which would contradict or diminish the probative force of Senator Byrd's statements.

The Fund also seeks further support for its argument citing to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1988) arguing that "[p]recendent exists for prohibiting the retroactive application of economic legislation." *Pet. Br.* 27. The Fund seemingly takes the position that any retroactive application of economic legislation violates due process. *Apfel* dealt with the constitutionality of the Coal Industry Retiree Health Benefits Act, which imposed a significant retroactive liability on Eastern Enterprises for lifetime benefits of former employees. The Court in *Apfel*, found that Eastern's liability was different than the liability incurred by the coal operators in *Usery*.[9] "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 those who have profited from the fruits of their labor.'" *Id. citing Usery*, 428 U.S. at 16. As explained by the Benefits Review Board in *Matthews*, "*Apfel* is not only distinguishable from the instant case; it does not support employer's position." *Matthews*, 24 B.L.R. 1-198.

Senator Byrd's statements confirm the rational purpose for the enactment of §1556 of the PPACA. Even without his statements, there are plausible reasons as to why Congress

[9] The period of retroactivity in *Apfel* stretched as far as fifty years. *Apfel*, 524 U.S. 531.

elected to use January 1, 2005 as an operative date. Congress' choice of January 1, 2005 as the operative filing date allows for the amendments to apply to a fair number of pending cases and all future claims. The January 1, 2005 date also excludes a larger pool of cases which were filed prior 2005. Congress' decision strikes a balance between the parties' interests. The Fund has failed to demonstrate that the retroactive application of the PPACA amendments to the BLBA violates the Fund's due process rights. The Fund's argument should be rejected.

B. The Fund has failed to demonstrate that the retroactive application of the PPACA amendments to the BLBA constitutes an unconstitutional taking of private property.

The Fund asserts that the impact of the PPACA amendments to the BLBA creates a substantial economic impact on the Fund in terms of liability, for which it was provided with no prior notice. *Pet. Br.* 29-31. The Fund concedes that it has offered no financial documentation to support its position, but believes that the appropriate remedy is to remand this case to the Office of Administrative Law Judges to allow the Fund time to submit such documentation. When this case was before the Benefits Review Board, the Fund took no action to move for the submission of financial evidence. Even after the Board's holding in *Matthews* was issued the Fund did not seek to introduce evidence to support its position. It is Mrs. Stacy's firm position that

the Fund's arguments were properly addressed by the Benefits Review Board in this case, and in *Matthews*. The Fund's failure to request the opportunity to submit financial documentation to support its position before the Board constitutes waiver, and the Fund should not be afforded the opportunity to unnecessarily extend the litigation of this claim.

The Supreme Court in *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 222-223 (1986) held:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

Similar to the situation in *Connolly*, in passing the PPACA amendments to the BLBA "the United States has taken nothing for its own use. . ." *Id.* at 224. To determine whether an unjust "taking" has occurred, three factors are to be considered. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Court in *Penn Cent. Transp. Co.* explained that a reviewing Court should consider: 1. "The economic impact of the regulation on the claimant"; 2. "[T]he extent to which the regulation has interfered with distinct investment-backed expectations"; and 3. "[T]he character of the governmental action." *Id.* at 124. The Fund does not directly argue that "the character of the

governmental action" supports its position that a taking has occurred. *Id.* Just as in *Connolly*, Congress' actions in enacting § 1556 of the PPACA "adjusts the benefits and burdens of economic life to promote the common good. . ." *Connolly*, 474 U.S. at 225. The purpose of the Black Lung Benefits Act is "to satisfy a specific need created by the dangerous conditions under which the former employees labored to allocate to the mine operator an actual, measurable cost of his business." *Usery*, 428 U.S. at 18.

The Fund argues that the PPACA amendments to the BLBA create a "harsh new liability on the Fund that it could not have foreseen in 2005."[10] *Pet. Br.* 30. The Fund alleges that its new liability based on the PPACA amendments is "substantial" because the number of awarded claims will significantly increase.[11] *Id.* 30-31. The Board found these arguments to be "identical" to the arguments raised in *Matthews*, and rejected these arguments for the "same reasons set forth in *Matthews*." *JA* 8. The Court in *Matthews* noted that "since 1974, the federal black lung benefits

[10] The Fund's assertion that "it could not have foreseen" the amendments to the BLBA is mystifying. *Pet. Br.* 30. The Fund previously argued that "since 1999, six bills have been introduced in the House and one in the Senate, all seeking to amend the BLBA exactly as Congress did in the PPACA." *Id.* at 20-21. The Fund's arguments in its brief are contradictory and establish that the Fund could have foreseen the PPACA amendments to the BLBA.

[11] The Fund cannot substantiate its claim that the number of cases awarded under the Black Lung Benefits Act will substantially increase. Only time will determine if the number of awarded claims will noticeably increase. The Fund's speculation lends nothing to its argument that a taking has occurred. For a survivor to be entitled to an automatic award of benefits, the miner must still meet the elements for entitlement in his claim for benefits.

program has required each policy issued to cover liabilities under the Act to include the Federal Coal Mine Health and Safety Act endorsement." *Matthews*, 24 B.L.R. 1-199. *citing to* 20 C.F.R. § 726.203(a). The Board concluded that the Fund "has been on notice that it may be liable for any liability arising from amendments to the Act." *Id.*

The Fund does not dispute that pursuant to 20 C.F.R. § 726.203(a) it has been on notice that it is liable for cases arising under the Federal Coal Mine Health and Safety Act of 1969 "and any laws amendatory to, which may be or become effective while this policy is in force. . ." 20 C.F.R. § 726.203(a)(2008). Instead, the Fund argues that it simply "relied to its detriment on the existing law by setting premiums based on the number of claims awarded in prior years under the BLBA." *Pet. Br.* 31. The Fund's argument must fail because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. [citations omitted] This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16.

The Fund argues for the first time on this appeal that "[d]ue process requires the Fund be given an opportunity to submit evidence of the economic impact created by the statutory amendments to support its argument. . ." *Pet. Br.* at 33. The

Fund acknowledges that the Court in *Matthews* found that the Fund "offered no direct proof of its financial situation, without which, it is difficult to assess the degree of economic impact that amended Section 932(l) will have on employer." *Matthews*, 24 B.L.R. 1-199. The Fund quibbles that it was forced to respond to Mrs. Stacy's motion for remand nine weeks after the PPACA was enacted, which afforded the Fund "little time to collect the data to demonstrate the shortfall in premiums and the overall projected impact on the Fund." *Id.* at 32. The Fund further supports its argument citing to 20 C.F.R. § 802.301(b), which holds that "[p]arties shall not submit new evidence to the Board." *Id.* The Fund fails to mention 20 C.F.R. § 802.301(c) which holds:

> Any party who considers new evidence necessary to the adjudication of the claim may apply for modification pursuant to section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. A party who files a petition for modification shall promptly notify the Board of such filing. Upon receipt of such notification, the Board shall dismiss the case without prejudice.

20 C.F.R. §802.301(c)(2008). Given the procedural history of this case and the facts surrounding it, Mrs. Stacy believes that the Fund has waived its right to request the opportunity to submit financial information.

Following the enactment of the PPACA amendments to the BLBA, the Fund submitted three written arguments to the Benefits

Review Board against application of the automatic provisions amended by the PPACA.[12] Notably, the Fund never requested that this case be remanded for any reason whatsoever.[13] It is only now, after the Board has rejected the Fund's arguments and found Mrs. Stacy entitled to benefits, that the Fund requests the opportunity to submit financial evidence to support its position.[14]

This Court has held:

> the course of the proceeding can violate due process, but if this happens, it will be on account of some prejudicial, fundamentally unfair element. If Betty B's "day in court" was fair (albeit imperfect) and the outcome reliable, then due process was achieved.

Betty B Coal Co. v. Director, OWCP, 194 F.3d 491, 501 (4th Cir. 1999) *citing to Lane Hollow Coal Co. v. Director, OWCP,* 137 F.3d 799, 808 (4th Cir. 1998). "The due process right to be heard compels the government to listen, but not the defendant to speak. It is a right to 'choose. . . whether to appear or

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[12] The Fund submitted a Supplemental Brief in Opposition to Remand for Application of Automatic Entitlement Provision on the 5th of August, 2010. *JA* 15.

[13] It is noteworthy that the Board issued its Decision and Order in *Matthews* on the 22nd of September, 2010. *See Matthews*, 24 B.L.R. 1-193. After the Board's decision in *Matthews t*he Fund filed a third argument on the 10th of November, 2010.

[14] The Fund's citation to online news articles speculating that the PPACA amendments to the BLBA *could* cost millions of dollars in increased premiums is not probative. *See Pet. Br.* 31. at Fn. 10. ("Burton said it has been reported that the federal black lung program currently approves 10 percent to 12 percent of the claims it receives. He suspects NCCI wants to raise its loss cost rates because it is anticipating an increase in the number of claims the federal program approves." *See* George Hohmann, *Black Lung Premiums Expected to Soar*, Charleston Daily Mail, May 21, 2010. http://www.allbusiness.com/insurance/insurance-policies-claims-insurance-premiums/14500667.html

default, acquiesce or contest.'" *Betty B. Coal Co.*, 194 F.3d 503. *citing to Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Fund failed to speak on this issue and therefore has no due process right to submit financial evidence.

IV. THE FILING DATE OF THE SURVIVOR'S CLAIM IS THE OPERATIVE FILING DATE FOR APPLICATION OF 30 U.S.C. §932(l) AS AMENDED BY THE PPACA.

A. The date Mrs. Stacy filed this claim for benefits is the operative date for determining whether she is entitled to an automatic award of benefits pursuant to 30 U.S.C. §932(l), as amended.

Prior to the PPACA amendments, 30 U.S.C. §921(l) held:

> In no case shall the eligible survivor's 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)(1982).[15] The 1981 amendments to the Black Lung Benefits Act "made clear that a miner's survivor would now have to prove that the miner's death was caused by pneumoconiosis. . ." *Pothering v. Parkson Coal Co.*, 861 F.3d 1321, 1327 (3rd Cir. 1988). Under the Court's interpretation in *Pothering*:

> if a miner had filed any claim and been determined eligible for benefits under the Black Lung Benefits

[15] The Amendments to the Black Lung Benefits Act in 1981 added "except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981." Pub. L. 97-119, §203(a)(6), 95 Stat. 1635, 1644(1981).

> Act, 30 U.S.C. §§901-45, prior to the effective date of the 1981 amendments, no subsequent claim needs to be filed by him or by his survivors for either type of survivor's benefits under the Act. . .

Id. at 1328. Based on the 1981 amendments to the BLBA, the automatic provision of entitlement for survivors only applied in cases where the miner filed prior to the date of the 1981 amendments. For cases where the miner filed after the date of the 1981 amendments, such as Mr. Stacy's claim, a survivor is required to file a claim for benefits. At the time Mr. Stacy's death, Mrs. Stacy was required to file a claim for benefits if she desired to obtain an award of survivor's benefits. *See JA* 2.

Section 1556(b) of the PPACA amended 30 U.S.C. §932(l) by removing ", 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*. Therefore, 30 U.S.C. §932(l) now holds:

> In no case shall the eligible survivor's 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.

Id. Section 1556(c) establishes that the PPACA amendments to the BLBA "shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act. . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148 §1556(c)(2010). Congress included no

limiting language in §1556(b) or §1556(c), which would prevent Mrs. Stacy's entitlement to an automatic award of benefits based on the facts of this claim.

"The general rule is that unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language (the Plain Meaning Rule)." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001). *citing to Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Fund argues that Congress' intent was unambiguous and that under the "plain language" of amended §932(l), Mrs. Stacy is not entitled to an award of benefits because the date Mr. Stacy filed his claim is the operative date for application of §932(l). *Pet. Br.* 35-36. The Fund does not assert that the Board erred as a matter of law, but believes that the Board's holding is "contrary to established canons of statutory construction." *Pet. Br.* 36. The Board properly found that "[t]he plain language of Section 1556(c) mandates the application of Section 932(l), as amended, to all "claims" filed after January 1, 2005, that are pending on or after March 23, 2010."[16] *JA* 21.

The Board properly interpreted amended §932(l) to provide for an automatic award of benefits for "eligible survivors, who

[16] A "claim" is defined as "a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a (con't) form and manner authorized by the provisions of this subchapter." 20 C.F.R. §725.101(a)(10).

were previously required to file claims. . ." *JA* 22. The Benefits Review Board accurately held:

> Given that both miners and survivors may file "claims" under the Act, and that Congress used the term "claims" in Section 1556(c) without any qualifying or limiting language, except for the specific effective date, the plain language supports the Director's position that Section 1556(c) must be interpreted to apply to amended Section 932(l) to survivor's claims that are filed after January 1, 2005.

Id. at 21-22.

The Fund believes that the date the miner's claim was filed establishes the operative date for application of §932(l), as amended, because a "survivor is not required to file a claim." *Pet. Br.* 35-36. The Fund acknowledges the Board's holding that Congress did not provide any limiting language regarding the term "claims", but believes this analysis "is contrary to established canons of statutory construction." *Id.* 36. The Fund believes that "when §1556(c) is read in conjunction with §921(l), the relevant filing date is *only* that of the living miner's claim." *Id.* 38.

The Fund's argument misses the mark because, when §1556(c) in read in conjunction with §921(c)(4) and §932(l), the word "claims" refers to any claim for benefits. The Fund is incorrect that §932(l) "specifically states that survivors are exempt from having to file a claim. . ." *Pet. Br.* 38. (emphasis added). Amended §932(l) holds that an eligible survivor, such as Mrs.

Stacy, is not "required to file a new claim for benefits. . ." *See* 30 U.S.C. §932(l), *as amended.* Section 932(l), as amended, specifically removed any limiting language which was added pursuant to the 1981 amendments to the BLBA. The Fund's only support for its argument is that §932(l) states that an eligible survivor is not required to file a claim for benefits. However, as discussed by the Board, a survivor will ultimately have to file some paperwork to establish that the miner passed away and that the survivor is an eligible claimant. *JA* 22. *citing to Pothering*, 861 F.2d 1328. Furthermore, the PPACA amendments to the BLBA were designed to have a prospective application as well as a retroactive application.

At the time Mrs. Stacy filed this claim for survivor's benefits, she was required to file a claim. The plain language of the PPACA amendments to the BLBA establishes that these amendments were intended to be applied to all claims filed after the 1st of January, 2005, which are pending on or after the 23rd of March, 2010. The Fund does not challenge the fact that Stacy was awarded Federal black lung benefits and received those benefits up until the time of his death. *JA* 2. The Fund also does not contest that Mrs. Stacy filed this claim after the 1st of January, 2005 and it was still pending before the Benefits Review Board on the 23rd of March, 2010. *Id.* Based on the unambiguous language employed by Congress, and the undisputed

facts of this case, Mrs. Stacy is entitled to an automatic award of benefits.

Should this Court find that the language in §1556(c) is ambiguous, the Board addressed this issue and found that §1556(c) is intended to apply to all claims. The Fund attempts to confuse the Board's decision and argues that "crux of the Board's decision" was the Director's interpretation. *Pet. Br.* 38. The Fund's argument is meritless because the "crux" of the Board's decision rested on the plain language of the PPACA amendments. *JA* 21-22. The Board held:

> even if the word "claims" is Section 1556(c) were ambiguous, we agree that the Director's interpretation is correct because it is consistent with the "fundamental purpose" and "practical reality" of amended Section 932(l).

Id. at 22. Furthermore, the Board did not err in finding that the legislative history by Senator Byrd supports a finding that §932(l), as amended, applies to the date a survivor files a claim for benefits. The Board included a discussion of Senator Byrd's statements as supporting the Director's interpretation of §1556(c), if it was determined to be ambiguous. Under this analysis, the Board did not err in considering the legislative history. Senator Byrd stated:

> Mr. President, in order to clarify for the record, I want to make it known that section 1556 of the Patient Protection and Affordable Care Act is intended to apply to <u>all claims</u> filed after January 1, 2005, that

> are pending on or after the date of enactment of that act.
>
> It is clear that the section will apply to all claims that will be filed henceforth, including many claims filed by miners whose prior claims were denied, or by widows who never filed for benefits following the death of a husband.

156 Cong. Rec. S2083 (daily ed. Mar. 25, 2010). (emphasis added).

As previously argued, the Board did not err by considering the legislative history provided by Senator Byrd, two days after the PPACA was enacted. *See Supra* 11-13. The Board correctly distinguished the facts of this claim from the facts in *Sullivan*, where Justice Scalia offered a concurring opinion criticizing the majority for considering Congress' interpretation of the intent of Congress some twenty years prior. *JA* 23. *Sullivan*, U.S. at 631. The statements made by Senator Byrd two days after the enactment of the PPACA are in no way analogous to the subsequent legislative history criticized by Justice Scalia in *Sullivan*.

The Court in *North Haven Bd. Of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982). unequivocally found that post-enactment statements by "the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." Senator Byrd sponsored the PPACA amendments to the BLBA and his explanation of these amendments "deserves to be accorded

substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

The Fund's discussion of the Third Circuit's holding in *Pothering* lends nothing to its argument that the date the miner files a claim is the operative date for §932(l), as amended. *Pet. Br.* 41. The Court in *Pothering* considered the operative date for application of §932(l), as amended by the 1981 amendments to the BLBA. *Pothering*, 861 F.2d 1321. The Court in *Pothering* considered the application of §932(l) when it contained the limiting language which was removed by §1556(b) of the PPACA. The Board's holding, and the Director's position before the Board, are not inconsistent with the Third Circuit's holding in *Pothering* because these cases dealt with different versions of §932(l).

Finally, there is no merit to the Fund's argument that the Board's holding "renders the limiting language of §1556(c) meaningless." *Pet. Br.* 41. *referencing JA* 22-23. The Board properly held:

> [t]he plain language of Section 1556(c) mandates the application of Section 932(l), as amended, to all "claims" filed after January 1, 2005, that are pending on or after March 23, 2010. Pub L. No. 111-148, §1556(c).

JA 21. Therefore, eligible survivors who meet the requirements of §932(l), as amended, are entitled to an award of benefits. Contrary to the Fund's belief, the Board's holding regarding the

plain meaning of §1556(c) does not extend the period of retroactivity beyond the period envisioned by Congress. *See Pet. Br.* 42. Instead the PPACA amendments to the BLBA strike a balance between deserving claimants and prevents overburdening coal mine operators and their carriers. "[T]he fact the line might have been drawn differently at some points is matter for legislative, rather than judicial, consideration." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

The Board properly held that the plain language of §1556(c) provides that §932(l), as amended, applies to all claims filed after the 1st of January, 2005, which are pending on or after the 23rd of March, 2010. Given the unambiguous language of §1556(c), the Board did not err in finding that Mrs. Stacy is entitled to an automatic award of benefits pursuant to §932(l), as amended. The Board also correctly held that even if §1556(c) is ambiguous, the Director's interpretation and the legislative history provided by Senator Byrd, establish that §1556(c) applies to all claims. The Fund's argument that the date the miner filed his or her claim for benefits is the operative date for application of §932(l), as amended, should be rejected.

B. The Director's interpretation of §932(l), as amended, is entitled to deference because it is consistent with the plain language of the amendments and the legislative history by the sponsor of the amendments to the BLBA.

As argued above, the Board determined that "[t]he plain language of Section 1556(c) mandates the application of Section 932(l), as amended, to all "claims" filed after January 1, 2005" which meet the eligibility requirements. The Board based its holding in this claim on the plain language of §1556(c). However, the Board engaged in an alternative analysis and held that "even if the word "claims" in Section 1556(c) were ambiguous, we would agree with the Director's interpretation. . ." *JA* 22. (emphasis added). Under this alternative analysis the Board still reached the same interpretation of the word "claims" in §1556(c), and did not err in giving deference to the Director's interpretation.

The Fund believes that the Board abused its discretion by affording "deference to the Director's litigation position that the operative date for application of 30 U.S.C. §932(l) is the filing date of the survivor's claim." *Pet. Br. referencing JA* 24. The Fund's argument regarding the deference afforded to the Director's interpretation focuses on the discussion in the Board's alternative holding. The Fund argues that the Board abused its discretion in giving deference to the Director's position because the Director's interpretation is "inconsistent with the plain language of the statute" and "is inconsistent with the Director's prior interpretation of that statute. . ." *Pet. Br.* 44. However, the Board did not err in its

consideration of the Director's interpretation of §1556(c), which is supported by the legislative history offered by Senator Byrd. Furthermore, the Director's interpretation is not inconsistent with its prior position.

The Fund does not challenge that deference can be afforded to the Director's interpretation of the BLBA and any amendments to the BLBA. The Director's interpretation is entitled to deference because the BLBA:

> has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessary require significant expertise and entail the exercise of judgment grounded on policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991). The Director's interpretation of §1556 of the PPACA "is deserving of substantial deference "unless it is plainly erroneous or inconsistent with the regulation"." *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 160 (1987) *citing to Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Fund believes that the Director's interpretation of the operative date for application of §932(l), as amended, is contrary to the plain language of the statute. Yet, as argued above, Congress did not include any limiting language in §1556(b) or §1556(c) of the PPACA which would support the Fund's contrary interpretation

of the operative date for application of §932(l), as amended. *See Supra* § IV A.

The Fund's argument that "the Director's interpretation came in the form of a legal brief" does not diminish the value of the Director's interpretation. *Pet. Br.* 47. Furthermore, the Fund's citation to *The Pittsburg & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007). does not support its position that deference should not be given to the Director's interpretation. *Id.* The Court in *Pittsburg & Midway* sought to determine the definition of the term "massive" as it related to the application of 20 C.F.R. § 718.304 and ultimately found that the "legislative intent, case law interpreting the Black Lung Benefits Act, and the regulatory history of the black lung regulations. . . lend support to the Director's position." *Pittsburg & Midway*, 508 F.3d 984. The Board's analysis in this case is similar to the analysis conducted in *Pittsburg v. Midway*.

The Benefits Review Board considered the Director's interpretation in light of the purpose of the amendments to §932(l), and the legislative history provided by Senator Byrd. *JA* 22-23. The purpose of the amendments to §932(l) is to provide benefits to the survivor's of miners who previously received an award of Federal black lung benefits. The Board properly found that the legislative history by Senator Byrd

supports the Director's interpretation. *Id.* at 23. Senator Byrd stated that the PPACA amendments to the BLBA are "intended 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 (daily ed. Mar. 25, 2010).

The Fund also argues that the Director's interpretation "deserves no deference" because the Director's interpretation "is inconsistent with his prior interpretation of that same statute." *Pet. Br.* 48. The Fund's argument must fail because the language of 30 U.S.C. §932(l)(1982) as amended in 1981, is not the same language of §932(l) as amended by the PPACA. *See* Pub. L. No. 111-148, § 1556(b) (2010). Section 1556(b) of the PPACA amended the language of §932(l) by removing ", except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981." *Id.* The Board correctly held that this limiting language was included by the 1981 Amendments. *JA* 24. *See also* Pub. L. 97-119, §203(a)(6), 95 Stat. 1635, 1644 (1981).

The effect of these two statutes is the same in that it provides benefits to certain eligible survivor's of coal miners. However, the language of these two statutes cannot be considered to be the same. The substantive form of each statute provided benefits for eligible survivors, with the Black Lung Benefits Amendments of 1981 adding limiting language. The plain language

of §921(l), as amended, removed the limiting language added by the 1981 Amendments and provides for entitlement for eligible survivors based on the language of §1556(c) of the PPACA.

The Fund's argument that the Third Circuit's holding in *Pothering*, 861 F.2d 1321, "does not support the Director's interpretation of §932(l), as amended" is misplaced. *Pet. Br.* 50. Based on the limiting language of the 1981 Amendments, the Court in *Pothering* held:

> If a miner filed any claim and been determined eligible for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, prior to the effect date of the 1981 amendments, no subsequent claim needs to be filed by him or by his survivors. . .

861 F.2d, at 1328. The language of §932(l), as amended by the PPACA, is not the same language considered by the Third Circuit in *Pothering*. As such there is no merit to the Fund's assertion that §932(l), as amended, "should be applied the same way now as the Third Circuit did in *Pothering.*" *Pet. Br.* 50.

The Board properly found that the Director's interpretation is consistent with the plain text of §1556(c). The Director's interpretation is consistent with the purpose of the automatic provisions of §932(l), as amended, and is further supported by the legislative history provided by the sponsor of the PPACA amendments to the BLBA. Finally, the Director's interpretation is not inconsistent with its prior interpretation because §932(l) does not contain the limiting language that was added by

the 1981 Amendments. The Board did not err in affording deference to the Director's interpretation of the term "claims" contained in §1556(c) of the PPACA.

CONCLUSION

The Fund's argument that the amendments to the BLBA contained in the PPACA are not severable is based on speculative future events which may not occur. This argument is not ripe for adjudication at this time and the Fund's position is inconsistent with the Supreme Court's precedent. The Fund has failed to demonstrate that the PPACA amendments to the BLBA are unconstitutional. The retroactive application of the PPACA amendments to the BLBA do not deny the Fund due process or constitute a taking of private property.

The plain language of §1556(c) establishes that 30 U.S.C. §932(l), as amended, applies to survivor's cases which are filed after the 1st of January, 2005. Deference should be afforded to the Director's interpretation of the PPACA amendments as its interpretation is consistent with the plain language of the statute, the legislative history, and the overall purpose of the amendments. Based on the foregoing, Mrs. Stacy respectfully requests that this Court affirm the Decision and Order issued by the Benefits Review Board finding Mrs. Stacy entitled to an automatic award of benefits pursuant to 30 U.S.C. §932(l), as amended.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Respondent, Elsie Stacy, requests that the Court hear oral argument regarding this matter.

RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1020 **Caption:** WV CWP Fund v. Elsie Stacy and Director, OWCP

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(s) Ryan C. Gilligan

Attorney for Elsie Stacy

Dated: May 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 20th of May, 2011 I filed, by certified mail, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, the requisite number of this Response Brief of Appellee. I also certify that I have mailed, postage prepaid, first-class a copy of this Response Brief of Appellee to:

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Addendum of Unpublished Decisions

BRB No. 09-0666 BLA

BEULAH ANN MATHEWS
(Widow of BRUCE MATHEWS)
Claimant-Respondent

v.

UNITED POCAHONTAS COAL COMPANY
AND
WEST VIRGINIA CWP FUND
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DIGESTS

Black Lung Desk
Book Section

PART I.D.
&
Part X.B.

On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005 that were pending on March 23, 2010, were enacted. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010). The amendments, in part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The Board held that retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 does not violate the Fifth Amendment Due Process Clause. The Board held that employer did not meet its burden to establish that Congress had no rational legislative purpose for retroactive application of amended Section 932(*l*), or that the choice of January 1, 2005 for application of the amendment rendered the legislative action unconstitutional. The Board also rejected employer's argument that retroactive application of amended Section 932(*l*) constituted an unlawful taking of employer's property under the Fifth Amendment, because employer did not meet its burden to establish that the 932(*l*) amendment imposed a severe economic impact on employer, disproportionately interfered with its distinct investment-backed expectations, or

constituted an inappropriate governmental action. ***Mathews v. United Pocahontas Coal Co.***, 24 BLR 1-193 (2010).

Part I.A.

On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005 that were pending on March 23, 2010, were enacted. With respect to living miners' claims and survivors' claims, Section 1556 of Public Law No. 111-148 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner is found to have at least fifteen years of qualifying coal mine employment, and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that the miner's death was due to pneumoconiosis, or that at the time of the miner's death he or she was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). ***Mathews v. United Pocahontas Coal Co.***, 24 BLR 1-193 (2010).

With respect to survivors' claims, the amendments revive the "derivative entitlement" provision of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 932(*l*), a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). ***Mathews v. United Pocahontas Coal Co.***, 24 BLR 1-193 (2010).

Part VIII.C.1.

On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005 that were pending on March 23, 2010, were enacted. With respect to living miners' claims and survivors' claims, Section 1556 of Public Law No. 111-148 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner is found to have at least fifteen years of qualifying coal mine employment, and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that the miner's death was due to pneumoconiosis, or that at the time of the miner's death he or she was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). ***Mathews v. United Pocahontas Coal Co.***, 24 BLR 1-193 (2010).

Benefits Review Board

BRB No. 09-0666 BLA

DATE ISSUED: 09/22/2010
DECISION and ORDER

BEULAH ANN MATHEWS
(WIDOW OF BRUCE MATHEWS)
Claimant-Respondent

v.

UNITED POCAHONTAS COAL COMPANY
AND
WEST VIRGINIA CWP FUND
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (06-BLA-5675) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits

[1] Claimant is the widow of the miner, who died on August 10, 2005. Director's Exhibit 7. Claimant filed her claim for survivor's benefits on October 3, 2005. Director's Exhibit 3. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibit 1.

Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited the miner with at least thirty-nine years of coal mine employment, as supported by the record. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), through application of the doctrine of collateral estoppel. The administrative law judge further found that claimant established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.[2] 30 U.S.C. §932(*l*).

By Order dated April 7, 2010, the Board permitted the parties to submit supplemental briefing to address the impact on this case of the new amendments. The Director, Office of Workers' Compensation Programs (the Director), and employer responded, and agree that the recent amendment to Section §932(*l*) is applicable to this case. The Director further asserts that Section 932(*l*) mandates an award of benefits, regardless of whether claimant is able to prove that the miner had pneumoconiosis, or that his death was due to pneumoconiosis. By contrast, employer asserts that retroactive application of the Section 932(*l*) amendment to claims, such as this one, filed after January 1, 2005 is unconstitutional, because it would violate employer's due process rights, and would constitute an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. In the alternative, employer requests that this case be held in abeyance until sixty days after the Department of Labor (DOL) issues guidelines or promulgates regulations implementing the new amendments. In response to the Board's request for additional briefing, the

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[2] As it existed prior to March 23, 2010, Section 422(*l*) provided that:

> 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, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 422(*l*) as follows: "(b) Continuation of Benefits – Section 432(*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'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that "[t]he 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(c).

Director has filed a response to employer's arguments, urging the Board to reject employer's constitutional challenge to the retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005.[3]

Regarding the merits of entitlement in claimant's survivor's claim, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to find the existence of pneumoconiosis established under 20 C.F.R. §718.202(a). Employer further asserts that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Claimant did not file a brief in response to employer's appeal. The Director declined to file a response brief relevant to the merits of entitlement.

We turn first to employer's argument that it is unconstitutional to apply Section 932(*l*) to claims, such as this one, filed prior to the March 23, 2010, amendments to the Act. Employer concedes that Congress has the right to enact retroactive legislation, as long as the statute serves a legitimate legislative purpose and is furthered by rational means. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20, 3 BLR 2-36, 2-43-47 (1975); Employer's Supplemental Brief at 7-8. Employer also concedes 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*, 428 U.S. at 15, 3 BLR at 2-43; Employer's Brief at 7. However, relying on *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), employer contends that retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 is a violation of due process because Congress provided no "legitimate purpose" for making the legislation retroactive, and arbitrarily chose January 1, 2005 as the operative filing date for the application of amended Section 932(*l*). Employer's Supplemental Brief at 8.

We disagree. As the Director asserts, examination of the legislative history discloses that the sponsor of the amendments, Senator Robert C. Byrd, explained that amended Section 932(*l*) would apply not only to all future miners' and survivors' claims, but that it would "also 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." Director's Brief at 6, *citing* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010)(statement of Sen. Byrd). Thus, the rational purpose for applying amended Section 932(*l*) retroactively is to compensate the survivors of deceased miners "for the effects of disabilities bred in the past." *See Usery*, 428 U.S. at 15, 3 BLR at 2-43 (upholding the retroactive application of the Black Lung Benefits Act of 1972); Director's Brief at 6, 11 n.4.

[3] On September 10, 2010 employer filed a brief entitled "Reply Brief on Behalf of the West Virginia CWP Fund, as Carrier for United Pocahontas Coal Company." The brief was not accompanied by a motion to accept additional briefing, nor did it contain any argument as to why the Board should accept this additional brief. Thus, we decline to accept employer's additional brief.

Nor is there merit to employer's assertion that Congress' choice of January 1, 2005 as the operative filing date for the application of amended Section 932(*l*) violates due process. As the Director points out, the United States Supreme Court has "never insisted that a legislative body articulate its reasons for enacting a statute . . . particularly . . . where the legislature must necessarily engage in a process of line-drawing." Director's Brief at 6, *quoting U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *Fritz*, 449 U.S. at 179, *quoting Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976).

Moreover, employer's reliance on *Apfel* is misplaced. In *Apfel*, the Court held that retroactive application of the Coal Industry Retiree Health Benefit Act (Coal Act) to one particular former operator was unconstitutional because it required the former operator to fund health benefits for retired miners who had worked for the operator before it left the coal industry. *Apfel*, 524 U.S. at 528-39. The Court did not hold, as employer implies, that retroactive application of any economic legislation necessarily violates due process. Moreover, as the Director contends, *Apfel* undercuts employer's assertion. Justice O'Connor, writing for the Court, emphasized that the disproportionate and severe retroactive burden placed upon the former operator by the Coal Act, which rendered the Coal Act unconstitutional, as applied to the former operator, "differ[ed] 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 those who have profited from the fruits of their labor.'" *Apfel*, 524 U.S. at 536, *quoting Usery*, 428 U.S. at 18, 3 BLR at 2-45; Director's Brief at 11 n.4. Thus, *Apfel* is not only distinguishable from the instant case; it does not support employer's position. We hold, therefore, that employer has not met its burden to establish that retroactive application of amended Section 932(*l*) is a violation of due process.

We turn next to employer's assertion that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There is no dispute that a "takings" analysis may apply to general economic regulations which, in effect, transfer a property interest from one party to another for the greater good, and is not limited to outright acquisitions of property by the government for itself. *See Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); Employer's Supplemental Brief at 11; Director's Brief at 7. Employer and the Director also agree that, while there is no set formula for determining whether a regulatory taking has occurred, the Court has set forth a factually specific, three-prong analysis, inquiring into: 1) the economic impact of the regulation on the complainant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1985); Employer's Supplemental Brief at 9; Director's Brief at 8.

Employer asserts that the economic impact of amended Section 932(*l*) on employer, and its carrier, the West Virginia CWP Fund (the Fund), is substantial. Employer's Supplemental Brief at 10-11. Employer explains that the Fund based its assessment of premiums for federal black lung insurance for 2005 on the number of claims awarded in prior years under the Act, as it then existed. Employer's Supplemental Brief at 10-11. Employer asserts that retroactive application of amended Section 932(*l*) will substantially alter those projections, because the number of claims filed with a date of last exposure before December 31, 2005 that will be awarded will significantly increase. Employer's Supplemental Brief at 11. Employer contends that the Fund had no notice that Section 932(*l*) would be amended and, thus, it had no opportunity to adjust its premiums to cover the increase in claims that will be awarded as a result of amended Section 932(*l*). Employer's Supplemental Brief at 11.

While amended Section 932(*l*) may affect employer and its carrier, financially, the assessment of the economic impact on an employer "directly depends on the relationship between the employer and the plan to which it had made contributions" and the impact must be "out of proportion" to employer's experience with the plan. *Connolly*, 475 U.S. at 225-26; Director's Brief at 10. In this case, however, employer has offered no direct proof of its financial situation, without which, it is difficult to assess the degree of economic impact that amended Section 932(*l*) will have on employer. Therefore, on the facts of this case, we agree with the Director that employer has not met its burden to establish this prong of the takings analysis. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

Employer further asserts that amended Section 932(*l*) interferes with employer's investment-backed expectations by imposing a harsh new liability that employer could not have foreseen in 2005, depriving employer of the opportunity to adjust its conduct to avoid or minimize any adverse effect. Employer's Brief at 10. Contrary to employer's argument, as the Director asserts, since 1974, the federal black lung benefits program has required each policy issued to cover liabilities under the Act to include the Federal Coal Mine Health and Safety Act endorsement. 20 C.F.R. §726.203(a); Director's Brief at 9. This endorsement provides, in pertinent part, that insurers are liable for their principals' obligations under the Act "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force . . . ." 20 C.F.R. §726.203(a); Director's Brief at 9. We agree with the Director that the inclusion of this endorsement in the policies issued to employer by its carrier supports a conclusion that employer has been on notice that it may be liable for any liability arising from amendments to the Act. Moreover, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery*, 428 U.S. at 16, 3 BLR at 2-44. Thus, we conclude that the alleged disruption of employer's investment-backed expectations, under the facts presented here, does not support a conclusion that the application of amended Section 932(*l*) effects an unlawful taking of employer's property.

Employer next asserts that the retroactive character of amended Section 932(*l*) renders it constitutionally suspect. We disagree. First, as the Director asserts, "the enactment of retroactive statutes . . . is a customary congressional practice," Director's Brief at 10, *quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984), and Congress may "impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation,'" without effecting an unconstitutional taking. *Apfel*, 524 U.S. at 529, *quoting Gray*, 467 U.S. at 731. Moreover, as the Director observes, the character of the governmental action in this case is not one where the government has physically invaded or permanently appropriated any of employer's assets for its own use. *See Connolly*, 475 U.S. at 225; Director's Brief at 11. Instead, retroactive application of amended Section 932(*l*) "adjust[s] the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225; Director's Brief at 11. For the foregoing reasons, we agree with the Director and hold that, under the facts presented, employer has not met its burden to establish that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. *See Sperry Corp.*, 493 U.S. at 60.

Employer alternatively asserts that, because it had no notice of the change in law effected by the recent amendments, due process and the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556(d), 557, as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), require that the case be remanded, with instructions for the record to be reopened to allow employer the "opportunity to develop its defense with notice of the new burdens of proof and presumptions created by" the Section 932(*l*) amendment. Employer's Supplemental Brief at 4-5. Employer further contends that application of the new amendment may require employer to choose an entirely new strategy in its defense, necessitating different medical experts or medical evidence. Thus, employer argues, due process and the APA require that employer be permitted to develop whatever new evidence it deems necessary to respond to the changes in law, without the constraints of the limitations on evidence set forth at 20 C.F.R. §725.414.

Based on the facts of this case, we hold that employer's contentions lack merit. As discussed above, the amendment to Section 932(*l*) provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Employer agrees that amended Section 932(*l*) is applicable to this case, as claimant filed her claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was in payment status at the time of his death. Employer's Supplemental Brief at 3. Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. §932(*l*). Consequently, as amended Section 932(*l*) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, employer's request that the case be remanded with instructions for the record to be reopened, is denied.

Finally, we reject employer's request that this case be held in abeyance until sixty days after DOL issues guidelines or promulgates regulations implementing amended Section 932(*l*). As the Director contends, the mandatory language of amended Section 932(*l*) supports the conclusion that the provision is self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *See, e.g., Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987). Employer also notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 13. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity of, the recent amendments to the Act. Consequently, employer's request to hold this case in abeyance is denied, and we affirm the award of benefits on the basis that claimant is derivatively entitled to survivor's benefits.[4]

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] In light of our disposition herein, we need not address the administrative law judge's findings regarding the merits of entitlement, pursuant to 20 C.F.R. §§718.202(a), 718.205(c).

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]

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[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.

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[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,

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[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.