

2-12-2015

Blue Skies for Black Lung Benefits Act Survivors? Courts' Interpretations of § 932(1) Following the Enactment of the Patient Protection and Affordable Care Act

Maureen Hughes

Follow this and additional works at: <http://scholarship.law.edu/lawreview>

 Part of the [Labor and Employment Law Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [Workers' Compensation Law Commons](#)

Recommended Citation

Maureen Hughes, *Blue Skies for Black Lung Benefits Act Survivors? Courts' Interpretations of § 932(1) Following the Enactment of the Patient Protection and Affordable Care Act*, 64 Cath. U. L. Rev. 183 (2015).

Available at: <http://scholarship.law.edu/lawreview/vol64/iss1/10>

Blue Skies for Black Lung Benefits Act Survivors? Courts' Interpretations of § 932(l) Following the Enactment of the Patient Protection and Affordable Care Act

Cover Page Footnote

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2008, The University of North Carolina at Chapel Hill. The author would like to thank Professor Roger C. Hartley for his invaluable edits and the many hours he spent advising the author on this topic. Lastly, the author sincerely wishes to thank her Catholic University Law Review colleagues for their contributions to this Note.

BLUE SKIES FOR BLACK LUNG BENEFITS ACT SURVIVORS? COURTS' INTERPRETATIONS OF § 932(I) FOLLOWING THE ENACTMENT OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Maureen Hughes⁺

Leonard Gambini was so debilitated by black lung disease,¹ which he contracted while working as a coal miner in Lackawanna County, Pennsylvania, that as his disease progressed, he could no longer play with his grandson.² His wife, Gloria, remembers that Leonard would “be on the couch laying down, and he’d get on his knees[,] and he’d be crying[,] and he’d kiss the baby, kiss him because he knew he wasn’t going to live too long.”³ The Gambinis received federal benefits provided to miners with black lung disease and miners’

⁺ J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2008, The University of North Carolina at Chapel Hill. The author would like to thank Professor Roger C. Hartley for his invaluable edits and the many hours he spent advising the author on this topic. Lastly, the author sincerely wishes to thank her *Catholic University Law Review* colleagues for their contributions to this Note.

1. Black lung disease, or “pneumoconiosis[,] is a lung disease that results from breathing in dust from coal, graphite, or man-made carbon over a long period of time.” *Coal Worker’s Pneumoconiosis*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/000130.htm> (last updated Oct. 2, 2014). The disease can develop into either a simple or complicated form, and no specific cure currently exists. *Id.* Symptoms include cough and shortness of breath, and the disorder may result in respiratory failure, chronic bronchitis, or other pulmonary diseases. *Id.* American doctors began to identify what has come to be known as black lung disease in the late 1800s. ALAN DERICKSON, *BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER* 1 (1998). In 1881, H.A. Lemen, a professor of medicine at the University of Denver, introduced and discussed trends he recognized in coal miners’ lung health at the Colorado State Medical Society’s annual meeting. *Id.* During this presentation, Lemen:

[O]ffered for his colleagues’ edification the case of his patient James McKeever, for thirty years a coal miner in Scotland, England, and Pennsylvania. He noted McKeever’s “harassing cough,” “care-worn expression,” and other non-specific symptoms. In contrast to such vague indications of chronic respiratory disease, he also announced the less ambiguous finding that this patient sometimes expectorated more than a pint of black liquid in a day. After commenting on the “decidedly inky appearance” of the substance, the Denver physician made this disclosure: “The sentence I am reading was written with this fluid. The pen used has never been in ink.” The impact of this stratagem on its immediate audience remains unknown. But it is evident from the inclusion of Lemen’s case report in the state medical society’s program that by the 1880s physicians in Colorado had developed some curiosity about the health consequences of mining coal.

Id.

2. Dave Bohman, *Benefits Granted for Widows of Coal Miners with Black Lung Disease*, WNEP (Aug. 28, 2013, 5:32 PM), <http://wnep.com/2013/08/28/benefits-granted-for-widows-of-coal-miners-with-black-lung-disease/>.

3. *Id.* (internal quotation marks omitted).

survivors under the Black Lung Benefits Act (BLBA).⁴ However, the federal government terminated Gloria's BLBA benefits shortly after Leonard's death in 2001 after concluding that Gloria was not entitled to a continuation of BLBA benefits because she could not prove black lung disease caused Leonard's death.⁵

Recently, a line of federal appellate decisions have held differently, implying that Gloria did not need to show that Leonard died of black lung disease in order to continue receiving BLBA benefits.⁶ Several U.S. Courts of Appeals have found that the 2010 Patient Protection and Affordable Care Act (PPACA) changed the language of the BLBA so that dependent eligible survivors,⁷ like Gloria, are now entitled to a continuation of benefits following a miner's death, regardless of whether the survivor can prove that the miner died as a result of black lung disease.⁸ Gloria is now set to receive over \$600 per month in survivor benefits because Leonard was suffering from black lung disease when he died.⁹

4. *See id.* Under the BLBA, a miner must have been receiving pre-death benefits in order for his survivor to continue to receive them. *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275, 1282 (11th Cir. 2013) (finding that the Secretary of Labor's similar interpretation of 30 U.S.C. § 932(l) (2012) supported the current interpretation of the BLBA, and therefore, this requirement did not arise out of "judicial imagination"). A miner is eligible to receive benefits during his life if he establishes that: (1) he has black lung disease; (2) the black lung disease resulted from working in coal mines; (3) the black lung disease aided in the advancement of the miner's total disability; and (4) he is "totally disabled." 20 C.F.R. § 725.202(d)(2)(i)-(iv) (2013).

5. Bohman, *supra* note 2.

6. *See* *Union Carbide Corp. v. Richards*, 721 F.3d 307, 310 (4th Cir. 2013); *U.S. Steel Mining Co.*, 719 F.3d at 1282-84; *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381 (4th Cir.), *amended by* No. 11-1020, 2011 U.S. App. LEXIS 25427, at *1 (4th Cir. 2011); *B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233, 238 (3d Cir. 2011).

7. A survivor must meet his or her individual test of eligibility apart from that of the miner to receive continued BLBA benefits after a miner's death. *See* 20 C.F.R. § 725.212(a). In addition to the requirement that a miner must have been receiving BLBA benefits before his death, an individual may only receive BLBA benefits as an "eligible" survivor if he or she is "a surviving spouse, surviving divorced spouse, child, parent, brother, or sister" of a miner who "was dependent on the miner for a certain period of time." *U.S. Steel Mining Co.*, 719 F.3d at 1282-83. The Code of Federal Regulations (C.F.R.) establishes definitions of a "surviving spouse," 20 C.F.R. § 725.214, "surviving divorced spouse," *id.* § 725.216, a survivor's child, *id.* § 725.220, and survivor's "parent[s], brother[s], [and] sister[s]," *id.* § 725.224. Even after the passage of the PPACA, courts still hold that a survivor must prove that a miner died of black lung disease if the "relational and dependency requirements" cannot be met. *See, e.g., U.S. Steel Mining Co.*, 719 F.3d at 1282, 1284.

8. *Union Carbide Corp.*, 721 F.3d at 314; *U.S. Steel Mining Co.*, 719 F.3d at 1284; *W. Va. CWP Fund*, 671 F.3d at 391; *B & G Constr. Co.*, 662 F.3d at 252. These decisions, discussed and compared to the Sixth Circuit's holding in *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013) throughout this Note, interpret changes made by the PPACA to § 932(l), a subsection that controls the filing of claims by survivors under the BLBA.

9. Bohman, *supra* note 2.

Gloria's story echoes the experiences of approximately 10,000 other Pennsylvanian widows.¹⁰

The original rendering of the BLBA was passed as a component of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA).¹¹ The BLBA established "a unique federal program designed to provide compensation to coal miners afflicted with one of the country's most dreaded occupational diseases."¹² According to its legislative history, the passage of the BLBA represented the acceptance and adoption of a humanitarian program that was analyzed and debated for many years.¹³ However, numerous amendments, passed in 1972,

10. *Id.*

11. STAFF OF H. COMM. ON EDUC. & LABOR, 96TH CONG., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977 III (Comm. Print 1979). DOL was established in 1913 to "g[ive] U.S. workers an information-gathering institution closely attuned to many of their vital interests, including working conditions." DERICKSON, *supra* note 1, at 62. Despite DOL's prompt investigation of industrial lead poisoning after the Department's formation, "no comparable investigation of miners' respiratory disease followed, even though the first secretary of labor, William B. Wilson, was himself a victim of miners' asthma." *Id.* The federal government eventually took note of this oversight. See Chris Hamby, *A Century of Denial on Black Lung*, THE CENTER FOR PUBLIC INTEGRITY (Nov. 1, 2013, 12:19 PM), <http://www.publicintegrity.org/2013/11/01/13662/century-denial-black-lung> (noting that "[d]espite widespread reports of a unique disease afflicting coal miners dating to the 19th Century, the industry and the doctors it employed succeeded in stifling a comprehensive law to recognize black lung and compensate those left breathless by it until 1969" with the passage of the FCMHSA). The same year the FCMHSA was passed, West Virginia Congressman Ken Hechler held a rally in Charleston, West Virginia to bring attention to black lung disease and the lack of concern on behalf of local and federal governments. *Id.* During the rally, Congressman Hechler held a large roll of bologna over his head to represent "his opinion of the West Virginia Medical Association's [previously stated] view that there was no black lung epidemic." *Id.* His accompanying speech foreshadowed problems with the administration of BLBA benefits and addressed the coal mining industry's stance on black lung disease. *Id.*

12. STAFF OF H. COMM. ON EDUC. & LABOR, 96TH CONG., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977 III (Comm. Print 1979).

13. *Id.* At the time of its passage, the BLBA "was the only . . . single disease compensation law ever attempted. Members of the [founding Interdepartmental Task Force on Occupational Diseases and Workers' Compensation] looked to the [BLBA] as the laboratory that would generate a good model for future handling of occupational disease claims." Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 667 (1989). However, the BLBA program may not have been prompted by the widespread research and cases involving black lung disease, as the legislative history suggests. *Id.* at 668. In fact, before the enactment of the BLBA in 1969, "[n]ot a single serious study of workers' compensation and pneumoconiosis had been undertaken." *Id.* (quoting PETER BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* 280 (1987)) (internal quotation marks omitted). Rather, some believe that "Congress passed the [FCMHSA] as part of a large initiative to compensate miners in the wake of a devastating mine explosion. . . [that] raised concern for the health and safety of miners and the well-being of their families." Jeffrey R. Lindequist, *The Black Lung Benefits Act—Sixteen Tons, What Do You Get?: How Do You Determine a Miner Has Had a Material Change in Condition to Allow a Subsequent Claim for Benefits?*, 29 W. NEW ENG. L. REV. 497, 499 (2007).

1977, 1981, and 2010, made it difficult for courts to interpret the law.¹⁴ Administrative agencies and federal courts have grappled with the meaning of the statute's changing text, particularly with respect to a survivor's eligibility for benefits after miners' deaths.¹⁵ The fluctuating Congressional priorities reflected in these frequent changes to the BLBA may contribute to the general confusion tribunals experience when they attempt to apply the BLBA.¹⁶

The U.S. Department of Labor (DOL) is primarily responsible for administering BLBA benefits.¹⁷ BLBA benefits are non-taxable income.¹⁸ The benefits range from \$631 per month if a deceased miner is survived by one primary beneficiary, to \$1,263 per month if a deceased miner is survived by one primary beneficiary and three or more dependents.¹⁹ The BLBA requires

14. See, e.g., *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275, 1277–79 (11th Cir. 2013).

15. See, e.g., *id.* (analyzing the statutory provisions changed by each amendment in terms of who could receive BLBA benefits and how they could be received).

16. See, e.g., *id.* (highlighting the “piecemeal” development of the law to reflect Congress’ changing opinion on the matter). See also Prunty & Solomons, *supra* note 13, at 671 (noting that since the 1980s, “Congress has not lost interest, but its attention has been focused on more pressing national concerns”).

17. 20 C.F.R. § 725.1(d) (2013) (requiring that “[c]laims filed by a miner or survivor on or after January 1, 1974 . . . be filed under an applicable approved State workers’ compensation law, or if no such law has been approved by the Secretary of Labor, the claim may be filed with the Secretary of Labor”). Both the Social Security Administration (SSA) and DOL managed these claims prior to January 1, 1974. *Id.* § 725.1(b)–(c). The SSA and DOL did not originally interpret their roles as BLBA benefits administrators in the same way, which resulted in inconsistent application of the BLBA. Prunty & Solomons, *supra* note 13, at 670. The SSA, in response to criticism from Congress on the manner in which it originally denied claims, came to understand that its primary responsibility was merely to sanction, and not dispute, the BLBA claims before it. *Id.* The DOL, on the other hand, understood its responsibility as an undertaking to create “a fair system for the adversarial litigation of occupational lung disease compensation claims filed by coal miners.” *Id.* These conflicting applications illustrate “the divergent perspectives that have plagued the federal black lung program, and the often incompatible expectations of the groups involved, continue to generate controversy and impede realization of the law’s stated purpose: to provide fair, industry-funded workers’ compensation benefits for . . . coal worker’s pneumoconiosis.” *Id.* at 666.

Currently, BLBA claims are first filed with the Office of Workers’ Compensation Programs (OWCP) within DOL. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS’ ABILITY TO PURSUE CLAIMS 8 fig.2 (2009) [hereinafter GOV’T ACCOUNTABILITY OFFICE]. If denied by OWCP, claims are appealed to DOL’s Office of Administrative Law Judges (OALJ), whose decisions may be appealed to DOL’s Benefits Review Board. *Id.* If the BRB denies a claim, a BLBA claimant may then appeal the decision to the applicable federal U.S. Court of Appeals. *Id.*

18. 30 U.S.C. § 922(c) (2012). It is estimated that the potential impact of the retroactive application of the 2010 PPACA amendment could reach \$1 billion. Brief of Petitioner at 14, *B & G Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 662 F.3d 233 (3d Cir. 2011) (No. 10-4179).

19. Div. of Coal Mine Workers’ Comp., U.S. Dep’t of Labor, *Black Lung Monthly Benefit Rates for 2014*, U.S. DEPARTMENT LAB., [hereinafter *Monthly Benefit Rates*], <http://www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm> (last visited July 28, 2014). The BLBA requires that the

employers to finance the payment of the benefits because “the cost and responsibility of th[at] occupational disease [should] be borne by the industry from which it arises.”²⁰

In 2008, DOL initially denied eighty-seven percent of all BLBA claims.²¹ However, BLBA claims initially denied by DOL may linger in the DOL appeals process for years.²² Neither party to a claim dispute has an incentive to expedite

rate for an individual BLBA beneficiary be 37.5% of a federal employee’s salary, which is determined by the DOL. *Id.* The government classifies the seniority and experience level of its employees, and the DOL uses those classifications to find the applicable salary rate. *Id.* See Pay & Leave Pay Administration, U.S. Office of Pers. Mgmt., *Fact Sheet: Within Grade Increases*, U.S. OFF. OF PERSONNEL MGMT., <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/within-grade-increases/> (last visited Aug. 24, 2014). The cost of the BLBA “since its inception easily exceeds \$30 billion.” Prunty & Solomons, *supra* note 13, at 666 n.1. In 1989—twenty years after the enactment of the FCMHSA—market analysts estimated non-corporate mine owner costs totaled “at least \$5 billion to \$6 billion in insurance premiums, self-insured benefit payments, and claims defense costs over the past fifteen years” to that point. *Id.*

20. STAFF OF H. COMM. ON EDUC. AND LABOR, 96TH CONG., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977 III (Comm. Print 1979). Cost burdens are typically placed on the industry, and “[i]f a claimant is awarded benefits, the mine company that is determined to be the responsible employer of the miner generally must provide for the payment of benefits, either directly or through insurance.” GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, at 6 (footnote omitted).

21. GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, intro. Initial denials occurred at such a high rate primarily due to the medical personnel hired by mine owners and operators, often with more prestigious credentials, who created more in-depth, sophisticated, and longer evaluations of the miner’s condition than the medical personnel hired by the miners or their survivors. *Id.* at 21. DOL hires pre-approved doctors “to conduct diagnostic tests and [to] provide pulmonary evaluations.” *Id.* at 28. Beginning in 2012, The Center for Public Integrity (CPI) undertook a far-reaching investigation to examine “how doctors and lawyers, working at the behest of the coal industry, have helped defeat the benefits claims of miners sick and dying of black lung [disease].” Chris Hamby, *Breathless and Burdened*, CENTER FOR PUB. INTEGRITY, <http://www.publicintegrity.org/environment/breathless-and-burdened> (last visited Aug. 26, 2014). Doctors at Johns Hopkins, one of the leading providers hired to determine whether benefit-seeking miners suffered from black lung disease, rarely discovered that the miners in question were suffering from the disease. Chris Hamby, *Johns Hopkins Medical Unit Rarely Finds Black Lung, Helping Coal Industry Defeat Miners’ Claims*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2013/10/30/13637/johns-hopkins-medical-unit-rarely-finds-black-lung-helping-coal-industry-defeat>. However, outside doctors, who reviewed 1,500 cases in which Johns Hopkins doctors found no black lung disease, found the disease in 390 of the cases. *Id.* Also exacerbating this issue was that “[t]he extent to which DOL’s district offices hold approved doctors accountable for the quality of submitted medical evidence [was] unclear.” GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, at 29. The DOL’s self-professed reluctance to remove medical professionals from the provider list, once they are approved, made the DOL’s list of approved doctors less reliable. *Id.*

22. GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, intro. (reporting a difficulty in scheduling court appearances in rural communities, sometimes resulting in delays over two years, but also finding that recent technological advances could possibly alleviate that burden). Approximately twenty percent of denials of BLBA benefits by one board within the DOL were appealed to other boards within the DOL. *Id.* at 15 (finding that this percentage is “significant”).

the administrative appeal because miners may receive interim benefits while their claims are being appealed, and the defendants—the mining companies—have a nearly fifty percent chance that they will win the claim on appeal.²³

The PPACA altered 30 U.S.C. § 932(l), which some circuits believe entitles widows, like Gloria, to survivor's benefits without having to show a miner died of black lung disease.²⁴ Subsection (l) was originally added in a 1977 amendment designed to eliminate “the need to file a claim for survivors whose associated miner had been awarded benefits under the benefits scheme by the

Also, demands are frequently remanded to the lower DOL board for further evidence gathering, a process that can draw out an appeal for as long as one year. *Id.*

23. *Id.* at 19. The C.F.R. governs the interim BLBA payments. 20 C.F.R. § 725.420(a) (2013). Specifically, the C.F.R. provides that a claimant will begin to receive benefits “in any case in which the operator liable for such payments has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary [of Labor].” *Id.* Mining companies may be willing to accede paying interim benefits if they can avoid paying benefits to the miner and his survivors long-term because long-term payments could easily exceed what mining companies pay in interim benefits. *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 17 (finding that there are financial incentives for mining companies to prolong claims). *See also Monthly Benefit Rates, supra* note 19 (indicating that payments range from \$631 to \$1231 per month, without distinguishing between short-term payments and long-term payments). Additionally, as a part of its 2013 “Breathless and Burdened” study, CPI alleged that mining companies may be represented by law firms willing to stretch the bounds of the law when representing their clients against BLBA benefit claims. Chris Hamby, *Coal Industry's Go-To Law Firm Withheld Evidence of Black Lung, At Expense of Sick Miners*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2013/10/29/13585/coal-industrys-go-law-firm-withheld-evidence-black-lung-expense-sick-miners> (charging that a leading mining firm has “a record of withholding evidence” that suggests a miner has black lung disease when that finding is made by the firm's own experts). Imbalanced access to legal representation between a BLBA claimant and a defendant mining company may also have contributed to mining companies' high success rate in defending claims. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 26–27. The GAO found:

[t]here are few financial incentives for lawyers to take black lung claimants' cases, and claimants generally do not have the financial resources to cover the costs associated with developing the evidence needed to support and defend their claims. According to DOL officials, attorneys are not inclined to take claimants' cases due to a low probability of success. . . . [O]nly 13 [%] of all claims were initially approved by OWCP in fiscal year 2008. . . . Because claimants lack financial resources for evidence development and DOL's payment of claimant attorney's fees is contingent on the success of cases, claimant attorneys bear much of the legal costs during the litigation of claimants' cases. In Black Lung Benefits Act cases, a claimant may not be charged a fee by an attorney unless black lung benefits are awarded.

Id. at 26 (footnotes omitted).

24. *See* *Union Carbide Corp. v. Richards*, 721 F.3d 307, 310 (4th Cir. 2013) (dictating that the PPACA reset the standard for receiving survivor benefits to proving the miner's eligibility for receiving BLBA benefits upon the miner's death); *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275, 1279 (11th Cir. 2013); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381–82 (4th Cir.), *amended by* No. 11-1020, 2011 U.S. App. LEXIS 25427, at *1 (4th Cir. 2011); *B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233, 243–44, 253 (3d Cir. 2011).

time the miner died.”²⁵ The 1977 version of § 932(*l*) stated that “[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.”²⁶ Thus, beginning in 1978, eligible dependent survivors did not need to file a claim in order to continue receiving BLBA benefits following a miner’s death.²⁷

That changed in 1981, when Congress added the following phrase to the end of subsection (*l*): “[E]xcept with respect to a claim filed under this part on or after [January 1, 1982].”²⁸ This addition, concerning benefit eligibility for deceased miners’ dependent survivors, reflected legislative alteration of the BLBA’s original purpose.²⁹ In fact, Congress simultaneously altered the *stated* purpose of the BLBA in § 901(a) by removing the language added to this provision in 1972 that allowed BLBA benefits to be given to surviving dependents of miners who either died from black lung disease or “who were totally disabled by this disease at the time of their deaths.”³⁰ Following the 1981 changes, the purpose of the BLBA reverted back to providing benefits only “to the surviving dependents of miners whose death was due to [pneumoconiosis].”³¹

In addition to altering §§ 901(a) and 932(*l*), the 1981 amendment changed §§ 921(a)³² and 922(a)(2).³³ Congress narrowed each of those sections to reflect its evident concern about providing continued benefits to survivors of miners who could demonstrate that a miner had died of black lung disease.³⁴ Thus, the

25. *U.S. Steel Mining Co.*, 719 F.3d at 1278 (interpreting § 932(*l*) and providing the historical justification for the amendments to the BLBA).

26. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, sec. 7(h), § 422(*l*), 92 Stat. 95, 100 (1978) (codified as amended at 30 U.S.C. § 932 (2006)) (internal quotation marks omitted).

27. *Union Carbide Corp.*, 721 F.3d at 310; *see supra* note 25 and accompanying text.

28. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 203(a)(6), § 422(*l*), 95 Stat. 1635, 1644 (codified as amended at 30 U.S.C. § 932 (2006)) (internal quotation marks omitted).

29. *See infra* notes 30–31 and accompanying text.

30. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, sec. 4(b)(2), § 401, 86 Stat. 150, 154 (codified as amended at 30 U.S.C. § 901 (2006)) (internal quotation marks omitted); Black Lung Benefits Revenue Act sec. 203(a)(4) (mandating the removal of this provision from the statute and thereby restoring the BLBA’s original purpose).

31. 30 U.S.C. § 901(a) (1982); *see* Black Lung Benefits Revenue Act sec. 203(a)(4). Following the 2010 enactment of the PPACA, § 901(a) remains substantially similar to this language. *Compare* 30 U.S.C. § 901(a) (1982), *with* 30 U.S.C. § 901(a) (2012) (illustrating that the current law under § 901(a) still reflects the change that Congress made in 1981, omitting the purpose of the BLBA to provide benefits to dependents of miners who were totally disabled at the time of their deaths).

32. Black Lung Benefits Revenue Act sec. 203(a)(5).

33. *Id.* at sec. 203(a)(1).

34. *See* Daniel N. Price, *Black Lung Benefits Revision*, SOC. SECURITY BULL., Nov. 1982, 26, 26–28, *available at* <http://www.ssa.gov/policy/docs/ssb/v45n11/v45n11p26.pdf> (discussing the

amended §§ 921(a) and 922(a)(2) were read consistently with the other portions of the BLBA that the 1981 amendment edited.³⁵ The U.S. Court of Appeals for the Eleventh Circuit explained the result of the 1981 narrowing of the BLBA benefit eligibility for dependent survivors as follows: “The net effect of these amendments [was that] to obtain benefits after 1981, survivors needed to file claims and show that their associated miners died due to pneumoconiosis.”³⁶

The next, and most recent, change to the BLBA occurred in 2010 with the enactment of the PPACA, which returned § 932(l) close to its original form.³⁷ Presently, subsection (l) states, “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.”³⁸ Notably, the PPACA *did not* alter the other provisions of the BLBA, which were changed by the 1981 amendments and required a survivor to prove the disease caused a miner’s death in order to continue receiving BLBA benefits.³⁹

financial motivations for the 1981 amendments given the increasing burden on the federal government to continue paying miner and survivor benefits); *see also* Black Lung Benefits Revenue Act sec. 203(a)–(6), §§ 412(a)(2), (5), 411(a), 422(i).

35. *Compare* Black Lung Benefits Revenue Act sec. 203(a)(1), (5) (modifying language of 30 U.S.C. §§ 901(a), 922), *with id.* at sec. 203(a)(2), (3), (6) (modifying language in exactly the same way at 30 U.S.C. §§ 922, 931, 932).

36. *U.S. Steel Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 719 F.3d 1275, 1278 (11th Cir. 2013) (citing *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988)) (examining the historical basis for the statutory changes).

37. *Compare* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, sec. 7(h), § 422, 92 Stat. 95, 99–100 (codified as amended at 30 U.S.C. § 932 (2006)), *with* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1556(b), § 422(l), 124 Stat. 119, 260 (2010) (codified as amended at 30 U.S.C. § 932(l) (2012)). *See* Black Lung Benefits Revenue Act sec. 203(a)(6) (enacting the language to restore the original statutory provision).

38. 30 U.S.C. § 932(l) (2012).

39. *See* Patient Protection and Affordable Care Act sec. 1556, (amending 30 U.S.C. § 932(l) to no longer require a new filing, refiling, or revalidation of an existing benefit paid before a miner’s death, but making no change to §§ 901(a), 921(a), 922(a) (emphasis added). According to the Fourth Circuit, § 921(a) still contains the 1981 narrowing language, which requires that:

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

W. Va. CWP Fund v. Stacy, 671 F.3d 378, 390 (4th Cir.), *amended by* No. 11-1020, 2011 U.S. App. Lexis 25427, at *1 (4th Cir. 2011) (emphasis added) (quoting 30 U.S.C. § 921(a)). Noting the apparent conflict between this section and § 932(l) under the PPACA, the Fourth Circuit also said that “§ 921(a)—unlike § 932(l)—appears to force survivors to prove that the miner’s ‘death was due to pneumoconiosis,’ because it limits benefits in respect to the death of any miner . . . to claims filed before the effective date of the 1981 amendments.” *Id.* Similarly, § 922(a)(2) still provides that benefit payments will be made to the widow of a miner “at the rate the deceased miner would receive such benefits if he were totally disabled” when a miner dies “due to pneumoconiosis

The current circuit split developed out of the tension between § 932(*l*) and the other portions of the BLBA.⁴⁰ The U.S. Courts of Appeals for the Third, Fourth, and Eleventh Circuits have all held that the changes made to the BLBA by the PPACA no longer require survivors to prove that a miner died of black lung disease in order to receive benefits, despite recognizing that § 932(*l*) may be inconsistent with other sections of the BLBA.⁴¹ However, the U.S. Court of Appeals for the Sixth Circuit reconciled this apparent inconsistency in a recent, and rather internally contradictory, decision.⁴² Because the incidence of black lung disease is on the rise,⁴³ Congress decided that the PPACA change to § 932(*l*) should apply retroactively.⁴⁴ Therefore, employers would likely face an escalation in the amount of total benefits paid to miners and miners' survivors if the threshold to receive BLBA benefits is lowered.⁴⁵ Clarifying this discrepancy in the case law to provide a uniform statutory interpretation will result in appreciable benefits to miners, survivors of miners, employers, and the courts.⁴⁶

or, except with respect to a claim filed . . . on or after the effective date of the Black Lung Benefits Amendments of 1981, of a miner receiving benefits under this part.” 30 U.S.C. § 922(a)(2) (emphasis added) (retaining the 1981 amendments' limiting language). See also *U.S. Steel Mining Co.*, 719 F.3d at 1280 (noting that Congress' failure to amend these other portions of the BLBA concurrently with changes made to § 932(*l*) was one of the major arguments advanced by defendant U.S. Steel Mining Company in defending its stance that the PPACA did not eliminate the need for survivors to show a miner died of black lung disease to receive BLBA survivor benefits). Moreover, the stated purpose of the BLBA is still “to provide benefits . . . to the surviving dependents of miners whose death was due to [pneumoconiosis].” 30 U.S.C. § 901(a).

40. *U.S. Steel Mining Co.*, 719 F.3d at 1280 (observing that a “fledgling circuit split has developed” with regard to § 932(*l*)'s statutory interpretation).

41. See *Union Carbide Corp. v. Richards*, 721 F.3d 307, 310 (4th Cir. 2013); *U.S. Steel Mining Co.*, 719 F.3d at 1284; *W. Va. CWP Fund*, 671 F.3d at 381–82, 390–91; *B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233, 238 (3d Cir. 2011).

42. See *Vision Processing, LLC v. Groves*, 705 F.3d 551, 558–59 (6th Cir. 2013) (explaining in dicta that despite the tension between § 932(*l*) and the other BLBA provisions, the sections could be reconciled); see *infra* notes 112–14 and accompanying text.

43. Howard Berkes, *As Mine Protections Fail, Black Lung Cases Surge*, NPR (July 9, 2012, 5:00 AM), <http://www.npr.org/2012/07/09/155978300/as-mine-protections-fail-black-lung-cases-surge> (uncovering in a 2012 two-part investigation completed in conjunction with CPI that “[c]ases of the worst stage of the disease have quadrupled since the 1980s in a triangular region of Appalachia stretching from eastern Kentucky through southern West Virginia and into southwestern Virginia”).

44. Patient Protection and Affordable Care Act sec. 1556(c). Although enacted in 2010, the PPACA states that “[t]he amendments [to § 932(*l*)] shall apply with respect to claims filed . . . after January 1, 2005, that are pending on or after the date of enactment of this Act.” *Id.*

45. See Chris Hamby, *As Experts Recognize New Form of Black Lung, Coal Industry Follows Familiar Pattern of Denial*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2013/11/01/13653/experts-recognize-new-form-black-lung-coal-industry-follows-familiar-pattern-denial> (describing the financial impact that recognizing more relaxed black lung standards would have on coal mining operators). See *Monthly Benefit Rates*, *supra* note 19 (listing the amount of monthly payments employers must make for qualified beneficiaries).

46. Persistent confusion surrounding the BLBA could result in such claims lingering in the legislative process for longer than would be desirable or necessary if the rules surrounding BLBA

This Note summarizes the amendments made to the BLBA following its passage in 1969 through the enactment of the 2010 PPACA. Next, this Note addresses the split among the circuits over the meaning of the revised language in § 932(l), and explains the reasoning of the Third, Fourth, Sixth, and Eleventh Circuits regarding the effect of the PPACA on BLBA benefit eligibility for miners' dependent survivors. This Note then explains the significance of, and necessity in, resolving the confusion over § 932(l). Subsequently, this Note provides an analysis of § 932(l)'s surplusage⁴⁷ issue, a problem inherent in reading § 932(l) as a component of the rest of the BLBA statutory scheme. Finally, this Note suggests that the current circuit split over the construction of § 932(l) can be easily reconciled by using a synthesized approach when deciding future § 932(l) issues.

I. THE HISTORY OF § 932(L): THE BLBA'S MULTIPLE AMENDMENTS PRIOR TO THE ENACTMENT OF THE PPACA

A. A Myriad of Amendments

The history of BLBA survivor benefit eligibility prior to the enactment of the PPACA can be examined in four phases: (1) from the 1969 enactment of the original BLBA until 1972; (2) from 1972 until 1977; (3) from 1977 until 1981; and (4) from 1981 until 2010.

1. Phase One: 1969 until 1972

The Federal Coal Mine Health and Safety Act (FCMHSA) of 1969 required that the Secretary of the then-named Department of Health, Education, and Welfare (HEW) "make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis."⁴⁸ Additionally, the FCMHSA established that the wife of a miner receiving FCMHSA benefits would receive the same amount of benefits after his death as a miner who was "totally disabled" by the disease.⁴⁹ Thus, "the HEW under the FCMHSA required widows of coal miners to prove that the miner died due to pneumoconiosis in order to receive survivors'

benefits administration were clarified. For example, as a result of the lack of settlement language, the BLBA does not facially recognize settlement agreements within the Longshore and Harbor Workers' Compensation Act (LHWCA), which makes resolving the confusion around the BLBA even more significant with respect to reducing the litigation costs for involved parties. Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 52, 105 n.166 (2013) (citing *Ramey v. Dir., Office of Workers' Comp. Programs*, 326 F.3d 474, 476–77 (4th Cir. 2003)) (detailing the long history and significant cost of BLBA litigation).

47. The term "surplusage" refers to "[r]edundant words in a statute or legal instrument; language that does not add meaning." BLACK'S LAW DICTIONARY 1581 (9th ed. 2009).

48. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(a), 83 Stat. 742, 793 (1969) (codified as amended 30 U.S.C. § 921(a) (2012)).

49. *Id.* § 412(a)(2).

benefits even if the miner had been receiving pneumoconiosis disability benefits.”⁵⁰ This heightened requirement led to the rejection of many widows’ claims because they lacked the evidence and capacity to prove that a miner died of black lung disease.⁵¹

2. Phase Two: 1972 until 1977

Recognizing that the resultant denial of many widows’ claims created by the language of the initial FCMHSA was a problem, Congress enacted the Black Lung Benefits Act of 1972 (BLBA).⁵² The BLBA made many changes to the FCHMSA, including altering the stated purpose of the FCHMSA.⁵³ Specifically, the BLBA of 1972 changed the purpose of the statute from offering benefits only to survivors of miners who had died from black lung disease to providing benefits to survivors of miners who had *either* died of black lung disease or were “totally disabled” by the disease at the time of their death.⁵⁴ Thus, following the 1972 amendment, “surviving spouses could obtain benefits either by showing that the miner died due to pneumoconiosis or that the miner had been totally disabled by the disease when he or she died.”⁵⁵ The 1972 amendment’s implementation “resulted in a surge of approvals for [BLBA] claims [by dependent survivors].”⁵⁶ Despite this broadening of the BLBA,⁵⁷ §

50. B & G Constr. Co. v. Dir., Office of Workers’ Comp. Programs, 662 F.3d 233, 239–40 (3d Cir. 2011) (citing John S. Lopatto III, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 684 (1983)).

51. Lopatto, *supra* note 50, at 684. The miner- and survivor-friendly nature of the BLBA is further emphasized by the rebuttable presumption established by the 1972 amendments that mining caused a miner’s pneumoconiosis “if a miner worked in an underground coal mine for ten years or more, or if such a miner died due to pneumoconiosis after working in a coal mine for ten or more years.” Lindequist, *supra* note 13, at 502–03. This rebuttable presumption, if applicable to a miner’s claim, erased the need for miners or their survivors to meet the BLBA’s requirement that they show that the pneumoconiosis was the result of mining. *Id.*

52. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, 150 (1972). See Lindequist, *supra* note 13, at 502–04 (detailing the obstacles FCMHSA created for miners, and thus, miners’ survivors, to obtain benefits, such as the ability to work or do “gainful activity”).

53. Black Lung Benefits Act sec. 4(b)(2) (adding a phrase to broaden eligibility requirements for survivors). The 1972 amendment also included siblings, parents, and “orphans or dependent children of a miner who died from pneumoconiosis” as individuals who could be considered dependent eligible survivors. Lindequist, *supra* note 13, at 502 & 502 n.38 (referencing Black Lung Benefits Act sec. 1(b)(1)).

54. See Black Lung Benefits Act sec. 4(b)(2).

55. U.S. Steel Mining Co. v. Dir., Office of Workers’ Comp. Programs, 719 F.3d 1275, 1277–78 (11th Cir. 2013) (expounding upon the procedural history of the BLBA of 1972 to determine a survivor’s eligibility for benefits).

56. B & G Constr. Co. v. Dir., Office of Workers’ Comp. Programs, 662 F.3d 233, 241 (3d Cir. 2011) (noting that while benefits eligibility was expanded in general, it was not changed in § 922, which managed widow benefits specifically).

57. See Lindequist, *supra* note 13, at 503 (stating that the reason for expansion was inclusion of more miners’ survivors). The 1972 amendment added another miner- and survivor-friendly rebuttable presumption to that already established in the original 1969 enactment of the BLBA. *Id.*

932(f)'s three-year statute of limitations led to "a backlog of administrative claims and the denial of thousands of survivors' benefits claims."⁵⁸

3. Phase Three: 1977 until 1981

The 1977 amendment added § 932(l) to the BLBA, which made it unnecessary for a deceased miner's survivor to prove that the miner died of black lung disease in order for the survivor to continue receiving BLBA benefits following a miner's death.⁵⁹ Additionally, the 1977 amendment "created the Black Lung Disability Trust Fund to better provide funding for the benefits program."⁶⁰ These measures combined to make the 1977 amendment "tremendously successful in increasing the number of miners who received benefits."⁶¹

4. Phase Four: 1981 Until 2010

The broadening of the BLBA in 1977 dramatically increased the number of BLBA claims, "a development which began to 'wreak havoc' in the coal industry and caused Congress to again amend the [BLBA] in 1981 with the Black Lung Benefits Revenue Act of 1981."⁶² Congress, during the administration of President Reagan, added the phrase, "except with respect to a

After the 1972 amendment was passed, a presumption of pneumoconiosis attached "regardless of a negative chest X-ray if a miner had worked in an underground coal mine for at least fifteen years (or a surface miner working in similar conditions) and shows other signs or symptoms of pneumoconiosis." *Id.* Given that the symptoms of black lung disease are rather common, *see Coal Worker's Pneumoconiosis*, *supra* note 1 (listing two symptoms: cough and shortness of breath), the requirement that a miner exhibit "other signs or symptoms" was likely easily satisfied. *See Prunty & Solomons*, *supra* note 13, at 679–81 (remarking that of the 537,000 claims filed after this presumption was established, zero were successfully rebutted).

58. *B & G Constr. Co.*, 662 F.3d at 241. In its current form, § 932(f) establishes that "[a]ny claim for benefits by a miner under th[e] benefits section of the BLBA] shall be filed within three years after whichever of the following occurs later—(1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. § 932(f) (2012).

59. *See supra* note 25 and accompanying text. The 1977 amendment added yet another rebuttable presumption to the BLBA benefits analysis that subjected future BLBA claims to the presumption that "a deceased miner who had worked for twenty-five years or more in a coal mine had died due to pneumoconiosis." Lindequist, *supra* note 13, at 505.

60. Lindequist, *supra* note 13, at 504. The Black Lung Disability Trust Fund (the Fund) took over the responsibility to issue payments to a miner or his survivor when "no responsible coal operator could be found to assume liability, or if the operator responsible refused to make payments." *Id.* at 504 n.52. The Fund is able to make payments because it "is financed by coal mine companies through an excise tax." GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 6. Additionally, "each coal mine operator is required to pay an excise tax to support payment of benefits to claimants and to cover the cost of administering the program." *Id.*

61. Lindequist, *supra* note 13, at 505 (exploring the benefits and issues created by the 1977 amendments).

62. *B & G Constr. Co.*, 662 F.3d at 242 (quoting *Helen Mining Co. v. Dir., Office of Workers' Comp. Programs*, 924 F.2d 1269, 1273 (3d Cir. 1991)).

claim filed under this part on or after [January 1, 1982]” to § 932(l).⁶³ This amendment reinstated (with respect to claims filed after January 1, 1982) the nearly insurmountable requirement that survivors prove that a miner died as a result of black lung disease in order to receive BLBA benefits.⁶⁴ Additionally, the 1981 amendments changed other portions of the BLBA so that the entire statutory scheme incorporated and reflected that requirement.⁶⁵ No further changes occurred to the BLBA until the 2010 passage of the PPACA.⁶⁶

5. Phase Five: The PPACA Changes

As part of an overhaul of the American healthcare system, section 1556(b) of the PPACA altered § 932(l) yet again.⁶⁷ The PPACA returned the language of § 932(l) to nearly the same content originally added by the 1977 amendment.⁶⁸ However, other than § 932(l), the PPACA did not change the other portions of the BLBA that relate to the pre-benefits requirement of proof that a miner died of black lung disease.⁶⁹ There is no legislative history accompanying section 1556(b) of the PPACA, so courts do not have the benefit of a clear congressional intent concerning why Congress modified § 932(l) to the exclusion of the other portions of the BLBA.⁷⁰ Per section 1556(c) of the PPACA, section 1556(b)’s change to § 932(l) applies retroactively to January 1, 2005, an alteration that is accompanied by legislative history.⁷¹

63. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, sec. 203(a)(6), § 422(l), 95 Stat. 1635, 1644.

64. *B & G Constr. Co.*, 662 F.3d at 242 (noting the reinstatement of such limiting language in accordance with similarly restricting changes in the 1981 amendments).

65. *Id.* at 242–43 (listing each section altered). The 1981 amendment also removed most of the rebuttable “statutory presumptions . . . making it tougher for miners to prove entitlement under the [BLBA].” Lindequist, *supra* note 13, at 506. Additionally, the amendment reassigned the management of the Black Lung Disability Trust Fund to the Internal Revenue Service. *Id.* at 506–07. Despite the changes, and the fact that it was suddenly more difficult for survivors to obtain BLBA benefits, Lindequist believes that “[i]f Congress had intended to completely undercut the benefits provided, it would have removed all the statutory presumptions that aid a miner in proving entitlement. [] [I]t was well within the power of Congress to eliminate these benefits altogether, a path it did not take.” *Id.* at 507 (using the fact that Congress retained two rebuttable presumptions after 1981 to bolster this assertion).

66. *B & G Constr. Co.*, 662 F.3d at 243.

67. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1556(b), § 422(l), 124 Stat. 119, 260 (2010).

68. See *supra* note 37 and accompanying text (comparing the language added in 1977 with that added in 2010).

69. See Patient Protection and Affordable Care Act sec. 1556(a)–(c) (omitting other sections of the BLBA from edits made to the language of § 932(l)). Notably, this means that the purpose statement of the BLBA also remained unchanged. See *infra* notes 147–48 and accompanying text (describing the purpose statement as concerned with expanding the benefits available to citizens).

70. See, e.g., *B & G Constr. Co.*, 662 F.3d at 244–45 (finding a lack of legislative history particular to section 1556(b) and noting the numerous contradictions created).

71. *Id.* (citing 156 CONG. REC. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd)). During debate over this portion of the PPACA on the Senate floor, Senator Byrd of West Virginia

B. An Imbalanced Circuit Split Develops: The Sixth Circuit's Interpretation of § 932(1) Stands in Opposition to that of the Third, Fourth, and Eleventh Circuits

1. The Third, Fourth, and Eleventh Circuits Analyze § 932(1)

Following the 2010 PPACA changes to the BLBA, the Third, Fourth, and Eleventh Circuits each considered cases that raised the issue of whether survivors were required to prove that a miner died of black lung disease in order to receive continued BLBA benefits.⁷²

The Third Circuit decided the issue first in *B & G Construction Co. v. Director, Office of Workers' Comp. Programs*.⁷³ The court heard the case following B & G's appeal of a decision by DOL to uphold Norma Campbell's award of BLBA survivor benefits.⁷⁴ Norma was married to Ernest Campbell,

made it clear that the changes made by section 1556(b) of the PPACA would apply retroactively to January 1, 2005, with great implications on both future claims and claims dating back to that time. 156 CONG. REC. S2083–84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd). Specifically, Senator Byrd stated that section 1556 would:

[A]pply to all claims that will be filed henceforth, including many claims filed by miners whose prior claims were denied, or by widows who never filed for benefits following the death of a husband. But section 1556 will also benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order. Section 1556 applies immediately to all pending claims, including claims that were finally awarded or denied prior to the date of enactment of the [PPACA], for which the claimant seeks to modify a denial, or for which other actions are taken in order to modify an award or denial I look forward to working to ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won.

Id. Employers have argued that there can be no justification for choosing the retroactivity date of January 1, 2005. Brief of Petitioner at 24, *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275 (11th Cir. 2013) (No. 11-14468-CC) (arguing that no legislative history exists to explain any justification). Specifically, *U.S. Steel Mining Company*, on appeal to the Eleventh Circuit, argued that the date of January 1, 2005 violated *U.S. Steel Mining Company's* "ability to protect its interest through fair notice in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 25. *U.S. Steel Mining Company* further argued that the "date bears no special significance in the federal black lung program. Congress arbitrarily and irrationally chose this date, and in doing so, attached new legal rights and duties to pre-enactment transactions." *Id.*

72. See *Union Carbide Corp. v. Richards*, 721 F.3d 307, 310 (4th Cir. 2013); *U.S. Steel Mining Co.*, 719 F.3d at 1277; *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381 (4th Cir.), *amended by* No. 11-1020, 2011 U.S. App. Lexis 25427, at *1 (4th Cir. 2011); *B & G Constr. Co.*, 662 F.3d at 238.

73. 662 F.3d 233, 238 (3d Cir. 2011).

74. *Id.* at 237. The court's explanation of the history of Norma's claim is illustrative of the multi-leveled appeal process within DOL:

This matter comes on before this Court on B & G Construction Company's petition for review of a decision and final order of the Benefits Review Board . . . of the United States Department of Labor . . . dated August 30, 2010, that reversed an administrative law judge's . . . decision and order denying respondent Norma G. Campbell's . . . claim for survivor's benefits pursuant to provisions of the Black Lung Benefits Act The Board determined that Campbell was entitled derivatively to survivor's benefits under 30

who worked as a miner for B & G for more than sixteen years before his death on April 4, 2005.⁷⁵ On February 6, 2006, Norma filed a claim for survivor benefits under the BLBA.⁷⁶ At the time, Norma was required to demonstrate that black lung disease caused Ernest's death.⁷⁷ A DOL administrative judge initially denied her claim because she could not prove that Ernest died from black lung disease.⁷⁸ Norma repeatedly appealed the decision within DOL, but the DOL BLBA appeals process took so long that her claim was still in the system when the PPACA was passed in 2010.⁷⁹ Because the PPACA made the revised § 932(l) retroactive to January 1, 2005, the Benefits Review Board found that Norma no longer needed to prove that Ernest died of black lung disease as a prerequisite to receiving BLBA survivor benefits.⁸⁰ B & G petitioned the Third Circuit to review that decision, and, subsequently, the Third Circuit upheld DOL's award of benefits.⁸¹ After extensively reviewing the history of the BLBA, including the numerous amendments, the Third Circuit attempted to reconcile the post-PPACA amended § 932(l) with the unchanged portions of the BLBA.⁸² The court held that Congress intended to use the 2010 PPACA amendment to the BLBA as a way to eliminate the need for eligible, benefit-seeking survivors to demonstrate a direct correlation between a miner's death and black lung disease.⁸³ However, the court noted that while § 932(l) removed the need for eligible survivors to re-file claims after a miner's death,⁸⁴ at least one other section of the BLBA still "indicates that an eligible survivor [must] prove that a miner was eligible to receive benefits under the subchapter and is required to file a claim to prove that pneumoconiosis caused the miner's death."⁸⁵ The Third Circuit concluded that "it [was] evident that there [was] no way to reconcile" § 932(l) with the unedited portions of the BLBA.⁸⁶

U.S.C. § 932(l), as last amended by the Patient Protection and Affordable Care Act of 2010 . . . (emphasis added)

Id. (citations omitted).

75. *Id.* at 245.

76. *Id.*

77. *Id.*

78. *Id.* at 245–46 (explaining that the ALJ relied on B & G's medical expert in its decision, who had reported no evidence of black lung disease, over the doctor who had treated Ernest Campbell prior to his death).

79. *See id.* (highlighting the disagreement between medical reports as part of the issue that lead to such a lengthy appeals process).

80. *Id.* at 246.

81. *Id.* at 238, 246.

82. *See id.* at 247–53 (analyzing the legislative history, previous wording, plain language interpretation, and each amendment made to the BLBA).

83. *Id.* at 252.

84. *Id.* (quoting 30 U.S.C. § 932 (2012)).

85. *Id.* (naming § 922(a) as one of those sections).

86. *Id.*

Less than two months later, the Fourth Circuit faced the same BLBA issue.⁸⁷ The fact pattern in *West Virginia CWP Fund v. Stacy* essentially mirrors that of Norma Campbell's story.⁸⁸ Elsie Stacy was married to Howard Stacy, who worked as a coal miner in West Virginia for eleven years.⁸⁹ Howard received BLBA benefits for twenty years before his death in 2007.⁹⁰ Elsie reapplied for BLBA survivor benefits following Howard's death, but she was denied because she could not show that Howard died from black lung disease.⁹¹ The Fourth Circuit noted that the portions of the BLBA that remained unamended by the 2010 PPACA amendment appeared to conflict with § 932(l) and referenced the *B & G Construction* court's interpretation of the same interpretive issue.⁹² The Third Circuit's reasoning persuaded the Fourth Circuit, but the Fourth Circuit also added that § 932(l), as the most recently passed part of an internally contradictory statute, "repeal[ed] by implication" §§ 901, 921(a), and 922(a)(2).⁹³

In 2013, the Eleventh Circuit offered its own interpretation of § 932(l) in *U.S. Steel Mining Co. v. Director, Office of Workers' Compensation Programs*.⁹⁴ The Eleventh Circuit combined the approaches employed by the Third and Fourth Circuits to solve the § 932(l) statutory construction issue.⁹⁵ The facts presented before the Eleventh Circuit echoed those in the Third and Fourth Circuit cases.⁹⁶ Eligah Starks was a coal miner for forty-four years and qualified for BLBA benefits at the time of his death in 2006.⁹⁷ Upon his death, Eligah's wife, Kathy, filed a claim to receive Eligah's BLBA benefits as his survivor.⁹⁸ A DOL administrative judge found that Kathy failed to demonstrate, by a preponderance of the evidence, that Eligah had died from black lung disease, and thus, denied Kathy continued survivor benefits.⁹⁹ In deciding Kathy's appeal, the Eleventh Circuit utilized an approach similar to the Third Circuit's

87. See *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 380–81 (4th Cir.), amended by No. 11-1020, 2011 U.S. App. Lexis 25427, at *1 (4th Cir. 2011).

88. Compare *B & G Constr. Co.*, 662 F.3d at 245–48, with *W. Va. CWP Fund*, 671 F.3d at 382–83.

89. *W. Va. CWP Fund*, 671 F.3d at 382.

90. *Id.*

91. *Id.*

92. *Id.* at 389–91 (citing *B & G Constr. Co.*, 662 F.3d at 249–52).

93. *Id.* at 391 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)) (internal quotation marks omitted).

94. 719 F.3d 1275 (11th Cir. 2013).

95. See *id.* at 1280, 1284 (holding a survivor is not freed from all obligations to act under § 932(l)).

96. See *id.* at 1279; *W. Va. CWP Fund*, 671 F.3d at 382; *B & G Constr. Co.*, 662 F.3d at 245–46.

97. *U.S. Steel Mining Co.*, 719 F.3d at 1279 (noting that Starks began receiving benefits in 2000).

98. *Id.*

99. *Id.*

analysis in an effort to reconcile the language of § 932(l) with the language of the BLBA provisions that remained unamended following enactment of the PPACA in 2010.¹⁰⁰

First, the Eleventh Circuit considered the plain text of the statute.¹⁰¹ The court found § 932(l)'s use of the term “eligible survivor” was ambiguous and required clarification in order for the court to understand the role of § 932(l) within the context of the BLBA statutory scheme.¹⁰² Therefore, the Eleventh Circuit examined the legislative history of section 1556, the portion of the PPACA that changed § 932(l), in order to comprehend Congress' intent.¹⁰³ Finding no legislative guidance on the § 932(l) changes except with respect to retroactivity, the court interpreted the current § 932(l) statutory language and, like the Fourth Circuit, concluded that the plain meaning of the latest statutory amendment should govern.¹⁰⁴ Ultimately, the Eleventh Circuit found that so long as:

[A] survivor can meet the requirements of § 932(l), she is entitled to benefits, and the language in the unamended statutes does not apply to her. If a survivor cannot meet the § 932(l) requirements, she must file a claim [for survivor's benefits] and make the appropriate showing—including, per § 922(a), that the miner died due to pneumoconiosis.¹⁰⁵

Essentially, if survivors are eligible dependents as defined under the BLBA, then they are both entitled to survivor benefits without having to prove that the miner died as a result of black lung disease and immune from the other portions of the BLBA that the 2010 PPACA did not change.¹⁰⁶ However, dependents who are unable to show that they are eligible are subject to the limiting language the PPACA did not remove from the other portions of the BLBA, and, therefore, the dependents must still show that the miner died of black lung disease to receive survivor benefits.¹⁰⁷

2. *The Sixth Circuit Throws a Curveball: Vision Processing, LLC v. Groves*

In 2013, prior to the Eleventh Circuit's ruling in *U.S. Steel Mining Co.*, the Sixth Circuit faced the same BLBA interpretation issue that confronted the other

100. Compare *id.* at 1280–83 (internal quotation marks omitted) (analyzing the statutory definition of “eligible survivor” by initially examining §§ 932 and 922(a)), with *B & G Constr. Co.*, 662 F.3d at 248–50 (interpreting the statute by first looking to §§ 922(a) and 932 for guidance).

101. *U.S. Steel Mining Co.*, 719 F.3d at 1280–84.

102. *Id.* at 1281 (quoting 30 U.S.C. § 932(l) (2012)) (internal quotation marks omitted) (determining that survivors must meet the relational and dependency requirements laid out in other BLBA provisions).

103. *Id.* at 1283.

104. *Id.* at 1284 (holding that the plaintiff was entitled to receive benefits if she met the relational and dependence elements required of an eligible survivor).

105. *Id.*

106. *Id.*

107. *Id.* at 1283–84 (listing the relational and dependency showings as the only two actions required of a person seeking BLBA survivor benefits).

circuits.¹⁰⁸ Christie Groves was married to Earl Groves, who worked in Kentucky coal mines for twenty-nine years prior to his death in 2006.¹⁰⁹ A DOL administrative judge denied Christie's claim for survivor benefits because she could not prove that Earl died of black lung disease.¹¹⁰ The Sixth Circuit's decision in *Vision Processing, LLC v. Groves* was the result of Christie's appeal.¹¹¹ The Sixth Circuit noted the tension between § 932(*l*) and the other unchanged portions of the BLBA, particularly § 922(a)(2).¹¹² However, the Sixth Circuit found that the provisions could be reconciled and did not have to be read in conflict with one another.¹¹³ The court noted that the less restricting unamended statutes of the BLBA should not render § 932(*l*), "[t]he key specific provision" changed in the post-2010 amendments, null and void.¹¹⁴ However, the Sixth Circuit did not explain why it classified § 932(*l*) as a more specific statute than the unamended BLBA sections.¹¹⁵ This holding, and the Sixth Circuit's reasoning for reconciliation, created what the Eleventh Circuit termed a "fledgling circuit split."¹¹⁶ The Sixth Circuit, in its analysis, appeared to hold that a survivor did not need to show that a miner died of black lung disease, but also went on to state:

While Congress would have been wise to make corresponding changes to the other more general provisions, the omission [of those changes] does not create irreconcilability but merely leaves in place additional language that serves no useful purpose (except as a reminder of the old rules). The fact remains that survivor benefits are paid to the survivors of miners who die due to pneumoconiosis, and the post-2010 amendments simply resurrect a former method for making this showing.¹¹⁷

Despite including this language in its decision, and thus placing itself in opposition to the Third, Fourth, and Eleventh Circuits, the Sixth Circuit returned a decision in favor of Christie, relying on the fact that the amendment to § 932(*l*) was more recent than the amendments made to the unedited provisions of the

108. *Id.* at 1275; *see also* *Vision Processing, LLC v. Groves*, 705 F.3d 551, 551, 553 (6th Cir. 2013).

109. *Vision Processing, LLC*, 705 F.3d at 554 (noting that Groves had applied for BLBA benefits prior to his death and had been in the midst of fighting for benefits at the time of his death).

110. *Id.*

111. *Id.* at 554. The PPACA amendments forced the Benefits Review Board to overturn the ALJ's initial denial of her claim for survivor benefits. *Id.*

112. *Id.* at 558–59 (declaring the tension a "scrivener's misfortune").

113. *Id.* (stating that Congress' oversight to extend § 932(*l*)'s amendment to other BLBA provisions only served to create unnecessary language in the amended provisions).

114. *Id.*

115. *Vision Processing, LLC*, 705 F.3d at 559 (determining that Congress amended the provision it had intended to change).

116. *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275, 1280 (11th Cir. 2013).

117. *Vision Processing, LLC*, 705 F.3d at 559.

BLBA.¹¹⁸ The court stated that it chose this method in order to provide “a tiebreaker to unravel the conflict.”¹¹⁹

II. WHY SUCH A SMALL CHANGE TO THE BLBA HAS GREAT SIGNIFICANCE

Two factors combine to make a resolution of the interpretive conflict between the post-PPACA § 932(l) and the other portions of the BLBA significant: (1) a sudden and drastic increase in cases of black lung disease over the previous decade,¹²⁰ and (2) the retroactive application of the PPACA amendment to the BLBA.¹²¹

A. *The Increasing Rate of Black Lung Disease*

Enactment of the FCMHSA in 1969 significantly impacted the coal mining industry.¹²² The FCMHSA drastically decreased the legal limit of coal dust a miner was permitted to breathe, so much so that some miners were subsequently inhaling only one-quarter the amount of coal dust they had prior to the FCMHSA’s enactment.¹²³ Accordingly, the incidence of black lung disease declined by ninety percent.¹²⁴

However, in eastern Kentucky, southern West Virginia, and southwestern Virginia, the rate of reported black lung disease has quadrupled since the 1980s.¹²⁵ Further, in an alarming and shocking trend, the most serious form of the disease currently affects miners younger than those historically impacted.¹²⁶

Among the contributing factors to the recent and unexpected rise in black lung disease are an increase in the number of hours worked on average on a weekly basis, revised coal dust control laws, and the development of advanced machinery.¹²⁷ Further, these causes, as well as the resulting increase in the rate

118. *Id.*

119. *Id.*

120. Berkes, *supra* note 43 (stating that the number of miners diagnosed with black lung disease “doubled in the last decade”).

121. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1556(c), 124 Stat. 119, 260 (2010).

122. *See* Berkes, *supra* note 43.

123. *Id.* The new limit set by the FCMHSA was “[two] milligrams per cubic meter of air.” *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Some of the more jarring cases of the disease involve individuals who worked in coal mines for less than ten years and others who were younger than thirty years old. *Id.* Additionally concerning is the fact that a new, previously unknown, form of the disease is emerging in miners, which doctors attribute to the inhalation of coal dust. Hamby, *supra* note 45. The mining industry has invested immense resources in an attempt to prove that the cause of this new form of black lung disease is not related to dust found in coal mines. *Id.* (stating that a particular mining company “hired radiologists, pathologists, pulmonologists and a statistician to examine [one miner], write piles of reports[,] and attack a growing body of medical literature”).

127. Berkes, *supra* note 43. “The average workweek for coal miners grew 11 hours in the last 30 years, adding about 600 hours of exposure each year.” *Id.* Advanced machinery is becoming

of black lung disease, can be attributed to a fivefold increase in the demand for coal since the 1970s.¹²⁸

It is unlikely that the accelerated rates of black lung disease will decrease in the near future.¹²⁹ Therefore, coupled with the continued increase in the occurrence of black lung disease, it is likely that more survivors will seek continued survivor benefits under the BLBA than ever before.

B. The Issue with Retroactive Application

Mine operators have challenged the constitutionality of the retroactive application of the PPACA's changes to § 932(l).¹³⁰ Specifically, the mine operators assert that retroactive application of the PPACA to § 932(l) "depriv[es] [the companies] of property without due process of law" in "violat[ion] [of] the Fifth Amendment's Due Process Clause."¹³¹

more capable of "cutting through [underground] coal seams," resulting in the increased release of silicon dioxide, which may be more detrimental to miners than the plain coal dust of the past. *Id.* Most mines provide breathing masks to employees. Steve James, *Black Lung Disease Seen Rising in U.S. Miners*, REUTERS (May 20, 2011 3:54 PM), <http://www.reuters.com/article/2011/05/20/us-black-lung-idUSTRE74J6DJ20110520>. However, a United Mine Workers union spokesperson claims the masks "do not fit well with facial hair and many miners have beards." *Id.* Therefore, the ill-fitting masks inhibit underground communication, "and, as a result, many miners may not wish to wear them." *See id.*

128. Berkes, *supra* note 43.

129. *See id.* (lamenting the lack of action being taken to make mining operations safer and how miners are left suffering in the same conditions). This could be due to the amount of silica dioxide in coal dust samples reported by coal mining inspectors and operators (which surpassed federal regulations), the weak and inconsistent legislative framework accompanying black lung disease legislation with which mine operators must comply, and the national demand for more coal than at any time in the past three decades. *Id.*

130. *See* U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs, 719 F.3d 1275, 1286 (11th Cir. 2013); W. Va. CWP Fund v. Stacy, 671 F.3d 378, 383 (4th Cir.), *amended by* No. 11-1020, 2011 U.S. App. Lexis 25427, at *1 (4th Cir. 2011); B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233, 253 (3d Cir. 2011). The employers emphasize that:

Retrospective laws are . . . of questionable policy, and contrary to the general principle that legislation by which . . . mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

Brief of Petitioner at 14, B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233 (3d Cir. 2011) (No. 10-4179) (quoting H. BROOM, LEGAL MAXIMS 24 (8th ed. 1891)) (internal quotation marks omitted).

131. *See, e.g.,* B & G Constr. Co., 662 F.3d 233 at 253 (quoting *Dusenbery v. United States*, 534 U.S. 161, 167 (2002)) (internal quotation marks omitted). Mine operators have also argued that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." Brief of Petitioner at 20–21, U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs, 719 F.3d 1275, 1286 (11th Cir. 2013) (No. 11-14468-CC) (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

1. *The Procedural Due Process Argument*

The mine operators' procedural due process argument is founded on the premise that, without the opportunity to show that a miner died from causes unrelated to black lung disease, the employer is denied a "fair and just hearing."¹³² These employers argue that the revised § 932(l) unconstitutionally creates an irrebuttable presumption in favor of the survivor.¹³³ The courts have rejected this argument, concluding that the revised § 932(l) does not create such a presumption.¹³⁴ Further, even if § 932(l) creates an irrebuttable presumption, courts have held there is no procedural due process violation because "there is no principle of law barring [Congress] from adopting that approach [regarding the BLBA]."¹³⁵

2. *The Substantive Due Process Argument*

Employers have also argued that the revised § 932(l) violates substantive due process because "the 2010 [PPACA] [a]mendment has no rational basis and runs counter to the stated purpose of the [BLBA]."¹³⁶ For example, in *B & G Construction*, the company claimed that because section 1556(b) of the PPACA contained no legislative history, "no rational basis" for the change existed.¹³⁷ The Third Circuit noted that the Supreme Court does not require Congress to attach legislative history to its statutory amendments, and, consequently, rejected *B & G's* argument.¹³⁸ Also, the Third Circuit found that the revised § 932(l) did not violate the purpose of the BLBA, which the Supreme Court previously characterized as relieving a miner's concern over whether his survivors would be able to continue collecting benefits after the miner's death.¹³⁹

132. See, e.g., *B & G Constr. Co.*, 662 F.3d at 253 (quoting Brief of Appellants at 30, *B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233 (3d Cir. 2011) (No. 10-4179)) (internal quotation marks omitted). *B & G Construction* also argued in its appellate reply brief that the retroactive application of the PPACA amendment to the BLBA constitutes a taking in violation of the Fifth Amendment because the amendment "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." Reply Brief of Petitioner at 12, *B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233 (3d Cir. 2011) (No. 10-4179)) (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 528–29 (1998)) (internal quotation marks omitted).

133. See, e.g., *B & G Constr. Co.*, 662 F.3d at 253.

134. See, e.g., *id.* at 254–55 (concluding that the employer's argument rests on an incorrect interpretation of PPACA's section 1556 that would permit any survivor of a miner to automatically receive BLBA benefits).

135. See, e.g., *id.* at 254.

136. See, e.g., *id.* at 255 (specifying that the employers argued the 2010 amendments turned the initially compensation-oriented BLBA program into a pension program, which went against the statute's purpose).

137. *Id.*

138. *Id.* at 256.

139. *Id.* at 258.

Given that courts have found the retroactive application of the revised § 932(*l*) to be constitutional, survivors who were previously denied benefits as far back as January 1, 2005 may now re-file.¹⁴⁰ The potential increase in the number of BLBA survivor benefit claims, as a result of the retroactive application, emphasizes the need to resolve the § 932(*l*) debate.

III. THE SURPLUSAGE PROBLEM, AND HOW TO RECONCILE THE DECISIONS OF THE SIXTH AND ELEVENTH CIRCUITS

A surplusage problem is at the heart of each case discussed in this Note. Courts have interpreted the deletion of the “except” clause in § 932(*l*) to mean that Congress intended to return § 932(*l*) to the pre-1981 version of the statute.¹⁴¹ This interpretation creates an issue in that it renders §§ 901, 921(a), and 922(a)(2) surplusage, meaning that these sections have no statutory role despite their lingering facial requirement that a widow show a direct correlation between a miner’s death and black lung disease prior to receiving benefits.¹⁴² Courts have found this combination of statutory language to be nearly, though not completely, irreconcilable.¹⁴³ Consequently, at least one court’s solution has been to accept the presence of the statutory surplusage.¹⁴⁴

Current statutory interpretation of § 932(*l*) is inherently circular: courts must choose between assigning meaning either to § 932(*l*) *or* to the other portions of the BLBA so as not to violate the rule against surplusage.¹⁴⁵ Specifically, if the courts do not require survivors to prove that the miner’s death was caused by black lung disease, the other unedited portions of the BLBA become

140. 156 CONG. REC. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd) (explaining how “[s]ection 1556 [of the PPACA] applies immediately to all pending claims, including claims that were finally awarded or denied prior to the date of enactment of the [PPACA]”).

141. See, e.g., *U.S. Steel Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 719 F.3d 1275, 1285–86 (11th Cir. 2013) (looking to the pre-1981 version and its implementation for guidance to interpret the current statute).

142. See *id.* at 1283 (stating that if a survivor applied for benefits under any other BLBA statute, he or she would have to prove that pneumoconiosis caused the miner’s death).

143. See, e.g., *B & G Constr. Co.*, 662 F.3d 233 at 252 (declining to accept the argument that section 1556 is null and void, in light of the other BLBA provisions); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 559 (6th Cir. 2013) (upholding section 1556 because it is within the bounds of fairness for the court to do so).

144. See, e.g., *U.S. Steel Mining Co.*, 719 F.3d at 1283 (deciding that, by interpreting § 932(*l*) to not require a miner’s survivor to prove a miner died from pneumoconiosis, the court “avoid[ed] rendering § 932(*l*) an altogether meaningless repetition of the existing requirements for obtaining survivors’ benefits”).

145. See James J. Sample, *The Sentences That Bind (The States)*, 103 COLUM. L. REV. 969, 984 n.90 (2003) (noting that the rule against surplusage is a “traditional canon of interpretation” that “reflects a ‘presumption that every statutory term adds something to a law’s regulatory impact’” (quoting WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 266 (2000))).

surplusage.¹⁴⁶ Similarly, if a court upholds this requirement, the 2010 PPACA change to § 932(*l*) is made unnecessary and likewise becomes surplusage. A court must, therefore, always decide whether to ignore a clear Congressional edit to § 932(*l*) in 2010 or the other sections of the BLBA when analyzing BLBA issues. Either choice results in a violation of the rule against surplusage.

The courts' decision to interpret the striking of the "except" language as evidence of Congressional intent to return the statute to its pre-1981 form comports with the purpose of both the PPACA and the original BLBA program, which is to provide expanded healthcare coverage and benefits to citizens.¹⁴⁷ Therefore, Congress' intent in changing § 932(*l*) may simply have been to effectuate a similar mechanism of achieving this goal.¹⁴⁸

However, the remaining unamended portions of the BLBA cannot be ignored. Why would Congress leave the other changes made by the 1981 amendment intact, particularly after making such comprehensive changes in 1981? Congress chose to leave those portions untouched, and therefore, the sections must serve some purpose to avoid violating the rule against surplusage.¹⁴⁹

The Eleventh Circuit's analysis appears to be a workable solution to the § 932(*l*) circularity problem. By relying heavily on the meaning of "eligible survivor," a point not stressed by the other courts,¹⁵⁰ the Eleventh Circuit appropriately assigned meaning to both the change made by the PPACA, as well as Congress' failure to amend the other portions of the BLBA.¹⁵¹ Pursuant to the Eleventh Circuit's reasoning, the change to § 932(*l*) would mean that a survivor is only exempt from proving a miner died from black lung disease if the survivor can show that he or she is an "eligible survivor," meaning a person who became a dependent survivor on or after January 1, 2005.¹⁵² This approach provides meaning to Congress' failure to amend the other portions of the BLBA added in 1981 because, as the Eleventh Circuit concluded, the deliberate absence of change points to a Congressional intent that individuals who are not "eligible

146. See *Vision Processing, LLC*, 705 F.3d at 559 (noting that the remaining language's only purpose is to reflect and echo the old provisions).

147. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (1969) (codified as amended 30 U.S.C. § 901(a)); see generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S.C.). See also *About the Law*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, <http://www.hhs.gov/healthcare/rights/> (last visited Oct. 8, 2014) (explaining the purpose of the PPACA).

148. See *supra* note 147 and accompanying text.

149. See *Sample*, *supra* note 145, at 984 n.90.

150. See *U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 719 F.3d 1275, 1280–81 (11th Cir. 2013) (noting the disagreement between the other circuits and their reasoning, none of which analyzed "eligible survivor").

151. *Id.* at 1281 (pointing out that Congress amended its chosen statute, and left other provisions to help interpret who is "eligible").

152. *Id.* at 1284–85 (internal quotation marks omitted) (finding the widow had already proven her "eligible survivor" status, and was, therefore, immune from having to prove her husband died as a result of pneumoconiosis).

survivor[s]” must still prove a miner died from black lung disease.¹⁵³ By reaching this result, the Eleventh Circuit reconciles both Congress’ action and inaction in amending the BLBA in 2010, and allows the statute to be read in a more seamless manner than capable under the readings of other courts.¹⁵⁴

Further, the Eleventh Circuit’s reasoning can be reconciled with the reasoning of the Sixth Circuit. If the Eleventh Circuit’s interpretation of § 932(*l*) were to prevail, the Sixth Circuit’s statement that “survivor benefits are paid to the survivors of miners who die due to pneumoconiosis”¹⁵⁵ would still be true, albeit in limited situations.¹⁵⁶ In combining the holdings of the Sixth and Eleventh Circuits, a cohesive restatement of § 932(*l*) following the PPACA would become: “[S]urvivor benefits are paid to the survivors of miners who die due to pneumoconiosis” *who are able to prove that they, themselves, are eligible survivors under the BLBA*.¹⁵⁷

Reading the revised § 932(*l*) in this way strikes a harmonizing balance between the competing interests of the original BLBA (to provide miners and their families with compensation for the terrible occupational hazard of working in coal mines to the benefit of the nation, particularly after contracting a disease from that work)¹⁵⁸ and the PPACA (to provide citizens access to health benefits and care).¹⁵⁹ Furthermore, this reading takes into account the practical implications of the 1981 amendments that Congress chose to leave unchanged in the PPACA amendments.

However: if Congress intended the Eleventh Circuit’s reading of § 932(*l*) to prevail, why did it fail to include an explanation for that rationale in any legislative history? The need for legislative history to inform the changes Congress made to the BLBA exists due to the conflicting portions of the BLBA, as elucidated by the courts.¹⁶⁰ However, that concern lessens when the decisions

153. See *id.* at 1281, 1284 (internal quotation marks omitted) (refusing to interpret the § 932(*l*) changes to eradicate the need for a survivor to file a claim under all circumstances).

154. See *id.* at 1284.

155. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 559 (6th Cir. 2013).

156. See *U.S. Steel Mining Co.*, 719 F.3d at 1281–84 (finding that survivors must “meet certain relational and dependency definitions . . . but not that survivors must show that a miner died due to pneumoconiosis or that a miner was totally disabled by pneumoconiosis when he died,” and that “[i]f a survivor can meet the requirements of § 932(*l*), [the survivor] is entitled to benefits”).

157. *Vision Processing, LLC*, 705 F.3d at 559. By combining the holdings of both the Eleventh and Sixth Circuits, the courts would also dispense with the necessity of having to find an arbitrary “tiebreaker” between the different post-2010 provision languages. *Id.* (believing that Congress would have to declare either § 932(*l*) or the other BLBA sections related to survivor benefits invalid).

158. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (1969) (codified as amended 30 U.S.C. § 901(a) (2012)).

159. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S.C.); see also *About the Law*, *supra* note 147.

160. See, e.g., *B & G Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 662 F.3d 233, 255 (3d Cir. 2011) (demonstrating that at least one mine operator, B & G Construction, advanced

of the courts on either side of the split are read harmoniously, rather than in conflict.

IV. CONCLUSION

As incidences of black lung disease continue to rise and survivors realize that the retroactive application of the PPACA changes to the BLBA may enable them to collect previously-denied benefits, it stands to reason that survivors of miners will, increasingly, submit claims for BLBA benefits. Also, as the ease of mobility of Americans increases over time, courts, not only those located in Appalachia, may see an increase in these claims, and be forced to analyze § 932(l) conundrum. Should those courts choose to use a synthesized Sixth and Eleventh Circuit approach, it seems unlikely that courts will need to grapple so strenuously with what, on its face, appears to be contradictory language in § 932(l) and other portions of the BLBA, making the processing of BLBA litigation more streamlined and effective.

the argument that, because there was no legislative history accompanying the change to § 932(l), there could be no rational basis for Congress' amendment of the language).

