BLACK LUNG LEGAL CLINIC
Timothy C. MacDonnell
Director and Assistant Clinical Professor
540/458-8562; 540/458-8135 *facsimile*

WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW

May 27, 2011

Via Electronic Mail and UPS Delivery

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
United States Courthouse Annex, 5th Floor
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Re: West Virginia CWP Fund, as carrier for Olga Coal Company v. Elsie L. Stacy, and Director, OWCP
Case No. 11-1020

Dear Ms. Connor:

Enclosed are eight copies of Brief of Amicus Counsel, Timothy C. MacDonnell, in Support of Respondent, Elsie L. Stacy. We respectfully request that the Court accept this filing in Mrs. Stacy's case. Copies have been sent this day to all parties.

Respectfully,

Timothy C. MacDonnell
Counsel for Claimant

Micah P.S. Jost
Jacob L. Triolo
Student Caseworker

Enclosure

cc: Kathy L. Snyder, Esquire
Joe E. Wolfe, Esquire
Ryan C. Gilligan, Esquire
Maia Fisher, Esquire

No. 11-1020

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

WEST VIRGINIA CWP FUND,
as carrier for OLGA COAL COMPANY,

v. ***Petitioner,***

ELSIE L. STACY,

and ***Respondent,***

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

Party-In-Interest.

PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD

BRIEF OF AMICUS COUNSEL, TIMOTHY C. MACDONNELL, IN SUPPORT OF RESPONDENT, ELSIE L. STACY

Timothy C. MacDonnell, Esquire
Micah P. S. Jost, Student Caseworker
Jacob L. Triolo, Student Caseworker
Black Lung Legal Clinic, Room 106, Lewis Ha
Washington and Lee University School of Law
Lexington, VA 24450
(540) 458-8562

Amicus Counsel

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil or bankruptcy case, corporate defendants in a criminal case, and corporate amici curiae. Counsel has a continuing duty to update this information.

No. 11-1020 Caption: West Virginia CWP Fund, as carrier for Olga Coal Co. v. Stacy

Pursuant to FRAP 26.1 and Local Rule 26.1,

Timothy C. MacDonnell (name of party/amicus) who is Amicus (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   [ ] YES [**X**] No

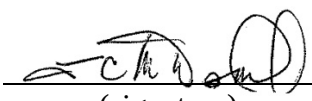
2. Does party/amicus have any parent corporations?
   [ ] YES [**X**] No
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
   [ ] YES [**X**] 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 [**X**] No

5. Is party a trade association? (amici curiae do not complete this question)
   [ ] YES [**X**] No
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. Does this case arise out of a bankruptcy proceeding?
   [ ] YES [**X**] No
   If yes, identify any trustee and the members of any creditors' committee:



(signature) May 27, 2011 (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

ADDITIONAL AUTHORITIES

INTRODUCTION

Section 1556 of the Patient Protection and Affordable Care Act ("PPACA") became law on March 23, 2010, amending section 422(*l*) of the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 932(*l*). *See* Pub. L. No. 111-148, § 1556, 124 Stat. 119 (2010). If a coal miner proved that he was entitled to black lung benefits during his life, the law now no longer requires his widow to litigate a new black lung claim. Instead, for widows whose claims fall within the statutory timeframe, benefit payments continue automatically. Section 1556 thus creates a new condition of entitlement, providing derivative benefits for an eligible widow whose husband already carried the burden of proving (1) that he was a miner; (2) that he had black lung disease, or pneumoconiosis; (3) that this pneumoconiosis arose out of his coal mine employment; (4) that he was totally disabled; and (5) that the pneumoconiosis contributed to the total disability. *See* 20 C.F.R. § 725.202(d).

Mrs. Elsie L. Stacy's husband was awarded black lung benefits in 1987. Joint Appendix ("JA") 2. Olga Coal Company ("Employer") began paying benefits to Mr. Stacy and his spouse, thereby admitting that he was indeed a miner who was totally disabled by pneumoconiosis arising from his mine work. JA 3. When Mr. Stacy died in 2007, benefit payments ceased. Mrs. Stacy had to file a new claim to establish once again that her husband suffered from pneumoconiosis, and to prove in addition that it was this disease that killed him. Three years later, while Mrs.

Stacy's claim was still pending, Congress enacted PPACA § 1556. The amendment applies to any claim filed after January 1, 2005 that is pending on or after March 23, 2010. PPACA § 1556(c). Because Mrs. Stacy's claim was filed within this timeframe, the Benefits Review Board ("BRB") held that she was entitled to survivors' black lung benefits based on her husband's award. JA 18-27.

For the reasons set forth below, the Black Lung Clinic at Washington and Lee University School of Law urges the Court to uphold the BRB's decision. Where an award of black lung benefits for a miner and his dependents has already demonstrated that the miner's coal mine employment totally disabled him, it is fair and rational for Congress to mandate that the employer continue to compensate the miner's widow as well. It is well within Congress's power to apply this requirement retroactively to recently filed claims. *See Usery v. Turner Elkhorn*, 428 U.S. 1, 27 n.25 (1976).

CONCISE STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE*, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Black Lung Clinic at Washington and Lee University School of Law is a nonprofit legal clinic which represents claimants seeking benefits under the Black Lung Benefits Act. The Clinic assists miners and their widows whose legal needs are not met by a private bar which often cannot afford to represent black

lung claimants.[1] Since 1996, the Clinic has provided representation free of charge to more than 250 claimants, including over 130 widows.

Of the twenty-three widows the Clinic currently represents, the majority are litigating claims for survivors' benefits years after their husbands were finally determined to be disabled by pneumoconiosis arising from their coal mine employment.[2] Under PPACA § 1556, many of these widows are now relieved of the burden of proving that pneumoconiosis hastened their husbands' deaths in addition to disabling them during life.

The Black Lung Clinic supports Congress's decision to restore to survivors their automatic entitlement to benefits based on the pneumoconiosis-induced disability their spouses were found to have suffered. The Clinic submits this brief because of its interest in ensuring that the widows it represents receive the full

---

[1] "There are few financial incentives for lawyers to take black lung claimants' cases, and claimants generally do not have the financial resources to cover the costs associated with developing the evidence needed to support and defend their claims." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 26 (2009).

[2] *See, e.g., Terry v. Hobet Mining, Inc.*, 2008-BLA-5432 (June 23, 2010) (Decision and Order Awarding Benefits) (ALJ Adele Odegaard), *appeal pending*, 10-582-BLA (Benefits Review Board). Mrs. Adele Terry's husband first filed for benefits in 1980. In 2005, two years after his death, he was awarded benefits based on a claim filed in 1993. Mrs. Terry filed for survivor's benefits on May 4, 2007, and received an award on June 23, 2010 based on her automatic entitlement under § 932(*l*), *as amended by* PPACA § 1556.

benefit of the amendments to the BLBA Congress recently passed to help them. All parties have consented to the filing of this brief.

ARGUMENT

I. Mrs. Stacy's interpretation of § 1556 is the only interpretation that does justice to the plain meaning of the text and effectuates the intent of Congress.

Under amended 30 U.S.C. § 932(*l*), an eligible widow is automatically entitled to survivors' black lung benefits based on her husband's award of benefits during his lifetime. The Black Lung Clinic agrees with the Director of the Office of Workers' Compensation Programs, the BRB, and Mrs. Stacy that § 1556(c) extends this new condition of entitlement to widows like the claimant in this case who filed a claim after January 1, 2005 which is pending on or after March 23, 2010. Only this interpretation does justice to the plain meaning of the statute and effectuates the intent of Congress. This is made clear by a careful examination of what amended § 921(*l*) accomplishes.

A miner is entitled to black lung benefits if he proves that he is disabled by coal-dust-induced pneumoconiosis. *See* 20 C.F.R. § 725.202(d). During the miner's lifetime, these benefits are augmented on account of the miner's

dependents, including his wife.[3] Under pre-PPACA law, all benefit payments ceased upon the miner's death. The survivor was then required to file a new claim and prove that the miner—who had already been found to be completely disabled by pneumoconiosis—also died because of the disease. Section 1556 of the PPACA amended the BLBA so that a miner's widow now continues to receive benefits, which derive automatically from the miner's award. Thus, as a practical matter, the benefits a widow receives after her husband's death now flow by operation of law from a prior finding that the miner was disabled by pneumoconiosis, rather than from a new finding that the disease hastened his death.[4]

---

[3] A miner's award is augmented by 50% for one dependent, 75% for two dependents, and 100% for three or more dependents. *See* 20 C.F.R. § 725.520(c)(3). A spouse who becomes the primary beneficiary after the miner's death is entitled to the same basic rate due to a miner. § 725.520(b).

[4] This approach returns to the balance struck by the initial legislation in 1969. *See* John S. Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 681 n.25 (1983). A widow can now obtain benefits where her husband's claim resulted in a finding of disability, but if the miner never filed for benefits, the widow must prove that his death was hastened by pneumoconiosis. Thus, by returning to the 1969 approach, Congress effectively limited the retroactive effect of § 1556(b) to only those cases where an employer was already found liable in the miner's lifetime, which in turn lessens employers' exposure to unexpected liability.

This is not merely a procedural change or new presumption.[5] By its plain language, amended § 932(*l*) spares certain widows the burden of filing a new claim for benefits. These widows need never prove that pneumoconiosis killed their husbands. The provision can only be understood as an acknowledgement by Congress that the widow of a miner who was disabled by pneumoconiosis has herself suffered a compensable injury. *See Usery*, 428 U.S. at 25 (describing "the suffering endured by [a miner's] dependents by virtue of his illness" as an "injury attributable to the operator's business"). Like the provisions granting augmented benefits to miners with dependents, amended § 932(*l*) recognizes that pneumoconiosis affects not only the miner, but also his family members, "who were most likely to have shared the miner's suffering."[6] *See id.* at 26. As discussed more fully below, Congress has recognized this reality in the past, and

---

[5] In § 1556, Congress did not create an irrebuttable presumption that the death of a miner who was receiving benefits was caused by pneumoconiosis, although it unquestionably could have done so. *Cf.* 30 U.S.C. § 921(c)(3) (creating an irrebuttable presumption that the death of a miner with complicated pneumoconiosis was caused by pneumoconiosis); *Usery v. Turner Elkhorn*, 428 U.S. 1, 24-27 (1976) (upholding retroactive application of the presumption against constitutional challenge).

[6] *See, e.g., Soubik v. Director, OWCP*, 366 F.3d 226, 231 (3d Cir. 2004) ("[The widow] also testified . . . that she personally observed her husband's breathing difficulty for 'a long period of time' before his death. . . . [H]e would breathe heavily and spit up blood and mucus every day. . . . She also saw that, just before his death, he could barely walk and was very weak.").

the resulting legislation has been upheld as constitutional even when effectuated retroactively. *See Usery*, 428 U.S. at 24-27.

The foregoing analysis explains how and why Congress sought to help widows of disabled miners through § 1556. The remaining question then is ***when*** it was meant to apply: Was the amendment intended to help any widow who filed a claim after January 1, 2005 which was pending on or after March 23, 2010, or was it meant to apply only where the miner filed his claim within that timeframe? Under the former interpretation, urged by Mrs. Stacy, the Department of Labor, and the Benefits Review Board, § 932(*l*) applies immediately to help numerous widows whose claims are pending now. Under the latter view, presented by Employer, § 932(*l*) aids few, if any, widows with currently pending claims, and the provision would be broadly applicable only in the distant future.[7] The plain text of § 1556, as well as all the other available evidence, demonstrates that Mrs. Stacy's interpretation of the law is correct.

---

[7] The timeline of Mrs. Stacy's claim illustrates this practical reality. Mr. Stacy filed for benefits in 1986 and died in 2007. JA 2. Under Employer's interpretation, if a similar miner had filed for benefits just inside the § 1556(c) timeframe in 2005, his widow would not benefit from § 1556(b) until his death twenty-one years later, in 2026. It would be strange indeed for Congress to mandate a five-year retroactivity period for its change to § 932(*l*) if it actually intended that the amendment have no effect in most cases for decades to come. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

The Black Lung Clinic agrees with Employer that this Court should look to "the express language of § 932(*l*) and § 1556(c)." *See* Brief of Petitioner, West Virginia CWP Fund [Emp'r's Br.] 43. The plain language of § 1556(c) makes amended § 932(*l*) applicable to Mrs. Stacy. Nearly four months after it admitted that § 932(*l*) "may" apply to Mrs. Stacy's claim, Employer decided instead that the "unequivocal, unambiguous language of the BLBA" did not apply to Mrs. Stacy. Emp'r's Br. 3, 35. Employer arrived at this conclusion only by distorting the meaning of § 932(*l*) and ignoring its plain purpose.

Section 932(*l*) applies to Mrs. Stacy's claim because the express language of § 1556(c) refers, without restriction, to all "claims filed" within the relevant period. Employer argues, however, that the unqualified word "claims" in this context refers only to some claims—those filed by miners. Because Mrs. Stacy cannot be required to file a "new claim for benefits" under amended § 932(*l*), Employer contends that § 1556(c) could apply only to the claim originally filed by her husband. *See* Emp'r's Br. 35. This argument ignores the fact that Mrs. Stacy did properly file a claim for benefits in 2007, within the period contemplated by § 1556(c), at a time when she was still statutorily required to do so. It defies reason to argue, as Employer does, that § 1556 cannot apply to Mrs. Stacy's claim simply because she cannot now, as of March 23, 2010, be compelled to file another claim.

Employer's position is not supported by the contention of *amicus* Old Republic Insurance Company ("Old Republic") that "[a]s an economic entity, from an insuring perspective, the claim of the spouse and worker are the same." Brief of Old Republic Insurance Company ("Old Republic Br.") 12. Insurance industry practices cannot change the fact that the law in 2007 required Mrs. Stacy to file a new claim and § 1556(c) makes amended § 932(*l*) apply to the claim she properly filed at that time. Old Republic cites *Boyd & Stevenson Coal Co. v. Director, OWCP*, 407 F.3d 663, 667 (4th Cir. 2005) for the proposition that "the claim of a worker or the worker's survivor[] are the same economic entity, the survivor's claim being derivative of the workers' [sic] claim." Old Republic Br. 12. Insofar as this statement is accurate, it is irrelevant. The Clinic agrees, of course, that Mrs. Stacy's present entitlement to benefits is derivative of her husband's benefits award. But the derivative nature of widows' claims has never barred a widow from filing a claim for benefits under the BLBA. Otherwise, the 1981 amendments—which ended widows' automatic entitlement to derivative benefits—would have barred any widow from filing and pursuing a claim thereafter. [8]

[8] The Fourth Circuit recognized in *Boyd & Stevenson* that a widow who was not required to file a "new" or "separate" claim could still be required "to complete additional forms . . . to establish that she is eligible for benefits." 407 F.3d at 668-69. Such a "written assertion of entitlement to benefits" is a "claim" under the

Congress could have provided that the second clause of § 1556 would apply to claims filed ***by miners*** within the relevant timeframe. Instead, it declared without limitation that § 1556(b) would apply to "claims" filed after January 1, 2005 and pending on or after March 23, 2010. Rather than insert a restriction not intended by the legislature, this Court should, as Employer notes, presume that Congress "says in a statute what it means and means in a statute what it says there." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Further, § 1556(c) uses the word "claims" with reference to both § 1556(b), which amends 30 U.S.C. § 932(*l*), and § 1556(a), which amends 30 U.S.C. § 921(c)(4). Employer admits that in § 1556(a), "claims" must include the claim of either a widow or a miner if it is to make sense in that section's context. *See* Emp'r's Br. 37-38. "[T]he term should be construed, if possible, to give it a consistent meaning throughout the Act." *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995). In § 932(*l*), as in § 921(c)(4), a claim is a claim, whether filed by a miner or a survivor. Yet even if the Court were to accept Employer's

---

BLBA (although not a "new claim," which a survivor is no longer required to file under § 932(*l*)). *See* 20 C.F.R. § 725.101(a)(10).

As the BRB noted in this case, "Section 932(*l*) does not 'prohibit filings for which there is an administrative need,' and . . . survivors will need to file some sort of paperwork or 'claim,' because a survivor cannot begin to receive benefits unless the Office of Workers' Compensation Programs is notified of the miner's death and of the survivor's current status." *See Stacy v. Olga Coal Co.*, BRB No. 10-0113 BLA (Dec. 22, 2010) (citing *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328 (3d Cir. 1988)).

argument that § 1556(c) should be interpreted in light of § 932(*l*) only, without regard to consistency throughout the BLBA, § 932(*l*) itself uses the word "claim" to refer to both "the claim of such miner" and the "new claim" that pre-PPACA law required a widow to file. Thus, interpreting "claims" in § 1556(c) in light of the word's usage in § 932(*l*) also makes it clear that the term encompasses any "written assertion of entitlement to benefits," whether filed by a miner or a widow. *See* 20 C.F.R. § 725.101(a)(10) (defining "claim").

If the Court does not agree that the plain language of the statute requires Mrs. Stacy's interpretation, and instead finds its meaning ambiguous, the legislative history of § 1556 illuminates the matter. The late Senator Byrd, the sponsor of § 1556, discussed the amendment's application to widows' claims and emphasized that it "applies immediately to all pending claims." 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement by Sen. Byrd). His statements leave no room for doubt that § 1556 reaches Mrs. Stacy's claim.[9]

[9] Employer seeks to undermine Senator Byrd's explanation on the basis that he spoke shortly after the PPACA's enactment. *See* Emp'r's Br. 38-40. The Clinic acknowledges that post-enactment statements generally "cannot serve to change the legislative intent of Congress expressed before the Act's passage." *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). But Senator Byrd sought to explain—not alter—the pre-enactment legislative intent. Employer cannot produce any legislative history from before the PPACA's enactment that contradicts the reasonable explanation provided by the sponsor of § 1556 just two days after the Act's passage. Quite simply, Senator Byrd's statement provides the best evidence of Congress's intent that is available to this Court.

In sum, Employer's interpretation is unsupported by the text of § 1556 or the legislative purpose behind it. By restricting the effect of § 1556(b) to those widows whose husbands filed after 2005 (and whose claims were not resolved prior to March 23, 2010), Employer would prevent § 932(*l*) from routinely delivering benefits in widows' claims for years to come. This harsh limitation would contravene Congress's intention that § 1556 apply to widows' claims that are pending now. The Court should affirm the BRB's interpretation of § 1556, which takes Congress at its word and applies amended § 932(*l*) as the legislature intended.

II. Congress acted constitutionally in providing automatic derivative benefits for widows now rather than at some indefinite point in the future, and remand for further evidence development is unnecessary.

Employer argues that § 1556 takes its property and denies it due process in violation of the Fifth Amendment. To the contrary, Congress acted constitutionally in "adjusting the burdens and benefits of economic life" between coal companies and the widows of disabled miners through the limited retrospective application of its amendments to § 932(*l*). *See Usery*, 428 U.S. at 15. Employer also asserts, for the first time on appeal, that it is entitled to a remand to introduce additional evidence supporting its Takings Clause claims. This argument is not properly before the Court and should be rejected. *Holland v. Big River*

Minerals Corp., 181 F.3d 597, 605 (4th Cir. 1999). Even if Employer had requested remand below, however, further evidentiary development is unnecessary because nothing Employer could produce would demonstrate that § 1556 violates the Constitution.

Employer's due process challenge turns primarily on the retroactive nature of § 1556. The Supreme Court has already found, however, that compensating widows for their husbands' coal dust-induced disability is a rational, legitimate purpose that can be accomplished retroactively.[10] *See Usery*, 428 U.S. at 19-20. *Usery*'s reasoning unquestionably applies to the present case: The Court specifically noted there that its "analysis of the retrospective application of the § 411(c)(3) presumption of death due to pneumoconiosis is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis." *Usery*, 428 U.S. at 27 n.25. These words describe precisely the effect of § 1556.

Yet even if its arguments were not foreclosed by *Usery*, Employer could not prove a due process violation. Congress limited the retroactive application of

[10] In *Usery*, the Court considered an amendment to the BLBA which created an irrebuttable presumption "grant[ing] benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner's death was caused by pneumoconiosis." *Id.* at 24.

§ 1556(b) to a specific cohort of claims—those filed after January 1, 2005 and pending on or after March 23, 2010. PPACA § 1556(c). Employer acknowledges that the legislation does not violate due process if this Court can rationally conceive of a legitimate purpose for this choice, whether or not Congress ever articulated it. *See* Emp'r's Br. 25 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Of course, as the Benefits Review Board has found, such a purpose is easily conceivable. *See Mathews v. United Pocahontas Coal Co.*, 24 Black Lung Rep. (Juris) 1-193, 1-197 (Ben. Rev. Bd. 2010) (pending on recon.).

As Senator Byrd explained, § 1556 was intended to "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. S2084 (daily ed. March 25, 2010) (statement by Sen. Byrd). The Seventh Circuit recently found this explanation sufficient to defeat a due process challenge to § 1556(a). *See Keene v. Consolidation Coal Co.*, ___F.3d ___, No. 10-1948, slip op. at 8-9 (7th Cir. May 19, 2011). Employer ignores this rationale, however, speculating that the amendment was designed instead to accomplish purposes it considers invalid—to "correct . . . perceived past transgressions" or "punish bad conduct." *See* Emp'r's Br. 26. Employer's belief regarding Congress's motive lacks any basis in fact or law.

Even if the Court finds Senator Byrd's explanation insufficient, the practical effect of § 1556 in a widow's claim, discussed above, suggests that the law's

purpose was not to punish employers, but simply "to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Usery*, 428 U.S. at 18. It is conceivable, reasonable, and legitimate that Congress intended that § 1556 "compensate the survivors of deceased miners 'for the effects of disabilities bred in the past.'" *See Mathews*, 24 BLR at 1-197 (quoting *Usery*, 428 U.S. at 15). The Constitution requires nothing further.

Plainly, the retroactive implementation of § 1556 was designed for the rational purpose of extending this compensation to "claimants who have recently filed a claim." *Id.* (quoting 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd)). Although Congress did not explain its precise choice of onset date, it is settled that "where the legislature must necessarily engage in a process of line-drawing[,] . . . . the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (internal citations omitted). That Congress could have drawn § 1556(c) differently does not render its choice "arbitrary and irrational." Emp'r's Br. 25.

Under Fourth Circuit precedent, Employer's reliance on Justice Kennedy's opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) lends no support to its arguments. If "[p]recedent exists for prohibiting the retroactive application of economic legislation as violating both the Due Process and the Takings Clause of

the Fifth Amendment," Emp'r's Br. 27, it cannot be found in *Apfel*. That case "does not stand for the legal proposition that the Eastern assignments under the Coal Act contravene the Takings Clause." *A.T. Coal Co. v. Massanari*, 305 F.3d 226, 237 n.17 (4th Cir. 2002). "Nor can [it] stand for the proposition that the Eastern assignments are unconstitutional under the Due Process Clause, because only Justice Kennedy arrived at such a conclusion." *Id.* Employer's citation to *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 389 (1935), a "case . . . decided during the now discredited era of activist review of economic legislation under the due process clause," *N. Am. Coal Corp. v. Campbell*, 748 F.2d 1124, 1128 (6th Cir. 1984), is equally unhelpful. *See* Emp'r's Br. 28.

Section 1556 does not violate Employer's due process rights because it uses rational means to accomplish a legitimate legislative purpose. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 734 (1984). Nearly twenty-five years ago, Employer accepted liability for Mrs. Stacy's husband's disabling pneumoconiosis. JA 3. There can be little doubt that both Mr. Stacy and his wife suffered because of this disability until Mr. Stacy died in 2007. *See* JA 5-7 (discussing Mr. Stacy's lung problems and hospitalizations). Section 1556 relieves Mrs. Stacy of the burden of proving that black lung killed her husband. Instead of compensating Mrs. Stacy for his death, the benefits she receives "serve as deferred compensation for the suffering endured by [Mr. Stacy's] dependents by virtue of

his illness." *See Usery*, 428 U.S. at 25. Because it merely requires Employer to pay "compensation for injury attributable to [its] business," *id.*, retroactive implementation of § 1556 does not violate due process.

Nor could Employer possibly establish that § 1556 violates the Takings Clause. Assuming *arguendo* that a regulatory reallocation of economic burdens among private parties is ever properly analyzed under the Takings Clause,[11] no taking has occurred in this case. The Court can determine this as a matter of law without remanding the case for further evidentiary development, because no evidence Employer could introduce would show that Congress effected an unconstitutional taking by restoring a pre-1981 condition of entitlement for certain recently filed widows' claims.

---

[11] It is doubtful whether the type of economic regulation Employer objects to here can ever constitute a Fifth Amendment taking. Like the law at issue in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), section 1556 "simply imposes an obligation to perform an act, the payment of benefits." *Id.* 540 (Kennedy, J., concurring in the judgment and dissenting in part). "To the extent it affects property interests, it does so in a manner similar to many laws; but . . . none constitute takings." *Id.*

Although the Court has not so held, "[f]ive Supreme Court Justices have expressed the view that the Takings Clause does not apply where there is a mere general liability (i.e., no separately identifiable fund of money) and where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise proper taking." *See Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1057 (11th Cir. 2008) (citing *Apfel*, 524 U.S. at 539-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-56 (Breyer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting)).

Employer rightly notes the three factors courts consider to determine whether an act of Congress constitutes a taking: "(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 Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986) (internal quotation marks omitted). Each of these factors weighs strongly against Employer's position.

First, the economic impact on Employer of § 1556's limited retroactive application may be substantial, but it is not disproportionate to Employer's experience in the coal industry. *Cf. Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) ("As to the . . . severity of the economic impact . . . , [plaintiff] has not shown its withdrawal liability here to be out of proportion to its experience with the plan, notwithstanding the claim that it will be required to pay out 46% of shareholder equity." (internal quotation marks and citations omitted)). Here, as in every other case § 1556(b) reaches, Employer's liability arises from the disability endured by a miner it employed, for which Employer was already found responsible under the BLBA. Thus, whatever the precise extent of the economic burden § 1556 imposes, it cannot be considered disproportionate and Employer cannot satisfy the first prong of the takings analysis. *See Usery*, 428 U.S. at 25.

With regard to the second takings factor, no evidence Employer could produce would demonstrate that its reasonable investment-backed expectations have been unconstitutionally disrupted. The changes brought about by § 1556 are not novel or unprecedented; indeed, any company in existence prior to 1981 was already familiar with the concept of automatic derivative survivors' benefits. It is well established that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (internal quotation marks omitted). As the BRB observed in *Mathews*, Employer has long been on notice that its obligation to compensate disabled coal miners' widows might be adjusted.

> [S]ince 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). 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). . . . [T]he 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.

Mathews, 24 BLR at 1-199 (internal citations omitted). Moreover, as Employer itself notes, Congress has been considering legislation similar to § 1556 for over a decade. *See* Emp'r's Br. 25 n. 13 (citing H.R. 1010, 11th 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). Thus, Employer cannot credibly assert that § 1556 imposes "a harsh new liability . . . that it could not have foreseen before 2005." *See* Emp'r's Br. 30. No evidence Employer could present to an ALJ would change this.

Employer argues that the West Virginia Coal Workers' Pneumoconiosis Fund, insurance carrier for Olga Coal Company, based its assessment of premiums on pre-PPACA law. *See* Emp'r's Br. 31. It states that the Fund "cannot prospectively adjust the premiums" to compensate for an increase in awards of survivors' benefits under § 1556. *Id.* But in *Usery*, the Court declared itself "unwilling to assess the wisdom of Congress' chosen scheme by examining . . . the degree to which the retrospective liability" could be distributed to consumers prospectively. *See Usery*, 428 U.S. at 18-19; *see also id.* at 44 (Powell, J., concurring in part) (noting that "the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers," but nonetheless concurring that they had failed to demonstrate a due process violation). Section 1556 is not constitutionally suspect even if the Fund cannot pass on the liability it now faces.

Finally, regardless of the evidence Employer might produce on remand, the "essential character" of § 1556 confirms that no taking has occurred. The

amendment requires the payment of benefits to certain coal miners' widows; "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use." *Connolly*, 475 U.S. at 225. Any "interference with the property rights of [the] employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." *Id.*

In conclusion, Employer has waived its opportunity to present new evidence by failing to request remand for further development of the record from the BRB. Remand is unnecessary in any event because nothing Employer could produce would prove that § 1556 constitutes a taking. Because the provision neither violates Employer's due process rights nor takes Employer's property unconstitutionally, the Court should uphold the application of § 1556 to Mrs. Stacy's claim.

Ultimately, Employer objects to § 1556 because the provision requires it to accept automatic responsibility once again for compensating the widows of disabled coal miners. This is a substantial cost which Employer and its *amici* do not believe they should have to bear; they are unhappy that Congress disagrees with them. But their opposition to § 1556 is a matter of policy, not law. If Congress enacted § 1556 "unwittingly," *see* Old Republic Br. 13, Employer's remedy is to lobby its representatives for different legislation in the future. *See*

Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 423 (1952) (noting that courts "do not sit as a super-legislature to weigh the wisdom of legislation"). Its arguments belong before Congress, not this Court.

III. The court should decline the invitation of *amicus* Old Republic to base its decision on issues not presented in this case.

Amicus Old Republic asks the Court to decide this case in part based on issues not before the Court, including whether a widow whose claim was previously denied under pre-PPACA law may file a subsequent claim to take advantage of § 1556. *See* Old Republic Br. 11 n.12. The Court should reject this invitation.

Mrs. Stacy filed her first and only claim for survivors' benefits shortly after the death of her husband in 2007, at a time when this was the only way she could obtain benefits. There are two issues in Mrs. Stacy's case: (1) whether § 1556 applies to the claim she filed after January 1, 2005 which was pending on March 23, 2010; and (2) whether the law is constitutional. As discussed above, the plain language and legislative intent dictate that the law does apply to Mrs. Stacy, and Supreme Court precedent demonstrates that it is constitutional.

In cases where a widow has filed a subsequent claim based on the change in the law brought about by § 1556, the matter is more complicated. The primary issue in such cases is the proper application of res judicata. This is a complex

question which the Benefits Review Board has not yet addressed. Although the Director has asserted elsewhere that res judicata does not bar an award, *see* Old Republic Br. 10-11, the matter has not been adequately briefed here and is beyond the facts of Mrs. Stacy's case. Because this question may have constitutional ramifications, it is particularly important that the Court decline to address it unnecessarily. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999).

IV. The Court should not hold this claim indefinitely in abeyance pending the resolution of unrelated PPACA challenges which cannot affect the validity of § 1556.

The Court should also reject Old Republic's request to needlessly delay the resolution of Mrs. Stacy's claim by holding this case in abeyance. The challenges to the PPACA Employer and its *amici* cite are unrelated to § 1556, and no court has enjoined the enforcement of the statute.[12] Even if the courts were ultimately to strike down the individual mandate provision, which is the main focus of PPACA challenges, under settled severability doctrine that ruling would not affect § 1556.

[12] The lone district court judge to strike down the PPACA as a whole granted the government's motion for a stay of his declaratory judgment pending review by the Eleventh Circuit. *See Florida ex rel. Bondi v. U.S. Dept. of Health & Human Services* ("*Florida v. HHS*"), 3:10-CV-91-RV/EMT, 2011 WL 723117, at *9 (N.D. Fla. Mar. 3, 2011).

Employer discusses at length the PPACA's individual health insurance mandate, which has no relation to the Act's amendments to the Black Lung Benefits Act. Employer's argument is grounded in speculation that the federal courts may find the individual mandate unconstitutional and then strike down § 1556 as well, as non-severable. Only one federal court has held the PPACA unconstitutional in its entirety. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services* ("*Florida v. HHS*"), __ F.Supp.2d __, 2011 WL 285683, at *39 (N.D. Fla. Jan. 31, 2011) *appeal docketed*, No. 11-11021 (11th Cir. Mar. 9, 2011).[13] Each court to address the issue within the Fourth Circuit has found the individual mandate provision either constitutional or severable. *Cf. Liberty University Inc. v. Geithner*, No. 6:10-cv-00015, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) (order granting United States government's motion to dismiss); *Virginia v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va. 2010) (order declaring individual mandate unconstitutional but finding the remainder of the Act severable).

[13] Employer has not asserted that it is in any way a party to this litigation. The plaintiffs in *Florida* include two private citizens, the National Federation of Independent Business, and the attorneys general or governors of twenty-six states, including no state within the Fourth Circuit. *See Florida v. HHS*, 2011 WL 285683, at *1. Even if the Eleventh Circuit were to find the PPACA unconstitutional, Employer would not benefit from that ruling. *Id.*, 2011 WL 723117, at *9 ("[M]y declaratory judgment, of course, only applies to the parties to this litigation . . . .").

Appeals of *University* and *Virginia* are currently before this Court. *Liberty University, et al. v. Geithner*, No. 10-2347 (4th Cir.); *Commonwealth of Virginia v. Sebelius*, No. 11-1057/1058 (4th Cir.). Even if this Court or the Supreme Court invalidates the individual mandate, § 1556 should not be affected. The severability analysis upon which Employer relies to arrive at a contrary conclusion is deeply flawed. Fundamentally, Employer fails to recognize that a court's duty is to sever as much of a statute as can possibly be saved. "[T]he normal rule is that partial, rather than facial, invalidation is the required course." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161 (2010) (internal quotation marks omitted). Following the "required course," when a court strikes down a particular provision, it must determine whether some or all of the rest of the statute would be "fully operative as a law." *INS v. Chadha*, 462 U.S. 919, 934 (1983). If so, those portions are presumed to be severable. *Id*. This presumption is only defeated where it is "evident" that Congress would not have enacted some or all of the remainder of the statute without the invalidated portion. *See Free Enter. Fund*, 130 S. Ct. at 3161-62. Where, as here, a statute contains no severability clause, "Congress's silence is just that—silence—and it does not raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

Employer argues that the individual mandate is necessary to the rest of the Act, such that all the other provisions must fall if the mandate does. This position

makes no sense in the context of § 1556. Simply put, the statutory requirement that Americans purchase health insurance if they can afford to do so lacks any connection to the automatic continuation of federal black lung benefits for coal miners' widows, and § 1556 remains fully operative regardless of the individual mandate's validity. There is no evidence that Congress would not have enacted § 1556 if it could not have the mandate as well.

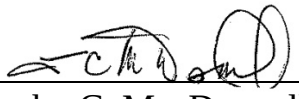
Employer's related argument that § 1556 would not have been passed without the entire remainder of the Act is equally nonsensical and speculative. Employer is correct that bills were introduced before 2010 which would have reinstated automatic benefits for miners' survivors. *See* Emp'r's Br. 20 n.6 (providing citations). Yet none of these bills contained anything resembling the third provision of § 1556, which limits the retroactive application of the amendments to claims filed after January 1, 2005 and pending on or after March 23, 2010. PPACA § 1556(c). Thus, § 1556 differs fundamentally from these earlier bills because its retroactive effect is clearly delineated, and "[c]ongressional doubt concerning judicial retroactivity doctrine . . . provide[s] a plausible explanation" for Congress's failure to enact the previous versions. *See Landgraf v. USI Film Products*, 511 U.S. 244, 261 (1994). There is no reason to believe that, simply because the earlier bills failed, Congress would not have enacted § 1556 without also passing each and every one of the approximately 450 other parts of

the PPACA contained in its 2,700 pages. *See Free Enter. Fund*, 130 S. Ct. at 3161-62; *Florida v. HHS*, 2011 WL 285683, at *38-39 (noting the length and number of "separate pieces" the PPACA contains). The Court should not hold this claim in abeyance pending rulings on the individual mandate which should have no effect on § 1556.

CONCLUSION

For the reasons set forth above, the Black Lung Clinic agrees with Mrs. Stacy, the Department of Labor, and the Benefits Review Board that Mrs. Stacy is entitled to survivors' benefits under § 932(*l*), as amended by § 1556.

Respectfully submitted,



Timothy C. MacDonnell, Esquire
Amicus Counsel for Respondent

Micah P.S. Jost
Jacob L. Triolo
Student Caseworkers

Black Lung Legal Clinic, Room 106
Washington and Lee University
School of Law, Lewis Hall
Lexington, VA 24450
540/458-8562; 540/458-8135 *facsimile*

CERTIFICATE OF COMPLIANCE

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

No. 11-1020 **Caption:** West Virginia CWP Fund, as carrier for Olga Coal Co. v. Stacy

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines: Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

[**X**] this brief contains 6,877 [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains _____ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]

[**X**] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [*state name and version of word processing program*] in 14 point, Times New Roman [*state font size and name of the type style*]; *or*

[ ] this brief has been prepared in a monospaced typeface using _____ [*state name and version of word processing program*] with _____ [*state number of characters per inch and name of type style*].

_____

Amicus Counsel for Elsie L. Stacy

Dated: May 27, 2011

PROOF OF SERVICE

I, Timothy C. MacDonnell, do hereby certify that I served the foregoing BRIEF AMICUS CURIAE ON BEHALF OF RESPONDENT, ELSIE L. STACY, upon the following by mailing a copy to each by electronic mail, United Parcel Service Ground Track Delivery, or by United States Postal Service this the 27th day of May, 2011:

Electronic Mail and United Parcel Service Ground Track Delivery:

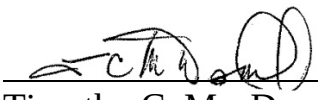
Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
United States Courthouse Annex, 5th Floor
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Electronic Mail:

Kathy L. Snyder, Esquire
ksnyder@jacksonkelly.com

Joe E. Wolfe, Esquire
Ryan C. Gilligan, Esquire
rgilligan@wwrrlawfirm.com

Maia Fisher, Esquire
blls-sol@dol.gov
fisher.maia@dol.gov



Timothy C. MacDonnell, Esquire

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 11-1020 as

☐ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: Elsie Stacy as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

(signature)

Timothy C. MacDonnell
Name (printed or typed)

540-458-8562
Voice Phone

Black Lung Legal Clinic
Firm Name (if applicable)

540-458-8135
Fax Number

Washington & Lee Law School, 106
Lexington, VA 24450
Address

salms@wlu.edu
macdonnellt@wlu.edu
E-mail address (print or type)

OR, I, _____, AM NOT PARTICIPATING IN THIS CASE.
(Name)

APPELLATE COUNSEL IS: _____.
(Name) (Phone)

CERTIFICATE OF SERVICE

I certify that on May 27, 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:

Kathy L. Snyder, Esquire
Wendy G. Adkins, Esquire
ksnyder@jacksonkelly.com

Ryan C. Gilligan, Esquire
rgilligan@wwrrlawfirm.com
Maia Fisher, Esquire
fisher.maia@dol.gov and BLLS-SOL@dol.gov

/s/ Timothy C. MacDonnell
Signature

May 27, 2011
Date