No. 11-3780

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAMROCK COAL COMPANY, INC.; JAMES RIVER COAL COMPANY

Petitioners

v.

PHYLLIS A. CRAWFORD, widow of PAUL CRAWFORD; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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REQUEST FOR ORAL ARGUMENT

Petitioner has requested oral argument. The Director has no objection and believes argument may aid the Court with its decisional process because this case presents an important issue concerning the interpretation of recent amendments to the Black Lung Benefits Act that is a matter of first impression for this Court. *See* Fed. R. App. P. 34(a)(2)(C); Sixth Circuit Rule 34(a).

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STATEMENT OF JURISDICTION

Shamrock Coal Company and its insurance carrier (collectively, Shamrock or employer) petition this Court for review of a Benefits Review Board decision awarding Phyllis Crawford's claim for benefits under the Black Lung Benefits Act (the BLBA), 30 U.S.C. § 901(a). Petitioner's Appendix (App.) 1. This Court has both appellate and subject matter jurisdiction over Shamrock's petition for

review pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. § 921(c), as incorporated by section 422(a) of the BLBA, 30 U.S.C. § 932(a).

On July 21, 2011, within the sixty-day time limit set forth in section 21(c), Shamrock petitioned this Court for review of the Board's May 24, 2011, Order on Motion for Reconsideration and its February 25, 2011, Decision and Order. 33 U.S.C. § 921(c). The injury contemplated by section 21(c)—Paul Crawford's exposure to coal mine dust—occurred in the Commonwealth of Kentucky, within the jurisdictional boundaries of this Court. 33 U.S.C. § 921(c).

The Board had jurisdiction to review the administrative law judge's decision pursuant to section 21(b)(3) of the Longshore Act. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). Shamrock appealed the administrative law judge's December 29, 2009, decision to the Board on January 22, 2010, within the thirty-day period prescribed by section 21(a) of the Longshore Act. 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a).

STATEMENT OF THE ISSUE

In addition to disability benefits for coal miners, the Black Lung Benefits Act provides for survivors' benefits to the dependents of certain miners. Prior to 1982, the BLBA provided for derivative survivors' benefits; that is, the dependent of a miner who had been awarded benefits on a lifetime disability claim was

automatically entitled to survivors' benefits after the miner's death. Congress amended the BLBA to eliminate derivative survivors' benefits for miners' claims filed after January 1, 1982. Subsequently, surviving dependents were generally entitled to benefits only after proving that pneumoconiosis caused the miner's death. In 2010, Congress restored derivative survivors' benefits for certain claims. This recent amendment "shall apply with respect to claims filed . . . after January 1, 2005, that are pending on the date of enactment of this Act." Pub. L. No. 111-148, § 1556(c) (2010). The Board ruled that this amendment applies to Mrs. Crawford's claim, which was filed in 2006 and remains pending.

The question presented is: does the amendment restoring derivative survivors' benefits apply to Mrs. Crawford's claim?

STATEMENT OF THE CASE

Paul Crawford, a former coal miner, filed a claim for federal black lung benefits in 2003. App. 26. Shamrock disputed the claim and the matter was referred to an ALJ for a formal hearing in 2004. Prior to the ALJ issuing a decision, Mr. Crawford died. *Id*. Following his death, his widow, Phyllis Crawford, filed a claim for survivors' benefits. *Id*. Her claim was consolidated with his. The ALJ awarded the miner's lifetime claim, finding that Mr. Crawford was totally disabled by pneumoconiosis, but denied Mrs. Crawford's survivor's claim, finding that pneumoconiosis had not caused the miner's death. App. 42.

Shamrock appealed the award in the miner's claim, and Mrs. Crawford appealed the denial of her claim for survivors' benefits, to the Benefits Review Board.

While the appeals were pending, the BLBA was amended by the Section 1556 of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA), which reinstated derivative benefits to certain survivors of miners who had been awarded black lung benefits. Pub. L. No. 111-148, § 1556 (2010). The Board affirmed, as supported by substantial evidence, the ALJ's finding that the miner was totally disabled due to pneumoconiosis during his lifetime and therefore entitled to benefits. App. 19-20. The Board then held that Mrs. Crawford was entitled to derivative survivors' benefits pursuant to Section 1556. The Board accordingly reversed the ALJ's denial of her claim and remanded the case to the district director to enter an award. App. 21. Shamrock requested reconsideration which the Board denied. App. 9.

Shamrock then petitioned this Court to review the Board's holding that Mrs. Crawford is entitled to derivative survivors' benefits. App. 1.

STATEMENT OF THE FACTS

1. Statutory Background: Black Lung Survivors' Benefits.

"The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969, to provide benefits for miners totally disabled due at least in part to pneumoconiosis arising out of coal mine

employment, and to the dependents and survivors of such miners." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-84 (1991). The statute, now known as the Black Lung Benefits Act, has always provided for two types of benefits: disability benefits for miners and survivors' benefits for their dependents. Congress has recalibrated the program's eligibility requirements several times since its inception. For miners' lifetime disability claims, statutory presumptions have come and gone, the meaning of key terms has evolved, and procedures have changed. But the ultimate element of entitlement has remained constant: a miner who is totally disabled by pneumoconiosis arising out of coal mine employment is entitled to disability benefits.

Claims for survivors' benefits have also been impacted by the addition and removal of various presumptions and other definitional and procedural changes. But unlike miners' disability claims, the ultimate criteria for survivors' benefits have changed over the years. As initially enacted in 1968, a survivor could prove entitlement by showing either (1) that the miner's death was caused by pneumoconiosis, or (2) that the miner was totally disabled by pneumoconiosis at the time of his or her death. 30 U.S.C. § 901(a) (1970).

Congress first amended the statute in 1972.[1] The 1972 Amendments

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[1] These amendments, the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, (continued…)

introduced several provisions designed to "[r]elax the often insurmountable burden of proving eligibility" that claimants had faced. S. Rep. No. 92-743 (1972), reprinted in 2 U.S.C.C.A.N. 2305, 2306. While these amendments did not change the ultimate criteria of entitlement for survivors, they introduced several provisions that aided a claimant in establishing those criteria. One such provision, BLBA Section 411(c)(4), created the "15-year presumption." 30 U.S.C. § 921(c)(4) (1972). Under that rule, workers who spent at least 15 years in the mines and suffered from a totally disabling respiratory or pulmonary impairment were rebuttably presumed to be totally disabled by pneumoconiosis, to have died due to pneumoconiosis, and to have been totally disabled by the disease at the time of their death. *Id.*

Concerned that the BLBA was still being interpreted "too restrictively[,]" Congress again amended the Act in 1977, further relaxing the eligibility criteria in several ways.[2] *Director, OWCP v. Bethlehem Mines Corp.*, 669 F.2d 187, 190 (4th Cir. 1982). Most importantly for present purposes, the 1977 Amendments added BLBA Section 422(*l*), 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979), which

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(…continued)

86 Stat. 150 (1972), also redesignated Title IV as the Black Lung Benefits Act.

[2] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).

added a third route to survivors' benefits: derivative benefits. As a result, the eligible survivors of a miner who had been awarded disability benefits on a claim filed during his or her lifetime were automatically entitled to survivors' benefits. *See Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988). The survivors of miners who had not been so awarded could still obtain survivors' benefits by proving that the miner's death was caused by pneumoconiosis or that the miner was totally disabled by the disease at the time of death.

In 1981, Congress changed course and significantly tightened the BLBA's eligibility requirements.[3] The 1981 Amendments prospectively eliminated derivative benefits for the survivors of any miner who had not yet filed a claim. *Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 211 n.1 (4th Cir. 1992). Congress achieved this result by adding a final clause to Section 422(*l*), which now provided: "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title 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*

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[3] Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981).

[January 1, 1982]." 30 U.S.C. § 932(*l*) (1982). The 1981 Amendments also eliminated the ability of survivors to secure benefits by proving that a miner was totally disabled at the time of his or her death. Pub. L. 97-119 § 203(a)(4). As a result, survivors could generally only obtain benefits by proving that pneumoconiosis caused a miner's death. 30 U.S.C. § 921(a); 20 C.F.R. § 718.1.[4] In this endeavor, survivors no longer had the aid of the 15-year presumption which, along with two other statutory presumptions, was prospectively eliminated by the 1981 Amendments. Pub. L. 97-119 § 202(b)(1)-(2) (1981).

In 2010, Congress once again recalibrated the BLBA's eligibility requirements by reinstating derivative survivors' benefits and the 15-year presumption. This was accomplished by Section 1556 of the Affordable Care Act, which provides:

> (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 ",

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[4] There was one short-lived exception inapplicable to this appeal. Section 411(c)(5) provides that the eligible survivors of miners who were employed for at least 25 years before June 30, 1971, and died before March 1, 1978, are entitled to benefits "unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis[.]" 30 U.S.C. § 921(c)(5). It does not apply to claims filed after July 1, 1982. *Id*.

> 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 [March 23, 2010].

Pub. L. No. 111-148, § 1556 (2010).

As a result of these amendments, survivors whose claims fall within Section 1556(c)'s effective-date requirements may establish entitlement by showing either (1) that the miner's death was due to pneumoconiosis or (2) that the miner filed a claim during his or her lifetime that results in an award of benefits. Thus, assuming that the BLBA's other conditions of entitlement (such as relationship and dependency) are met, the survivor is entitled to benefits if the miner is awarded benefits. *See* 30 U.S.C. §§ 902, 932(*l*); 20 C.F.R. §§ 725.204; 725.205. In addition, a miner or survivor who filed a claim after January 1, 2005, and whose claim was pending on or after March 23, 2010, may rely on the 15-year presumption in establishing his or her entitlement to benefits, assuming the miner satisfies that presumption's prerequisites.

2. Factual and Procedural History.

Mr. Crawford mined coal in Kentucky for nineteen years. App. 27; Director's Exhibit (DX) 19 at pp. 8-9. He last worked as a coal miner for Shamrock from 1979 until 1982. DX 6, 7. Shortly after leaving the mines, Mr.

Crawford filed a claim for federal black lung benefits. App. 25; DX 1. His claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis. *Id*. After much litigation, the denial of his initial claim was upheld and became final in 1999. App. 26; DX 1.

In 2003, Mr. Crawford filed a second claim for federal black lung benefits, alleging that he was now totally disabled by pneumoconiosis. DX 3; 20 C.F.R. § 725.309(d).[5] A Department of Labor district director agreed and proposed awarding the claim.[6] App. 26; DX 38. Shamrock disagreed and requested a hearing before an administrative law judge. DX 39. While the claim was pending before an ALJ, Mr. Crawford died. DX 56. Mrs. Crawford filed a claim for survivors' benefits on October 20, 2006. App. 26; DX 57. At the private parties' request, the ALJ remanded the miner's claim to the district director for consolidation with the survivor's claim. DX 47 at p. 109. Upon consolidation, the district director proposed awarding the survivor's claim, along with the

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[5] An unsuccessful claimant can file a "subsequent" claim a year or more after the initial claim is denied. 20 C.F.R. § 725.309(d). In addition to proving total disability due to pneumoconiosis, a subsequent claimant must prove, with new evidence, one condition of entitlement resolved against him or her in the previous claim. *Id*.

[6] District directors are authorized by the Department of Labor "to develop and adjudicate claims," and administer the initial stage of a claim for black lung benefits under the Act. 20 C.F.R. §§ 725.101(a)(16), 725.401. The district director's findings are not binding on the ALJ. 20 C.F.R. § 725.455(a).

previously approved miner's claim. App. 26; DX 76, 79. Shamrock requested a hearing on both claims. DX 77.

A formal hearing was held, after which the ALJ ruled that the evidence established that Mr. Crawford was totally disabled by pneumoconiosis. App. 39 n.6. The miner was therefore entitled to benefits from July 2003 until his death. App. 42. Turning to Mrs. Crawford's claim, the ALJ concluded that Mrs. Crawford had failed to prove that pneumoconiosis hastened the miner's death. App. 40-41. Accordingly, he denied her claim. App. 40-41. Shamrock appealed the award of the miner's claim and Mrs. Crawford appealed the denial of the survivor's claim to the Board. App. 15-16.

On March 23, 2010, while the consolidated cases were on appeal, the Affordable Care Act was enacted. During briefing, the parties addressed the ACA's impact on the appeal. *See* Director's Response, filed April 16, 2010; Crawford's Response/Reply, filed April 6, 2010; and Shamrock's Reply, filed May 11, 2010. Both Shamrock and the Director pointed out that the ACA did not impact the outcome of the appeal of the miner's claim because that claim was filed before January 1, 2005. Shamrock argued that the ACA amendments did not apply to the survivor's claim either because the miner's claim was filed before January 1, 2005. The Director and Mrs. Crawford maintained that the amendments were applicable to the survivor's claim because that claim was filed

after January 1, 2005, and pending on March 23, 2010.

On February 25, 2011, the Board affirmed the ALJ's award of the miner's claim, reversed the ALJ's denial of the survivor's claim, and remanded the case to the district director for the entry of an award of benefits. App. 21. On the miner's claim, the Board held that the ALJ properly weighed the evidence in finding that the miner was totally disabled by pneumoconiosis and affirmed the award. App. 19-20. On the survivor's claim, the Board reversed the ALJ's denial "as claimant is derivatively entitled to benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. § 932(*l*), because she filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner has been determined eligible to receive benefits at the time of his death." App. 20-21. The Board therefore ruled that Mrs. Crawford was entitled to survivors' benefits. *Id*.

Relying on its own precedent, the Board rejected Shamrock's argument that the retroactive application of Section 1556 violated the Fifth Amendment's Due Process and Takings Clauses. App. 18 n. 9 (citing *Mathews v. United Pocahontas Coal Co.*, 2010 WL 4035060, 24 Black Lung Rep. (Juris) 1-193 (Ben. Rev. Bd. Sept. 20, 2010), *appeal docketed*, No. 11-1620 (4th Cir. June 9, 2011), and *Stacy v. Olga Coal Co.*, 2010 WL 6809226, 24 Black Lung Rep. (Juris) 1-207 (Ben. Rev. Bd. Dec. 8, 2010), *aff'd sub nom. West Virginia CWP*

Fund v. Stacy, __ F.3d __, 2011 WL 6062116 (4th Cir. Dec. 7, 2011)).[7]

Shamrock moved for reconsideration, which the Board denied. App. 9. Shamrock timely appealed the Board's denial of reconsideration and its decision reversing the ALJ's denial of the survivor's claim to this Court. App. 1.

SUMMARY OF THE ARGUMENT

The Affordable Care Act reinstates derivative survivors' benefits in federal black lung claims that are filed after January 1, 2005, and pending on or after March 23, 2010. Mrs. Crawford filed this claim on October 20, 2006, and it remains pending. The amendment therefore applies to her claim. She is entitled to derivative benefits because her husband was found to be totally disabled by pneumoconiosis in his own claim.

Shamrock's primary argument is that the amendment does not apply to Mrs. Crawford's claim because her husband's claim was filed prior to 2005. The only court of appeals to consider this argument squarely rejected it, and with good

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[7] Shamrock does not challenge Section 1556's constitutionality on this appeal. Two courts of appeals have upheld the constitutionality of the ACA's restoration of derivative survivors' benefits. *B&G Construction Company, Inc. v. Director, OWCP [Campbell]*, __ F.3d __, 2011 WL 5068092 (3d Cir. Oct. 26, 2011); *West Virginia CWP Fund v. Stacy*, __ F.3d __, 2011 WL 6062116 (4th Cir. Dec. 7, 2011). A third court has upheld the ACA's restoration of the 15-year presumption as constitutional. *Keene v. Consolidation Coal Co.*, 645 F.3d 844 (7th Cir. 2011).

reason.[8] It is contrary to the plain language of Section 1556(c), which revives derivative benefits and the 15-year presumption in all "claims" filed after January 1, 2005. Even if Section 1556(c) is regarded as ambiguous, the Director's interpretation of it maintains consistency among Section 1556's subsections, is consistent with the structure and history of the BLBA sections the ACA revives, and is entitled to deference. Shamrock's alternative argument—that a survivor's eligibility for derivative benefits depends on whether or not the miner's claim was resolved during his lifetime—is based entirely on a misreading of the statutory text. Mrs. Crawford is entitled to derivative survivors' benefits, and the Board's decision should be affirmed.

ARGUMENT

1. Standard of Review.

This Court exercises *de novo* review over questions of law, including interpretations of the BLBA. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). As the statute's administrator, the Director's interpretation of the BLBA and its implementing regulations is entitled to deference. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999).

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[8] *West Virginia CWP Fund v. Stacy*, __ F.3d __, 2011 WL 6062116 (4th Cir. Dec. 7, 2011).

2. Section 1556's restoration of derivative survivors' benefits applies to this claim.

Section 1556 revives derivative survivors' benefits for claims that were filed after January 1, 2005, and pending on or after March 23, 2010. Mrs. Crawford's claim was filed on October 20, 2006, and remains pending. The Board accordingly held that the amendment applies to her claim. Shamrock argues that the amendment does not apply to Mrs. Crawford's claim because *her husband's* claim was filed before 2005. Shamrock br. at 8, 13-14. This argument presents a question of statutory construction and therefore the analysis begins with Section 1556's text:

> (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.

Pub. L. No. 111-148, § 1556 (2010).

To risk belaboring the obvious, subsection (c) provides the effective date for both subsections (a) and (b). That date is tied to the filing of a "claim" without any qualifying or limiting language except for the specific effective date.

Under the BLBA and its implementing regulations, both miners and their survivors may file "claims." *See, e.g.*, 30 U.S.C. § 931(a); 20 C.F.R. §§ 718.204(a); 718.205(a). There is no dispute that Mrs. Crawford filed her claim for survivors' benefits on October 20, 2006, or that it was pending on the day the Affordable Care Act was enacted, March 23, 2010. The plain language of Section 1556 thus supports the Board's decision.

Shamrock acknowledges that Section 1556(c) contains no language qualifying or limiting the term "claims," Shamrock br. at 14, and its brief fails to explain away this fact. The analysis need go no further. Indeed, the only court of appeals to consider Shamrock's interpretation of Section 1556(c) squarely rejected it. *Stacy*, 2011 WL 6062116 at *8-9. As the Fourth Circuit explained:

> the definition of 'claim' is not qualified by Section 1556(c). Instead, the plain language of that section requires that amended § 932(*l*) apply to *all* claims filed after January 1, 2005, that are pending on or after March 23, 2010. Because Congress used the term 'claims' without any qualifying language, and because both miners and their survivors may file claims under the BLBA, the plain language supports the Director's position that amended § 932(*l*) applies to survivors' claims that comply with Section 1556(c)'s effective date requirements.

Id. at *8 (citations omitted). Even if Section 1556(c) is susceptible to two interpretations—the Director's interpretation, that "claims" means "claims," or Shamrock's interpretation, that "claims" means "miners' claims"—the Director's interpretation of Section 1556(c) should be adopted because it maintains

consistency within Section 1556's three subsections, is supported by the history of Section 422(*l*), is supported by Section 1556's legislative history, and is entitled to deference.

a. The Director's interpretation maintains consistency within Section 1556.

The Director's reading has the virtue of maintaining consistency among Section 1556's three subsections. Section 1556(a) reinstates BLBA Section 411(c)(4)'s 15-year presumption, which explicitly applies to both miners' claims and survivors' claims.[9] Thus, the word "claims" in Section 1556(c)—which provides the effective date for subsection (b) as well—must refer to both types of claims.

In Shamrock's view, however, giving Section 1556(c) a consistent meaning vis-à-vis subsections (a) and (b) is unimportant. Instead, Shamrock reads the word "claims" in Section 1556(c) as having a different meaning with regard to each subsection. In the context of Section 1556(a)'s reinstatement of the 15-year presumption, Shamrock agrees that the word "claims" in 1556(c) means all kinds of claims. Shamrock br. at 15. But in the context of Section 1556(b)'s

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[9] BLBA Section 411(c)(4) applies to a "miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this title[.]" 30 U.S.C. § 921(c)(4).

reinstatement of derivative survivor's benefits, the word has a different meaning, "miners' claims." Thus, in Shamrock's view, Section 1556(a)'s restoration of the 15-year presumption applies to Mrs. Crawford's claim, but Section 1556(b)'s reinstatement of derivative survivors' benefits would not apply to that same claim—despite the fact that 1556(a) and (b) are governed by the same effective date provision, Section 1556(c).

Nothing in Section 1556's text supports such a strained construction of the word "claims," as the Fourth Circuit correctly observed in rejecting a nearly identical argument:

> [T]he Director's interpretation, unlike petitioner's proposed reading, maintains consistency within Section 1556. The 15-year presumption, as reinstated by Section 1556(a), explicitly applies to both miners' and survivors' claims. In the context of Section 1556(a), petitioner conceded, the word 'claims' in Section 1556(c) refers to all kinds of claims. However, in the context of Section 1556(b), petitioner argues that the very same word only refers to miners' claims. In contrast to petitioner's tortured reading, the Director's interpretation allows the word "claims" to mean the same thing—*all* claims—throughout Section 1556.

Stacy, 2011 WL 6062116 at *9. This Court should likewise reject this tortured interpretation of Section 1556(c).

b. The Director's interpretation is supported by the history of Section 422(*l*).

Shamrock argues that its counterintuitive reading of Section 1556(c) is mandated by the text of Section 422(*l*), which originally provided: "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*) (1976 & Supp. III 1979). The 1981 Amendments inserted a final limiting clause: "except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981." 30 U.S.C. § 932(*l*) (1982). Shamrock correctly points out that this limitation was interpreted to apply only to miners' claims filed after the 1981 Amendments, and not to claims filed by the survivors of miners who were awarded lifetime benefits based on pre-1981 claims. Shamrock br. at 14 (*citing Smith v. Cam[c]o Mi[ning,] Inc.*, 13 BLR 1-17 (1989)); *see generally Pothering*, 861 F.2d at 1327. But the conclusion Shamrock tries to draw from this history—that the effective date of Section 1556's revocation of the 1981 Amendments must also be keyed to the date a miner's claim is filed—simply does not follow.

The original text of Section 422(*l*) referred to only one species of claim – "the claim of such miner[.]" 30 U.S.C. § 932(*l*) (1976 & Supp. III 1979). It was therefore natural to conclude that the word "claim" in the limiting clause inserted

into that section by the 1981 Amendments also referred only to miners' claims.[10] Section 1556 is quite different. It does not insert the word "claim"—or any other word—into Section 422(*l*). It merely deletes text from Sections 422(*l*) and 411(c)(4). The word "claims" appears only in Section 1556(c), which, as described above, specifies the category of claims to which both deletions apply, suggesting that the word should be given the only consistent meaning it could have, *i.e.*, "miners' or survivors' claims."

The 1981 Amendments provides a clear model of what Congress could have done—but chose not to do—in Section 1556. If Congress had wished to reinstate derivative survivors' benefits only for the survivors of miners who were awarded lifetime benefits on claims filed after 2004, the most natural thing would be to do what it did in 1981. Section 422(*l*) could have easily been amended to read ". . . except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981 and on or before January 1, 2005." But Congress did not choose that option, instead deciding to

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[10] In addition, this interpretation of the 1981 Amendments was strongly supported by their legislative history. *Pothering*, 861 F.2d at 1327 ("Survivors of those miners who are currently [sic] receiving benefits, or who have filed for them, will not be affected by this change. These survivors will receive benefits even if the miner eventually dies from causes unrelated to black lung.") (quoting 127 Cong. Rec. 29932). Section 1556's limited legislative history points in the opposite direction. *See infra* at 22-23.

write one single effective date clause, Section 1556(c), applicable to the reinstatement of both the 15-year presumption and derivative survivors' benefits. The Director's interpretation gives meaning to this choice.

Shamrock presents a related argument based on Section 422(*l*)'s text. Because Section 422(*l*) ostensibly relieves the survivors of miners who were awarded benefits from the obligation to file claims, the argument goes, Congress could not have intended to tie the date on which Section 422(*l*) is revived to the date a survivor's claim is filed. Shamrock br. at 11, 15. But, as the Fourth Circuit recently held, "it does not contravene the plain language of amended § 932(*l*) to determine the applicability of Section 1556(c) based on the date of a survivor's claim." *Stacy*, 2011 WL 6062116 at *9. At the time Section 1556 was enacted, the only way a survivor could obtain benefits was to file a claim.[11] Section 1556(c) should be interpreted with reference to the black lung program as it existed in 2010 rather than 1981, particularly in light of Congress' decision not to follow the example of the 1981 Amendments. And, of course, nothing in either Section 1556 or Section 422(*l*) can undermine the fact that Mrs. Crawford

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[11] This is even true for the survivors of miners awarded lifetime benefits because they suffer from complicated pneumoconiosis, a diagnosis that carries with it an irrebuttable presumption that the miner's eligible survivors are entitled to benefits. *See* 30 U.S.C. § 921(c)(3).

actually filed this claim in 2006.

Nor does Section 422(*l*) forbid a survivor from filing a claim. To the contrary, Section 422(*l*)'s limitation of derivative survivors' benefits to "eligible survivors" suggests that the survivor claimant must prove—and the responsible operator must have an opportunity to contest—his or her eligibility.[12] Disputes over these issues could only be resolved in the claims process or something functionally identical to it. *See Pothering*, 861 F.2d at 1328 n.13 (Section 422(*l*) 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."); *Stacy*, 2011 WL 6062116 at *9 ("Amended § 932(*l*) relieves eligible survivors of the obligation of proving that a miner died from pneumoconiosis; it does not *prohibit* survivors from filing a claim.").

c. The Director's interpretation is supported by Section 1556's legislative history.

Section 1556's legislative history, while scanty, directly supports the Director's interpretation of the provision. Senator Robert Byrd, who sponsored Section 1556**,** explained that amended Sections 411(c)(4) and 422(*l*) were meant to apply to "*all claims* filed after January 1, 2005, that are pending on or after the

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[12] *See, e.g.*, 30 U.S.C. § 902(a), (e), (g); 20 C.F.R. §§ 725.204; 725.205.

date of enactment of that act." 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd) (emphasis added). He added that Section 1556 "applies immediately to all pending claims, including claims that were finally awarded or denied prior to the date of enactment of the [ACA]." *Id.*

The Director does not disagree with the oft-quoted adage that "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Elec. Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). However, given the dearth of prior history, Senator Byrd's comments were considered by the Third Circuit in *Campbell*. 2011 WL 5068092 at *13 ("Though Senator Byrd made his comments about section 1556 after Congress passed the amendment, we think his statement is nevertheless significant inasmuch as he was the sponsor of section 1556, a single amendment in a complex bill of great length.") (citations omitted). If the Court finds Section 1556 to be ambiguous, Senator Byrd's statement—made almost immediately after its passage—is worthy of at least some weight in ascertaining its meaning.

d. The Director's interpretation is entitled to deference.

As the administrator of the BLBA, the Director's interpretation of its ambiguous provisions is entitled to deference. *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994) ("the Secretary of Labor's interpretation of the

provisions of the Black Lung Act is entitled to deference."). The fact that the Director's position is advanced in litigation does not undermine his claim to deference. *See v. WMATA*, 36 F.3d 375, 383 (4th Cir. 1994) ("The position advocated in the Director's brief, which represents a reasonable interpretation of an ambiguous or silent statutory provision by the agency charged with administering that law, is entitled to judicial deference."); *cf. Metropolitan Stevedores Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). The Supreme Court has explained that deference is owed to an agency's interpretation of a statute it administers:

> The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

United States v. Mead, 533 U.S. 218, 227-28 (2001) (internal quotation marks and citations omitted).[13]

Shamrock asserts that deference is not appropriate here because the

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[13] In these circumstances, the Director's position is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Department intends to promulgate regulations implementing the 2010 Amendments, which will be entitled to such deference. *See* Department of Labor Semiannual Regulatory Agenda at 8 (Dec. 20, 2010), available at http://www.dol.gov/asp/regs/unifiedagenda/fall_2010_agenda.pdf.

Director's position is inconsistent with the BLBA's plain language. Shamrock br. at 11-12. In particular, Shamrock contends that the Director's interpretation of Section 1556 "abrogate[s] the long-standing policy and stated purpose of the Act '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.'" Shamrock br. at 11-12 (quoting BLBA Section 401(a), 30 U.S.C. § 901(a)) (emphasis deleted). Shamrock argues that the Director's interpretation is similarly inconsistent with BLBA Sections 411(a) and 412(a)(2), 33 U.S.C. §§ 921(a) and 922(a)(2), which require survivors to prove that the miner's "death was due to pneumoconiosis" for claims filed after the effective date of the 1981 amendments. Shamrock br. at 12.

As an initial matter, this argument has nothing to do with the meaning of Section 1556(c)'s effective date language. It is an attack on Section 422(*l*)'s provision for derivative survivors' benefits, full stop. It is not clear that there is any conflict between Section 422(*l*) and Section 401's general statement of purpose.[14] But there is an undeniable tension between Section 422(*l*), as revived,

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[14] As the Third Circuit explained, providing derivative survivors' benefits "unquestionably will further Congress' goal of 'ensur[ing] that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.'" *Campbell*, 2011 WL 5068092 at *20 (quoting 30 U.S.C. § 901(a)).

and Sections 411(a) and 412(a)(2). The latter provisions were, like Section 422(*l*), amended in 1981 to clarify that derivative survivors' benefits no longer applied to post-1981 claims. In 2010, when Congress restored derivative benefits in Section 1556 by reinstating Section 422(*l*), it did not revise the other sections that had been amended in 1981, resulting in the conflicting language.

While "repeals by implication are not favored in the law, they are allowed . . . (1) Where provisions in the two acts are in irreconcilable conflict, . . . and (2) If the later act covers the whole subject of the earlier one and is clearly intended as a substitute[.]" *Gallenstein v. United States*, 975 F.2d 286, 291 (6th Cir. 1992). If such a conflict exits, the later act controls. *Id.* Both grounds for implied repeal exist here. Section 422(*l*), as revived in 2010, provides for derivative survivors' benefits; Sections 411(a) and 412(a)(2), as amended in 1981, purport to limit survivors' benefits only to cases where the miner's death was caused by pneumoconiosis. Moreover, the only purpose Congress could have had in restoring Section 422(*l*) is to allow for derivative survivors' benefits: survivors could already secure benefits by proving that a miner died due to the disease. Unless Section 1556(b) is understood to repeal conflicting language in other sections of the BLBA by implication, it will have no effect at all.

Both the Third and Fourth Circuits have agreed with the Director that Section 1556(b)'s restoration of derivative survivors' benefits, as Congress' most

recent enactment, trumps conflicting language in un-amended provisions. *See Campbell*, 2011 WL 5068092 at *14 ("[W]e are constrained to hold section 1556, as Congress' latest legislation on the subject of survivors' benefits, negates any language suggesting that an eligible survivor of a miner who was eligible to receive benefits at the time of his death must file a new claim in order to prove that the miner's death was due to the effects of pneumoconiosis."); *Stacy*, 2011 WL 6062116 at *11 ("To the extent that § [401, 421(a), and 422(a)(2)] require . . . a survivor to prove that pneumoconiosis caused the miner's death in order to receive benefits, § [422(*l*)]—as the most recent amendment to the BLBA—overrides the conflicting language[.]") (citation and internal quotation marks omitted).[15] Shamrock has offered no argument that undercuts this reasoning.

Because Mrs. Crawford filed her claim after January 1, 2005, and because it was pending on and after March 23, 2010, BLBA Section 422(*l*), as revived by ACA Section 1556, applies to her claim. She is therefore entitled to survivors' benefits without needing to prove that pneumoconiosis caused or hastened her husband's death.

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[15] The *Stacy* decision's well-reasoned analysis of implied repeal is dicta because the court found that the petitioner had waived the argument. *Stacy*, 2011 WL 6062116 at *9-11.

3. A survivor's eligibility for derivative benefits pursuant to Section 422(*l*) is not dependent on the date the award of the miner's claim becomes final.

In passing, Shamrock suggests that Mrs. Crawford is not entitled to derivative survivors' benefits because her husband "was not receiving benefits from a final award at the time of his death[.]" Shamrock br. at 11. This is based on a misreading of Section 422(*l*), which applies to the eligible survivors of "a miner who was determined to be eligible to receive benefits under this title at the time of his or her death[.]" 30 U.S.C. § 932(*l*). Shamrock apparently interprets this provision as if it read "a miner who was determined, at the time of his or her death, to be eligible for benefits under this title." But that is simply not what Section 422(*l*) says. The trigger for eligibility is whether it is determined—at any time—that the miner was eligible for benefits at the time of his or her death. The provision says nothing at all about *when* the miner's eligibility determination must be adjudicated.[16]

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[16] To the extent that Shamrock argues that the Board's award of survivors' benefits to Mrs. Crawford was premature because her husband's "award was not final," Shamrock br. at 11, that argument is now moot. Shamrock did not appeal Mr. Crawford's award of disability benefits to this Court, and its Petition for Review specifically states that it is challenging the Board's decision to reverse the ALJ's denial of Mrs. Crawford's survivor's claim. App. 1. Nor has Shamrock alleged any error in its opening brief in the Board's affirmance of the ALJ's determination that Mr. Crawford was totally disabled due to pneumoconiosis and thus eligible for lifetime disability benefits. Shamrock has therefore waived any

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A miner's right to BLBA benefits does not expire at death; his dependent or legal representative has the right to pursue the miner's lifetime claim to collect the payments owed to the miner prior to his death. 20 C.F.R. § 725.545(c). The contrary view would set up a perverse incentive for employers to delay proceedings in the hope that the miner might pass away before a final award is issued. *See Youghiogheny & Ohio Coal Co. v. Webb III*, 49 F.3d 244, 248-49 (6th Cir. 1995) ("Indeed, the coal mining companies would effectively frustrate the purpose of the Act if they were able to avoid making the payments owed to a disabled miner simply because he died before receiving payment in full."). Mr. Crawford's claim, filed during his lifetime, was properly adjudicated after his death. He was awarded benefits, as a miner totally disabled by pneumoconiosis, from July 2003 until his death. App. 42. Mrs. Crawford is therefore automatically entitled to survivors' benefits by operation of Section 422(*l*), as reinstated by Section 1556.

At the end of its brief, Shamrock further muddies the waters by claiming that the Board improperly "modified" the ALJ's denial of Mrs. Crawford's claim based on the new amendments because "[m]odification … is directed to

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(…continued)

challenge to the miner's award. *See* Fed. R. App. P. 28; *Brindley v. McCullen*, 61 F.3d 507, 509 (6th Cir.1995).

reviewing factual errors … and cannot be based on a change of law." Shamrock br. at 15. Shamrock is referring to the statute's modification procedure, which allows a party to request that an otherwise finally decided benefits claim be reopened. 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a). It was not modification, but the general rule that "[a]n appellate court must apply the law in effect at the time it renders its decision" that dictated the Board's action. *See Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 525 (1969). Section 1556(c) itself compels the conclusion that the ACA's amendments to the BLBA apply to pending claims. The Board correctly applied amended Section 422(*l*) and reversed the ALJ's denial of Mrs. Crawford's claim as contrary to law.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the Board's holding that Phyllis Crawford is entitled to derivative survivors' benefits pursuant to amended Section 422(*l*).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,021 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

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