

U.S. DEPARTMENT OF LABOR  
BENEFITS REVIEW BOARD  
WASHINGTON, D.C.

HELEN FAIRMAN, w/o CLARK FAIRMAN,	)	
	)	
Claimant/Respondent	)	BRB No. 10-0494 BLA
v.	)	Case No. 09-BLA-5386
HELEN MINING COMPANY, LLC,	)	OWCP No. xxx-xx-0358
	)	
Employer/Petitioner	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR,	)	
	)	
Party-in-Interest/Respondent	)	

**RESPONSE BRIEF OF THE DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**

Helen Mining Company (Employer) has timely appealed from Administrative Law Judge Thomas Burke's May 3, 2010 Summary Decision, which awarded survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (BLBA), to Helen Fairman (Claimant). Employer argues that Judge Burke (the ALJ) erred when he awarded benefits based on Section 1556 of the recently-enacted Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 1556 (2010). Section 1556 amended the BLBA with respect to the entitlement criteria for certain miners' and survivors' claims. The Director, Office of Workers'

Compensation Programs, urges the Board to affirm the ALJ's decision awarding benefits.

### STATEMENT OF THE CASE AND FACTS

Clark Fairman (Miner), was awarded lifetime benefits by an administrative law judge on May 18, 1997. The Miner passed away on January 26, 2008, and Claimant, Miner's surviving widow, filed her survivor's claim on March 17, 2008. The case was referred to the ALJ, who received evidence, conducted an evidentiary hearing, and heard arguments on the claim.

The PPACA was enacted on March 23, 2010, after the evidentiary proceedings in this case had been completed. Section 1556(b) of PPACA amended the BLBA by deleting the final clause of Section 422(l), which stated that the section did not apply to "claim[s] filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981." Section 422(l) now reads as follows:

#### **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.

30 U.S.C. § 932(l). The amended section applies to claims that are filed after January 1, 2005, and pending on or after the March 23, 2010 PPACA enactment date. Pub. L. No. 111-148, § 1556(c)

(2010). *See also* 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010)(statement of Sen. Byrd).

After receiving memoranda from the parties on the effect of the amendment, the ALJ issued a decision awarding Claimant benefits on May 3, 2010. The ALJ correctly interpreted the amended provision to automatically entitle Claimant to benefits because the Miner had received a lifetime award. The Employer timely appealed this decision and has filed its Petition for Review and supporting brief.<sup>1</sup> Several of the arguments Employer raises have already been addressed and rejected by the Board.<sup>2</sup> The remainder of the Employer's arguments are similarly without merit.

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<sup>1</sup> Employer inadvertently failed to paginate its brief; it is assumed herein that its brief is conventionally paginated with the captioned page, containing the initial text "Comes Now Employer ... ," numbered as page one.

<sup>2</sup> Employer baldly asserts in a single paragraph that retroactive application of the 2010 amendments violates the Fifth Amendment's due process and takings clauses. Employer relies on the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and its own unsupported belief that Congress had no rational basis for retroactively applying Section 422(l). The Board rejected similar arguments in *Mathews v. Pocahontas Coal Co.*, \_\_ BLR \_\_, BRB No. 09-666 BLA, slip op. at 3-7 (Sept. 22, 2010). It held that *Apfel* did not support an assertion that retroactive application of Section 422(l) is unconstitutional. In addition, the Board held that Congress had a rational purpose for applying Section 422(l) retroactively – to compensate the survivors of miners for injuries bred in the past. The Board should therefore reject the Employer's argument based on its holding in *Mathews*. In addition, the Employer asks the Board to hold cases affected by the 2010 amendments in abeyance pending the Director's promulgation of implementing regulations or the outcome of federal court challenges to the PPACA. The Board held in *Mathews* that it will not delay adjudication of cases on these grounds, however. *Id.* at 7. Finally,

**MRS. FAIRMAN IS AUTOMATICALLY  
ENTITLED TO BENEFITS PURSUANT TO  
AMENDED SECTION 422(l).**

Employer recognizes that amended Section 422(l) “may be viewed as creating an entitlement for all survivors of miners who were receiving benefits at the time of death.” (Employer Brief at 13).<sup>3</sup> It nevertheless asserts that this interpretation should not be given effect because it is inconsistent with other provisions of the BLBA. Employer’s argument must be rejected.

1. Section 422(l), standing alone, confers benefits on eligible survivors.

The Employer first posits that the newly amended Section 422(l) “does not result in an automatic survivor’s entitlement unless the Act otherwise provides that survivor’s benefits may be awarded on the basis that the miner had been determined to be totally disabled due to pneumoconiosis at the time of his death.” (Employer brief at 10).

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although the Employer provides eight reasons why it believes PPACA provisions unrelated to the BLBA are unconstitutional (presumably to convince the Board that the PPACA will fall in district court), it does not ask the Board to rule on the PPACA’s overall legality. Such review would be beyond the Board’s authority in any event. *See Herrington v. Savannah Machine and Shipyard Co.*, 17 BRBS 196 (1985)(recognizing that Board’s authority to address the constitutionality of a statute is limited to statutes under its jurisdiction, i.e., the BLBA and the Longshore and Harbor Workers’ Compensation Act and its extensions). The Board should therefore ignore this section of Employer’s brief.

<sup>3</sup> Employer also posits a bizarre alternative interpretation of amended Section 422(l), suggesting that it somehow combines with amended Section 411(c)(4) to create an irrebuttable presumption of death due to pneumoconiosis. The Director has never advocated such an interpretation and there is absolutely no basis for it. The Board should ignore the Employer’s unwarranted reading.

Employer does not flesh out this argument and it is difficult to understand. To the extent that Employer is suggesting that amended Section 422(l) has no effect because a claimant/survivor cannot establish entitlement by proving that the miner was disabled due to pneumoconiosis, however, it is mistaken.

The Board has expressly interpreted amended Section 422(l) to “provide[] that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor benefits without having to establish that the miner’s death was due to pneumoconiosis.” *Mathews v. Pocahontas Coal Co.*, \_\_ BLR \_\_, BRB No. 09-666 BLA, slip op. at 2 (Sept. 22, 2010). *See also Campbell v. B & G Construction Co.*, BRB No. 09-750 BLA, 2010 WL 3514144 (August 30, 2010); *Benamati v. ITEC*, BRB No. 09-677 BLA, 2010 WL 2798084 (June 10, 2010); *Hunzie v. Kemmerer Coal Co.*, BRB No. 09-624 BLA, 2010 WL 2336260 (May 20, 2010). The Board’s interpretation is correct.

The clear intent of amended Section 422(l) is to provide derivative benefits to a certain class of survivors, even though survivors outside that class could prove entitlement only by establishing death due to pneumoconiosis. By amending Section 422(l), Congress essentially changed the conditions of entitlement for survivors’ claims. It accomplished this by adding as an alternative condition that the miner had been awarded benefits. Thus, as a result of the PPACA amendments, a survivor who files a claim after January 1, 2005 that is

pending on or after March 23, 2010 is entitled to benefits if (1) the survivor meets the BLBA's relationship and dependency requirements; and (2) the miner's death was due to pneumoconiosis or the deceased miner received an award of benefits on his own lifetime claim. That survivors of miners who were denied benefits or who never filed must prove death due to pneumoconiosis simply does not preclude other survivors from obtaining derivative benefits under Section 422(l).

Any conceivable doubt regarding the effect of amended Section 422(l) is resolved by the headings Congress used when it enacted Section 1556. Section 1556(b)'s title, "Continuation of Benefits," clearly conveys that the amendment was designed to provide benefits continuously to miners' families after the miner who had been receiving benefits died. It is well-established that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991).<sup>4</sup> Even though the heading was not codified in the United States Code, it is part of the public laws and published in the Statutes at Large, and is thus an expression of the legislative intent. *See Schmitt v. City of Detroit*, 395 F.3d 327, 330 (6th Cir. 2005) (holding that statutes at large are primary source of legal authority and that "even if a portion of [a public law],

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<sup>4</sup> As Chief Justice Marshall observed over 200 years ago, "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such cases the title claims a degree of notice, and will have its due share of consideration." *U.S. v. Fisher*, 6 U.S (2 Cranch) 358, 387 (1805).

which appears in the Statutes at Large ... were omitted from the United States Code, it would retain the force of law.”); *U.S. v. Green*, 2006 WL 1687714, at \*1 (W.D. Ky. 2006) (“Enacting language, bill numbers and history, and other material to be found in the Statutes at Large is regularly omitted from the codifications. This does not render the Statutes at Large ineffective.”). In short, there is no doubt that amended Section 422(l) acts to provide benefits to the survivors of miners who were themselves awarded benefits.

In contrast, the Employer’s construction – that amended Section 422(l) does not apply to this case because a survivor can not separately establish entitlement by proving the miner was disabled due to pneumoconiosis -- would mean that amended Section 422(l) had no practical effect for survivors. That is an absurd result, which must be avoided under accepted rules of statutory construction. See 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (“It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.”) (7th ed. 2010). For that reason, the Employer’s contention should be rejected.

2. Section 422(l) is not rendered ambiguous and unenforceable by other, contradictory, provisions of the BLBA.

The Employer makes the related argument that amended Section 422(l) is rendered unenforceable by language in Sections 412(a)(2) and

411(a), 30 U.S.C. §§ 922(a)(2), 921(a), that is inconsistent with that of Section 422(l).<sup>5</sup> (Employer brief at 11-12.) The 1981 amendments to the BLBA inserted language in several sections of the BLBA, including Section 422(l), to indicate that certain survivors were no longer automatically entitled to benefits although the miner had received a lifetime award. Employer correctly observes that PPACA Section 1556 only removed the reference to the 1981 amendments' termination of automatic entitlement for survivors from Section 422(l), and did not remove such references from other BLBA provisions amended in 1981.<sup>6</sup>

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<sup>5</sup> Section 412(a)(2) provides:

In the case of death of a miner due to pneumoconiosis or, except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981, of a miner receiving benefits under this part, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.

30 U.S.C. § 922(a)(2).

Section 411(a) provides:

The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or, except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981, who at the time of his death was totally disabled by pneumoconiosis.

30 U.S.C. § 921(a).

<sup>6</sup> In addition to Section 412(a)(2), at least two other BLBA provisions --

The Employer asserts that the existence of these conflicting provisions nullifies amended Section 422(l). Although Employer is correct that amended Section 422(l) is in conflict with other BLBA provisions, Employer is wholly mistaken about the consequences of that conflict. As the more recent enactment, amended Section 422(l) nullifies the other, conflicting BLBA provisions.

"Where provisions in [] two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one...." *U.S. v. Posadas*, 296 U.S. 497, 503 (1936). *See also* 1A Norman A. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 22.22 (7th ed. 2010) ("Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute.... The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute ... are treated as repealed."); *Chrysler Credit Corp. v. Burton*, 599 F. Supp. 1313 (M.D. N.C. 1984) ("If two acts of a legislature are applicable to the same subject, their

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Sections 412(a)(3) and (a)(5), 30 U.S.C. 922(a)(3), (a)(5), which govern payment of benefits to children and parents -- conflict with amended Section 422(l). We do not concede, however, that there is an irreconcilable difference between amended Section 422(l) and Section 411(a), 30 U.S.C. 922(a). For claims filed after January 1, 1982, Section 411(a) precludes the payment of benefits in respect of a miner "who at the time of his death was totally disabled due to pneumoconiosis." This provision merely precludes a survivor of a miner from establishing entitlement by independently demonstrating the miner was totally disabled due to pneumoconiosis, a prohibition not altered by the 2010 amendments. It does not directly address derivative entitlement. Nevertheless, for purposes of this brief, we will assume that it does conflict, as Employer suggests.

provisions are to be reconciled if this can be done by fair and reasonable intendment, if, however, they are repugnant to one another, the last one enacted shall prevail.”). In light of this precedent, then, amended section 422(l) must control, and must be deemed to have impliedly repealed all contrary provisions of the BLBA.<sup>7</sup>

In sum, Section 1556(b) has repealed by implication all other BLBA provisions that limit derivative survivors' benefits only to the survivors of miners whose claims were filed before January 1982. Amended Section 422(l), being the latest pronouncement of Congress, governs this claim and requires an award of benefits to Mrs. Fairman.<sup>8</sup>

#### **THE EMPLOYER’S PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED**

The Employer also suggests that its procedural due process rights were violated when the ALJ declined to hold an additional hearing or

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<sup>7</sup> Employer also relies on the general statement of statutory purpose stating that the BLBA is intended “to provide benefits ... to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease.” 30 U.S.C. § 901(a). A statute’s specific terms trump a general statement of purpose. *See Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1559 (Fed.Cir.1993) (“[T]he specific substantive section in issue here ... surely trump[s] other general goals of the overall statute to the extent that they are arguably inconsistent, particularly where the general goals are stated only in general, introductory and hortatory language....”). In any event, to the extent this provision, too, conflicts with amended Section 422(l), it must be considered repealed.

<sup>8</sup> Mrs. Fairman meets the requirements for benefits under amended Section 422(l). Her late husband was awarded benefits in 1997, and that award is final. Mrs. Fairman filed her claim in 2008, and her claim was pending on the March 23, 2010 effective date of the PPACA.

reopen the record to allow the parties to submit additional evidence after the PPACA amendment became effective. (Employer brief at 7.) However, under the circumstances of this case, the proceedings were more than fair to the Employer, and this argument too lacks merit.

Procedural due process does not prescribe any particular form for the collection of evidence in adjudicative proceedings, but simply requires that the procedures be fair and reasonable under the circumstances. *See Penobscot Air Services, Ltd. v. F.A.A.*, 164 F.3d 713, 724-25 (1st Cir. 1999). Full evidentiary proceedings were conducted in this case prior to the PPACA's enactment. The Employer was then afforded an opportunity to submit a memorandum on the effect of the PPACA amendments. The issues relating to the amendments' application in this case are purely legal, and thus no additional opportunity to submit evidence was required.

**THE ADMINISTRATIVE PROCEDURE ACT DOES NOT BAR ENFORCEMENT OF SECTION 422(l)'S AUTOMATIC ENTITLEMENT PROVISION**

Employer contends that the ALJ's interpretation of Section 1556 violates the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), because the ALJ gave the Claimant the benefit of an automatic entitlement, despite the APA's default rule that the proponent of an order has the burden of proof. This argument is specious, however. The amendment to Section 422(l) did not alter a survivor/claimant's burden of proof. Rather, as described above, it altered the conditions of

entitlement a survivor/claimant must prove to obtain benefits. Thus, the APA is not implicated here. In any event, as the employer recognizes, the APA's default rule as to the burdens of proof may be overcome by statutory language. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 271 (1994)(recognizing that APA's burden rule applies "except as otherwise provided by statute"). Thus, even if it were found that the burden of proof for survivor/claimants has been altered, the change results entirely from the statute, and does not run afoul of the APA. Accordingly, the Board should reject this argument.

CONCLUSION

Section 1556 of PPACA, if read reasonably and in a manner reflecting legislative intent, reinstated Section 422(l)'s automatic entitlement for survivors in cases where the miner received a lifetime award of benefits. In addition, amended Section 422(l) is constitutionally sound and its enforcement does not require the promulgation of new regulations. For all the reasons stated herein, the Board should affirm the ALJ's decision applying Section 422(l) and granting the Claimant benefits.

Respectfully submitted,

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