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

BEULAH ANN MATHEWS (widow of BRUCE MATHEWS)	)	
Claimant/Respondent	)	BRB No. 09-0666 BLA
v.	)	Case No. 2006-BLA-05675
UNITED POCAHONTAS COAL CO.	)	OWCP No. XXX-XX-8071
and	)	
WEST VIRGINIA CWP FUND	)	
Employer/Carrier-Respondent	)	
and	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest/Petitioner	)	

DIRECTOR'S BRIEF IN RESPONSE TO THE BOARD'S JULY 14, 2010 ORDER

This case involves an appeal by the West Virginia CWP Fund (the "Fund") on behalf of its insured, United Pocahontas Coal Company, from Administrative Law Judge Thomas F. Phalen's (the "ALJ") May 29, 2009 Decision and Order awarding survivors' benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. 901-944. The ALJ based his award on his finding that Bruce Mathews died due to pneumoconiosis. The Fund appealed to challenge that finding. After briefing of the appeal was completed, Section 422(l) of the BLBA, 30 U.S.C. 932(l), was amended by Section 1556 of the recently-enacted Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No.

111-148, § 1556 (2010). This provision allows an eligible survivor of a miner to establish her entitlement to benefits based solely on the fact that the miner had been awarded benefits on a claim filed during his lifetime. These survivors are no longer required to prove that the miner died due to pneumoconiosis. Amended Section 422(l) applies to survivors' claims that are filed after January 1, 2005 and that are pending on or after the March 23, 2010 effective date of PPACA. In response to the Board's April 7, 2010 order allowing supplemental briefing on the impact of the amendments on this case, the Director, Office of Workers' Compensation Programs, argued that amended section 422(l) applies to this claim, and that Mrs. Mathews is entitled to benefits based on the final award of black lung benefits that was made to her deceased husband. The Director urged the Board to affirm the ALJ's decision and order based on amended Section 422(l).[1]

In its supplemental brief, the Fund conceded that amended section 422(l) applies to this case, but argued that the Board should find the amendment unconstitutional because its retroactive application violates the Fund's right to due process and constitutes an unlawful taking of its property under the Fifth Amendment. The Board has ordered the Director to respond to these contentions.[2] As discussed below, the West Virginia

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[1] PPACA also amended the BLBA by re-establishing the Section 411(c)(4) presumption. 30 U.S.C. 921(c)(4). In a survivor's claim, Section 411(c)(4) provides a rebuttable presumption of death due to pneumoconiosis if certain conditions are met. The Section 411(c)(4) presumption also applies to Mrs. Mathews' claim. Given that she is entitled to benefits under amended Section 422(l), 30 U.S.C. 932(l), any question about the proper application of amended Section 411(c)(4) to Mrs. Mathews' claim is moot. In any event, the arguments we make regarding the constitutionality of amended Section 422(l) apply with equal force to amended Section 411(c)(4).

[2] Because the Board has decided that it has authority to address constitutional questions, *see, e.g., Herrington v. Savannah Machine & Shipyard Co.*, 17 Ben. Rev. Bd. Serv. (MB) 194, 196 (1985), we do not address the question of the Board's authority to do so in this

CWP Fund's constitutional challenge is wholly without merit and should be rejected by the Board.[3]

ARGUMENT

THE FUND HAS FAILED TO PROVE THAT RETROACTIVE APPLICATION OF AMENDED SECTION 422(l) VIOLATES DUE PROCESS.

The Fund argues that retroactive application of PPACA Section 1556 deprives it of due process. Specifically, the Fund contends that Congress acted arbitrarily and irrationally by allegedly failing to "provide any legitimate purpose for retroactively

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brief. We note, however, that the Board's authority to decide the constitutionality of statutory provisions has been questioned. *Compare American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 936 (2d Cir. 1976) (Board is not the proper forum to adjudicate the constitutionality of legislation it is charged with administering) *with Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868, 874 (3d Cir. 1996) (viewing Board as "competent" to hear constitutional contentions); *cf. Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117-1119 (6th Cir. 1984) (Board assumed power of district courts to decide legal questions and so may decide may whether black lung regulations are consistent with the Black Lung Benefits Act).

[3] The Board also requested the Director to address the "propriety" of holding cases affected by the amendments in abeyance pending promulgation of new regulations. There is no need to delay the adjudication of any affected case on this ground. The amended statutory provisions are self-effectuating and the existence of allegedly inconsistent regulations does not preclude the amendments' immediate application. It is a fundamental legal principle that legislative statutes trump any conflicting administrative regulations. *See, e.g., Caldera v. J.S. Alberici Constr. Co.,* 153 F.3d 1381, 1383 n.** (Fed. Cir.1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson,* 872 F.2d 1264, 1267 (6th Cir.1989) ("statutory language ... prevail[s] over inconsistent regulatory language"); *60 Key Centre, Inc. v. Administrator of General Services Admin.,* 47 F.3d 55, 58 (2d Cir.1995) ("When a regulation operates to create a rule out of harmony with the statute under which it is promulgated, the regulation is considered a nullity."). Moreover, the Director may interpret and urge application of the new amendments with respect to this and other claims without issuing new regulations. "Promulgation of a regulation [] is not a prerequisite for according respect to an agency interpretation" of a statute. *Deel v. Jackson,* 862 F.2d 1079, 1087 (4th Cir.1988), *cert. denied,* 490 U.S. 1092 (1989). Consequently, the Board should decline to hold any case in abeyance pending promulgation of regulations.

imposing the amendments to the BLBA to claims filed after January 1, 2005[.]" (Bf. at 8). The Fund's argument is wholly without merit.

The Fund concedes, as it must, that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Thus, the Fund must overcome "a strong presumption of validity[.]" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). "In the retroactive context, the requirements [of due process] are 'met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *North America Coal Corp. v. Campbell*, 748 F.2d 1124, 1128 (6th Cir. 1984)(citing *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717(1984)). The fact that a statute's retroactive application imposes new duties and upsets otherwise settled expectations is not sufficient to invalidate it ... unless the changes it imposes are 'particularly harsh and oppressive.'" *Id.* (citations omitted); *see also Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995) ("the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means").

Retroactive application of the BLBA has been challenged before on due process grounds, and those challenges have failed. Most notably, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court rejected an argument that the BLBA

as a whole violated due process because it imposed retroactive liability on coal mine operators. As the Court later explained:

> In [*Turner Elkhorn*] we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.... This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223 (1986)(citations omitted). The *Turner Elkhorn* Court held that the BLBA was "justified as a rational measure to spread the costs of the employees' disabilities to those who benefited from the fruits of their labor." *Turner Elkhorn*, 428 U.S. at 18. Similarly, the Sixth Circuit held that the retroactive application of Section 411(c)(5), 30 U.S.C. 921(c)(5), which provided a rebuttable presumption of entitlement if certain conditions are met, was constitutionally sound. The court noted that "the rational purpose [of the presumption] is compensating survivors of deceased miners for the injury that the miners suffered because of black lung disability." *North America Coal Corp.*, 748 F.2d at 1128. The court concluded that "because retroactive application of this statute operates only to make mine operators responsible for compensating the families of employees injured by their conditions of employment we cannot find that it is particularly harsh and oppressive." *Id.*

The Fund ignores this precedent and attempts to meet its heavy burden merely by suggesting that Congress had no clear reason for choosing January 1, 2005 as the start date for claims affected by the amendments. The Fund's self-serving puzzlement aside, Congress' rationale for applying the 2010 PPACA amendments retroactively is both

apparent and logical. In remarks made two days after the PPACA's enactment, amendment sponsor Senator Byrd emphasized that the amendments are intended to help compensate deserving miners and survivors whose claims were pending: "[section 1556] will also benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order" and will help "ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won." 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement of Sen. Byrd). Thus, as with the Section 411(c)(5) presumption, the rational purpose for applying amended Section 422(l) retroactively is to compensate the survivors of deceased miners for the employment-related injuries suffered by the miners.

Nor is the fact that Congress did not articulate a precise reason for the January 1, 2005 starting date problematic. The Fund's quibble over Congress' choice of a start date does not prove that the amendments' retroactive application is not "justified by a rational legislative purpose." In any event, the Supreme Court "has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing ...." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, a rational reason for Congress' choice of that particular date is easily inferable. As Senator Byrd stated, the amendments were intended to "benefit all of the claimants who have recently filed a claim." *Id.* Thus, it is logical to assume that Congress choose a limited five-year retroactive period to capture a significant portion of the universe of claims pending at the time of the PPACA's enactment, and therefore benefit a large number of claimants, while

at the same time limiting costs for operators, carriers and the Black Lung Disability Trust Fund.

In sum, the Fund has fallen far short of demonstrating that Congress had no rational legislative purpose for retroactively applying the PPACA amendments or that such application is "harsh and oppressive." For these reasons, the Fund's assertion that retroactive application of amended Section 422(l) violates due process should be rejected.

ARGUMENT

THE FUND HAS NOT PROVEN THAT APPLICATION OF THE PPACA AMENDMENTS TO THIS CASE CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY.

The Fund also argues that the amendments constitute an unlawful taking of property in violation of the Fifth Amendment's Takings Clause. This assertion is wholly without merit as well.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V. The clause is primarily concerned with physical invasions, occupations or removals of property. However, in some cases, overly burdensome regulation can constitute an unconstitutional taking. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). A regulatory action only becomes a compensable taking under the Fifth Amendment if the government interference goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This happens when "some people alone" are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, "[g]iven the propriety of the

governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

The inquiry into whether a regulatory taking has occurred does not lend itself to any set formula, but relies instead on factual inquiries into the circumstances of each particular case. *Id.* at 224. However, three factors have particular significance in the evaluation of a regulatory takings claim: 1) the economic impact of the regulation on the regulated entity, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.* at 225, *citing Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). The first two factors are primary, and the third may be relevant in determining whether a taking has occurred. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005).

The WV CWP Fund asserts that consideration of these three factors compels the conclusion that retroactive application of the PPACA amendments in this case constitutes an unconstitutional taking of its property. The Fund, however, bears a substantial burden in challenging a governmental action as an unconstitutional taking. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). The Fund has not met that burden. It has not cited a single case in which a workers' compensation-type statute such as the BLBA was found to violate the Takings Clause. Moreover, as explained below, the broad arguments the Fund presents to discharge its burden are not persuasive.

The Fund first alleges that retroactive application of the PPACA amendments disrupts the Fund's investment-backed expectations by imposing a "harsh new liability"

on the Fund that it could not have foreseen in 2005. Br. at 10. This argument ignores the fact that, since 1974, the federal black lung benefits program has required that a specific contractual endorsement be contained within each liability policy issued to cover liabilities under the BLBA – including the policies the Fund issued to United Pocahontas. This endorsement specifically provides that insurers are liable for their principals' obligations under the BLBA "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force." 20 C.F.R. § 726.203(a). A federal black lung insurance policy is in force at any at any time while a claim can be made against the policy. *National Independent Coal Operators Association, Inc. v. Old Republic Insurance Co.*, 544 F. Supp. 520, 527-8 (W.D.Va. 1982); *see also* 65 Fed. Reg. 79920, 80027 (Dec. 20, 2000). As a "state administered trust fund set up to provide coverage for claims arising under the BLBA," (the Fund's brief at 10), the Fund is bound by this mandatory endorsement and thus has been on notice that it may be liable for any liability arising from amendments to the BLBA. Accordingly, the Fund's argument that it has been blindsided by the liability created by the PPACA amendments must be rejected. *See Connolly*, 475 U.S. at 227, citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."). *See also Turner Elkhorn Mining Co.*, 428 U.S. at 15-16 (legislation adjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations). The Fund's Taking Clause argument fails for this reason alone.

The Fund next generally asserts that the PPACA amendments will have a substantial economic impact on the Fund. But the Fund presents absolutely no evidence

of its financial situation to support this argument. The absence of this information is fatal to the Fund's argument on this score -- without it, the Board has no way to determine what economic impact the PPACA amendments will have on the Fund. *See Connolly*, 475 U.S. at 225-226 (economic impact of federal legislation obligating an employer, who was withdrawing from a multi-employer pension plan, to pay a share of the plan's unfunded vested benefits "directly depends on the relationship between the employer and the plan to which it had made contributions," and must be "out of proportion" to employer's experience with the plan to constitute a taking).

Finally, the Fund argues that the retroactive character of the PPACA amendments necessarily makes them constitutionally suspect, and thus supports its contention that the amendments result in an unlawful taking. But the Fund's premise is false. The Supreme Court has explained that "the enactment of retroactive statutes 'confined to short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice.' We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation under the Fifth Amendment's Due Process Clause." *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (citing *U.S. v. Darusmont*, 449 U.S. 292, 296-97 (1981)). The Court's decision in *Connolly* suggests the same is true under the Takings Clause. Referring to its *Turner Elkhorn* holding that the BLBA's retroactive liability did not violate due process, the Court observed that "it would be surprising indeed to discover now that ...Congress unconstitutionally had taken the assets of the employers there involved." *Connolly*, 475 U.S. at 223.

Further, here, the government has not physically invaded or permanently appropriated any of the Fund's assets for it own use. *Connolly*, 475 U.S. at 225. Instead, the PPACA amendments "adjust[] the benefits and burdens of economic life to promote the common good." *Id.* Under the Supreme Court's jurisprudence, such governmental action does not constitute a taking. *Id.* (*citing Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124; *Turner Elkhorn Mining Co.*, 428 U.S. at 15, 16; *Andrus v. Allard*, 444 U.S. U.S. 51, 65 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413).[4]

The Fund has failed to prove that retroactive application of amended Section 422(l) constitutes an unlawful governmental taking. The Board should therefore reject the Fund's argument that retroactive application of amended Section 422(l) is unconstitutional.

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[4] To support its due process and takings arguments, the Fund also points to the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The Fund's reliance on *Apfel* is unavailing. In that case, a divided Court concluded that retroactive application of the Coal Industry Retiree Health Benefits Act was unconstitutional as applied to a specific coal company. Under CIRHBA, the company was required to fund lifetime health benefits for over 1000 former miners at significant cost even though it left the coal industry long before an industry-wide agreement to fund lifetime health benefits existed. In *Apfel*, four Justices found retroactive application of CIRHBA to violate the takings clause and one found it violated due process. Thus, "[f]ive Justices agreed that [] retroactive application of CIRHBA was unconstitutional but no single rationale commanded a majority." *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 551 (6th Cir. 2001). Because "no single rationale was agreed upon by the Court," its decision has no precedential value. *Id.* at 552. In any event, given that only one Justice specifically voted to hold that retroactive application of the statute violated due process, it is unclear why the Fund believes *Apfel* supports its due process argument. And although four Justices concluded that an unconstitutional taking occurred, Justice O'Connor, who announced the opinion of the Court, expressly noted that the disproportionate and severe retroactive burden placed on the coal company by CIRHBA "differs from coal operators' responsibilities under the Black Lung Benefits Act of 1972. That legislation merely imposed 'liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.'" *Apfel*, 524 U.S. at 536 (citing *Turner Elkhorn*, 428 U.S. at 18). Thus, *Apfel* undercuts, rather than supports, the Fund's position.

CONCLUSION

In accordance with the above discussion, the Director requests that the Board reject the Fund's constitutional arguments and affirm the decision and order based on amended Section 422(l).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2010, copies of the foregoing documents were served by mail, postage prepaid, on the following:

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