IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHMOND, VIRGINIA

No. 11-1020

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

Petitioner,

v.

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

Respondent,

and

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

Party-In-Interest.

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

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

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

West Virginia CWP Fund who is Petitioner, 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

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

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

6. Does this case arise out of a bankruptcy proceeding?

____ YES __X__ NO

/s/ Wendy G. Adkins March 17, 2011
Counsel for West Virginia CWP Fund

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I. STATEMENT OF SUBJECT MATTER JURISDICTION AND BASIS FOR APPELLATE REVIEW

This matter involves an appeal from a final order of the United States Department of Labor Benefits Review Board ("Board"). This Court has jurisdiction over an appeal from a final order of the Board pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 921(c), as incorporated by § 422(a) of the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 932(a). This Court has held that the § 921(c) final order rule closely parallels the rule for appeals from final orders of district courts found at 28 U.S.C. § 1291. Newport News Shipbuilding and Dry Dock v. Director, OWCP, 590 F.2d 1267, 1268 (4th Cir. 1978). The Board vacated the denial of benefits by United States Department of Labor Administrative Law Judge ("ALJ") Jeffrey Tureck and remanded this federal black lung claim to the District Director for an entry of an award of survivors' benefits to Elsie Stacy, surviving spouse of Howard Stacy. Joint Appendix ("JA") 26. The Board's Order conclusively determines the merits of Mrs. Stacy's claim. Thus, this Court has jurisdiction to hear an appeal of this final order.

The jurisdictional time limit for filing an appeal from a final order of the Board is sixty days. See 33 U.S.C. § 921(c), 20 C.F.R. § 725.482(a). The Board issued its final order mandating an award of benefits to Mrs. Stacy on December 22, 2010. JA 18. The West Virginia Coal Workers' Pneumoconiosis

Fund ("Fund"), as insurer of Olga Coal Company, filed its appeal with this Court on January 6, 2011. JA 34. The injury alleged in this case, within the meaning of section 21(c) of the LHWCA, occurred in West Virginia. JA 2. Therefore, this Court has jurisdiction to review the Board's decision.

II. STATEMENT OF THE ISSUES

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 eligibility for automatic survivor's benefits pursuant to the amendments to the BLBA contained in the Patient Protection and Affordable Care Act?**

III. STATEMENT OF THE CASE

Mrs. Elsie Stacy, surviving spouse of miner Howard Stacy, filed an application for federal black lung survivor's benefits on February 1, 2007. JA 2. Following a formal hearing, ALJ Tureck issued a Decision and Order-Denying Benefits on September 10, 2009. JA 1-8. Mrs. Stacy appealed the denial of benefits to the Board. The parties had fully briefed the case by December 16, 2009, and were waiting on a decision from the Board.

Before the Board issued a Decision, the Patient Protection and Affordable Care Act ("PPACA") was enacted on March 23, 2010. See Pub. L. No. 111-148, § 1556 (March 23, 2010). Section 1556 of the PPACA contains amendments to the BLBA. On May 13, 2010, Mrs. Stacy moved for remand to the District Director for application of the PPACA amendments to her survivor's claim. JA 10-12. She sought derivative entitlement to survivor's benefits pursuant to the amendments to 30 U.S.C. § 932(l) because her husband was receiving federal black lung benefits at the time of his death. Id.

The Fund, as insurer for Olga Coal Company, had to file its response to Mrs. Stacy's motion on May 27, 2010, only nine weeks after the passage of the PPACA. At that juncture, the Fund could only state that the amendments to § 932(l) may affect Mrs. Stacy's claim. Accordingly, the Fund asked that Mrs. Stacy's claim be held in abeyance until 60 days after the Department of Labor

("DOL") issued guidelines or promulgated regulations implementing § 932(1) or until resolution of the various legal challenges to the PPACA pending in various federal district courts. JA 25-26. The Board issued an Order on June 18, 2010, denying Mrs. Stacy's motion for remand. JA 15. The Board advised the parties that they would determine the impact of the PPACA amendments on Mrs. Stacy's claim as part of their review of the merits on appeal. Id.

On August 5, 2010, the Fund asked the Board to accept and consider an additional argument opposing application of the derivative entitlement provision to Mrs. Stacy's claim. JA 15. Specifically, the Fund asserted that § 932(1), as amended by § 1556 of the PPACA, is inapplicable to Mrs. Stacy's claim because the miner's claim, which gives rise to derivative survivor's benefits, was filed before January 1, 2005 and was not pending on or after March 23, 2010. Id.

On September 23, 2010, the Board issued an Order accepting the Fund's supplemental brief. JA 14-17. Mrs. Stacy responded on October 15, 2010, and the Director responded on October 27, 2010. JA 21. On November 10, 2010, the Fund submitted an additional brief addressing the arguments raised by the Director. Id.

On December 22, 2010, the Board issued a published decision vacating ALJ Tureck's denial of benefits and remanding Mrs. Stacy's claim to the District Director for entry of an award of benefits. JA 18-27. Specifically, the Board held

that § 932(l), as amended by § 1556 of the PPACA, applied to a survivor who had filed a claim after January 1, 2005 and that claim was pending on or after March 23, 2010. JA 24. Because Mrs. Stacy met these filing requirements and her husband was receiving federal black lung benefits at the time of his death, the Board concluded that Mrs. Stacy was derivatively entitled to survivor's benefits under § 932(l), as amended by § 1556(c) of the PPACA. Id. Relying on its prior decision in Mathews v. United Pocahontas Coal Co., 24 Black Lung Rep. (Juris) 1-193 (Ben. Rev. Bd. 2010) (pending on reconsideration), the Board summarily rejected the Fund's challenges to the constitutionality of the PPACA amendments. JA 24-25. The Fund timely appealed the Board's decision to this Court on January 6, 2011. JA 34-39.

IV. STATEMENT OF FACTS

Howard Stacy worked as a coal miner for eleven years ending in 1986. JA 2. All of his coal mine work occurred in West Virginia. Id. He applied for federal black lung benefits on September 25, 1986. Id. The Department of Labor awarded benefits to Mr. Stacy in 1987. Id.

In addition to coal mine employment, Mr. Stacy's other relevant exposures include smoking cigarettes for approximately 35 years at a rate in excess of three packs per day stopping in 1997. Id. He had a heart attack in 1997 after which he underwent angioplasty, coronary artery bypass surgery, and had a pacemaker implanted. Id. Mr. Stacy's last hospitalization was in 2007. Id. His treating physicians determined that he had multiple gallstones and performed gallbladder surgery. Id. Seven days after the surgery, Mr. Stacy experienced cardiac arrest and, according to his wishes, resuscitation was not attempted. JA 3. Mr. Stacy received federal black lung benefits until his death at the age of 62 on January 17, 2007. JA 2.

His wife, Elise Stacy, filed a claim for survivor's benefits on February 1, 2007.[1] Following a formal hearing, ALJ Tureck denied benefits on September 10,

[1] Beginning on January 1, 1982, the survivors were not automatically entitled to benefits based solely on the fact that the miner was receiving federal black lung benefits at the time of his death; rather, survivors had to prove pneumoconiosis caused or hastened death. See 20 C.F.R. § 718.205; Shuff v. Cedar Coal Co., (continued)

2009. JA 1-9. ALJ Tureck applied the law in effect at that time which required the survivor to prove that Mr. Stacy had pneumoconiosis, that coal mine employment caused his pneumoconiosis, and that pneumoconiosis caused his death. See 20 C.F.R. § 718.205(a)(1)-(3)); JA 4-8.

ALJ Tureck initially concluded the Fund was not collaterally estopped from litigating the issue of the existence of pneumoconiosis because that issue was never "actually litigated" in the miner's claim. JA 3-4. He then reviewed the medical records, radiographic evidence, and experts' opinions, and held the evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis.[2] JA 4-7. He credited the assessment of Dr. Stephen Basheda, a board-certified pulmonary specialist, who concluded the miner did not have pneumoconiosis, but rather suffered from significant cardiac disease, chronic bronchiectasis, tracheal stenosis, and esophageal reflux disease that manifested as pulmonary and

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967 F.2d 977, 979 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3337 (U.S. Jan. 11, 1993) (No. 92-662).

[2] Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses and includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis. Legal pneumoconiosis includes any chronic lung disease or impairment arising out of coal mine employment including any chronic restrictive or obstructive pulmonary disease. See 20 C.F.R. § 718.201(a)(1)(2).

respiratory symptoms. JA 7. Accordingly, ALJ Tureck denied survivor's benefits. JA 1-9.

Mrs. Stacy appealed the denial of benefits to the Board. JA 19. The parties had fully briefed the case by December 16, 2009, and were waiting on a decision from the Board when the President of the United States signed the PPACA. See Pub. L. No. 111-148, § 1556 (March 23, 2010).

Section 1556 of the PPACA amended the BLBA by reinstating two presumptions repealed in 1982. The first amendment applies to 30 U.S.C. § 921(c)(4) which provides rebuttable presumptions of total disability due to pneumoconiosis, death due to pneumoconiosis, and total disability due to pneumoconiosis at the time of death, when a miner had fifteen or more years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. The second amendment applies to 30 U.S.C. § 932(l) which provides that survivors of miners who received federal black lung benefits during their lifetimes, will automatically receive survivor's benefits without the necessity of filing a new claim.

Applicability of § 921(c)(4) and § 932(l) was previously limited to claims filed prior to January 1, 1982. See 20 C.F.R. § 718.305(e) and § 725.212. With the PPACA, Congress made § 921(c)(4) and § 932(l) retroactively applicable "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." See PPACA, Pub. L. No. 111 148, § 1556(c) (citation omitted).

On December 22, 2010, the Board issued a published decision vacating ALJ Tureck's denial of benefits and remanding Mrs. Stacy's claim to the District Director for entry of an award of benefits. JA 18-27. Specifically, the Board held that § 932(l), as amended by § 1556 of the PPACA, applied to a survivor who had filed a claim after January 1, 2005 that was pending on or after March 23, 2010. JA 24. Because Mrs. Stacy's claim met these filing requirements and her husband was receiving federal black lung benefits at the time of his death, the Board concluded that Mrs. Stacy was derivatively entitled to survivor's benefits under § 932(l), as amended by § 1556(c) of the PPACA. Id. The Board used the date Mrs. Stacy filed her claim in 2007 as the operative date in determining whether the amendments to the PPACA applied in her case.

V. SUMMARY OF ARGUMENT

This case presents three issues of first impression. The first issue concerns whether the amendments to the BLBA are severable from the PPACA should the Act or the individual mandate provision be deemed unconstitutional. The individual mandate of the PPACA requires everyone, with some stated exceptions, to buy federally-approved health insurance beginning in 2014 or be subject to a monetary penalty. The individual mandate is a necessary component in satisfying the PPACA's overall purpose -- creating effective health insurance markets. The absence of a severability clause strongly suggests Congress' intent to make the PPACA non-severable. Accordingly, Congress would not have passed the PPACA in its present form without the individual mandate. Moreover, the failure of seven bills since 1999 containing identical language to § 1556 of the PPACA demonstrates that Congress would not have passed the amendments to the BLBA without the backdrop of the entire PPACA. Because the individual mandate is not severable from the rest of the PPACA, and Congress has chosen not to pass the amendments to the BLBA independently, § 1556 must be declared invalid if the entire PPACA or any portion of the Act is deemed unconstitutional.

The second issue is whether retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is constitutional. By arbitrarily and irrationally choosing January 1, 2005 as the effective date for the BLBA

amendments, Congress readjusted the rights and burdens of employers, upset otherwise settled expectations, and attached new legal rights and duties to pre-enactment transactions. For these reasons, retroactively applying the BLBA amendments violates the Fund's due process rights.

The retroactive application of the amendments to the BLBA in the PPACA also effects a taking in violation of the Fifth Amendment as the Fund had no notice, and, therefore, no opportunity, to adjust the premiums it charged for federal black lung insurance to cover the increase in awarded claims that will occur because of these amendments. Thus, the retroactive application of the amendments to the BLBA contained in the PPACA should be prohibited as unconstitutional.

The third issue concerns what date must be used to determine if a survivor is eligible for automatic entitlement to benefits as reinstated by the amendments in the PPACA. Under the amendments to 30 U.S.C. § 932(l), a survivor is automatically entitled to benefits if the miner was receiving federal black lung benefits at the time of his death. With § 1556 of the PPACA, Congress substantially changed the existing law by reinstating automatic entitlement for this category of survivors which had not existed since January 1, 1982.

Relying on the statutory interpretation offered by the District Director, the Board concluded that the plurality of the word "claims" in § 1556(c) of the PPACA demonstrates that Congress did not intend to limit its application based on

the filing date of the miner's claim. The required statutory analysis, however, does not end with § 1556 of the PPACA. Well-established canons of statutory construction require that the amendment contained in § 1556 be read in conjunction with the original statutory provision being amended. When § 1556(c) is read in conjunction with § 932(l), the relevant filing date is only that of the living miner's claim because § 932(l) does not require the filing of a survivor's claim. The express and unambiguous language of § 1556(c) and § 932(1), when read as a whole, establishes that the operative date for determining eligibility to automatic survivor's benefits under the amended § 932(1) is the filing date of the miner's claim.

The Board erred by going beyond the express statutory language of § 932(1) and relying on the post-enactment statements by Senator Byrd as probative evidence of the intent of Congress. Senator Byrd's statements, as well as public policy arguments like those made by the Director and adopted by the Board, are irrelevant. This issue turns solely on statutory construction. The Board had no reason to look beyond the unambiguous statutory language of § 932(l) and § 556(c) because the statute clearly expresses the intent of Congress to limit the application of § 932(1) by the filing date of the miner's claim.

Finally, the Board erred in giving deference to the Director's interpretation which essentially ignores the express language of § 932(1). The Director's current

interpretation of § 932(l) is also inconsistent with his prior interpretation of this statute. Following the 1981 amendments to § 932(l), the Director's position was that the operative date for determining eligibility to automatic survivor's benefits was the filing date of the miner's claim. The PPACA did not alter or amend the substantive language of § 932(1), only its applicable date. Accordingly, no valid reason exists for the Director's inconsistent interpretations of § 932(l). The Board's unjustified deference to the Director's interpretations is irrational and an abuse of discretion.

VI. ARGUMENT

A. STANDARD OF REVIEW

In reviewing claims for benefits under the BLBA, this Court determines whether substantial evidence supports the findings of fact and conclusions of law issued by the ALJ. Dehue Coal Co. v. Ballard, 65 F.3d 1189, 1193 (4th Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938); Milburn Colliery Co. v. Hicks, 138 F.3d 524, 529 (4th Cir. 1998). In determining whether substantial evidence supports the ALJ's factual determination, the Court should address whether all relevant evidence has been analyzed and whether the ALJ has sufficiently explained the

rationale used in crediting certain evidence. See Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 439 (4th Cir. 1997).

The ALJ's and Board's conclusions of law are to be reviewed *de novo* to determine if they are rational and consistent with the applicable law. See Ballard, 65 F.3d at 1193; see also Island Creek Coal Co. v. Compton, 211 F.3d 203, 207-08 (4th Cir. 2000). This Court reviews issues of statutory construction *de novo*. See, e.g., Orguera v. Ashcroft, 357 F.3d 413, 418 (4th Cir. 2003).

B. DISCUSSION OF ISSUES

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

The ALJ denied Mrs. Stacy's claim after a review of the substantive merits. JA 1-8. While Mrs. Stacy's claim was pending on appeal before the Board, Congress passed the PPACA. JA 14, 19. Subsequently, the Board applied the PPACA amendments to award survivors' benefits. JA 18-27. Thus, Mrs. Stacy's award of survivor's benefits rests solely upon the application of the automatic entitlement provisions of the BLBA, as recently amended by the PPACA.

Since the Board's decision, federal district courts have declared the PPACA unconstitutional. Numerous appeals concerning the constitutionality of the PPACA are currently pending before various federal courts of appeals, including

this Court.[3] To date, one district court has found the PPACA unconstitutional and one has held the individual mandate unconstitutional.[4] Seven separate actions are

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[3] See, e.g., Walters v. Holder, No. 2:10-cv-00076-KS-MTP (S.D. Miss. refiled Mar. 4, 2011) (re-filing with amended complaint after Feb. 3, 2011, order dismissing case without prejudice for lack of subject matter jurisdiction); Mead v. Holder, No. 1:10-cv-0095-GK, 2011 WL 611139 (D.D.C. Feb. 22, 2011) (order granting United States' Motion to Dismiss), *appeal docketed*, Seven-Sky v. Holder, No. 11-5047 (D.C. Cir. Feb. 28, 2011); Florida [Bondi] v. U.S. Dep't of Health and Human Servs., No. 3:10-cv-00091-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (order granting plaintiff's motion for summary judgment, declaring individual mandate unconstitutional and Act not severable), *appeal docketed*, No. 11-11021 (11th Cir. Mar. 9, 2011); Pruitt v. Sebelius, No. 6:11-cv-30-RAW (E.D. Okla. filed Jan. 21, 2011) (pending before district court); Virginia v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010) (order granting Virginia's Motion for Summary Judgment, declaring individual mandate unconstitutional but finding Act severable), *appeal docketed*, No. 11-1057 (4th Cir. Jan. 20, 2011) (appeal), No. 11-1058 (4th Cir. Jan. 20, 2011) (cross-appeal); N.J. Physicians, Inc. v. Obama, No. 2:10-cv-01489-SDW-MCA, 2010 WL 5060597 (D.N.J. Dec. 8, 2010) (order granting motion to dismiss for lack of standing), *appeal docketed*, No. 10-4600 (3d Cir. Dec. 14, 2010); Liberty Univ. 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), *appeal docketed*, No. 10-2347 (4th Cir. Dec. 3, 2010); Thomas More Law Ctr. v. President of the U.S., 720 F.Supp.2d 882 (E.D. Mich. 2010) (order dismissing counts one (commerce clause argument) and two (taxation argument)), *appeal docketed*, Thomas More Law Ctr. v. Barack Obama, No. 10-2388 (6th Cir. Oct. 25, 2010); Baldwin v. Sebelius, No. 10-cv-1033-DMS-WMC, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010) (order granting motion to dismiss for lack of standing), *appeal docketed*, No. 10-56374 (9th Cir. Sept. 1, 2010); Kinder v. Dep't of Treasury, No. 1:10-cv-01033-RWS (E.D. Mo. filed July 7, 2010) (motion to dismiss currently pending before court); Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius, No. 1:10-cv-00499 (D.D.C. filed March 26, 2010) (pending before district court).

[4] On December 13, 2010, the United States District Court for the Eastern District of Virginia held the individual mandate, as contained in the PPACA, is unconstitutional. Virginia, 728 F.Supp.2d 768. Due to the difficulty in (continued)

currently pending before six Circuit Courts of Appeals (the Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits). The primary focus of these suits, and thus of the PPACA constitutionality debate, is the individual mandate.

Two cases addressing the constitutionality of the individual mandate are currently set for oral argument before this Court on May 10, 2011.[5] If any portion of the PPACA is found to be unconstitutional by this Court or the Supreme Court

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determining the potentially severable portions of the Act from the non-severable portions of the Act, the court chose to forgo such an analysis and "hew closely to the time-honored rule to sever with circumspection, severing any 'problematic portions while leaving the remainder intact.'" Id. Thus, because the Eastern District of Virginia did not fully analyze the severability issue, the Court's failure to invalidate the entire PPACA in light of its unconstitutional findings is of no consequence as to whether the amendments to the BLBA must fall with the individual mandate.

On January 31, 2011, the Patient Protection and Affordable Care Act was declared unconstitutional. See Bondi, 2011 WL 285683. As such, the provisions contained in § 1556 of the Act, including the amendments to 30 U.S.C. § 932(l), reviving automatic entitlement to survivor's benefits, are now void. See id. at *39-40 (holding that "[b]ecause the individual mandate is unconstitutional and not severable, the entire Act must be declared void"). On March 3, 2010, Judge Vinson granted the defendants' motion to stay, contingent "upon the defendants filing their notice of appeal within seven (7) calendar days of [the] order and seeking an expedited appellate review." Bondi is now pending review by the Eleventh Circuit Court of Appeals. See No. 3:10-cv-01-RV/EMT (Mar. 8, 2011) (notice of appeal filed), *appeal docketed*, No. 11-11021 (11th Cir. Mar. 9, 2011).

[5] See Virginia, No. 11-1057 (4th Cir. Jan. 20, 2011) (order consolidating appeal (11-1057) and cross-appeal (11-1058)); Liberty Univ., Inc., No. 10-2347 (4th Cir. Dec. 3, 2010). The appeal and cross-appeal in Virginia were consolidated by order dated January 20, 2011. Both Virginia and Liberty Univ., Inc. are currently scheduled for oral argument on May 10, 2011.

of the United States, the amendments to the BLBA must also be declared invalid because the BLBA amendments are not severable. Accordingly, if any provision of the PPACA is declared unconstitutional, application of the PPACA amendments to Mrs. Stacy's claim would be foreclosed.

The amendments to the BLBA are not severable from the entirety of the PPACA should the individual mandate be deemed unconstitutional. The standard for determining the severability of an unconstitutional provision is well-established: "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." See, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)); Champlin Refining Co. v. Corp. Comm'n of Oklahoma, 286 U.S. 210, 234 (1932). In applying this standard, the Court must consider whether, in the wake of the severance of the unconstitutional provision, the balance of the statute will function in a manner consistent with the intent of Congress, and whether, in the absence of the severed unconstitutional provision, Congress would have enacted the statute anyway. Alaska Airlines, 480 U.S. at 685.

Reviewing courts may look to "the statute's text or historical context" to determine if Congress would have preferred the statute without the stricken

provisions to no statute at all. See Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161-62 (2010). While determining what Congress may have done in a given circumstance has been described as "elusive," the record here strongly indicates that Congress would not have passed the PPACA in its present form without the individual mandate. Id. at 3161. The record also reveals that Congress would not have passed the amendments to the BLBA absent inclusion in the PPACA.

First, Congress would not have passed the PPACA in its present form without the individual mandate. Opponents of the individual mandate, which regulates passive inactivity by requiring Americans to purchase health care insurance or face a hefty penalty, argue that the mandate is an unprecedented and unconstitutional stretch of Congress' power to regulate commerce under Article I, Section 8, Clause 3 of the United States Constitution. At least two different federal district judges agree. See Virginia v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010) (order granting Virginia's Motion for Summary Judgment, declaring individual mandate unconstitutional but finding Act severable); Bondi, No. 3:10-cv-00091-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (order granting plaintiffs' motion for summary judgment, declaring individual mandate unconstitutional and Act not severable).

The individual mandate is a necessary component in satisfying the PPACA's overall purpose. As the United States District Court for the Northern District of Florida explained, "[t]his is because the individual mandate was indisputably essential to what Congress was ultimately seeking to accomplish. It was, in fact, the keystone or lynchpin of the entire health reform effort." Bondi, 2011 WL 285683, *35. Indeed, the PPACA itself explains that the individual mandate is necessary for the Act to perform as intended. See PPACA at § 1501(a)(2)(l) ("[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. . . . The [individual mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."). Specifically, the individual mandate is a necessary component of the PPACA's insurance market reforms, which are, in turn, necessary to accomplish the purpose of the PPACA. Id. Thus, the individual mandate is a necessary component in fulfilling Congress' purpose with the PPACA.

Notably, however, the PPACA contains no severability clause despite the individual mandate's "keystone" status and the emergence of debates addressing the constitutionality of the mandate even prior to its passage into law. Because a severability clause was included in an earlier version of the Act, but was ultimately

removed prior to the PPACA becoming law, the absence of such a clause is highly suggestive of Congress' intent to make the PPACA non-severable. See Russello v. United States, 464 U.S. 16, 23-24 (1983) (Where "Congress includes [particular] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended."). Therefore, as the individual mandate is necessary to fulfill the purpose of the PPACA and as Congress would not have passed the PPACA in its current form without the mandate, it is not severable. Thus, an unconstitutional ruling on the individual mandate issue requires invalidating the entire PPACA.

Second, Congress would not have passed the amendments to the BLBA independently of the individual mandate and the total PPACA package. Therefore, if the individual mandate is declared unconstitutional, the PPACA amendments to the BLBA must also be declared invalid. See, e.g., Alaska Airlines, Inc., 480 U.S. at 684. Congress' desire not to amend the BLBA outside of the PPACA is evidenced by the legislative record. Specifically, 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.[6] Tellingly, none of those bills made it out of committee.

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

The PPACA amendments to the BLBA are retroactively applicable to January 1, 2005. See PPACA, Pub. L. No. 111-148, §1556(c). Notably, as three bills were introduced in the House between January 2005 and March 23, 2010, Congress had three opportunities during that time frame to amend the BLBA, but failed to do so.[7] Accordingly, the legislative record supports that Congress would not have passed the amendments to the BLBA contained in the PPACA, absent the entire PPACA package. The fact that Congress bypassed multiple opportunities to amend the BLBA prior to the PPACA, and that the PPACA amendments did exactly what Congress failed to do through seven prior bills, is strong evidence that Congress would not have passed the amendments without the backdrop of the national healthcare legislation.

Because the individual mandate is not severable from the rest of the PPACA and because Congress would not have passed the amendments to the BLBA without the PPACA, those amendments must be declared invalid if the individual mandate, or any other provision of the PPACA, is struck down as unconstitutional. Therefore, as the validity of the Board's decision in this federal black lung claim rests upon the applicability of § 932(l) of the BLBA, as amended by § 1556 of the

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Congress (2002); H.R. 4235, 107th Congress (2002); H.R. 228, 106th Congress (1999).

[7] See H.R. 1010, 111th Congress (2009); H.R. 1123, 110th Congress (2007); H.R. 300, 109th Congress (2005).

PPACA, a finding that the individual mandate is unconstitutional requires a finding that the amendments to the BLBA, as contained in the PPACA, are invalid.

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

Even if the individual mandate of the PPACA is found to be constitutional or the amendments to the BLBA severable, the retroactive application of those amendments is unconstitutional. The Board summarily rejected the Fund's constitutional challenges to the BLBA amendments relying solely on their decision in Mathews v. United Pocahontas Coal Co., 24 Black Lung Rep. (Juris) 1-193 (Ben. Rev. Bd. 2010) (pending on reconsideration). As the Board noted in Mathews, Congress unquestionably has the power to enact retroactive legislation. Mathews, 24 Black Lung Rep. (Juris) at 1-197. The specific issue raised by the PPACA amendments is whether Congress used that power in a way consistent with the Constitution in making the 2010 amendments to the BLBA retroactive to claims filed after January 1, 2005. Retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is contrary to law because it denies the Fund due process and constitutes an unconstitutional taking of private property.

Accordingly, this Court should prohibit the retroactive application of the amendments to the BLBA as unconstitutional.[8]

a. Retroactive application of the amendments to the BLBA contained in the PPACA is contrary to law because it constitutes a denial of due process.

Legislation that attaches new legal rights and duties to pre-enactment transactions, occurrences, and conduct has long been recognized as constitutionally suspect because of its great potential for violating the guarantee of fairness implicit in the Due Process Clauses of the Fifth and Fourteenth Amendments.[9] As Justice Scalia succinctly explained in a discussion regarding retroactive legislation:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law.

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (citations omitted).

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[8] This issue of whether the retroactive application of § 1556 of the PPACA is unconstitutional is also currently pending before the United States Court of Appeals for the Seventh Circuit. Keene v. Consol. Coal Co., No. 09-BLA-0352 (BRB February 26, 2010), *appeal docketed*, No. 10-1948 (7th Cir. April 20, 2010). The Seventh Circuit has scheduled oral argument in Keene for April 6, 2011.

[9] See generally R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 350 (1935); Nichols v. Coolidge, 274 U.S. 531, 542 (1927); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 554 (1949) (dictum); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315-16 (1945) (dictum); Mora v. Mejias, 223 F.2d 814, 816-19 (1st Cir. 1955).

The Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("[e]lementary considerations of fairness" weigh against retroactive legislation). While Congress is not prohibited from imposing new liability for conduct that has previously been completed, the Court "has never 'intimated that Congress possesses unlimited power to readjus[t] rights and burdens ... [and] upse[t] otherwise settled expectations.'" Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 229 (O'Connor, J., concurring) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)). To the contrary, the Court has stated that retroactive civil legislation must be "supported by a legitimate legislative purpose furthered by rational means." Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984); see also Usery, 428 U.S. at 15-20 (due process requires inquiry into whether the legislature acted in an arbitrary and irrational way when enacting a retroactive law).

Congress unquestionably has the power to enact legislation designed to compensate coal miners who are totally disabled by an occupationally acquired lung disease. R.A. Gray & Co., 467 U.S. at 729 ("legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality"). Here, the issue raised is whether Congress used that power in a

way consistent with the Constitution in making the 2010 amendments to the BLBA retroactive to claims filed after January 1, 2005.

Congress may enact legislation that "attaches new legal consequences to events completed before its enactment," Landgraf, 511 U.S. at 270, or "upsets otherwise settled expectations," Usery, 428 U.S. at 16, so long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." R.A. Gray & Co., 467 U.S. at 730. See also General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). While Congress need not articulate a legitimate purpose for imposing its legislation retroactively, such a purpose must be rationally conceivable. See, e.g., FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

Applying this precedent to the legislation in question establishes that retroactive application of the amendments to the BLBA contained in the PPACA is unconstitutional because Congress' actions were arbitrary and irrational. See Usery, 428 U.S. at 15-20. Congress did not provide any legitimate purpose for retroactively imposing the amendments to the BLBA to claims filed after January 1, 2005, nor is any such purpose conceivable. The PPACA and its legislative history are devoid of any explanation for the choice of the January 1, 2005 date. That date bears no special significance in the realm of the federal black lung program. Congress arbitrarily and irrationally chose this date, and in doing so, readjusted the rights and burdens of employers, upset otherwise settled

expectations, and attached new legal rights and duties to pre-enactment transactions.

In Mathews, the Board relied on a post-enactment statement of the late Senator Robert Byrd to support the notion that Congress' intent in retroactively applying the amendments to the BLBA was to compensate the survivors of deceased miners "for the effects of disabilities bred in the past." Mathews, 24 Black Lung Rep. (Juris) at 1-197. By this rationale, Congress could impose any retroactive legislation at its will to correct any perceived past transgressions. The Supreme Court, however, provided in Usery that when Congress imposes burdens retroactively, the rationale that the statute is designed to regulate or punish bad conduct is normally unavailable and hence the statute must be justified on some other basis. Usery, 428 U.S. at 17-18 ("[W]e would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness [for intentional wrongdoing].").

Furthermore, Senator Byrd's remarks were made two days after the legislation's enactment. Even if Senator Bryd's statements could be construed to support the proposition that Congress' intent in retroactively applying the amendments to the BLBA was to compensate the survivors of deceased miners for the effects of disabilities bred in the past, those comments are entitled to little, if any, weight because they were made after Congress passed the bill and after the

President signed it. See 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010). Discussing the weight to be given to such post-enactment legislative statements, Justice Scalia explained:

> The legislative history of a statute is the history of its consideration and enactment. "Subsequent legislative history"-which presumably means the *post*-enactment history of a statute's consideration and enactment-is a contradiction in terms.
>
> . . . .
>
> In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed. . . .
>
> Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J. concurring in part). Even if somehow relevant, Senator Byrd's comments made on an existing law after its passage do not cure the fact that the retroactive January 1, 2005 date is arbitrary and irrational. The legislative history is simply devoid of any evidence that Congress ever seriously considered the impact of § 1556(c).

Precedent exists for prohibiting the retroactive application of economic legislation as violating both the Due Process and the Takings Clause of the Fifth Amendment. In Eastern Enterprises v. Apfel, 524 U.S. 498, 529-37 (1998), the Supreme Court disallowed retroactive imposition of lifetime employee health benefit liabilities under the pension provisions of the Coal Industry Retiree Health Benefit Act. Four of the five Justices who voted to invalidate the retroactive

assessment on the corporation joined a plurality opinion written by Justice O'Connor. Id. The plurality opinion found that the assessment against the corporation violated the Fifth Amendment prohibition against taking private property for public use. Id. at 538. Justice Kennedy, in a concurring opinion, found that the retroactive application of the 1992 Coal Act to the corporation violated substantive due process principles under the Fifth Amendment, because it was an "egregious" retroactive application of a law. Id. at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part); see also R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 389 (1935) (Supreme Court struck down the Railroad Retirement Act of 1934, which required railroads to finance pensions for workers who had retired within a year before enactment of the law, on the basis that the legislation was an unconstitutional violation of due process).

The January 1, 2005 effective date for the PPACA amendments is arbitrary as it has no relationship to the federal black lung program. As the amendment to the automatic entitlement provision completely eliminated a survivor's burden of proof as to death causation, Congress implemented a significant change in the law which readjusted the rights and burdens of employers, upset otherwise settled expectations, and attached new legal rights and duties to pre-enactment transactions. Similar to the effects of retroactive application of imposition of benefits in Apfel, the retroactive application of the amendments to the BLBA in

the PPACA, particularly reinstatement of the automatic entitlement provision, is "egregious retroactive application of a law." For these reasons, the Board should find that retroactive application of the amendments to the BLBA contained in the PPACA is unconstitutional because such action violates the Fund's due process rights.

b. Retroactive application of the amendments to the BLBA contained in the PPACA is contrary to law because it constitutes an unconstitutional taking of private property.

The retroactive application of the amendments to the BLBA in the PPACA effects a taking in violation of the Fifth Amendment. U.S. CONST. AMEND V. To determine if retroactive application of the amendments to the BLBA effects a taking, it is appropriate to consider their impact on investment-backed expectations, their economic impact, and the essential character of the measure. See Babbitt v. Youpee, 519 U.S. 234, 239 (1997). Upon consideration of these factors, the Court should find the retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is unconstitutional.

The extent to which the statutory amendments disrupt the Fund's investment-backed expectations is one relevant factor. This inquiry examines whether a property owner had any realistic opportunity to anticipate the government action and to adjust its conduct to avoid or minimize its adverse effect.

See Babbitt, 519 U.S. at 246-47 (Stevens, J., dissenting); see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Reg., 496 U.S. 18, 40 n.23 (1990) (the period of retroactivity is significant because, once a transaction is completed, the parties' interest in finality and repose increases with the passage of time). The amendments to the BLBA in the PPACA squarely implicate "the interests in fair notice and repose that may be compromised by retroactive legislation." Landgraf, 511 U.S. at 266, 271 (noting that in "contractual or property rights . . . predictability and stability are of prime importance"). These retroactive amendments impose a harsh new liability on the Fund that it could not have foreseen in 2005. The Fund has no opportunity to adjust its conduct to avoid or minimize the adverse effect of these amendments.

Second, the economic impact of the amendments to the BLBA on the Fund is substantial. The Fund is a state administered trust fund set up to provide coverage for claims arising under the BLBA "where the date of last exposure is on or before the thirty-first day of December, two thousand five, without regard to the date the claim is filed." W.VA. CODE § 23-4B-2 (2010). Employers seeking to insure claims arising under the BLBA with a date of last exposure after December 31, 2005, must seek insurance through privately operated insurance companies.

The Fund based its assessment of premiums for federal black lung insurance prior to 2005 on the BLBA as it existed during those years. The Fund relied to its detriment on the existing law by setting premiums based on the number of claims awarded in prior years under the BLBA. Retroactive application of these amendments, however, substantially alters those projections. The number of claims filed will be awarded is going to significantly increase because of the amendments to the BLBA contained in the PPACA. The Fund, however, cannot prospectively adjust the premiums to compensate for this increase because those premiums have already been paid. The Fund had no notice, and therefore no opportunity, to adjust the premiums it charges for federal black lung insurance to cover the increase in claims that will now be awarded.[10]

In Mathews, the Board agreed that the extent to which the retroactive BLBA amendments disrupt the Fund's investment-backed expectations is a relevant

[10] Following passage of the PPACA, the National Council on Compensation Insurance, West Virginia's rating and statistical agent, asked the West Virginia Office of the Insurance Commissioner to increase the loss cost rates by 44.9 percent for surface mining and 44.6 percent for underground mining. See George Hohmann, *Changes Threaten Black Lung Fund: Byrd's Modifications May Cost $50 Million to $100 Million*, Charleston Daily Mail, March 24 2010, (*available at* http://www. allbusiness. com/ labor-employment/workplace-health-safety-occupational/14171111-1.html); see also George Hohmann, *Black Lung Premiums Expected to Soar*, Charleston Daily Mail, May 21, 2010 (*available at* http://www.allbusiness.com/insurance/insurance-policies-claims-insurance-premiums/14500667-1.html).

factor. Mathews, 24 Black Lung Rep. at 1-199 (citing Connolly, 475 U.S. at 224-25). As was the case in Mathews, the Board held, however, that the Fund has not met its burden in this case to establish this prong of the takings analysis because the Fund "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." JA 25. The Fund, however, had no opportunity to introduce any such evidence.

This claim was pending before the Board when Congress passed the PPACA. The Board ordered the Fund to file its response to Claimant's motion to remand on May 27, 2010, nine weeks after the passage of the PPACA. The Fund had very little time to collect the data to demonstrate the shortfall in premiums and the overall projected impact on the Fund. Moreover, the Board's regulations prohibit the submission of that information to the Board because they are not authorized to engage in *de novo* review of evidence or to make findings of fact. See 20 C.F.R. § 802.301(a). The Board's governing regulations specifically provide that, "[p]arties shall not submit new evidence to the Board." See 20 C.F.R. § 802.301(b). At minimum, this claim should be remanded to the ALJ for additional proceedings to allow the Fund to present evidence regarding the economic impact of these amendments.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" See Mathews v. Eldridge, 424 U.S. 319, 333 (1976).[11] With § 1556 of the PPACA, Congress imposed costly retroactive liability on the Fund. Due process requires the Fund be given an opportunity to submit evidence of the economic impact created by the statutory amendments to support its argument that the legislation effects an unconstitutional taking. The appropriate forum to submit such evidence is before the ALJ, which necessitates remand.

For these reasons, the retroactive application of the amendments to the BLBA contained in the PPACA is unconstitutional because such action effects a taking in violation of the Fifth Amendment. If the Board's decision is not reversed, then the claim should be remanded to the ALJ and the record reopened for additional evidence as to the economic impact on the Fund.

[11] See also Morgan v. United States, 304 U.S. 1 (1938) ("[T]he right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."); Lane Hollow Coal Co. v. Director, OWCP, 137 F.3d 799, 807 (4th Cir. 1998) ("No 'process,' however thorough, can provide what is 'due' without notice to those who stand to lose out thereby.").

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

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

Section 1556(b) of the PPACA amended 30 U.S.C. § 932(l) of the BLBA as follows:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner~~, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981~~.

30 U.S.C. § 932(l), *as amended* (stricken language noted). This statutory provision provides that a survivor of a miner who was receiving federal black lung benefits at the time of his death, is automatically entitled to survivor's benefits.

The PPACA provides that the amendments to § 932(l) "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 [March 23, 2010]." PPACA, Pub. L. No. 111-148, § 1556(c) (citations omitted). The question presented is *whose* claim - the miner's or the survivor's - must be filed within these timeframes to trigger eligibility to the amended § 932(l).

The unequivocal, unambiguous language of the BLBA provides the answer. The role of the court is "to interpret the language of the statute enacted by Congress." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 441 (2002). Accordingly, "if the statute speaks clearly 'to the precise question at issue we must give effect to the unambiguously expressed intent of Congress.'" Barnhart v. Walton, 535 U.S. 212, 217-18 (2002) (quoting Chevron, U.S.A., Inc., v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 842-43 (1984)).

The plain language of § 932(l) states that a survivor is not required to file a claim for derivative entitlement. See 30 U.S.C. § 932(l) (in no case shall the survivors of a miner receiving benefits at the time of his death "be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner."). It would, therefore, contravene the plain language of the statute to determine the applicability of this statutory provision based on the date a *survivor's* claim is filed. See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (Court presumes that Congress "says in a statute what it means and means in a statute what it says there.").[12] The plain language of § 932(l) provides that the operative date for determining whether the survivor is eligible for benefits under this

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

provision is the date the *miner's* claim was filed because the survivor is not required to file a claim.

The Board disagreed and held that the plain language of § 1556(c) of the PPACA mandates the application of § 932(l), as amended, to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. JA 21-22. Given that both miners and survivors may file "claims" under the Act, and that Congress used the term "claims" in § 1556(c) of the PPACA without any qualifying or limiting language, the Board concluded § 1556(c) must be interpreted to apply the amended § 932(l) to *survivors'* claims that are filed after January 1, 2005. JA 21-22.

The Board's analysis is contrary to established canons of statutory construction. The Board overlooks the necessity to read § 1556(c) of the PPACA in conjunction with the statutes being amended to give them full force and effect. Courts have a "duty to construe statutes not isolated provisions." Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995).[13] Statutes that are *in pari materia* or relating to the same subject matter are to be interpreted in light of, and consistently with,

[13] See also Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, 22:34 (7th ed. 2010) ("A general rule of construction directs that a statute should be read as a whole. Thus, as to future transactions, provisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had been originally enacted as one section.")

one another. See, e.g., Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (statutory provisions *in pari materia* normally are construed together to discern their meaning); United States v. Stewart, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together, as if they were one law."). Applying these canons of statutory construction, the amendments contained in § 1556 of the PPACA must be read in conjunction with the original statutory provisions being amended.

Section 1556 of the PPACA amended two statutes under the BLBA including 30 U.S.C. § 921(c)(4) and § 932(l). See Pub. L. No. 111-148, § 1556 (a), (b). In subsection (c), Congress then provided that the amendments to these two statutes "shall apply with respect to claims filed . . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Id. at § 1556(c). This language in § 1556(c) must be read in conjunction with § 921(c)(4) and § 932(l) to discern their meaning. See Gustafson, 513 U.S. at 568; Erlenbaugh, 409 U.S. at 244.

When § 1556(c) is considered in light of § 921(c)(4), the word "claims" includes claims of either a miner or a survivor because § 921(c)(4) speaks of "such miner's, his widow's, his child's, his parents', his brother's, his sister's, or his dependent's claim." See 30 U.S.C. § 921(c)(4). This statutory provision, therefore, applies to claims filed by both living miners and survivors. Thus, when § 1556(c)

is read in conjunction with § 921(c)(4), the relevant filing date is either that of the living miner's claim or the survivor's claim. In contrast, § 932(l) specifically states survivors are exempt from having to file a claim, and provides that their benefits are derivative from an awarded living miner's claim. Therefore, when § 1556(c) is read in conjunction with § 932(l), the relevant filing date is *only* that of the living miner's claim.

The Director diverted the Board's attention away from the unambiguous statutory language of § 932(1) by arguing that his interpretation effectuates the "the fundamental purpose," "the practical reality," and "the larger purpose" of § 932(1). Id. The Director argued that the "larger purpose" of § 932(1) is to ensure "the survivor's entitlement [is] based solely on the miner's award." Id. at 8. The "larger purpose" and the "fundamental purpose" arguments made by the Director became the crux of the Board's decision.

In support of the Director's "larger purpose" theory, the Board credited the comments made by Senator Robert C. Byrd on March 25, 2010, two days after the PPACA became effective. JA 22-23. The Board resorted to legislative history to support its decision regarding the meaning of the statute as amended. The Board, however, had no reason to consider legislative history because the text of the statute is unambiguous. See Dep't. of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 132 (2002) (noting that "reference to legislative history is

inappropriate when the text of the statute is unambiguous."); Chevron, 467 U.S. at 842-43 (same).

Moreover, "a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992). The Board's analysis improperly goes beyond the express statutory language of § 932(1) to find that the post-enactment statements by Senator Byrd are probative of the intent of Congress. JA 22-23.

Even if Senator Byrd's statements could be construed to support such a proposition, which they do not, those comments are entitled to little, if any, weight because they were made after Congress passed the bill and the President signed it. The Board cited two Supreme Court cases for the general proposition that post-enactment statements are persuasive. JA 23. The cases cited by the Board do not support its contention. In Pac. Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 208 (1983) and N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982), the Supreme Court found statements made on the floor of Congress and exchanges between legislators during a debate prior to enactment of a statute to be to be persuasive history. Pac. Gas and Elec. Co., 461 U.S. at 208 n.19; N. Haven, 456 U.S. at 526 n. 16. As the statutory language of § 932(1) and § 1556(c) is clear and unambiguous, this Board should

not have considered or determined what weight, if any, should be afforded to Senator Byrd's post-enactment statements. See Sullivan, 496 U.S. at 631-32 (Scalia, J. concurring in part) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."). See also Mass. v. EPA, 549 U.S. 497, 530 n.27 (2007) (quoting Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.").

In an effort to ignore the strong words of Justice Scalia, the Board noted that the post-enactment statements in Sullivan were made by the most recent class of Congress concerning the intent of earlier classes of Congress concerning legislation passed some 20 years earlier. JA 23. Although it is especially the case with respect to post-enactment statements made by the current class of Congress concerning legislation passed during prior Congressional sessions, the Supreme Court has consistently held that post-enactment statements by individual members of Congress as to the meaning of a statute are entitled to little or no weight. See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); see also Pittston Coal Group v. Sebben, 488 U.S. 105, 118-19 (1988) (refusing to consider post enactment statements of key sponsor as those statements were not relied upon by legislators who enacted the law). Thus, even if the Board properly went beyond the statutory language, their analysis is not supported by applicable law.

The Board also relied on an acknowledgment in Pothering v. Parkson Coal Co., 861 F.2d 1321 (3d Cir. 1988) that § 932(1) does not "prohibit filings for which there is an administrative need – such as providing the OWCP with notice of the miner's death or information regarding the survivor's relationship." JA 22 (quoting Pothering, 861 F.2d. at 1328). The Board, however, failed to acknowledge that the Third Circuit went on to hold that § 932(1) does not require any new filing by a survivor, and therefore, the operative date for determining eligibility to derivative benefits is the date the miner's claim was filed. See Pothering, 861 F.2d at 1328, n 13. Specifically, because Mr. Pothering filed his original claim in 1978, the court concluded it was unnecessary for Mrs. Pothering to file a new claim in 1984 to obtain survivor's benefits. Id. Thus, Pothering and the present litigation position taken by the Director, and adopted by the Board, are inconsistent.

Finally, the Board summarily rejected any contention that the Director's interpretation renders the limiting language of § 1556(c) meaningless. JA 22-23. The Board emphasized that not all survivor's claims filed after January 1, 2005 were pending on or after March 23, 2010. Id. Of significance, however, is the Director's concession before the Board that pursuant to his interpretation any survivor of a miner who was receiving benefits at the time of his death is

automatically entitled to benefits if she *now* files a claim.[14] JA 23. The Board also fails to take into consideration the modification provision available in federal black lung claims that would allow a survivor to keep her initial claim filed in January of 2005 pending until March 23, 2010 and beyond. See 20 C.F.R. § 725.310 Thus, the Director's position, which the Board adopted, extends retroactive liability far beyond the five years envisioned by Congress when enacting the PPACA amendments.

In the PPACA amendments, similar to the 1981 amendments, Congress restricted the application of § 932(1) to claims filed within a certain time period. Neither the PPACA amendments nor the 1981 amendments support carte blanche application of § 932(1). Although adopted wholesale by the Board, the Director's interpretation of § 932(l), as amended by the PPACA, is contrary to the statute's plain language that prohibits the need for any filing by the survivor and renders the time limitations set by Congress moot as to survivors' claims. One of the most basic interpretive canons is that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" Corley v. United States, 129 S.Ct. 1558, 1566 (2009) (citing Hibbs

[14] For example, a miner was awarded benefits in the 1980s and passed away in 1990. No survivor's claim was filed because the miner died in a car accident. Although approximately 20 years have passed since the miner's death, the survivor is now eligible for derivative entitlement under the Director's interpretation.

v. Winn, 542 U.S. 88, 101 (2004) (quoting N. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000)). The broad and expansive retroactive application of the PPACA amendments advocated by the Director is not supported by the express statutory language and gives rise to substantial constitutional challenges.

The statutory analysis begins and ends with the express language of § 932(1) and § 1556(c). The Board erred by considering anything beyond express language of § 932(1) and § 1556(c). When § 1556(c) is read in conjunction with § 932(1) unambiguous statutory language demonstrates that the operative date for purposes of § 932(1) is the filing date of the miner's claim. As Mr. Stacy filed his claim long before January 1, 2005, Mrs. Stacy is not eligible to automatically receive benefits deriving from his claim under the amendments reviving § 932(l). Accordingly, the Board's decision should be reversed or vacated.

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

The Board provided deference to the Director's litigation position that the operative date for the application of 30 U.S.C. § 932(l) is the filing date of the survivor's claim. JA 24. The Supreme Court has found on a number of occasions that the Director's interpretation of the BLBA and its implementing regulations is not reasonable, and therefore, not entitled to deference. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994); Sebben, 488 U.S. 105. The Board abused its discretion by providing deference to the Director in Mrs. Stacy's claim because the Director's litigation position concerning the operative date for § 932(1) is inconsistent with the plain language of the statute and the interpreting regulations, is inconsistent with the Director's prior interpretation of that statute, and would provide a sweeping retroactive effect of § 1556 of the PPACA, contrary to Congress' intent.

When a statute is silent or ambiguous with respect to a specific issue, an agency's interpretation can be afforded deference provided the interpretation is "a permissible construction of the statute." Chevron, 467 U.S. at 842-43 (footnotes omitted). Courts apply a two-step test to all attempts by agencies to interpret the statutes they administer:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). Pursuant to Chevron, the first question this Court must answer is whether Congress "directly spoke" to the issue of whether an eligible survivor is entitled to benefits under § 932(l) without the necessity of filing an independent claim. Title 30 U.S.C. § 932(l) unambiguously instructs that in no case shall an eligible survivor "be required to file a new claim for benefits, or refile or otherwise revalidate the claim." As "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. As a survivor cannot be required to file a claim to be eligible for benefits under § 932(l), it would contravene the plain language of the statute to determine the applicability of this statutory provision based on the date a survivor's claim is filed.

The Director's position also conflicts with the plain language of the regulations. A "claim" is defined as:

> Claim means **a written assertion of entitlement to benefits** under § 415 or parts C of Title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

20 C.F.R. § 725.101(a)(10)(2009) (*emphasis added*). Through the express language of § 932(l), Congress specifically prohibited requiring a survivor to file a "claim" to be entitled to derivative benefits, which the regulations define as including any "written assertion." 20 C.F.R. § 725.101(a)(10). As no such written assertion can be required, it is inherently illogical to look to the date of any such filing as the operative date for determining eligibility under § 932(l). The Director's position that Mrs. Stacy's application for benefits filed in 2007 now triggers her eligibility for benefits is not entitled to deference because it is inconsistent with the plain language of both the statute and the regulations. See Director, OWCP v. Saulsberry, 887 F.2d 667, 668 (6th Cir. 1989) (holding the Director's interpretation is not entitled to deference because it "is contrary to the plain wording" of the regulation).

Deference in accordance with Chevron is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" Gonzales v. Oregon, 546 U.S. 243, 255-256 (2006). "Otherwise, the interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" Id. (citing Skidmore v. Swift & Co.,

323 U.S. 134, 140 (1944)). In The Pittsburg & Midway Coal Mining Co. v. Director, OWCP, 508 F.3d 975, 983 (11th Cir. 2007), the Eleventh Circuit distinguished between the deference owed to an agency's regulations and an agency's interpretations of its regulations. In Pittsburg & Midway, as in this case, the Director's interpretation came in the form of a legal brief and not in the form of a regulation promulgated through notice and comment rule-making.[15] In such cases when the "agency interpretation does not constitute the exercise of its formal rule-making authority," the consideration accorded to the agency is based upon the factors cited in Skidmore. The weight afforded an agency's judgment in a particular case depends upon the thoroughness of the agency's interpretation and its consideration, the validity of its reasoning, its consistency with earlier and later

[15] As stated above, the express language of § 932(l) answers to the question concerning the operative date for purposes of derivate entitlement. Moreover, the position taken by the Director in Mrs. Stacy's claim is a litigation position, not any interpretation given through its rule-making authority. Title 20 C.F.R. § 725.212(a)(2009), in its current form, does not apply to this claim because the regulation specifically states that automatic entitlement to survivor's benefits, resulting from the miner's receipt of federal black lung benefits during his lifetime, applies only to "a claim filed prior to January 1, 1982." At this juncture, the Department of Labor ("DOL") had provided no insight on how it intends to implement 30 U.S.C. § 932(l), as amended by § 1556 of the PPACA, as it has failed to promulgate any regulations. Indeed, to date, the Director's only guidance on this issue has been in the form of briefs filed in litigation. Thus, the opinions expressed by the Director for purposes of Mrs. Stacy's claim are not subject to Chevron deference.

pronouncements, and all those factors which give it power to persuade if lacking power to control. See Skidmore, 323 U.S. at 140.

As the Director voiced an interpretation that completely disregards the language of § 932(1), is inconsistent with his prior interpretation of that same statute, and would provide a sweeping retroactive effect of § 1556 of the PPACA, contrary to Congress' intent, his interpretation is unpersuasive and deserves no deference even under the Skidmore factors. This Court has refused to grant deference to an agency's interpretation of their own regulations when the agency has taken inconsistent positions without explanation. In Malcomb v. Island Creek Coal Co., 15 F.3d 364 (4th Cir. 1994), the Court stated:

> When the agency's varying interpretations of a regulation have not been the result of the agency making considered changes in its policy, but rather of the agency simply acting inconsistently without explanation, however, "the case for judicial deference is less compelling." Pauley, 501 U.S. at ----, 111 S. Ct. at 2535; see also INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n. 30, 107 S. Ct. 1207, 1221 n. 30, 94 L. Ed.2d 434 (1987). Moreover, if the agency's record of unexplained inconsistent interpretation is particularly egregious, the interpretation that the agency applied in the case before the court is entitled to no deference.

Malcomb, 15 F.3d at 369 (footnote and citations omitted).[16]

[16] See also BankAmerica Corp. v. United States, 462 U.S. 122, 130-32 (1983) (according no deference to agencies' interpretation of a statute that reversed, without adequate explanation, the interpretation employed by these agencies for sixty years); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858 n. 25 (1975) (giving "no special weight" to the Securities and Exchange Commission's (continued)

The Director conceded before the Board that after the 1981 amendments to § 932(1), he took the position that "the operative date for determining whether the survivor is eligible for benefits under [section 422(1)][17] is the date the miner's claim was filed." JA 23-24. In an attempt to distinguish the Director's prior inconsistent interpretation, the Board agreed with the Director that he had previously interpreted the limiting language of the 1981 amendments and he is now interpreting the amendment language in a different Act - § 1556(c) of the PPACA. JA 24. Both the 1981 and the PPACA amendments, however, limited the application of § 932(1) and must be read in conjunction with the substantive statutory language of § 932(1). See supra § 3(a). The PPACA did not alter or amend the substantive language of § 932(1). The sole reference to a "claim" that must be filed for purposes of § 932(1) continues to be the "claim of such miner." Thus, no valid reason exists for the Director's position concerning the operative date for the 1981 amendments to differ from his position concerning the operative date for the PPACA amendments.

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interpretation of a statute because it "flatly contradict[ed]," without explanation, the Commission's earlier interpretation); De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993) (acknowledging that, with agency statutory interpretation, there is a "type of inconsistency which would warrant rejection of deference").

[17] Section 422(l) of the BLBA is codified at 30 U.S.C. §932(l).

Furthermore, Pothering, 861 F.2d 1321, does not support the Director's interpretation of § 932(1), as amended by § 1556 of the PPACA, that the survivor's claim filing date is determinative. In Pothering, the issue was whether an eligible survivor of a deceased miner was required to file a new claim after the miner's death. 861 F.2d 1321. Mr. Pothering filed a living miner's claim in 1978, but passed away while that claim was pending before an ALJ. Id. at 1323. His wife completed a "Survivor's Notification of Beneficiary's Death" on April 24, 1984, but she failed to file a "Claim for Benefits Under the Black Lung Benefits Act." Id. The Third Circuit held that, if a miner filed a claim prior to the effective date of the 1981 amendments, no subsequent survivor's claim needed to be filed. Id. at 1328. Consequently, because Mr. Pothering filed his original claim in 1978, it was unnecessary for Mrs. Pothering to file a new claim for survivor's benefits and prove death due to pneumoconiosis. Id. Accordingly, the date the awarded miner's claim was filed is the operative date as held by the Third Circuit in Pothering. As the substantive language of § 932(l) as reinstated by the PPACA has not changed, it should be applied the same way now as the Third Circuit did in Pothering. Nothing has changed except the Director's position.

Because the Director's interpretation is contrary to the plain language of the statute and regulations and inconsistent with prior positions the Director has taken and the Third Circuit's holding in Pothering, the Board's decision to defer to the

litigation position taken by the Director in Mrs. Stacy's claim regarding the operative date under § 932(l), as amended by the PPACA, is irrational and an abuse of discretion.

VII. CONCLUSION

If the entire PPACA is ultimately declared unconstitutional, the amendments to the BLBA contained in § 1556 are not severable because the individual mandate is not severable from the rest of the PPACA and Congress has chosen not to pass the amendments to the BLBA independently. If the PPACA withstands constitutional review, the retroactive application of the amendments to the BLBA contained in § 1556 of the PPACA is still contrary to law because it denies the Fund due process and constitutes an unconstitutional taking of private property.

Finally, should the retroactive application of § 1556 be deemed constitutional, then the operative date for determining eligibility for survivor's benefits pursuant to § 932(1) is the date the miner's claim was filed because no survivor's claim is required. Mrs. Stacy, therefore, is not automatically entitled to survivor's benefits based on the amendments to 30 U.S.C. § 932(1) because her husband's claim was filed before January 1, 2005 and was not pending on or after March 23, 2010. Therefore, the West Virginia Coal Workers' Pneumoconiosis Fund, as carrier for Olga Coal Company, respectfully requests the Decision and

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

Respectfully submitted,

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

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VIII. REQUEST FOR ORAL ARGUMENT

The Fund respectfully requests this matter be set for oral argument before a panel of the United States Court of Appeals for the Fourth Circuit. This appeal raises three issues of first impression arising from the enactment of the PPACA and the amendments to the BLBA contained in that Act. These questions affect all pending and future federal black lung cases in which a survivor seeks derivative benefits based on an awarded miner's claim. A definitive ruling on this issue is necessary to ensure consistent application of the law in federal black lung claims. Oral argument will assist this Court in understanding the full extent of the issues and contentions of the parties. Given the significance of this issue to not only this claim, but also all pending and future survivor's applications seeking derivative entitlement, the parties should be given a full and fair opportunity to present the issue to this Court.

IX. ADDENDUM OF STATUTES, RULES, and REGULATIONS

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

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

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

> Regulations and presumptions
>
> (c) Presumptions
>
> For purposes of this section—
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living

> miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. § 932(l)(2010), in pertinent part:

> Failure to meet workmen's compensation requirements.
>
> (l) Filing of new claims or refiling or revalidation of claims of miners already determined eligible at time of death. In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

20 C.F.R. § 718.205 (2010), in pertinent part:

> Death Due to Pneumoconiosis.
>
> (a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. In order to receive benefits, the claimant must prove that:
>
> (1) The miner had pneumoconiosis (see § 718.202);
> (2) The miner’s pneumoconiosis arose out of coal mine employment (see § 718.203); and
> (3) The miner’s death was due to pneumoconiosis as provided by this section.

X. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated: March 17, 2011

CERTIFICATE OF SERVICE

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

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