No. 10-4179

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

B & G CONSTRUCTION CO., INC., and STATE WORKERS' INSURANCE FUND,
Petitioner

v.

NORMA G. CAMPBELL, WIDOW OF ERNEST J. CAMPBELL and 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

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
SEAN G. BAJKOWSKI
Counsel for Appellate Litigation
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

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Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

INTRODUCTION

Ernest J. Campbell, husband of Norma G. Campbell, worked as a miner for B&G Construction Co., Inc., for over 16 years. (Appendix volume 2 "App. II" 249). In 2000, he was found to be totally disabled by coal workers' pneumoconiosis and awarded federal black lung benefits. (App. III 296, 362). After his death, Mrs. Campbell's claim for survivors' benefits was denied because an administrative law judge found that she had failed to prove that pneumoconiosis caused her husband's death. While her appeal was pending before the Department of Labor's ("DOL") Benefits Review Board ("the Board"), Congress amended the Black Lung Benefits Act to provide that certain eligible survivors of miners who were awarded black lung benefits are automatically entitled to survivors' benefits. Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, § 1556 (2010). The Board, applying this amendment, awarded benefits to Mrs. Campbell. B&G Construction Co., Inc., and its insurance carrier, the State Workers' Insurance Fund of Pennsylvania (collectively, "B&G"), now petition this Court to review the Board's final order.

STATEMENT OF JURISDICTION

Mrs. Campbell filed this claim for federal black lung survivors' benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-944 ("BLBA"), on February 16, 2006. (App. II 252). Administrative Law Judge Daniel L. Leland ("the ALJ") denied Mrs. Campbell's claim on January 16, 2008. (App. III 294). Mrs. Campbell timely appealed the ALJ's decision to the Board on January 28, 2008. (App. III 302). *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (thirty-day period for appealing ALJ decisions to the Board). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated. On January 29, 2009, the Board vacated the ALJ's decision and remanded the case. (App. III 323).

On remand, the ALJ denied benefits on June 17, 2009. (App. III 334). Mrs. Campbell filed a timely notice of appeal on July 2, 2009. (App. III 342). *See* 33 U.S.C. § 921(a), as incorporated. The Board reversed the denial of benefits on August 30, 2010. (App. I 8).

The Court docketed B&G's timely petition for review of the Board's decision on October 27, 2010. *See* 33 U.S.C. § 921(c), as

incorporated (sixty-day period for seeking review after final decision of the Board). The Court has jurisdiction over B&G's petition under 33 U.S.C. § 921(c), as incorporated, as the injury in this case occurred in Pennsylvania.

STATEMENT OF THE ISSUE

Prior to 1982, the Black Lung Benefits Act provided for derivative survivors' benefits; that is, the widow of a miner who had been awarded benefits during his lifetime was automatically entitled to survivors' benefits when he died. Congress amended the BLBA to eliminate derivative survivors' benefits for miners' claims filed after January 1, 1982, after which surviving dependents were generally entitled to benefits only after proving that pneumoconiosis caused the miner's death. In 2010, Congress again amended the BLBA and restored derivative survivors' benefits for certain claims. Mrs. Campbell was awarded survivors' benefits under this provision. The questions presented are:

(1) Does the award violate the Fifth Amendment's Due Process Clause?

(2) Does the award violate the Fifth Amendment's Takings Clause?

STATEMENT OF THE CASE

Ernest J. Campbell, husband of Norma G. Campbell, worked as a miner for B&G for over 16 years. (App. II 249). In 2000, he was found to be totally disabled by coal workers' pneumoconiosis and awarded federal black lung benefits. (App. III 296, 362). After he passed away on April 4, 2005, Mrs. Campbell timely filed this claim for federal black lung survivors' benefits. (App. II 237). B&G timely controverted the claim.[1] (App. II 100). The district director recommended an award, finding that coal workers' pneumoconiosis had contributed to Mr. Campbell's death. (App. II 71).[2] B&G timely requested a formal hearing before an administrative law judge. (App. II 67).

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[1] B&G conceded that it was responsible for any benefits awarded to Mrs. Campbell because it is the coal mine operator that most recently employed her husband for a period of at least one year. (App. II 50); *see* 20 C.F.R. §§ 725.491, 725.494-.495.

[2] The district director is authorized "to develop and adjudicate claims" under the BLBA. 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).

The ALJ heard Mrs. Campbell's claim on November 7, 2007, then issued his January 16, 2008, decision denying benefits. (App. III 294). The ALJ held that Mrs. Campbell had not established that coal workers' pneumoconiosis contributed to her husband's death. On Mrs. Campbell's appeal, the Board vacated Judge Leland's decision and remanded the case. (App. III 323). On remand, Judge Leland again denied benefits in a decision dated June 17, 2009. (App. III 334). Mrs. Campbell appealed to the Board a second time.

While this appeal was pending, Congress amended the BLBA to restore the derivative survivors' benefits provision, section 422(l), for all claims filed after January 1, 2005, and pending on or after March 23, 2010. Pub. L. No. 111-148, § 1556(b) (2010). On August 30, 2010, the Board reversed the ALJ's denial of benefits and held that Mrs. Campbell is derivatively entitled to survivors' benefits because her husband was receiving federal black lung benefits under a final award at the time of his death. (App. I 8). B&G has now petitioned this Court to review the decisions below. (App. I 1).

STATEMENT OF THE FACTS

A. Derivative Survivors' Benefits - Statutory Background

The Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(h), 92 Stat. 95, 100 (1978), added section 422(l) to the BLBA. In order to prevent the BLBA from "impos[ing] a heavy burden of proof on claimants generally and widows in particular," section 422(l) provided for derivative survivors' benefits, *i.e.*, it allowed eligible survivors to establish their entitlement to benefits based solely on the fact that the miner had been awarded benefits during his lifetime. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988); *see also* 30 U.S.C. § 932(l) (1978); S. Rep. No. 95-209, 95th Cong., 1st Sess. at 18 (1977). Thus, section 422(l) provided: "[i]n 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) (1978).

The Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, § 203(a)(6), 95 Stat. 1635, 1644 (1981) (the "1981 Amendments"), eliminated derivative survivors' entitlement for

claims filed on or after January 1, 1982. *Pothering*, 861 F.2d at 1327. Congress achieved this result by adding to section 422(l) language stating that the provision applied "expect 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). As a result, in the case of a miner who filed his lifetime claim on or after January 1, 1982, the 1981 Amendments prohibited his dependent survivors from automatically obtaining benefits based on the miner's award. Instead, those survivors could generally establish their entitlement to benefits only by demonstrating that the miner died due to pneumoconiosis.[3] *Mancia v. Director, OWCP*, 130 F.3d 579, 584 n.6 (3d Cir. 1997); *see also* 20 C.F.R. §§ 718.1(a), 718.205(a), (c). This showing could by made by direct evidence of death causation or by proving that the miner suffered from complicated pneumoconiosis, thereby invoking an irrebuttable statutory presumption of death causation under section 411(c)(3) of

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[3] Until June 30, 1982, a limited category of survivors were entitled to benefits unless it was established that the miner was not disabled (either totally or partially) by pneumoconiosis at the time of his death. 30 U.S.C. § 921(c)(5); 20 C.F.R. §§ 718.1(a), 718.306. *See* n. 9, *infra*.

the BLBA, 30 U.S.C. § 921(c)(3). *See* 20 C.F.R. §§ 718.205(c)(3), 718.304.

Section 1556(b) of the PPACA amended the BLBA by deleting the limiting final clause of section 422(l) inserted by the 1981 Amendments. 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) (2006), amended by Pub. L. No. 111-148, § 1556, 124 Stat. 119 (2010). The amended section applies to claims, such as Mrs. Campbell's, filed after January 1, 2005, and pending on or after March 23, 2010, the PPACA's 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).[4]

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[4] The PPACA also reinstated section 411(c)(4)'s "15-year presumption" which may be invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines in conditions "substantially similar to conditions (cont'd . . .)

B. Decisions Below

1. Judge Leland's First Decision

Judge Leland found that the miner was employed as a bulldozer operator in coal mines from 1970-1987. (App. III 296). B&G did not contest that Mrs. Campbell qualified as a dependent survivor under the BLBA, and its own medical expert conceded that Mr. Campbell suffered from coal workers' pneumoconiosis. (App. II 50, App. III 258, 297). As a result, the only issue Judge Leland considered was whether the disease caused or hastened the miner's death. The two medical experts who addressed that issue provided conflicting opinions. Dr. Evanko, the miner's treating physician, stated that pneumoconiosis caused hypoxemia (decreased oxygen

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(. . . cont'd)
in an underground mine" and (2) suffered from "a totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If those criteria are met, a miner is entitled to a rebuttable presumption that he "is totally disabled by pneumoconiosis" and his survivors are entitled to a rebuttable presumption "that his death was due to pneumoconiosis[.]" *Id.* In view of Mr. Campbell's roughly 17 years of coal mine employment, this rebuttable presumption of death causation may be applicable to Mrs. Campbell's claim. (App. III 296). As a practical matter, it is irrelevant. By operation of section 422(l), she is entitled to survivors' benefits without needing to prove that pneumoconiosis caused her husband's death.

levels in the blood), which in turn hastened the miner's death from myelodysplasia (which decreases the production of oxygen-carrying red blood cells). (App. III 257). Dr. Fino, B&G's medical expert, found no evidence that the miner's death was caused, contributed to, or hastened by his inhalation of coal mine dust. (App. III 268). The ALJ denied Mrs. Campbell's claim, concluding that the opinion of Dr. Fino, a pulmonary specialist, was worthy of more weight than Dr. Evanko's "inexpert" opinion. (App. III 299).

2. The Board's First Decision

On Mrs. Campbell's appeal, the Board vacated Judge Leland's denial and remanded the case for further consideration. (App. III 323). The Board held that the ALJ erred in crediting Dr. Fino's opinion solely on the basis of his credentials without considering whether his opinion was reasoned and documented. (App. III 328). In addition, the Board held that the ALJ had failed to discuss relevant evidence in the record; in particular, hospital treatment records indicating that the miner had received treatment for COPD and acute respiratory distress. (App. III 329). The Board therefore remanded the case for Judge Leland to correct these defects.

3. Judge Leland's Second Opinion

On remand, Judge Leland found that neither Dr. Evanko's opinion nor Dr. Fino's opinion was well-reasoned or well-documented. (App. III 337-338). He therefore gave little weight to either doctor. *Id.* Concluding that Mrs. Campbell did not satisfy her burden to establish that pneumoconiosis had caused, contributed to, or hastened the miner's death, Judge Leland denied benefits. (App. III 338).

4. The Board's Second Decision

Mrs. Campbell again appealed to the Board. While her appeal was pending, Congress amended section 422(l) to restore derivative survivors' benefits. In response to the Board's request for supplemental briefing addressing the impact of this amendment, Mrs. Campbell and the Director argued that amended section 422(l) mandates an award of survivors' benefits in this case. (App. III 382, 388). B&G argued that amended section 422(l) provides only a rebuttable presumption of death due to pneumoconiosis, and that the case should be remanded to Judge Leland to determine whether B&G rebutted the presumption. (App. III 395). Rejecting B&G's contention, the Board held that:

> Based on our review of the recent amendments to the Act, we agree with the Director and claimant that claimant is derivatively entitled to survivors' benefits pursuant to Section 422(l) of the Act, 30 U.S.C. § 932(l), *amended by* Pub. L. No. 111-148, § 1556(b) (2010), as her claim was filed after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award on his claim at the time of his death. We need not consider, therefore, any allegations of error regarding the administrative law judge's findings under Section 718.205(c).

(App. I 10). Accordingly, the Board reversed the denial and awarded survivors' benefits to Mrs. Campbell. B&G then petitioned this Court to review the Board's decision, alleging that amended section 422(l) violates the Fifth Amendment's Due Process and Takings clauses. (App. I 1).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. One case pending before the Court presents similar issues: *ITEC and State Workers' Insurance Fund v. Shirley A. Benamati and Director, OWCP*, No. 10-3126.

SUMMARY OF THE ARGUMENT

Contrary to B&G's argument, the PPACA's reinstatement of derivative survivors' benefits in section 422(l) does not violate the

Due Process Clause. It does not create an impermissible irrebuttable presumption that Mr. Campbell's death was caused by pneumoconiosis, but simply provides that Mrs. Campbell is entitled to survivors' benefits because her husband was found to be totally disabled by the disease during his lifetime. The Supreme Court has already held that survivors' benefits are not intended solely as compensation for a miner's death, but as deferred compensation for the suffering endured by his dependents as a result of his illness. Amended section 422(l) sensibly allocates these costs, easily satisfying the Due Process Clause's minimum rationality standard.

B&G also argues that amended section 422(l) violates the Takings Clause because it will impose substantial costs on the coal industry. B&G offers no credible evidence to support its inflated projection of the costs this amendment will impose. In any event, these costs do not constitute a taking because they are proportionate to the incidence of pneumoconiosis among B&G's former employees and did not interfere with B&G's reasonable expectations. The Board's award of benefits to Mrs. Campbell should be affirmed.

ARGUMENT

A. Standard of Review

The issues addressed in this brief present questions of law which "are subject to plenary review by this Court." *Lombardy v. Director, OWCP*, 355 F.3d 211, 213 (3d Cir. 2004) (citations omitted).

B. Amended Section 422(l) Does Not Violate the Due Process Clause.

B&G bears a heavy burden in challenging section 422(l) on due process grounds.[5] "It is by now well-established 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)

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[5] B&G alleges a violation of its Fourteenth Amendment due process rights. *See, e.g.*, Pet. Br. 2. We assume that B&G intends to rely only on the Due Process Clause of the Fifth Amendment, which applies to actions of the federal government, and not the Fourteenth Amendment, which "applies only to acts under color of state law." *Lang v. Colonial Pipeline Co.*, 266 F. Supp. 552, 555 (E.D. Pa 1967), *aff'd* 383 F.2d 986 (3d Cir. 1967).

(upholding the BLBA against facial due process challenges because it is "justified as a rational measure to spread the costs of the employees' disabilities to those who benefited from the fruits of their labor"). Thus, B&G must overcome "a strong presumption of validity[.]" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). "[This Court has] made clear that when 'general economic and social welfare legislation' is alleged to violate substantive due process, it should be struck down only when it fails to meet a minimum rationality standard, an 'extremely difficult' standard for a plaintiff to meet." *Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1998) (quoting *Knight v. Tape, Inc.*, 935 F.2d 617, 627 (3d Cir. 1991)).

B&G's lead argument is that amended section 422(l) creates an "irrebuttable presumption" eliminating B&G's "opportunity to introduce evidence that [Mr. Campbell's] death was not, in fact, caused by pneumoconiosis, although he may have been receiving benefits at the time of his death." (Pet. Br. 27-31). According to B&G, this presumption violates its due process right to present evidence as to the cause of Mr. Campbell's death because the BLBA "was not intended to compensate survivors of miners based solely

on the fact that the decedent had pneumoconiosis; the stated purpose is to provide benefits to survivors whose decedent's death was *caused by pneumoconiosis.*" (Pet. Br. 31).

As an initial matter, the word "presumption" appears nowhere in section 422(l), in contrast to a number of other BLBA provisions that explicitly use the term.[6] It simply provides that certain dependent survivors are entitled to benefits if a deceased miner successfully proved that he was totally disabled by pneumoconiosis during his lifetime. This is a substantive rule of law, not an evidentiary presumption.

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[6] This Court has described the effect of the 1981 Amendments in language recognizing the distinction between section 422(l) and the BLBA's explicit presumptions:

> The amendments were viewed as a limiting measure; three of the *presumptions* of entitlement based on the duration of coal miner employment were deleted, *the provision allowing survivors to collect compensation if the coal miner, although he suffered from pneumoconiosis prior to death, died from an unrelated cause was repealed,* and the requirement that the Department of Labor accept a minimally qualified radiologist's positive diagnosis of pneumoconiosis was removed.

Bonessa v. United States Steel Corp., 884 F.2d 726, 727 (3d Cir. 1989) (emphasis added).

B&G imaginatively recasts section 422(l) as an irrebuttable presumption of death causation in order to take advantage of a series of Supreme Court decisions that, according to B&G, stand for the proposition that "irrebuttable presumptions have long been disfavored under the Due Process Clauses[.]" Pet. Br. 27-30. The entire exercise is pointless. It takes no great effort to recharacterize many irrebuttable presumptions as substantive rules and vice versa. This insight led the Supreme Court to recognize – after examining the entire line of "irrebuttable presumption doctrine" cases B&G relies upon – that irrebuttable presumptions do not implicate procedural due process as such. *Michael H. v. Gerald D.*, 491 U.S. 110, 119-121 (1991); *accord*, *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980). As a result, even explicit irrebuttable presumptions are evaluated under the same substantive due process standards that apply to any other statutory categorization. *Malmed*, 621 F.2d at 575-76. In this case, that standard is "minimum rationality" – a test amended section 422(l) easily satisfies. *Stern* 158 F.3d at 731 (quotation omitted).

B&G's substantive due process argument faces another serious hurdle in the form of the Supreme Court's *Turner Elkhorn*

decision. In that case, the Court considered due process challenges to a number of BLBA provisions, including section 411(c)(3). Unlike section 422(l), section 411(c)(3) explicitly purports to establish irrebuttable presumptions: if a miner suffers from complicated pneumoconiosis, a particular form of the disease, "there shall be [1] an irrebuttable presumption that he is totally disabled due to pneumoconiosis or [2] that his death was due to pneumoconiosis, or [3] that at the time of his death he was totally disabled by pneumoconiosis[.]" 30 U.S.C. § 921(c)(3).[7] Relying on many of the cases cited in B&G's brief, a district court ruled that section 411(c)(3) violated the due process clause because it "forecloses all

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[7] The third presumption was relevant because, prior to the Black Lung Benefits Amendments of 1981, "survivors could receive benefits, not only if the miner died due to pneumoconiosis, but also if during his lifetime he was disabled from pneumoconiosis and then dies from an unrelated cause." *Bonessa,* 884 F.2d at 728. This was true even for the survivors of miners who were not awarded benefits in claims filed during their lifetimes. *Id.*; *see also Pothering*, 861 F.2d at 1327; 30 U.S.C. § 921(c)(4) (1978). This path to entitlement was not restored by the PPACA; a survivor is only entitled to benefits by proving that the miner was awarded benefits on a claim filed during his lifetime or that the miner's death was caused by pneumoconiosis.

fact finding as to the effect of that disease upon a particular coal miner[.]" 428 U.S. at 22.

The Supreme Court reversed. The Court began its analysis by clarifying that section 411(c)(3)'s use of the term "irrebuttable presumption" was a red herring because, "[a]s an operational matter," the effect of this presumption was "simply to establish entitlement in the case of a miner" suffering from complicated pneumoconiosis. *Id.* Observing that a provision directly providing that all miners suffering from complicated pneumoconiosis are entitled to black lung benefits would be "clearly permissible" under the due process clause, the Court upheld section 411(c)(3)'s presumption of total disability due to pneumoconiosis despite "Congress' choice of statutory language[.]" *Id.* at 13- 24.

Turning to section 411(c)(3)'s presumption of death causation, the Court framed the potential due process issue in terms that could have been lifted from B&G's brief in this case:

> To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties . . . . The damage resulting from a miner's death

> that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business.

Id. at 24-25. The Court concluded, however, that section 411(c)(3) presented no such difficulties because the premise of this hypothetical argument is false:

> We think it clear, however, that the benefits authorized by § 411(c)(3)'s presumption of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's death, *but as deferred compensation for injury suffered during the miner's lifetime as the result of his illness itself*.
> . . .
> In the case of a miner who died with, but not from, pneumoconiosis, before the Act was passed, *the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness*.

Id. (emphasis added).

Turner Elkhorn wholly undermines B&G's argument that amended section 422(l) violates the due process clause by allowing for the possibility of survivors' awards where the miner did not die due to pneumoconiosis.[8] In upholding section 411(c)(3), the Court

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[8] In addition to overlooking *Turner Elkhorn*, B&G's argument that section 422(l) impermissibly conflicts with the Act's general (cont'd . . .)

upheld Congress's decision to award benefits – retroactively – to certain surviving dependents of miners who may or may not have died from pneumoconiosis.[9] In restoring derivative survivors' entitlement in amended section 422(l), Congress made an equally

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(. . . cont'd)
statement of purpose, 30 U.S.C. § 901(a), overlooks two basic cannons of statutory construction. First, a statute's specific terms trump a general statement of purpose. *See*, *e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1559 (Fed. Cir. 1993). Second, as Congress' most recent enactment, amended section 422(l) controls. *See*, *e.g.*, *U.S. v. Posadas*, 296 U.S. 497, 503 (1936) ("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[.]"). *See also* 1A Norman A. Singer, *Southerland 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.").

[9] This is not the only circumstance where Congress has provided for survivors' benefits in situations where pneumoconiosis may or may not have contributed to a miner's death. *See North America Coal Corp. v. Campbell*, 748 F.2d 1124, 1128 (6th Cir. 1984) (upholding former section 411(c)(5) presumption of entitlement for the survivors of any miner who was employed for at least 25 years before June 30, 1971, and died before March 1, 1978, finding 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"); *see also* n. 7, *supra* (discussing former provisions awarding benefits to survivors able to demonstrate that a miner was totally disabled by pneumoconiosis at the time of his death).

permissible choice to extend benefits to another class of surviving dependents.[10]

B&G asserts that amended section 422(l) is irrational because it "reverses the substantial progress that had been made by the 1981 Amendments to administer black lung claims in a rational scientifically-grounded manner." (Pet. Br. 27). To support this assertion, B&G relies on three U.S. Government Accountability Office ("GAO") reports attached to its brief: H.R. Doc. No. 80-81 (1980), H.R. Doc. No. 82-26 (1982) and H.R. Doc. No. 90-75 (1990), which supposedly show that the black lung program was "disastrous" before the 1981 Amendments. (Pet. Br. 32). B&G offers no support for the notion that the 2010 Congress is bound by 20-30 year-old GAO reports. But even indulging this novel

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[10] If anything, section 422(l) stands on firmer due process grounds than section 411(c)(3)'s irrebuttable presumptions. It is possible, albeit rare, for a miner to have complicated pneumoconiosis but suffer from no disability at all. Such a miner is nevertheless automatically entitled to lifetime benefits, and his dependents to survivors' benefits. In contrast, Mr. Campbell proved that he was in fact totally disabled by coal workers' pneumoconiosis in the course of administrative proceedings which gave B&G a full and fair opportunity to litigate the issue. (App. III 361). The notion that he and his wife suffered as a result of an occupational disease is by no means speculative.

conception of Article I, these reports are simply irrelevant. The aspects of the program that GAO identified as flawed are not employed by the black lung benefits program today and certainly have not been reactivated by amended section 422(l).

For example, the 1980 GAO report criticized the Social Security Administration's approval of black lung claims under the 1977 amendments as being based on "affidavits from spouses and other dependent persons, inconclusive medical evidence and presumptions based on years of coal mine employment." H.R. Doc. No. 80-81, at i. Amended section 422(l) does not employ any of these methods to establish a survivor's entitlement. Likewise, the 1982 GAO report examined the DOL's administration of the BLBA which, at that time, "authorized approval of black lung claims on the basis of (1) conflicting or inconclusive medical evidence, (2) affidavits from spouses or others, (3) presumptions based on years of coal mine employment, and (4) interim standards that could be no more restrictive than the standards used by the Social Security Administration[.]" H.R. Doc. No. 82-26, at i. GAO concluded that "these provisions did not ensure that black lung benefits were

awarded only to miners disabled from black lung or to their survivors." *Id.*

Amended section 422(l) does not resurrect these provisions. Instead, the amendment premises a survivor's entitlement on an award of benefits previously made in the miner's claim where, since 1982, the miner's entitlement will have been based on establishing total disability due to pneumoconiosis under the DOL's permanent regulatory criteria at 20 C.F.R. Part 718. GAO recognized that the Part 718 regulations implement "a more comprehensive medical testing procedure" and require "miners to conclusively prove black lung disease and total disability through the results of medical tests." H.R. Doc. No. 90-75, at 18.

The PPACA amendments restored only two provisions of the BLBA eliminated by the 1981 amendments: sections 422(l) and 411(c)(4). The amendments did not revive the presumptions at sections 411(c)(2) and (c)(5), and did not disturb the application of the "more stringent standards" of 20 C.F.R. Part 718. *See Pothering*, 861 F.2d at 1327. Under these circumstances, it is simply not possible that the PPACA amendments will return the black lung program to the situation which existed before the 1981

Amendments. And even if they did, it would be difficult to argue that such a state of affairs is unconstitutional in light of *Turner Elkhorn*.

In sum, B&G's due process challenge amounts to little more than disagreement with Congress' policy decision in amending the BLBA. B&G's dissatisfaction with the legislature does not amount to a deprivation of due process.

C. Amended Section 422(l) Does Not Violate The Takings Clause.

B&G also argues that section 422(l) constitutes an uncompensated taking of property in violation of the Fifth Amendment. While the Supreme Court did not address the Takings Clause in *Turner Elkhorn*, it has strongly suggested that the BLBA would survive such a challenge. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) ("Although both [*PBGC v. R.A. Gray & Co.*, 457 U.S. 717 (1984)] and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved."). Because amended section 422(l) comports with due process under the rationale of *Turner Elkhorn*, it

would be similarly surprising to find that the amendment effects a taking.

As in the due process context, "a party challenging governmental action as an unconstitutional taking bears a substantial burden." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998). B&G nevertheless contends that amended section 422(l) "plainly goes too far." (Pet Br. 33-34). While analyzing a regulatory takings claim is a fact-specific endeavor, courts consider three factors of "particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 225 (internal quotations omitted). While the first two factors are primary, *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005), a precise calibration of their respective weights is unnecessary because all three factors support section 422(l)'s constitutionality.

1. Economic Impact

B&G attempts to demonstrate substantial economic impact by extrapolating data about claim approval rates from the 1980 and

1982 GAO reports, from which it concludes that amended section 422(l) "would result in an estimated $210,000,000 in benefits that are not supported by medical evidence" and "lump sum payments of approximately $1 billion, for which the coal industry will bear primary responsibility." (Pet. Br. 35-36). This argument suffers from two defects – one conceptual, one practical – each of which is sufficient to undermine B&G's takings challenge.

The conceptual problem is that B&G considers only the brute "financial impact" of the amendment on the "financially strapped coal industry." (Pet. Br. 36). But the economic impact analysis is not a simple exercise in comparing the cost of a regulation against a regulated entity's ability to bear it. "The constitutionality of the assessment should not depend on the happenstance of the financial condition of the assessed [entity] at the time of the assessment." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 675 (3d Cir. 1999) (quoting *Branch v. United States*, 69 F.3d 1571, 1577 (Fed. Cir. 1995)). As this Court recognized, such an argument quickly leads to absurd results: "For example, an employer could resist an increase in the minimum wage on the ground that the increased cost would drive it out of business. Similarly, many small-business

owners find that anti-discrimination laws generate significant expenses, and some might be forced out of business by compliance costs." *Unity Real Estate*, 178 F.3d at 677 n.17.

Instead, the touchstone of the impact analysis – like the Takings Clause generally – is *proportionality*. "[T]he size of a liability only weighs in favor of finding a taking insofar as it is out of proportion to the legitimate obligations society may impose on individual entities." *Unity Real Estate*, 178 F.3d at 677. Thus, *Connolly* held that the retroactive application of the Multiemployer Pension Plan Amendments Act ["MPPAA"] did not violate the Takings Clause despite the fact that the MPPAA "completely deprives an employer out of whatever amount of money it is obligated to pay[.] 475 U.S. at 225. The deprivation was irrelevant because the liability imposed by the MPPAA "directly depends on the relationship between the employer and the plan to which it had made contributions." *Id.* Similarly, the liabilities section 422(l) imposes on B&G are proportionate to the incidence of totally disabling pneumoconiosis among B&G's former employees. This is not a case where "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), but 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 15.

Any doubt on this score is erased by *Eastern Enterprises* – the only case cited in this section of B&G's brief. Some background is necessary. A series of private agreements between certain coal mine operators and the UMWA, beginning in 1946, established multiemployer health care funds. 524 U.S. at 505-508. Beginning in 1974, these funds provided for lifetime health benefits to retired miners and their widows. *Id.* at 509, 530. When insolvency threatened the funds, Congress passed the Coal Act, which required coal mine operators that had signed the agreements to contribute to a new multiemployer benefit plan that would provide the promised health care coverage to miners and their widows. *Id.* at 514.

In *Eastern*, a four-justice plurality found that the Coal Act was an unconstitutional taking of property as applied to Eastern Enterprises, which stopped mining coal in 1966 and therefore never signed the post-1974 agreements providing for lifetime health benefits to miners and their dependents. *Id.* at 530. While

Eastern's liability was substantial, $50-$100 million, the constitutional defect was the fact that Eastern's liability was not proportional to its experience with the earlier plans. *Id.* *See also Unity Real Estate*, 178 F.3d at 658 ("On the economic impact factor . . . [t]he [*Eastern Enterprises*] plurality referred to previous cases requiring that liability be proportional to a party's experience with the object of the challenged regulation."); *Shenango, Inc. v. Apfel*, 307 F.3d 174, 181-82 (3d Cir. 2002).

The lesson of *Eastern Enterprises* is clear. The Coal Act assessment against Eastern was a taking because it bore no relationship to the problem Congress sought to address – the coal mine operators' failure to adequately fund their promise to pay for lifetime health care for miners and their survivors. Eastern made no such promise.[11] In contrast, B&G's liability under amended

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[11] It is questionable whether *Eastern Enterprises* even stands for this limited position, because a majority of the *Eastern Enterprises* Court – the four dissenters and Justice Kennedy, concurring – concluded that the Coal Act did *not* effect an improper taking. 524 U.S. at 539-568. As a result, "[t]he only binding aspect of the fragmented decision in *Eastern Enterprises* is its specific result, *i.e.* the [Coal Act] is unconstitutional as applied to Eastern (cont'd . . .)

422(l) – which compensates the survivors of totally disabled coal miners – is proportional to the incidence of totally disabling pneumoconiosis among B&G's former employees.

The *Eastern Enterprises* plurality went on to make this exact point in distinguishing *Turner Elkhorn*:

> Eastern's liability . . . differs from coal operators' responsibility for benefits 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 their labor.' Likewise, Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment[.]

Id. at 536 (quoting *Turner Elkhorn*, 438 U.S. at 18 (first alteration in original); *see also Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 695 (3d Cir. 1996) (Takings Clause not violated when the economic impact of premiums for retiree benefits assessed on plaintiffs was "sufficiently proportionate" to the nature of the plaintiffs' relationship with the beneficiaries). In sum, B&G's economic

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(. . . cont'd)
Enterprises." *Shenango, Inc. v. Apfel*, 307 F.3d 174, 185 (3d Cir. 2002) (quotation omitted).

impact analysis is fundamentally misguided because it focuses on the bare costs of compliance rather than the relationship of those costs to the injuries section 422(l) redresses and B&G's contribution to those injuries.

Moving from the conceptual, B&G's economic impact analysis also suffers from an equally fatal practical problem: it is completely unsupported by facts. B&G offers no evidence of its present financial condition beyond the claim that the "coal industry" is "financially strapped." (Pet. Br. 36). As a result, the Court has no way to determine what economic impact the PPACA amendments will have on B&G. And B&G's estimates of section 422(l)'s cost to the industry as a whole are indefensible. These figures are extrapolations from data in the 1980 and 1982 GAO reports based on the faulty assumption that "the effect of the challenged amendment is to revert to the disastrous situation that prevailed between 1978, when the irrebuttable presumption of death due to pneumoconiosis was first introduced, and 1981 when the presumption was eliminated prospectively." (Pet. Br. 34). To be sure, derivative survivors' benefits were in effect during the period studied by the GAO. But, as explained above, so were a host of

other provisions and procedures that were not revived by the PPACA.

2. Interference With Investment-Backed Expectations

B&G alleges that amended section 422(l) has significantly interfered with the investment-based expectations of coal mine operators and insurers because it "could not have been predicted" and will "revers[e] the progress that has been achieved since the 1981 amendments." (Pet. Br. 38). But unsupported predictions of a gloomy future do not establish a Takings Clause violation. As a simple factual matter, it is still unclear exactly how many claims will be awarded as a result of the amendment and, therefore, what the resulting economic impact will be, and B&G has pointed to nothing in amended section 422(l) that upset its own investment-backed expectations.

More importantly, B&G's argument ignores the fact that the black lung benefits program requires that a specific contractual endorsement appear in each policy issued by an insurance carrier providing liability coverage, including the policies the State Workers' Insurance Fund issued to B&G. This endorsement specifically provides that insurers are liable for obligations from any

amendments that are enacted while the policy is "in force," *i.e.*, at any time while a claim can be made against the policy. 20 C.F.R. § 726.203(a) (requiring an endorsement covering all obligations arising under "part C of title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 931-936, and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force.").

B&G's suggestion that it and other coal mine operators and their insurance carriers have been blindsided is simply unsupportable. *See Connolly*, 475 U.S. at 227 ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.") (citation omitted). B&G's claim rings particularly hollow in this context because the BLBA formerly provided for derivative survivors' entitlement. Indeed, this was the state of the law during much of the time B&G employed Mr. Campbell, 1970-1987. (App. II 246-47, 249). It was hardly impossible to imagine that Congress might someday restore this right.

3. Character Of The Governmental Action

On the third factor, B&G argues that "the nature of the governmental action was totally lacking in purpose and rationality" in view of the fact that "there was no debate, discussion or even mention in Congress of section 1556," which "will return us to the 1978-1980 period when black lung claims were overwhelmingly awarded to claimants who were not totally disabled due to pneumoconiosis." (Pet. Br. 38-39).[12] This attack on section 422(l)'s rationality raises due process concerns which have already been addressed. *See supra* at 15-25.

The "character of governmental action" prong of the Takings Clause analysis asks whether the challenged action "amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 539. It may also weigh in favor of finding a taking if the action

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[12] Of course, Mr. Campbell was totally disabled due to pneumoconiosis. *See* n. 10, *supra*. The same is true of any miner whose surviving dependents are entitled to benefits by operation of amended section 422(l).

"implicates fundamental principles of fairness underlying the Takings Clause." *Eastern Enterprises*, 524 U.S. at 537. Section 422(l) does not amount to a physical invasion and, as discussed previously, it fairly distributes black lung liabilities among coal mine operators.

Section 422(l) does not have a disproportionate economic impact on B&G, does not upset B&G's reasonable investment-backed expectations, and is not otherwise unfair in character. It is therefore not a taking of property under the Fifth Amendment.

In sum, B&G has failed to prove that amended section 422(l) violates due process or effects an unlawful taking. The Court should therefore reject B&G's argument that amended section 422(l) is unconstitutional and affirm the BRB's award of benefits to Mrs. Campbell.[13]

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[13] Accordingly, the Court need not address B&G's argument that Judge Leland's denial of benefits is supported by substantial evidence. If the Court finds amended section 422(l) to be unconstitutional, the case should be remanded to the Board to consider that issue.

CONCLUSION

This Court should hold that the PPACA section 1556 amendment to section 422(l) of the BLBA is constitutionally valid and affirm the Board's award of survivors' benefits to Mrs. Campbell.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/Sarah M. Hurley
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building
Suite N-2117
200 Constitution Ave, N.W.
Washington, D.C. 20210
(202) 693-5650

Attorneys for the Director, Office of Workers' Compensation Programs

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Zimmer Kunz PLLC
3300 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219

Paper copies of the Director's brief were served by mail, postage prepaid, on the following:

Ms. Lynda Glagola
Lungs-At-Work
4000 Waterdam Plaza Drive
Suite 120
McMurray, PA 15317

Mrs. Norma G. Campbell
152 Edwards Estate Road
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SARAH M. HURLEY
Attorney
U.S. Department of Labor