

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

ELSIE L. STACY, widow of)	
HOWARD W. STACY,)	
)	
Claimant/Petitioner)	
)	BRB No. 10-113 BLA
v.)	
)	Case No. 2008-BLA-5293
OLGA COAL CO.,)	
)	OWCP No. xxx-xx-7751
and)	
)	
WEST VIRGINIAL COAL WORKERS’)	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier/)	
Respondents)	
)	
and)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR,)	
)	
Party-in-Interest)	

DIRECTOR’S REPLY TO THE WEST VIRGINIA COAL WORKERS’
PNEUMOCONIOSIS FUND’S SUPPLEMENTAL BRIEF

This case arises from claimant Elsie L. Stacy’s appeal of Administrative Law Judge Jeffrey Tureck’s September 10, 2009 Decision and Order denying her February 1, 2007 claim for survivors’ benefits under the Black Lung Benefits Act (“BLBA”), 30 U.S.C. §§ 901-944, as amended by the Patient Protection and Affordable Care Act (“PPACA”), Pub. L. No. 111-148, § 1556 (2010). Mrs. Stacy is the survivor of Howard W. Stacy (the “Miner”), a former miner awarded federal black lung benefits pursuant to a claim he filed in 1986. The ALJ denied Mrs. Stacy’s claim because he

determined she failed to establish the Miner suffered from coal workers' pneumoconiosis. While Mrs. Stacy's case was on appeal, the BLBA was amended by PPACA to provide derivative entitlement to certain survivors of miners awarded benefits prior to their death. Mrs. Stacy and the Director both take the position that pursuant to the PPACA amendments, Mrs. Stacy is entitled to derivative survivors' benefits. The West Virginia Coal Workers' Pneumoconiosis Fund (the "Fund"), the insurance carrier for the coal mine operator responsible for this claim disagrees.

The Fund has filed two briefs addressing the PPACA amendments. In the first, the Fund asserted that retroactive application of the amendment was unconstitutional, although it conceded that the amendment "may" apply to Mrs. Stacy's claim. On August 4, 2010, the Fund filed a supplemental brief asserting, for the first time, that the PPACA amendments do not apply to Mrs. Stacy's claim. Specifically, the Fund asserts that a survivor is only entitled to derivative benefits pursuant to PPACA if her spouse filed a miner's claim after January 1, 2005. The Fund thus argues that because Mr. Stacy filed his claim in 1986, PPACA does not apply to Mrs. Stacy's case. By order dated September 23, 2010, the Board accepted the Fund's supplemental brief and requested that the Director respond. The Director disagrees with the Fund's interpretation of the amendment and submits this response.

BACKGROUND

The 1978 Amendments

The Black Lung Benefits Reform Act of 1977, P.L. 95-239, § 7(h), 92 Stat. 95, 100 (1978) (the "1978 Amendments"), 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) allowed an eligible survivor to receive derivative benefits, *i.e.*, allowed an eligible survivor of a miner to establish 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. 209, 95th Cong., 1st Sess. 18. 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).

At the time Section 422(l) was enacted, the BLBA also included a presumption intended to aid miners and survivors in establishing entitlement to benefits. *See* 30 U.S.C. § 921(c)(4) (1978). Section 411(c)(4) provided that, if certain conditions are met, there is a rebuttable presumption that: (1) the miner is totally disabled by pneumoconiosis or was totally disabled at the time of his death; and (2) the miner’s death was due to pneumoconiosis (together or individually, the “15 year presumption”). The first presumption was directly applicable to a living miner’s claim because a miner is entitled to benefits if he demonstrates that he is totally disabled due to pneumoconiosis. *See* 30 U.S.C. § 901(a); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 478 (7th Cir. 2001). The second presumption was directly applicable to a survivor’s claim because a survivor (other than those eligible under Section 422(l)) must prove that the miner’s death was due to pneumoconiosis to prevail.¹ *See* 30 U.S.C. § 901(a); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

The 1981 Amendments

¹ Prior to the Black Lung Benefits Amendments of 1981, the first presumption – total disability due to pneumoconiosis – was also directly relevant in a survivor’s claim because at that time, a survivor could prove entitlement either by showing that the miner’s death was due to pneumoconiosis or by showing that the miner was totally disabled by pneumoconiosis at the time of his death. *Pothering*, 861 F.2d at 1327.

The Black Lung Benefits Amendments of 1981, Pub. L. 97-119, § 203(a)(6), 95 Stat. 1635, 1644 (1981) (the “1981 Amendments”), eliminated derivative entitlement for claims filed on or after the effective date of the amendments (January 1, 1982). *Pothering*, 861 F.2d at 1327. Congress achieved this result by adding a clause specifying a date after which Section 422(l) would not apply. 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, *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) (emphasis added); *see also Mancia v. Director, OWCP*, 130 F.3d 579, 584 n.6 (3d Cir. 1997).² Given that the plain language of the statute clearly indicates the “claim” which must be filed after January 1, 1982, is the last referenced claim, “the claim of such miner,” courts and the Director consistently found the date of the miner’s claim controlled whether a survivor was eligible for derivative benefits under Section 422(l). 30 U.S.C. § 932(l) (1982); *see Pothering*, 861 F.2d at 1327; 48 Fed. Reg. 24272 (May 31, 1983); 127 Cong. Rec. 29932 (1981) (“Survivors of those miners who are curenly [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.”).

The 15 year presumption was also weakened by this legislation. The 1981 amendments limited the 15 year presumption to claims filed before January 1, 1982. *See* 30 U.S.C. § 921(c)(4) (1982).

PPACA

² If a survivor was not entitled to derivative benefits because the date of the claim in question was on or after January 1, 1982, that individual could still obtain benefits by filing a survivor’s claim and

In 2010, Congress amended the BLBA, including Section 422(l), in order to repeal certain of the 1981 Amendments and “ensure that claimants get a fair shake as they try to gain access to [BLBA] benefits.” 156 Cong. Rec. S2084 (daily ed. March 25, 2010) (statement of Sen. Byrd). *In toto*, these amendments to the BLBA, or Section 1556 of the PPACA provide:

(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).

Section 1556(a) of the PPACA amended Section 411(c)(4) by deleting language that rendered it inapplicable to claims filed on or after January 1, 1982. *See* Pub. L. No. 111-148, § 1556(a) (2010). PPACA therefore restored Section 411(c)(4) to its pre-1982 form.

Section 1556(b) of the PPACA removed the language preventing application of the derivative benefits provision to claims filed on or after January 1, 1982. *See* Pub. L. No. 111-148, § 1556(b) (2010). As a result of these amendments, Section 422(l) likewise now appears as it did when first promulgated in the 1978 amendments.

Section 1556(c) of the PPACA, provides the relevant time limitations for application of PPACA to the 15 year presumption and the derivative benefits provision. *See* Pub. L. No. 111-148, § 1556(c) (2010). It limits the application of the 15 year presumption and the derivative benefits

proving that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. § 718.1.

provision to miner and survivor “claims” filed after January 1, 2005. *Id.*; *see also* 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement of Sen. Byrd). Thus, subsection (a) of Section 1556 revitalizes the 15 year presumption at Section 411(c)(4); subsection (b) revitalizes the derivative benefits provision at Section 422(l); and subsection (c) provides both revitalizations are triggered for “claims” filed after January 1, 2005.

ARGUMENT

AMENDED SECTION 422(l) APPLIES TO SURVIVORS’ CLAIMS FILED AFTER JANUARY 1, 2005.

A. The Plain Language of Section 422(l) Mandates Its Application to All Claims Filed After January 1, 2005.

Derivative benefits pursuant to PPACA are available to certain survivors whose claims were filed after January 1, 2005. Mrs. Stacy filed a claim after January 2005. According to the Fund, the fact that Mrs. Stacy filed a survivor’s claim after January 2005 is irrelevant because the Section 1556(c) “claims” that must be filed after January 1, 2005 are miners’ claims, and do not include survivors’ claims. The Fund’s argument fails to acknowledge the plain language of Section 1556.

Congress clearly expressed the scope of the applicability of the 2010 BLBA amendments in PPACA Section 1556(c): “the amendments made by this section apply with respect to claims filed under part B or C of the Black Lung Benefits Act” after January 1, 2005. Given that under the BLBA and the black lung regulations, both miners and survivors may file “claims,” and that Congress used the term “claims” without any qualifying or limiting language except for the specific effective date, Section 1556(c) must be interpreted to apply amended Section 422(l) to both miner and survivor claims. *See, e.g.*, 20 C.F.R. §§ 718.204(a); 718.205(a). Consequently, the plain

meaning of Section 1556(c)'s "claims" includes both miners' and survivors' claims that were filed after January 1, 2005.

Even if the word "claims" in Section 1556(c) was ambiguous, the Director's interpretation is correct because it takes into consideration the totality of Section 1556. As noted above, Section 1556 reinstated two provisions of the BLBA – Section 411(c)(4)'s 15 year presumption and Section 422(l)'s automatic entitlement provision. Section 1556(c) therefore must be interpreted in light of both amended provisions.

Interpreting subsection (c)'s "claims" as meaning both miners' and survivors' claims is consistent with the fact that the 15 year presumption is by its own terms applicable to both types of claims:

If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, *his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim* under this title and . . . if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.

30 U.S.C. § 921(c)(4) (emphasis added); *see Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988). Since the presumption applies to both miners' and survivors' claims, it follows that the "claims" that must be filed after January 1, 2005, include both types of claims. And if the word "claims" must include survivors' claims for purposes of applying the presumption, consistency and harmony require that the same word include survivors' claims for purposes of applying the derivative benefits provision. In short, the Act's structure clearly indicates Section 422(l)'s effective date can be based on the survivor's date of filing.

The Fund misstates or misunderstands the overarching effect of amended Section 422(l). The Fund argues that because Section 422(l) ostensibly relieves the survivor of the need to file a "claim," the Section 1556(c) time trigger cannot apply to survivors' claims. This argument fails to acknowledge the fundamental purpose as well as the practical reality of Section 422(l). As the Board has recognized, under Section 422(l), the "survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis." *Mathews v. United Pocahontas Coal Co.*, __ BLR __, BRB No. 09-666 BLA, slip op. at 2 (Sept. 22, 2010); *see also Campbell v. B & G Construction Co.*, BRB No. 09-750 BLA, 2010 WL 3514144, *2 (August 30, 2010) ("eligible survivor of a miner who files a successful claim for benefits is automatically entitled to survivor's benefits without the burden of re-establishing entitlement"). Thus, the larger purpose of Section 422(l)'s admonition that a survivor need not "be required to file a new claim for benefits, or refile, or otherwise revalidate the claim of such miner" is to relieve the survivor of the need to prove any issues of medical entitlement. Instead, the provision mandates the survivor's entitlement based solely on the miner's award.

The Director's interpretation of the 2010 Amendments actuates this mandate. The effect of amended Section 422(l) is to change the conditions of entitlement for certain survivors previously required to prove that the miner died due to pneumoconiosis. The amendment added an alternative condition under which those survivors could establish entitlement – that the miner had been awarded benefits. Thus, as a result of the PPACA amendments, a survivor who files a claim after January 1, 2005 that is pending on or after March 23, 2010 is entitled to benefits if (1) the survivor meets the BLBA's relationship and dependency requirements; and (2) the miner's death was due to pneumoconiosis or the deceased miner received an award of benefits on his own lifetime claim.

These conditions mimic those in effect prior to the 1981 repeal of Section 422(l). *See* 20 C.F.R. 725.212 (1979).

With Section 422(l)'s larger purpose in mind, it is apparent that the Fund's assertion of a contradiction between Section 422(l) and PPACA Section 1556(c)'s filing requirement is baseless. Congress' decision to grant access to Section 422(l) to those survivors who have filed or who will file a benefits claim after January 1, 2005 is fully consistent with Section 422(l)'s purpose. Moreover, the practical reality is – just as it was prior to the 1981 repeal of Section 422(l) – that some sort of paperwork or "claim" will be filed by survivors in order to ensure they receive the benefits that are rightfully theirs. As the Third Circuit has recognized, 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.” *Pothering*, 861 F.2d at 1328 n.13. The reason for this is obvious – a survivor cannot begin to receive benefits unless OWCP is notified of the miner's death and of the survivor's current status. In short, the Fund's perceived contradiction simply does not exist when the purpose and practicalities of amended Section 422(l) are taken into account.

Finally, the Fund asserts that the Director's interpretation of subsection (c) “renders the time limitations imposed by Congress in § 1556(c) of the PPACA meaningless” because, “[a]ny eligible survivor of a miner who was receiving benefits at the time of his death, is automatically entitled to benefits if she now files a claim because that claim would be *filed after* January 1, 2005 and *pending after* March 23, 2010.” Fund's brief at 5. Pursuant to the plain language of Section 1556, this statement of eligibility is correct. *See* Pub. L. No. 111-148, § 1556 (2010); *see also* 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010). Such broad eligibility, however, simply reflects the clear intent of Congress. In spite of the Fund's dislike of the expansive nature of the PPACA

amendments, it is clear that it was Congress' intent that the amendments benefit a wide set of current and future claimants. As Senator Robert C. Byrd, sponsor of Section 1556 explained, amended Sections 411(c)(4) and 422(l) were not meant to benefit only future claimants making initial claims, but also (1) claimants who have had claims denied and will be filing subsequent claims; (2) claimants awaiting or appealing a decision or order; and (3) claimants in the midst of trying to determine whether to seek a modification of a recent order. *See* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd).

Moreover, accurate application of subsection (c)'s time limitations does not render them meaningless. Section 1556(c) of PPACA serves to prevent Section 422(l) from applying to previously denied claims. The denial of the prior survivor's claim remains in effect and bars payment of benefits "for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d)(5).

B. The Director's Interpretation Is Entitled to Deference.

The Director's interpretation of the BLBA and its amendments is entitled to deference. *See, e.g., Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006). The Fund agrees. It incorrectly asserts, however, that deference is not appropriate here because the Director's position is inconsistent with the plain language of the statute. As discussed above, the Director's position is entirely consistent with both the plain language of the statute and the statute's underlying purpose.

The Fund likewise erroneously argues that deference is not warranted because "the Director has taken inconsistent positions" and has "provided no explanation" for doing so. Fund's brief at 6, 11. In support, the Fund accurately but irrelevantly notes that, after the 1981 amendments, the Director took the position that "the operative date for determining whether the survivor is eligible for benefits under [Section 422(1)] is the date the miner's claim was filed." *Id.* at 10. The Fund's argument is specious because it compares the Director's interpretation of separate and distinct statutory language.

As previously noted, the plain language of the 1981 amendments mandated that the date of filing of the miner's claim determined applicability of Section 422(1). *See* Background Section *supra*. This is because the language inserting an end date for derivative benefits based on the date of a "claim" came directly after discussion of "the claim of such miner" and clearly referred to that discussion of miners' claims. *See* 30 U.S.C. § 932(1) (1982).

The legislative history also supports this interpretation. The Statement in Explanation of the 1981 Amendments made clear that the amendments' new proof requirements would not affect survivors of miners "currently receiving benefits, or who have filed for them" because survivors of such living miners would remain entitled to receive derivative "benefits even if the miner eventually dies from causes unrelated to black lung." 127 Cong. Rec. 29932 (1981). As one of the bill's co-

sponsor's, Senator H. John Heinz III emphasized, the 1981 amendments were not meant to affect those already drawing benefits or who had already filed claims. 127 Cong. Rec. 29933 (1981). Congress did not intend to "break faith with miners and their families who have served this country's energy needs and are now receiving benefits." *Id.*

The language added to Section 422(l) by the 1981 amendments is now gone. In sharp contrast, and as discussed above at length, the statutory language and construction of the wholly separate and distinct time limitation imposed by PPACA Section 1556(c) mandates a survivor's eligibility for derivative benefits pursuant to Section 422(l) be determined by the date the survivor's claim is filed. Thus, the Director has not taken inconsistent positions regarding the time limitations for filing of Section 422(l) derivative survivors' claims: in both cases, he advocated adhering to Congress's intent as expressed in the plain language of the provisions and in their legislative histories. His interpretation is therefore entitled to deference. *Andersen*, 455 F.3d at 1103.

In sum, under amended Section 422(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the PPACA is entitled to benefits based solely on the miner's lifetime award and without having to prove that the miner died due to pneumoconiosis. The Fund's assertion that amended Section 422(l) applies only to miner's claims that meet the effective date requirement is without merit and should be rejected.

**PURSUANT TO SECTION 422(l), MRS. STACY IS
ENTITLED TO SURVIVORS' BENEFITS.**

Mrs. Stacy's claim falls within the class of survivors' claims affected by Section 1556(b) of the PPACA: her husband was receiving federal black lung benefits at the time of his death pursuant to a final award; she filed her claim after January 1, 2005; and her claim is still pending before the Board. Pursuant to Section 422(l) of the BLBA, as amended, she therefore is automatically entitled

to derivative survivors' benefits. Pursuant to Section 422(1), the Board must vacate the ALJ's denial of benefits and enter an order directing the West Virginia Coal Workers' Pneumoconiosis Fund to pay Mrs. Stacy all benefits to which she is entitled and to reimburse the Black Lung Disability Trust Fund for the interim benefits it paid to Mrs. Stacy on the West Virginia Fund's behalf.

CONCLUSION

Accordingly, the Director respectfully requests that the Board reject the Fund's arguments and issue a decision awarding benefits to Mrs. Stacy payable by the West Virginia Coal Workers' Pneumoconiosis Fund because she meets the requirements of amended Section 422(1).

Respectfully submitted,

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